Modernising Law
Legislating for Technologies of Reproduction in Britain and Germany
A Comparative Case Study

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Abstract

The thesis compares the legislative decision-making in Germany and Britain with regard to 'new' reproductive technologies (most prominently IVF and embryo research). This entails the discourse analysis of legislative debates and papers and a close reading of the two laws governing reproductive technologies, the Human Fertilisation and Embryology Act 1990 and the German Embrvonenschutzgesetz [Embryo Protection Act] of the same year. Reproductive technologies are read as instances of modernisation. The legislative debates are therefore understood as addressing the problems and effects of modernisation: individualisation, detraditionalisation, the control and manipulation of (human) nature. Modernisation is conceptualised as ambivalent, both holding the promise of a brighter future and the risks of alienation and exploitation for humanity, and the erosion of tradition.

It is argued that the ambivalence of modernisation leads to conflicting concerns about reproductive technologies, concerns (or risks) which are irreconcilable, which in turn lead to insurmountable contradictions within each respective piece of legislation. However, it is held that these contradictions should not be read as the ultimate failure of the two laws. Rather, it turns out that the inability to overcome every contradiction, their indeterminacy, is what enables the two pieces of legislation to resist some and embrace other aspects of technological progress in the field of human reproduction.

The question whether the two laws can actually be said to 'rule' new reproductive technologies is worked through by drawing on the legislative discourses themselves, critical (legal) theory and contemporary theories of risk. The comparative perspective allows us to see how the two laws’ very different approaches lead to similar dilemmas, highlighting that the ambivalence of modernisation is inescapable. The thesis concludes with the (tentative) suggestion that even in today’s world of 'scientism' and permanent modernisation, law does not simply get eroded. Through its contingent nature, it resurfaces as the force that allows conflicting dynamics to co-exist.
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During the writing of this thesis emotional and intellectual debts have been accumulated that I will never be able to pay back. It has taught me how much support a supposedly isolated and autistic enterprise such as this actually requires, and how much it is the outcome of many people’s efforts, rather than just mine.

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Original plans for this project included interviews with policy makers inside and outside Parliament. I interviewed MPs and representatives from the scientific and medical communities. Despite their busy schedules, they made time for me and patiently answered my many questions (thank you to Kerstin Neef for typing transcripts). It is my fault (and wordiness) that their voices could ultimately not be included in this thesis. However, their genuine concerns and the real urgency with which they approached the question of medical progress taught me not to be cynical about their work. I hope I made it clear throughout that I wish to criticise, but not to dismiss.

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Reassurance

I must love the questions
Themselves
As Rilke said
Like locked rooms
Full of treasure
To which my blind
And groping key
Does not yet fit

Alice Walker (1991: 195)
Part One: Introducing Issues, Methods and Concepts

Chapter One: Introduction

"The King is dead. Long live the King!"

This thesis investigates how laws are made about modern medical science and human reproduction. Not many issues in the last twenty or so years have been as controversial as the so-called new reproductive technologies. They seem to throw up questions that affect the core of contemporary society's make-up, questions of family, identity, tradition, of the 'natural', of what makes us human. Hard questions. It seems so difficult for societies (and lawmakers) to make their peace with technologies of reproduction, because these technologies impact on - and are shaped by - everything that is problematic about contemporary social configurations: the role and responsibility of science, the problem of taboos, the nature of family life, the issue of progress, our hopes and fears regarding the future.

The problems brought about by technologies of reproduction seem particularly protracted because they combine two major controversies. The first one is the question of scientific manipulation of the natural world, and how it should be viewed. The second is about reproductive and sexual choices, different family forms and the question of morality. We know the first controversy from debates about nuclear power or genetically modified foods. It consists of arguments about the power of scientists, democratic control and the predictability of possible negative effects technological interventions into 'nature' might have. Yet in the case of reproductive technologies science does not simply manipulate plants or atoms or foodstuff. Science addresses human nature as its object of investigation (on this see Black 1997: 40). Scientists have gained control over a process that was previously beyond their reach, the "once invisible and mysterious process of conception" (Jackson 2001: 169). And this in turn gave some control over the previously uncontrollable to the users of the new technologies. They might now be able to choose a father for their child with a particular genetic make-up; they might choose to have a child without a father; they might choose to only 'use' embryos of a certain sex or status, and so on. And thus the controversies about
technologies of procreation also resemble those that we know about abortion, about single motherhood, about gender relations, and the appropriate way to become or be a parent (Stanworth 1987: 4; Lee and Morgan 2001: 1/2). These two controversies (one about science, one about reproductive freedoms) combine and present a minefield of contested issues that threaten to blow up anyone who is not treading carefully.

And it is this minefield that lawmakers enter when they set out to legislate for technologies of reproduction. What this thesis tries to do is to understand how they manage to make up their minds and how they come to conclusions. To achieve this understanding, this project undertakes a discourse analysis of the words spoken in two national parliaments in the course of legislation for new reproductive technologies. Between 1984 and 1990 the British and the German Parliaments debated and passed laws regulating the creation and treatment of embryos, the scientific and medical practices of assisted conception, and their use by ‘consumers’ or ‘patients’. The debates in Parliament resulted in the British Human Fertilisation and Embryology Act 1990 (HFE Act) and the German Embryonenschutzgesetz (Embryo Protection Act, ESchG).

Both legislative processes were initiated by the setting up of a Committee: The Benda Kommission in Germany (Der Bundesminister für Forschung und Technologie 1985) and the British Warnock Committee (DHSS 1984). In 1989 both governments introduced bills for primary legislation on the issues raised. They were passed in 1990 and became laws in 1991.

This introduction will briefly sketch some considerations and themes that will be explained and worked through in much more detail in the following chapters. First, the main argument and conceptual focus of the thesis will be introduced, followed by some remarks about the different literatures used, about deconstruction, and about terminology. Obviously, the main argument of this thesis will be much easier to understand once the whole line of reasoning has been allowed to unfold. The following

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1 Morgan, using a different metaphor, speaks of reproductive technologies as a “bureau de change of the moral economy” (1994: 152).
2 Both Parliaments had in the meantime also made a law about surrogacy, reacting to public concerns about some high profile cases of surrogacy: the British Surrogacy Arrangements Act 1985 and the German amendment to the Adoption Act (Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmuttern 1989).
paragraphs however might serve as a lens that might enable the reader to identify and follow more easily the development of the core arguments in later chapters.

**Law and modernisation**
The **HFE Act** and the **ESchG** and the preceding parliamentary debates are the main focus of this thesis. These debates are significant examples of legislative decision-making on contentious political, scientific, moral and legal issues. Yet, as will become obvious in the unfolding of this thesis, they are not only read for their own sake. The debates in the two parliaments are treated as ‘exemplary’ (Dewar 1998: 485) or ‘telling’ instances (Fitzpatrick 1987: 120). The two sets of debates, and the two laws, are understood as representative of a wider dynamic. They also directly address or draw upon wider, more generally shared assumptions:

> "Parliamentary speeches represent more than the feelings of the individual speaker: the more effectively a political discourse manages to capture broad-based social assumptions, the more it will carry its audience and the more effective it will be.” (Sheldon 1997: 34)

In this thesis, the debates about both Acts are understood as debates about lawmaking in the face of ongoing modernisation, as concerned with the typical problems and dilemmas of law in modernity. They address the problem of modern medicine, the permanent drive to extend scientific control to even further aspects of human or ‘natural’ life, and also the problem of (so-called) detraditionalised, new family forms and reproductive choices (also see Franklin 1999: 130). And all these problems, it will be argued, are expressions of two related, yet contradictory strands of modernity. These two strands are scientific rationality and individualisation. One of the core arguments of this thesis is that the dilemmas of reproductive technologies are expressions of the contradictions caused by the ambivalence of modernity. An ambivalence caused in turn by the frictions or tensions between two strands of the modern project: putting man, the individual, centre stage and subjecting nature to the objectifying and engineering rationality of science or ‘reason’. This argument about contradictory strands of modernity, its ambivalence, and the difficulty to legislate on or to order its (presumed) effects will feature in much more detail in Chapter Two and its following chapters.
For now it suffices to say that the two Acts themselves are read as paradigmatic legislation about the hopes and fears regarding modernisation, - modern medicine or science and modern individualism. This thesis compares in detail two instances of legislation about reproductive technologies, the HFE Act and the ESchG. Technologies of reproduction themselves are understood as instances of modernisation and therefore the two laws in question are read as representative, as ‘telling instances’, of a wider issue: the dilemmas confronting law when dealing with ongoing modernisation.

This thesis thus tries to move from the specific to the more general. Through a thorough analysis of a particular instance, it attempts draw broader conclusions. It attempts to be ‘locally robust’ and yet conceptually ‘bold’ (Law 1994: 85; 97). It is empirically based and theoretically informed. We will see later on, during the closer analysis of the legislative debates in the two countries themselves, that this move from the specific instance and purpose of legislation to more general ideas about legislation in modernity did not have to be imposed on the debates. The debates themselves speak of this movement. The speakers in both parliaments oscillate between the specific and the general. Ideas about 14-days-old embryos or about IVF for single women are constantly interspersed with arguments about ‘progress’, about ‘tradition’ or about the ‘enlightenment’. Frequently, the speakers address the question of lawmakers should generally approach such difficult problems. Moreover, there are obviously all those beliefs about the role of law within all these considerations that might not be openly expressed but that can nevertheless be deduced from the discourses. So, in a way, what this thesis does is establish a picture of the ‘general’, the job of lawmaking in the face of medical ‘progress’, through investigating a particular instance of lawmaking.

This movement towards the ‘general’, this reading of legislative debates as representative of wider dynamics opens many opportunities for insights into the problem of legal control, of the complicated relationship between modern law and modern medicine. Yet it might carry the risk of losing track of the specific nature of both Acts and also of the “plurality of the forms of law” (Hunt 1997: 112). Both Acts can be seen (and will be analysed) as performing different functions. They might render some few and specific activities criminal, they might legitimise others directly through
for example licensing or indirectly through what Foucault called ‘normalisation’ (Foucault 1990: 144; also see Lee and Morgan 1989: 12). They are engaged in the construction of ‘legitimate’ needs, ‘selfish’ desires, desperate women, happy families and very directly in the legal definition of ‘mother’, ‘father’, ‘treatment together’, ‘interest of the child’. They contain ideological and symbolic statements about human nature, about humans’ connectedness and individuality, about the (in)acceptability of suffering and about rationality and progress. They are manifestations of “the architectural and engineering dimension of the constitutive aspects of law” (Morgan 1998: 195; also 2001: 5) and they are driven by a range of different and often conflicting concerns. To name but a few: Should we trust the individual? Should we trust scientist? Can we trust law?

This thesis touches upon many of those concerns, but it focuses on one interpretative and constructive dimension, it reads the laws and the debates as concerned with what is particularly modern about new reproductive technologies. It will thus probably ‘let down’ some of the other concerns. Through this specific looking-glass many relevant issues can be viewed (scientific rationality, the legitimacy of laws, female reproductive decision-making), but they are seen as contributing to the wider question of modern law’s control over modern medicine. And yet this focus on one interpretation, one reading, should not be misunderstood as presuming “a unitary or totalising ‘Law’” (Hunt 1997: 113).

This thesis is not in the business of developing a world-embracing, final theory of ‘Law-in-Modernity’. Obviously, to understand more fully how laws interact with the erosive forces of ongoing scientific progress and ongoing individualisation, one would have had to look at the work of courts in much more detail (see on this Dewar 1998). Moreover, the relationship between statutory law and administrative regulation, the interaction between several regulatory bodies would have had to be studied (see for example Black 1998; Baldwin 1990; Allsop and Mulcahy 1996). Not everything about modern law can be understood through investigating the HFE Act and the ESchG. Not everything about the two Acts can be understood by reading them as paradigmatic instances of law’s struggle with ongoing modernisation. But still, reading the two pieces of legislation as
law's engagement with modernisation can provide insights both about the two Acts and about modern law and medicine.

**Does law rule?**
What this thesis attempts to address could also be understood as the "fundamental question" of the rule of law (Morgan and Nielsen 1992: 55/56). Law rules, if it is predictably and generally applied to (even changing) realities. It does not rule if it tries unsuccessfully to catch up with other knowledges, other claims to power, other normativities. Does law reign over scientific progress? Can it establish some kind of control over the ever-changing challenges of modern medicine? Or is it true that "surely" law "will never catch up" (Strathern 1992: 59)? For liberal conceptions of law, politics and the state the rule of law is a core condition of justice. Law, not simple power, not the influence of some vested interest, not the market should rule reality. Yet, thinking about the nature of modern medicine, of scientific progress and rapidly growing knowledge about what used to be beyond the reach of humans - the genome, the gamete, the embryo – many writers are pessimistic about law's chances of controlling what goes on in laboratories or clinics.

Many argue that medical progress, the constant creation of new ethical problems by modern medicine cannot adequately be dealt with by law. Law always gets there too late, it is "lagging behind [medical] developments" (Kennedy 1988: 4). By the time the legislature is aware of what goes on, "facts" have already been created. By the time it has made up its mind, what used to be new and unheard of, might then feel like a normal standard procedure. Ulrich Beck criticises the notion of "medical 'progress' as the normality of politically unchecked upheaval of social life" (1986: 336). Whereas legal control of medicine has to rely on 'indirect' means of power like statute, money and information which lose effectiveness along the long corridors of implementation, the 'subpolitics' of medical progress are of an 'immediate directness': "legislative and executive power are in the hand of medical research and praxis" (ibid: 338).
A good example of this pessimistic assessment of law's rule is Tim Murphy's declaration that "King Nomos does not still rule" (1997: 6). According to Murphy, in modern societies law's sovereignty has been replaced by a range of independent epistemologies or claims over reality, the administrative or the scientific 'mode' serving as examples. Law does not have any "modern instruments" (ibid: 5); it needs to borrow them from, amongst others, the natural sciences. It no longer occupies a central space in society. Typically, this narrative of law's decline is connected to a 'parallel' account of the social. Society does not seem what it used to be either: "Society no longer exists as a stable and identifiable entity" (ibid: 218). Others agree and diagnose "atomisation, fragmentation, the decline of community, homogenisation and the decline of diversity, the loss of spontaneity, dignity and self-reliance" (Galanter 1992: 1; also see Susskind 1996). In this rather gloomy picture many writers identify "a reluctance or a failure of the law to give even an ethical signpost, let alone a moral lead" (Lee and Morgan 1994: xiv). Douzinas et al seem to agree: "The virus that contaminated moral argument was launched at the heart of law, too" (1991: 12/13).

Famously, Foucault too can be read as arguing that law has lost its sovereignty to disciplinary systems and techniques: medicine, prisons or administration. Law does not "disappear", but it is "increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on)" (1981: 144). (Legal) power is not situated in some centre, at the top of a (legal) hierarchy. It is to be found in the 'capillaries' of society: in hospitals, schools, factories or asylums (1980: 102). McVeigh and Wheeler take that to mean that "law has been of declining importance since the eighteenth century" (1992: vi). Hunt and Wickham go as far as proclaiming the "simple and undisputable fact that law is relatively ineffective" (1994: 57). A good summary for this general agreement about the decline of law is provided by Cotterrell (1992). He speaks of the "fragmentation of legal form" and the "invasion of legal reason and doctrine by 'non-legal' knowledges":

"This image of overload and lack of principle suggests that law's effectiveness as a means of remaking the world is put seriously into question. Law does not now appear

3 Similarly, Unger (1976) tells a story of law's decline in contemporary modernity. Law has lost its independence from administration and welfare provisions and is thus losing ground to other systems of social regulation. On this also see Lloyd of Hampstead and Freeman 1985: 585. Further see Douzinas and Warrington 1994: 2/3.
as a means of creating order and stability from the contingency and transience of patterns of social life; instead it seems to mirror that contingency and transience.” (1992: 307)

**Law’s ambivalent rule**
This thesis is the outcome of an ongoing engagement with the problem of law’s rule over modern medicine. Is law simply window-dressing scientific developments to make them look less threatening or more acceptable? Are law and modern medicine like the hare and the tortoise in a permanent race that law is certain to lose? It might not be surprising that the thesis does not come to a simple, straightforward answer regarding the question: “is law important” (Lee and Morgan 1989: 11)? Fittingly, as it concerns itself to a large extent with ambivalence - the ambivalence of modernity, of progress of medicine, or individualisation - the answer it develops is not clear-cut. The conceptualisation of law’s rule over technologies of reproduction put forward here is (predictably) ambivalent.

It will be argued that law can be seen to borrow significantly from those dynamics it sets out to regulate. It borrows from medical knowledge and paradigms, from scientific language and rationality and from the logic of individualisation in all matters reproductive or sexual. It has to rely on extra-legal arguments in order to achieve some sense of legitimacy for its ordering attempts. Yet, it would be too simplified an analysis to conclude that law itself is meaningless, that it does not add anything to or impact at all on the dynamics it sets out to control. We will see that the lawmakers of both Parliaments engage in elaborate constructions: the construction of rationality, the construction of a juncture with morality, the construction of law’s subject and law’s ‘other’. And this process of construction leads to very particular forms of facts, knowledges or moralities. And these cannot be described as strictly extra-legal. They are not purely legal, yet not purely outside the law either.

The image that came to my mind while writing this is one of law that does not stand like a barrier or dam in the way of erosive forces of permanent social change when dealing with modernisation triggered by scientific progress. Nor is it simply drowned by the “tides” (Lee and Morgan 1989: 8) of medical progress. I argue that it ‘floats’. And as
the human body floats in water because it largely consists of water, law might be able to float on top of scientific and medical progress because it soaked up much of their contents. This 'soaking up' of extra-legal facts or knowledge should not be simply read as leading to the dissolution of law (just as the body does not simply dissolve in water).

My argument about law's importance for modern medicine and science (and vice versa) will become clearer in the chapters following this introduction. For now, some more introductory points must be made. They concern methodological, theoretical and terminological questions.

**Positioning**
The literatures with which this thesis engages are diverse. There is critical legal literature, dealing with the question of how legal order can be reconciled with views of the world and the social that emphasise transience, changeability, complexity and incoherence. Then there is what could be called the 'sociology of science', together with some aspects of Actor-Network-Theories. They address questions of scientific epistemologies, interpreting all forms of knowledge as localised and all claims to universality as claims to domination. Both emphasise the constructed nature of any order, treating the breakdown or incompleteness of order as the norm, rather than the exception and contradictions and tensions within (scientific) order as endemic. Much use has also been made of feminist contributions to the fields of law, politics, technology and medicine. In fact, as I certainly was a feminist before I became an academic, I find myself constantly and often not even consciously 'testing' theoretical arguments against the backdrop of feminist insights that pre-date the acquisition of theoretical vocabularies (see on this Miller 1990: 135). Feminist critiques of medical paternalism and legal liberalism inspired many of the initial research questions.

Further, there is a school of contemporary theorising that is concerned with risk as a social phenomenon and as a conceptual tool. Different configurations of this concern with risk feature prominently in Chapter Six. Finally, quite a few anthropological contributions have facilitated the understanding of the debates. The anthropological focus on meaning-making through cultural practices and the questioning of any claims
to the ‘natural’ enabled significant insights into what parliamentarians might be doing when they exchange lengthy stories about sperms, eggs and the growth of embryos.

This thesis does not substantially engage with human rights literature, an omission that might be less forgivable in the light of the inclusion of European human rights into the British legislative framework through the Human Rights Act 1998. Undoubtedly, this incorporation will have effects on the way technologies of reproduction are debated and regulated (see Jackson 2001: 8). However, it seems that it is too early to speculate about the impact of human rights law for Britain (Lee and Morgan 2001: vii/viii, 132). In Germany, the debates and the legislation are already shaped substantially by notions of rights (see Chapter Three). Without going into the details of these debates, it is fairly obvious that this focus on rights adds emphasis to the problem of defining the status of the embryo (critical Milns 2000/2001). It further strengthens some individuals’ claims that their needs must be met (critical Freeden 1991: 92). It ‘legalises’ and potentially depoliticises the controversies (see Blankenburg 1996). Yet, it would be a misconception of national legal frameworks to assume that based on the German example one can predict exactly what will happen in the British context (Teubner 1998; Morgan 2001: 50). I have therefore decided to refrain from speculation and have not included consideration about the impact of rights discourses in this thesis.

Deconstructions
Much of what this thesis does is deconstruction. It does not propose a coherent, better strategy for dealing with the contradictions of modernisation, or for the promises and risks of reproductive technologies. Yet deconstruction is not apolitical, because it destabilises and denaturalises order and re-introduces possibility, difference and dissent (Davies 1994: 259). It can therefore be understood as a “genuine form of political activism” (Lacey 1998: 158; also see O’Donovan 1985: xi, 59). There is a certain tension in the movement of deconstruction. On the one hand it is claimed that complete closure can never be achieved, that every definition can be shown to be contingent, biased, ‘containing the trace of its other’ (to use the jargon of post-structuralism). Yet, on the other hand, laws are frequently critiqued for not being coherent and therefore wrong:
“[Deconstruction] alerts reason, philosophy and other truth-telling discourses to their blind spots, hidden motives and oppressions; but it does so on the ground of the tradition of reason, with and against the concepts and argumentative techniques of philosophy.” (Douzinas et al 1991: 11)

However, this thesis, despite being based on deconstruction, might not fall completely into the trap of some deconstructive writing about law, because as briefly outlined above, it does not claim that law's incoherence, its heavy borrowing from extra-legal logics, its reliance on contradictory arguments, leads to the law's inevitable failure. On the contrary, law's failure to achieve ultimate closure, the fact that it remains contingent, the ambivalence of its links with morality, science or medicine, could be read as a **productive failure** (see on this notion Fitzpatrick 2001a: 12, 4). Going back to Cotterrell's criticism that law might not provide a stable order for transient and contingent social life, but that it seems to simply 'mirror that contingency and transience' (1991: 307), I argue that this enveloping of contingency or ambivalence might be the way that law remains at least partly relevant for the dynamics it sets out to regulate (also see for family law: Dewar 1998).

Although I have just claimed that this thesis intends to deconstruct, rather than to promote the 'right' way of dealing with the challenges of reproductive technologies, it is obvious that this thesis at times also does something else: it constructs. In telling a certain story about the events, in reading them as debates about modernisation and so on, I put forward a certain construction of the events, of the discourses and of the way we might theorise about them. And obviously my constructions could in turn be deconstructed again and so on and so forth (see on this Kerruish 1991: 12). This is why it is not really interesting "to celebrate the process of deconstruction", since "we all know that such deconstruction is possible" (Law 1994: 85). Rather, what both construction and deconstruction should speak of - and I hope that in this thesis they do - is a degree of reflexivity, the acceptance that we have to take responsibility for the way we talk about things.
Terminology

The controversial nature of technologies of reproduction is also reflected in the fact that their terminology is often contested. This thesis mostly uses the terminology which is most frequently found in the literature, but that does not mean that some of the terms employed are not problematic. First there is the concept of ‘new’ reproductive technologies. Some argue that this is an inept term, as not all the technologies or practices discussed under this label (and in the debates investigated here) are in fact new. For example surrogacy, where one woman has a child for another woman or man can be said to exist since biblical times (Zipper and Sevenhuijsen 1987). Also, anonymous fatherhood with or without actual sperm ‘donation’ exists independently from organised, officially recognised clinics (see Zipper 1987, on the terminology of donation see Strathern 1999: 183 – 185; also Bennet 1997). Women can have a child without living with the child’s father in- or outside organised reproductive medicine, engaging in more or less casual sex, without the man necessarily knowing about his ‘father’ role. Some women use sperm from men they know, organising fertilisation without sexual interaction. The term ‘new reproductive technologies’ thus includes practices that require medical help or intervention and some that do not (Strathern 1992: 16). It embraces high- and low-tech forms of reproductive medicine. However, some of the debates seem to focus entirely on the high-tech, expert-lead practice of IVF, In-Vitro-Fertilisation. It is not so much the separation of loving and responsible relationships from reproduction that is so very ‘new’ about the technologies. It is reproduction outside a woman’s body that captures people’s imagination and anxieties. Obviously, reproduction does not take place entirely outside a woman’s body in the case of IVF either. Only the very first stages of reproduction, the meeting of eggs and sperm takes place inside a test-tube. Everything else still requires a woman’s active and physical participation. Yet it is the embryo in the test-tube, in the hands of men, rather than in the womb of a woman, that signifies like nothing else the ‘newness’ of technologies of reproduction.4

And despite their ‘newness’, technologies of reproduction are talked about in language that borrows from ‘old’ knowledge. This language is not innocent. “To give new forms

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4 This might be one of the reasons why GIFT, where eggs and sperm are made to meet inside the woman’s body, is not regulated by the HFE Act. Critical: Lee and Morgan 2001: 142 – 146.
significance through old ones is to mobilise already existing cultural suppositions” (Strathern 1999: 181). Calling one of the two women in a surrogacy agreement ‘surrogate’ signifies that the other one is the ‘real’ mother (Morgan 1989: 56). And in mainstream language the ‘real’ mother appears to be the one commissioning a pregnancy. The woman giving birth then simply is a ‘surrogate’ for a particular purpose, gestation. This language and conceptualisation of motherhood enables the enforcement of surrogacy agreements.

Many descriptions of the practices of ‘assisted conception’ are critiqued for making the women involved invisible. Some instances of this tendency and their critique will feature later on in the thesis (in Chapter Five). In my own writing I have tried to at least mention women when I speak of ‘egg-collection’ (itself a term that eclipses the surgical nature of the procedure) or embryo transfer and so on. I have tried not to talk of women as ‘mothers’ just because they want a child or are pregnant. I have avoided the language of ‘unborn children’. But still, in describing some of the procedures, the embryo ends up occupying the centre-stage. It has proved to be rather difficult to avoid the embryo-centeredness of new reproductive technologies and their terminology. Critical thought is “exposed to the threat of infection through that which it critiques” (Adorno 1963: 99).

Legislation in London and Bonn
Moving onto less contested ground, a brief outline of the legislative processes that lead to the HFE Act 1990 and the ESchG will now be sketched out. Despite all the well-known and obvious differences between the two parliamentary democracies, many parallels can be observed. It has already been stated that both processes were initiated by Committee Reports in 1984 and 1985. It took both governments quite a few years to finally introduce legislation, which was criticised in both parliaments. In both countries there are two ‘Houses’ that have to pass any law. In Britain, the House of Commons and the House of Lords debated the Act. The Government introduced its Bill to the House of Lords, apparently because of its ‘calmer atmosphere’ and the concern that MPs might tend to vote according to the vocal demands of their most radical constituents (mostly so-called pro-lifers) (Mulkay 1997: 34, 38). This already hints that the British Government’s claim to be neutral on the question of embryo research has to be taken

5 This is not the case for the statutory construction of surrogacy. See section 30 HFE Act; also see § 1591
with some caution. The delay in legislation meant that even those who were against research had to agree that the HFE Bill as such was a welcome step to bring new reproductive technologies under control.\(^6\) The simultaneous introduction of abortion legislation might have helped to bring undecided MPs, who had problems with embryo research, but who were in favour of ‘liberal’ abortion laws, to support the pro-research clause rather than vote with the ‘pro-lifers’. Most members of the Government actually voted for embryo research.

In Bonn the Government did not pretend to be neutral. There was no free vote on the issues. MPs spoke and voted according to party lines. There were far less debates in the Bundestag than in London, as majorities were more or less clear from the onset. The House representing the (then still 11) German Länder, the Bundesrat, started talking about legislation before the national Government acted. They demanded a more complete, far-reaching regulation of the whole area of reproductive technologies, rather than a criminalisation of only the ‘worst’ abuses. Under the German constitution [Grundgesetz] only those issues it explicitly mentions can be regulated by the national legislature. All else remains in the sovereignty of the Länder, which traditionally deal with health policy. Criminal law however is under the control of the national legislature. This explains (partly) why the ESchG only contains criminal law provisions and no further regulative content. The constitution has now been amended and allows the Bundestag to regulate the whole field of reproductive technologies. The opposition at the time made the point that the constitution could have been changed then and there to allow a more complete regulation of the uses of reproductive technologies.

Although both countries at the time had conservative governments (the CDU [Christian Democratic Union] together with the FDP [Liberals] in Germany and the Conservative Party in Britain), it is an oversimplification to say that therefore both laws represent conservative victories over left oppositions. In Germany, the ‘left’ (consisting of the SPD [Socialdemocrats], the GRÜNEN [the Greens] and after 1990 the PDS [former east German Socialists]) at times had more conservative ideas about family relations and

\(BGB.\)
children's identities than the Government. Throughout, they demanded an even stricter regulation of technologies of reproduction. In Britain, the HFE Act could be said to represent a 'liberal' majority's victory over a relatively conservative minority. There was no real criticism of the Act from the 'left' (consisting of Labour and smaller Socialdemocratic and Liberal parties). The majority of those opposing the 1990 legislation were anti-abortionists too.

Despite many parallels in their creation, the HFE Act 1990 and the ESchG stand for rather different values. The HFE Act allows many of those things that the ESchG prohibits: egg donation, the treatment of single or unmarried women, surrogacy, embryo transfer and - most importantly - embryo research. Yet the HFE Act also contains elements of control which are absent from the German legislation: it created a new body, the HFE Authority, in order to regulate, supervise and document the day-to-day use of reproductive technologies (focussing on IVF and embryo research). This authority has influence over medical and scientific decision-making that is unheard of in other areas of medicine or in other countries. In Germany, on the other hand, everything that is not explicitly prohibited through the ESchG is left to the medical profession itself to regulate. These differences will be discussed in far more detail, particularly in Chapters Four and Five.

Comparing laws
Comparing the two different laws, and the two different sets of debates enables us to see how things could be different, how the lawmakers approached the similar challenges posed by new scientific and medical possibilities in very different ways, and how they yet ended up facing very similar dilemmas (also see Morgan and Nielsen 1992: 55/56). Contrasting the very different, yet comparable, efforts to create legal order in the face of messy and controversial realities creates a space in which something common to both of them can be observed and understood: the ultimate inability to achieve coherence, the failure to create certainty and closure.

Before the creation of the HFE Authority through the 1990 legislation, the Voluntary Licensing Authority (and then the Interim Licensing Authority) were charged with regulating fertility services and research on embryos. On this see: Gunning and English 1993.
By looking at just one of the Acts on its own, one might conclude that the lack of coherence, the ambivalence of the law itself, can be explained and excused as, as it were, accidental, as less significant because dependent on very particular circumstances. If only Lady Saltoun hadn't raised the issue of fatherless children, if the pro-lifers hadn't mixed the issues of reproductive technologies with those of (late) abortions during the debates, one could argue, maybe the HFE Act would be less mix-and-match, maybe it could have sorted out the problems of ‘artificial conception once and for all. (Can or can’t single women receive treatments? What distinguishes a 14 from a 15 days old embryo? Is cloning really bad? Is the ‘thing’ created through cell nuclear replacement an embryo?). Yet comparing the HFE Act and the ESchG one can clearly see that, taking up the other end of the stick on many occasions, the German lawmakers do not come to more coherent solutions either. They allow treatments and disallow research. They outlaw egg donation and tolerate the donation of sperm.

Much importance will be given (in Chapter Three) to the contrasting starting points of legislative work, the different self-image of lawmaking in both national contexts. The German natural law approach and the more positivist British approach will be understood as different ways of dealing with the dilemma of legitimising legislative decision-making (on the “justificatory dimension in Jurisprudence” see: Kerruish 1991: 18; and Chapter Three). Both approaches, however, will be seen to end up modified, annexed by their opposite, in the debates themselves. The positivist majority in London end up re-introducing arguments about the necessary ethical nature of their law, the German parliamentarians have to acknowledge a space for political decisions, for lawmaking rather than simply interpreting a pre-existing natural law. It turns out that law can never be characterised simply as either “exclusive of an ethics or inclusive of it” (Davies 1996: 150).

An overview of the thesis
Following this introduction, Chapter Two will outline the methodological choices made for this thesis and launch its conceptual focus. The notion of reproductive technologies as instances of modernisation will be introduced, as will the concern with the
ambivalent nature of modernisation. Chapters Three to Five contain the actual discourse analysis of the parliamentary debates that lead to the HFE Act and the EschG. Chapter Three starts off this analysis by establishing a list of all the different and conflicting concerns that were voiced during these debates. The concerns can be seen as addressing the high hopes and deep fears triggered through interventions into human reproduction. The chapter will then move to look at the conceptualisations of lawmaking in both national parliaments. It turns out that lawmaking is thought of in radically different terms in both legislative discourses.

Yet, we will also see that the clarity of this difference becomes blurred as the lawmakers themselves have to re-allow the excluded opposite of their constructions back into their discourses. The discourses will be read as concerning the legitimacy of legislative decision-making, a legitimacy that is difficult to achieve under the conditions of modernity. I suggest that the debates be regarded as attempts to ground or justify law and legal decision-making. This is done, I argue, through borrowing content from those dynamics the lawmakers set out to regulate and through a process of construction: law has to borrow from the discourse of science, yet it also constructs a very particular notion of scientific facts and rationalities.

Chapter Four takes a closer look at the lawmakers’ engagement with science and notions of progress. The embryo and scientists are the main characters in this chapter that also contains a discussion of ‘the natural’ as a discursive resource. Chapter Five will investigate the lawmakers’ construction of a legal subject, through distinct configurations of the (mostly female) users of reproductive technologies. Women are the main focus of this chapter that otherwise deals with questions of traditional families, morality and children’s welfare. The question of how law achieves influence and legitimacy vis-à-vis permanent scientific and medical progress and ongoing individualisation will be discussed by all three chapters. Concluding Part Two of the thesis is Chapter Six, which reflects upon the insights of the previously undertaken discourse analysis in the light of contemporary theories of risks. It turns out that ‘risk’ as a conceptual tool only adequately represents the concern and structure of the debates if it is thought of in ambivalent terms, as both signifying control and its breakdown, the
imposition of order and the its failure. Distinct schools of risk theorising which either stress the 'liberating' potential of risk society, or the oppressive nature of governance through risk tend to eclipse this crucial ambivalence. They further seem to rely on oversimplified two-step accounts of history ('before' and 'after' risk), which cannot be sustained based on the insights of this thesis.

Chapters Seven and Eight conclude the thesis. Chapter Seven introduces another level of comparison. The debates leading up to the two Acts are contrasted with more recent parliamentary controversies of 2000/2001, which directly addressed the relevance and 'success' of the 1990 legislation. They are the British debates about cloning and the German debates about Pre-Implantation Genetic Diagnostic. This comparison over time facilitates a refinement of the argument about the rule of law in the face of ongoing medical progress. Drawing upon further parliamentary debates, some court decisions and notions of fiction and exception, the diagnosis that law is not rendered irrelevant through the permanent progress of modern medicine or science is confirmed. Chapter Eight will summarise the previous arguments and conclude the entire project.
Chapter Two: Methodologies and Concepts

A: Prologue

"As soon as a divide is being made between theories and what they are theories of, the tip of technoscience is immediately shrouded in fog. Theories, now made abstract and autonomous objects, float like flying saucers above the rest of science, which by contrast becomes experimental or 'empirical'. The worst is yet to come. Since sometimes it happens that these abstract and autonomous theories, independent of any object, nevertheless have some bearing on what happens below in empirical science – it has to be a miracle!" (Latour 1987: 242)

This chapter will present the methodological and conceptual choices made for this thesis. It consists of two major parts, one mainly concerned with methodological questions, the other one introducing the core of the conceptual framework that will run through the remainder of the thesis. Typically, when presenting research questions of methodology and theory are dealt with before they are 'applied'. They are pulled 'before the bracket'. To a certain extent this betrays the development of both methodological and conceptual insights through an engagement with the data. It seems to turn what is actually an ordering exercise into some façade of order (Law 1994: 5, 39). To speak with Bruno Latour, it would render theories into flying saucers, miraculous and unapproachable. This has implications for questions of methodology, as methodological and theoretical perspectives go hand in hand. Certain theoretical assumptions necessitate certain methodological choices (Smith et al. 1996: 3; Potter and Wetherell 1996: 83; Jaworski and Coupland 1999: 37), and every methodological choice speaks of a distinct commitment to a particular view of the world (see Mason 1986: 37; May 1997: 31; Maykut and Morehouse 1994; Phelan and Reynolds 1996).

It seems inappropriate to neatly separate out methodologies, theories and 'data', when actually all three of them grow out of mutual dialogue and cross-fertilisation. The research for this thesis was not conducted in order to test a one-line hypothesis. It was exploratory rather than confirmatory (Robson 1993: 199; also see Bromley 1986: 275). "Instead of descending upon the social world armed with a body of theoretical propositions about how and why social relations exist and work as they do" (May 1997: 29), these social relations were first observed and then used to generate theoretical propositions. I would further argue that even the most rigid testing of a preconceived
hypothesis on some data will already be the outcome of some dialogue (explicit or implicit) with the empirical world.

"Before one can ask questions like: what is happiness, what is justice, what is knowledge and so forth, one has to have seen happy and unhappy people, just and unjust deeds [...]" (Arendt 1979: 92)

Thinking needs the empirical world, and thus we do not pluck 'abstract' hypotheses straight out of nowhere. "No thought takes place outside some framework, and to pretend that it does is just a ply of theoretical imperialism" (Kerruish 1991: 19). Methodologies speak of certain epistemological and theoretical commitments. Organising (and writing about) one's thinking has to match the project undertaken. This project is committed to a view of social reality as something complex rather than simple, as the outcome rather than the cause of human interaction and as something variable rather than monolithic. Method, theory and 'data' all are the outcome of one circular movement that started off with both an interest in theoretical arguments about the inability to achieve order or closure vis a vis complex realities and in 'what actually happened' in two parliaments. Once a pattern was perceived, the material was read again. The debates confirmed part of this pattern, but made other parts of it seem too crude. The concept or pattern was refined and confronted with the data again, and so and so forth.

As theory should reflect experience¹, in this case the experience of conducting research, it is appropriate that some of the growing pains of the final conceptual framework are made visible. This approach opens up the perspective in two directions. Firstly, the arguments that formed the starting-point of the investigation are found to be both useful and problematic at the same time. The "soft under-belly of a theory" (Turner 1992: 99) can be exposed without having to dismiss the whole body of thought. Secondly, my own argument opens up to possible criticism. If only that which can be repeated by someone else is scientifically 'viable', then to allow the reader to view the development of an argument invites critiques of decisions that have been made. To speak with John Law, "the places where the cracks are most visible are the growing places in research" (1994: 32). This is why the 'conceptual' part of this chapter only introduces the seed, or starting point of a more elaborate theoretical conclusion that will actually grow out of a

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¹ See Arendt: "This experience is an experience in thinking [...] and it can be won, like all experience in doing something, only through practice, through exercises" (1993: 14).

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close reading of the parliamentary debates. The conceptual part of this chapter (Part C) will introduce the general theme of the thesis, like the exposition of a piece of music might state its theme in a simplified form before it will be subjected to closer scrutiny. It will suggest that the parliamentary debates about new reproductive technologies be read as discourses about modernisation. Technologies of reproduction in this thesis are understood as instances of modernisation, here the modernisation of human reproduction through technological intervention. It is this conceptual commitment that will inform the further discourse analysis in Part Two. More theoretical insights and arguments will be added during this discourse analysis, and in Chapter Six a distinct body of literature, concerning itself with the notion of ‘risk’ will be introduced to further the development of a more elaborate argument.

However, it is not possible to represent the confusing, anarchic and at times extremely boring development and growth of data-analysis and theory without losing intelligibility. For order’s sake, the account of all three (methodologies, concepts and data) will be oversimplified. It will create a false illusion of completeness and coherence. The following set of arguments resembles an orderly system only because I turned it into one, afterwards. And so, despite all the reservations outlined above, this thesis will proceed in a rather orderly manner: there will be a section on methodologies, followed by one outlining the main conceptual commitment of the thesis, followed in Part Two by the actual data analysis.

The problem of order

“Indeed: order and chaos, full stop.” (Bauman 1991: 6)

In a nutshell, both methodology and theory are ways of grappling with the question of order – and this will be one of the recurrent themes of the following two chapters. On the one hand, methodology asks how it is possible to order the social world when approaching it as a researcher. How does one know? How does one ‘understand’? Which limits are there to getting ‘the full picture’? How does one explain what one has observed? The methodology of choice for this thesis is a comparative discourse analysis. Thus it is argued in the following section that it is possible to achieve some understanding of a social phenomenon by looking at it as a discourse, and, moreover,
that it is feasible to compare two discourses taking place at the same time but in different places.

On the other hand, theories or concepts can be thought of as a *particular order* being used to understand or explain what is going on. In this thesis, the initial concept used to order the discourses is that of *ambivalent modernisation*. Reproductive technologies are understood as representing this ambivalence in a paradigmatic way. They speak both of scientific rationality and of individualisation. The difficulties lawmakers have to impose order on, to position their laws in the right place, are explained by this fundamental, inescapable ambivalence.

The ‘notional undercurrent’ of the following chapter is thus the problem of order: firstly, in the form of methodology as an ordered approach to a social phenomenon, secondly, in the form of theory as an attempt to impose an order on a perceived reality. By suggesting that the debates looked at in much detail in this thesis can be read like a case study, that they tell a story about the problematic nature of law within modernity, of law and modernisation, I do not argue that this is the only possible reading of the discourses in question. Reading and writing is always “caught up in invention not simply representation” (Clifford 1986: 2). Other readings of the debates would have been possible and are consequently excluded.² I therefore ‘invent’ a story of ambivalence, modernisation and the rule of law, while I ‘discover’ it (critical: Widdowson 1998: 148; 1995a: 169). However, I maintain that as long as this story is not assumed to represent the debates “exactly as they really were”, it seems that the exclusion of other perspectives is the necessary dilemma of imposing order that cannot be avoided if one wants to say *anything* about *anything*.

The reader is thus invited to follow the suggested ‘notional undercurrent’ of order, ambivalence and law to throw light on two (interrelated) sets of questions: How do the legislators in Germany and in Britain attempt to establish a legal order on an ambivalent and contradictory reality? And in turn: How can I write about these efforts, i.e. how is it

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² See for example Franklin and Mulkay who both have worked on some of the debates I look at and who interpret them as being about kinship (Franklin 1992) and about the status of the embryo and scientific knowledge (Mulkay 1997).
B: Methodology – comparative discourse analysis

By now, the term ‘discourse’ and ‘discourse analysis’ have been used a few times, without defining and explaining their use. This will now be rectified followed by a discussion of the problem of comparison. There is no agreement as to what is meant by the term discourse or its analysis. According to Conley and O’Barr,

“‘Discourse’ has entered the technical language of most humanistic and social scientific disciplines over the last decade. Neither the object nor the method of analysis is consistent.” (1991: 2)

Rather than attempting to define on an abstract level what discourse analysis is or is not, I will clarify which methodological and conceptual commitments shape my use of this concept. To choose the method of discourse analysis speaks of certain epistemological choices and beliefs about what constitutes social reality. These will now be outlined briefly.

The central role of language and talk
Central to the method of discourse analysis is the belief that it is worth looking at language in more detail: “the politics of language is real politics” (Cameron et al 1999: 143). This is part of a wider theoretical and methodological ‘linguistic turn’ or shift to the investigation of language (Wood and Kroger 2000: ix, also: Smith et al. 1996: 3). Discourse analysis is “concerned with methods of description and with how versions [of reality] become established as solid, real and independent of the speaker” (Potter and Wetherell 1996: 81). Through discourse analysis, language can be seen as naturalising
certain versions of the ‘truth’: “[T]hat’s not just what I think, that’s the way it is” (ibid: 83; further see Fairclough 1992: 27).

This linguistic turn entails the problem of how to introduce material realities, which might lie outside the discourse, back into one’s understanding of what goes on. Even if one holds that discourse is more than mere ‘description’ or ‘rhetoric’ and is in fact constitutive of the social, one cannot simply conflate epistemology and ontology by arguing that what is not talked about simply does not exist (see Williams 1999). Also, it seems a very idealistic world-view to believe that people can choose entirely freely how they construct social reality through interaction (Cameron et al 1999; Chouliaraki and Fairclough 1999: 28). Particularly with regard to official, highly formalised discourse in the parliamentary context, care must be taken not to assume that what lawmakers talk about as the world, actually is the world (see below). However, here more than elsewhere, it also is true that “it is what people take to be real that has real consequences” (Dingwall 1994: 51). The following analysis will focus on inconsistencies and tensions within the discourses themselves. The thesis does not concern itself with what is ‘really’ happening to women who want to access reproductive technologies, or whether scientists might be breaking the laws parliamentarians struggled to create. This would have required entirely different methodological choices.

My commitment to the constructions put forward by the speakers also means that this thesis does not attempt to do many other things that could be done: I do not try to decide whether the embryo really is a human being or not. I do not decide whether children are better brought up in two parent families. I do not decide whether law should be separated from morality or not. I am interested in finding out how these questions are seen as problematic, and why it might be so very difficult to answer them.

**Emphasis on action**

Discourse analysis privileges (inter)action as a category of analysis. It understands order as the outcome of human interaction, and not primarily as its prerequisite: “Society is not what holds us together, but what is held together” (Gill and Grint 1995: 19). This must not be misunderstood as assuming that people can do and say whatever they want.
at any time. It simply presumes that it is “the achievement of stability” which is “problematic” (and not necessarily instability, exceptions or inconsistencies), and sees “activity and flux as primary” (Shotter 1993: 178, also see Titscher 2000: 25, Smith et al 1996: 3). It is here that discourse analysis and actor network theories can overlap. In actor network theories too, emphasis is given to what people do rather than what they are presumed to be. Latour, an actor network theorist, holds for the study of science and scientists:

“First look at how the observers move in space in time, how the mobility, stability and combinability of inscriptions are enhanced how the networks are extended, how all the informations are tied together in a cascade of re-representation, and if by some extraordinary chance, there is something still unaccounted for, then and only then, look for special cognitive abilities.” (1987: 246/247)

This perspective allows us to understand order, regularity and apparent simplicity as something that needs to be explained, rather than as something that can be taken for granted. Social realities are understood as contradictory rather than coherent and as fragmented and locally diverse rather than unified and global. John Law summarises:

“Ordering/organisations are like juggling, you have to keep all these balls in the air. The only way you can do that is by keeping on moving. As soon as you give up working on it, the order breaks down.” (1994: 188)

This is what we will look at in Part Two: How the complicated and contradictory manoeuvres, the incoherent and controversial positions of a multitude of actors in two different parliaments might come together to momentarily achieve something like an ordered world view on the status of the embryo, women and reproductive freedom or the role of science for human progress. How is the messy and untidy world of constant changes turned into something manageable, how do they legislate? This thesis presumes that following the actions and utterances of those involved in legislative debates can shed light on how this order is brought about and sustained, and why it also always remains only a partial order.

A focus on conflict
Discourse analysis as a methodology and conceptual framework assumes that people do not exist as “naturally disinterested information processors” (Potter and Wetherell 1996: 82). The discourses I will look at in here therefore must not be read as neutral instances
of people exchanging and receiving information: "People treat each other, and various kinds of collectivities, as agents who have a stake or interest in their actions" (ibid). To look at a discourse is thus to look at power and ideology. It raises questions of alliances, confrontation, strategies of domination and so on. Because knowledge and power constitute a contentious field, the creation of meaning cannot be a neutral exercise. When talking about genes, eggs and sperm and the 'natural' order, the speakers in the discourses do not simply summarise factual knowledge. There is a struggle going on, and in truly Foucauldian terms it is one over knowledge/power:

"The laws of nature are dragged in to sanction the moral code [...]. The whole universe is harnessed to men's attempts to force each other into good citizenship." (Douglas 1966: 3)

I read the debates on new reproductive technologies as such a conflict over meaning, in which the presentation of 'facts' is never merely that, and in which truth claims also speak of a 'will to power'. This does not mean that I hold that there is no distinction between force and reason. "Knowledge and power are indissolubly linked" (Law 1994: 84); however, this cannot rid us of the responsibility to attempt to distinguish between the two concepts:

"There is a gradient between the two, a gradient to do with ordering, rather than some kind of absolute rupture. [...] On the one hand, we cannot ever hope to achieve an ideal speech situation. On the other hand, I don't have much difficulty in saying that some speech situations are even less ideal than others." (ibid)

It is this theoretically informed, yet pragmatic position I want to take in the following discourse analysis: Highlighting the constructed nature of accounts of reality, without assuming that the two simply are one.

**My discourse**

It is now necessary to define what constitutes the discourses I will investigate, and to explain what I actually did as part of the so-called discourse analysis. The discourses of this thesis are defined through a constitutional framework and a certain time-scale: In Part Two I look at the spoken and written contributions to parliamentary debates on legislation about technologies of reproduction between the mid 1980 and 1990, both in Germany and Great Britain. In Part Three, these debates are contrasted with another set
of debates that took place in 2000 and 2001: the German debates on Pre-Implantation Genetic Diagnostics (PGD) and the British debates on so-called therapeutic cloning.

The discourses I analyse thus are legislative ones, not merely legal discourses, which would otherwise include statements by legal professionals outside of the context of legislation, by judges and lawyers, and also by so-called lay people, if they use the law to make their point (Conley and O'Barr 1991: 2/3). The interrelated texts constituting the discourses in question are: statements made in parliamentary debates, parliamentary papers (entirely recorded in official collections), and statements made both orally and in writing by experts or lobby groups vis à vis the parliamentary debates (here I only use those ones that made it into official collections).

Discourse as performance
It is the nature of the discourses under investigation here that they are highly formalised, and officially recorded. Both these features have effects on their use as data for a discourse analysis. Even though the debates were not recorded for my particular use, the fact that they were recorded (and were used for trust-building exercises, party political broadcast, career building, public and media scrutiny), means that they probably would not have taken place in the same shape or form if they had happened without observation. We thus see order being created and roles performed for an audience, with all the distortions this entails (see Dingwall 1997: 61). This means that there will be a difference between “what is presented and what really goes on” (Law 1994: 168). Yet, as has already been briefly outlined above, one must not get paralysed by this distinction in doing research; it rather has to be kept in mind when reading the highly formalised, choreographed debates between parliamentarians.

Moreover, the question is whether one can learn something about wider dynamics when reading parliamentary debates. This thesis does not claim to investigate how ‘the Germans’ or ‘the British’ think about technological progress. It does not attempt to uncover notions of national culture. Yet, as has been outlined in the Introduction, this thesis investigates the discourses in question in the belief that they might be representative of something outside themselves. I argue that the debates in question, the debates about technologies of reproduction, can be read as a case-study of how law tries
to come to term with the challenges of modernity, triggered through technological and medical progress. Through a close reading of what went on when lawmakers attempted to regulate new reproductive technologies, it is hoped to understand better what goes on between law and scientific progress, and law and individualisation in more general terms.

The legislative moment
What we can see in a legislative discourse is how heterogeneous, contradictory arguments are turned into supposedly unified, coherent laws. It is the legislative moment in which one more or less plausible account of reality is vested with authority. Arguments are transposed into statements of legality during the process of legislation. Legislation can thus be understood as an extreme instance of ordering: only a few of the competing versions of reality make their way into the law, others are excluded or eclipsed. Looking at legislation, rather than simply at laws, allows us to trace back how the law itself carries signs of the conflicts over plausibility and power. Legislation thus enables us to see the point at which politics turn into laws and thus how laws are both part of and reach beyond the political.

Consequently, despite the limits of only using 'official' material, analysing legislative debates is a worthwhile exercise: more than elsewhere, the relationships between knowledge, power, order and where the law fits into these, can be worked through. Obviously there are problems with this approach too. When listening to parliamentarians and parliamentarians only, one listens only to a very privileged voice. What we look at is the top of a hierarchy, and one of the centres of power. Doing this must not lead to the assumption that how this centre wants things to be done is the way things are done (Harris 1996: 3). Privileging regulation, over for example use, must not be taken to imply that the use of technologies of procreation (for example by scientists or women) might not have a similarly important impact on their material and normative reality. A social (and legal) phenomenon is not only shaped by its planned and formalised design, but also by the possibly unintentional or politically conscious activities of those involved in it (also see Lacey 1998: 9). For example women’s use of IVF might normalise (or in some cases scandalise) new reproductive technologies. Clinics ignoring for example s 13(5) of HFE Act, or reading it in a more or less
convenient way, possibly shape the realities of IVF more than the section’s actual enactment did. So, I am aware that I cut off important thoughts and problems by focussing solely on what goes on in the parliamentary arena (there will be some mentioning of activities outside of parliaments in the last past of the thesis).

Thus I will not be able to make statements about whether women in London can and do actually use IVF differently than in Berlin, or whether the prohibition of certain practices actually prevents their occurrence. However, “laws do materially affect the moral standing and capacity for action of individuals and groups”, even if “bodies of rules regulate people’s behaviour only in a rather approximate way” (Harris 1996: 3).

The problem of comparison: ‘deceptively simple or impossibly hortatory’?
This thesis compares the discourses in two national parliaments. Despite science and technology being more and more internationalised practices (with scientists, ‘consumers’ and capital moving relatively freely between countries), legislative responses to their challenges still remain mostly national (critical: Naumann 1999). There are some moves towards a more consorted regulation - for example the European Council Convention on bioethics, Council of Europe (1997a) - and the member states of the European Union have agreed on some legal statements that touch upon the questions dealt with in this thesis (for example the EU charter of basic rights with its provisions on right to (family) life, and the EU bio-patenting guidelines). However, the bulk of legislation about new reproductive technologies is still within the realm of the nation state.

Comparative research has attracted much theoretical and methodological interest. The editors of the journal Comparative Studies in Society and History advise researchers that,

“Comparison in the social sciences, like virtue, is better practiced than discussed, for theories of how to accomplish either tend to be deceptively simple or impossibly hortatory whereas the attempt to think comparatively or to behave virtuously has merit however flawed the result.” (1980: 143)

Even if it was ‘impossibly hortatory’ to think about conducting good comparative research, it must be worth doing it, if it prevents the over-simplifications and the lack of
reflexivity of much comparative research, particularly in the legal field (also see Sauerteig 1998: 271).

Much comparative work by legal academics simply lists differences of black-letter laws, without acknowledging any of the difficulties of writing about difference (see for example Rheinstein 1974). Some comparatists never seem to question the possibility of knowing and understanding diversity (see for example de Cruz 1993; for criticism see Legrand 1995). Some still tell stories of 'primitive societies' and 'traditional legal systems' (Ehmann 1976; also see de Cruz 1995: 25). Their work is based on the assumption that we can talk about law independently of ideological or cultural practices (Zweigert and Kötz 1984: 213). If these works ever venture into explaining differences, rather than just listing them,

"[They] set about categorising the cultural attributes of their European neighbours [and] invariably fall into the trap of caricature and stereotyping. [...] This is not meant to be a criticism of individual authors, but of the very notion that the term culture can ever be anything more than a shorthand which, when applied to countries, invariably requires a level of selectivity and reductionism which is (or should be) unacceptable as an analytical tool in social science." (King 1997: 121)

**Limiting or de-limiting comparative research?**

King (1997) particularly argues that, in times of globalisation, any definition of such a thing as a legal 'culture' is normally based on sweeping generalisations and the reifying of national boundaries and differences.⁴ He holds (borrowing from Luhmann) that comparisons of legal regulations should be limited to institutions rather than cultures and should try to understand how these institutions communicate with their environments. Similarly, Cotterrell suggests that talking of 'legal culture' does not make much sense, although it is obviously necessary to acknowledge that law is dependent on the culture it is situated in. He claims comparative research is more useful if "institutionalised, professionally managed legal doctrine is taken as a specific focus, rather than a potentially unlimited diversity of cultural sources of influence on legal systems" (1997: 23).

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⁴ One examples of such generalisations with regard to comparing German and British legislation on new reproductive technologies is Kratz who explains in a footnote (!) how "genetics and biology have traditionally played a more important role" in "German social structure" (1997: 86). Also see Stellpflug who explains the differences with reference to "English pragmatism" versus a "German concern with morality" (1992: 5, further: Deutsch 1991).
Rather than arguing for a limitation of one's research along the above lines, Legrand seems to suggest that only a de-limiting of legal research allows us to make comparative statements. He does not want to drop the notion of 'culture' from his theorising. Particularly, according to him, it is necessary to reflect upon one's own standpoint as a member of one's own culture, in order to talk about another culture, because it is never possible to look at another legal culture through the eyes of that culture itself. Legrand states:

"As a foreigner, one's first knowledge of another legal system is always mediated in the sense that one necessarily views others within the meanings constructed in one's own language and legal language. Such mediation can never be effaced [...]" (1995: 266)

Legrand is particularly sceptical about lawyers' ability to make sense of the common law 'mentalité' if they were brought up in the civil law tradition (1998). 'Neutrality' is unachievable and cannot be assumed (also see 1996a: 235).

The problem of culture
Legrand argues effectively and enthusiastically for greater (cultural) sensitivity of those researching (and also internationalising) laws (see: 1996c; on 'unifying' laws also see Teubner 1998), which unreservedly has to be a good thing. However, in emphasising diversity and difference, Legrand seems to assume the authenticity, relative coherence and purity of legal 'cultures'. The concept of legal 'mentalité' presupposes an organic link between cultural and legal particularities. When reading Legrand, one gets the impression of an apparent harmony between legal and wider social 'culture' (Legrand 1998: 225). This negates the frictions, contradictions and fragility of any cultural framework (also see O'Donovan 2000: 95).

It seems more fruitful to assume that both within the civil and the common law tradition non-lawyers often feel alienated by their own legal culture. They do not necessarily feel that the way their legal professionals 'do' law is right. When buying a house, trying to adopt a child or to get divorced, it seems to me that people might not feel that 'their' law, 'their' legal culture accommodates for their needs and their understanding of what is right. We do not 'naturally' speak the language of our laws. We all have to be bi- and tri- and multilingual in negotiating our place in society, vis a vis the law. There is always a
multiplicity of 'cultures' around, different identifications with and implications into the law. Legrand does not seem to entirely avoid the trap that many of those defending diversity fall into: the romanticisation of authentic and pure cultures. No doubt, the German and the British (or English?) 'legal culture' are different, and one has to be sensitive to this difference (also see Shaw 1992: 79). But neither culture is authentic, pure, homogenous or self-explanatory even to 'insiders'. Kuper, in a recent anthropological account, demands to "avoid the hyper-referential word altogether" (1999: x):

"The difficulties become most acute when (after all the protestations to the contrary have been made) culture shifts from something to be described, interpreted, even perhaps explained, and is treated instead as a source of explanation itself." (ibid: x/xi)

The impossibility to see 'culture', the fact that "cultures' do not hold still for their portraits" (Clifford 1986: 10), means that the restrictions for research suggested by King, Cotterrell and others are useful. The dilemma of 'writing culture' calls for modesty. The analysis has to start from one expression of a particular legal institution, one manifestation of legality, and has to try to avoid generalisations about how 'the British' or 'the Germans' think and do law. John Law argues for a focus on the 'local':

"In a modest and recursive sociology this is the place to start. It is certainly where I wish to start. But it is not necessarily the place to stop [...] For the talk of contingency is not to give up the search for pattern, but to assume that patterns only go so far [...] The conclusion is that commitment to contingency doesn't stand in the way of a search for powerful ordering patterns." (1994: 97)

The 'local' in my case is the group of men and women assembled in parliamentary contexts debating about the future of embryo research and fertility treatments. This thesis does not attempt to make statements about the British or German legal culture as such. The focus is not so much on the why of the found differences (which would assume a relationship of necessity between 'culture' and 'law'), and more on the how. How did differences in the discourses develop, how were controversies set up, how were they brought to distinct solutions?

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5 Many of the more typical generalisations about common and civil law traditions proved wrong when focussing on the debates informing this research. For example the supposed reluctance to codify law in common law cultures (with their emphasis on judicial discretion; see on this for example Goodrich 1986: 24 - 47) could not be confirmed at all when it came to the regulation of technologies of procreation. The British Fife Act codifies far more more extensively than the German counterpart, the incompleteness of the German EShG is often justified by the debaters through reference to judges who should be left to decide critical issues, because they are closer to their specificities.
This thesis thus makes the modest claim that it is possible to compare the debates in parliaments of two different countries about new reproductive technologies. It makes the more ambitious claim that a methodologically sound and empirically informed comparison of these debates enables to see something more general about law(s) in modernity. It might allow us to see how the two very different national approaches to similar technological and cultural challenges come up against similar dilemmas (also see Morgan and Nielsen 1992: 69). These dilemmas speak of the difficulties law has when imposing its order on the dynamics of modernisation.

Translations
Comparing text from German and British sources entailed translations. Again, translation is one of those either 'deceptively simple' or 'impossibly hortatory' tasks. Like comparing a legal provision, in order to translate a word, one has to understand how it relates to other words and contexts, which necessarily leads to the conclusion that it cannot adequately be translated into another language, because its 'equivalent' term relates to another set of words and connotations. Translation needs to recognise difference, but it also needs to establish relations, the right relations between things that are and remain different:

"Even to attempt to translate is to experience necessary, but instructive, failure. In this sense translation forces us to respect the other - the other language, the other person, the other text - yet it nonetheless requires us to assert ourselves, and our own languages, in relation to it. It requires us to create a frame that includes both self and other, both familiar and strange; in this I believe it can serve as a model for all ethical and political thoughts." (White 1990: xii)

It is once again necessary to resist the reification of for example language boundaries, assuming that within a language everybody is sure of meaning, and outside them, no-one can grasp any meaning at all. It needs to be acknowledged that translation is what we need to do all the time, in order to understand what anyone (person or text) says (White 1990: 230). Translation is thus as much a question of pragmatism as one of scruples.

The (pragmatic) decisions about translations made for this thesis are as follows: Wherever possible, texts were used in their original language and then translated by myself (for example Ulrich Beck's Risikogesellschaft). Translated data is introduced
without any further comments (thus rendering invisible the tensions and impossibilities of translation). This rule is broken where terms seemed untranslatable even with this pragmatic approach in mind. This is mostly true for names, but also for concepts like Leib, which does not simply mean ‘physical body’ [Körper], but rather refers to the lived experience of one’s body. It is a term also connoting biblical and historical texts, which has largely been displaced by notions of biology and medicine, i.e. by the use of Körper (see on this zur Lippe 1988; Duden 1992: 343; 1994: 131 – 138). Thus, if speakers decide to use the term Leib, they place themselves in a distinct tradition and reject others. All quotes from the German debates and from German literature are my own translations.

The problem of neutrality
One last problem that needs to be addressed when thinking about comparative research is one that has surfaced before: the problem of neutrality. When comparing two different social phenomena in two social contexts, how does one construct categories that do not simply represent the prejudices and particularities of one of them (Sauerteig 1998: 279/280)? And, more specifically, how do I, as a German lawyer, talk about British law, other than through ‘German’ concepts? It is useful, before attempting to counter this concern, to remind oneself that every statement about an observation is comparative in nature:

"Actually, no social phenomenon can be isolated and studied without comparing it to other social phenomena. Sociologists engage actively in the process of comparative work whenever concepts are chosen, operationalised, or fitted into theoretical structures. Trying to understand and explain variation is a process which cannot be accomplished without previous reflections on similarities and dissimilarities underlying the variation." (Olson 1990: 5)

We cannot say whether something is exceptional or normal without comparing it to some standard that is relatively independent from the concrete observation taking place. We cannot say whether something is typical or atypical, rare or common, high or low, without such comparison. Accordingly, to hold that it is impossible to compare across a national boundary either is a denial of the possibility of observation and judgement as such, or it conceptualises national borders as somehow different, more solid and more real than any other contextuality.

It is true that cross-national comparisons highlight the general problem of comparison, and the relativity of all standards against which to judge any phenomenon. To deny the
possibility of comparative research however, is to deny the possibility of any statement about anything - due to the inescapable relativity of standpoints. It denies the possibility - and the necessity - of communication. Mary Douglas calls this radical doubt about the possibility of rational discourse 'privileged withdrawal':

"Choose the more sophisticated path if you will. As you do so, we shall hear you invoking metaphors of ritual cleanness. You will separate yourself from dirty politics, and look down on those crude officers of public administration, whose minds such complicated doubts would never cross. They have a vested interest in legitimacy and so in the possibility of rational discourse. It is only the excluded elite who seriously entertain radical doubt and allow it to subvert the enterprise of communication." (1986: 83)  

The only logical consequence of this radically sceptical stance is to remain silent. There is no point in attempting to write a thesis if you do not have an interest in communicating your ideas. In order to communicate, one needs to believe in the feasibility of judgement and comparison. This thesis will not succeed in achieving a neutral, objective view on either the German or the British debates. However, it does not seem over-optimistic to assume that it is possible for me, as a German lawyer, to say something meaningful about the dynamics of both the German and the British parliamentary discourses on new reproductive technologies.

**Conclusion**

This section dealt with methodological considerations. It has highlighted that questions of methodology and theory are inextricably linked, as both speak of certain - connected - epistemological commitments. Further it has been emphasised that theory and methodology do not necessarily come 'before' data analysis, but that all three grow together in cyclical, and not always logical, movements. The methodological choices made for this thesis (i.e. comparing discourses) necessitate and facilitate a focus on action, conflict and the local. By following the actors in the networks of localised and closely read discourses, emphasis is given to how different 'solutions' were brought about. The focus on contradictions and consequent tensions will be elaborated further in the following conceptual section.

This thesis analyses how discursive order is established through legislative debates. This chapter investigated how this analysis can be done in an orderly way. In the

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6 On the interest in communication that motivates all historical research see Ricoeur 1981: 295.
following, much attention will be given to the fact that the actors in parliament involved in legislation do oversimplify reality and eclipse important aspects and dynamics of the social. In later chapters this will be read as the difficulties law has in coming to terms with the ambivalent nature of modernisation. This analysis has to be reflexive itself, it needs to acknowledge that the order imposed on the material through my account of what happened will be oversimplified and will eclipse other possible accounts. In Bauman’s words, sociologists are not only interpreters, but legislators too (1987). Methods and concepts dictate what can and cannot be seen, what is and is not deemed relevant. O’Donovan states:

“It is true that the power we have is not comparable to that of judge, legislator or administrator. Yet what and how we think, and our reflections on how we think, are significant.” (1993: 125)

In a way, reflexive research, and thus a methodology chapter, can be seen as “self-defeating: it is to try to legislate about what might emerge” (Law 1994: 17). This chapter has been grappling with that tension caused by laying down principles about reflexivity:

“But not to lay down principles, not to say how things are, is to abandon the traditional warrant for doing sociology – that of telling stories about the world. A nice dilemma.

Provisionally, very provisionally, I tend towards the camp of the modest legislators rather than the interpreters.” (ibid)

C: The ambivalence of modernisation as conceptual starting point

“The ambiguity that modern mentality finds difficult to tolerate, and modern institutions set out to annihilate […], reappears as the only force able to contain and defuse modernity’s destructive, genocidal potential. Hence the notorious duality of the modern tendency, oscillating between freedom and genocide, constantly able to stretch in either direction, spanning at the same time the most horrifying contemporary dangers and the most effective means of preventing them – the poison and the antidote.” (Bauman 1991: 52)

This thesis tries to understand how laws are made about new reproductive technologies. The parliamentary debates about embryo research, IVF, gamete donation and eugenics are not simply investigated for their own sake (even though they represent fascinating material in their own right). The debates are used as a case study. This case study
assumes that when looking at debates about reproductive technologies we are dealing
with debates about modernisation. Thus, this thesis is a case study about how
lawmakers talk about modernisation. New reproductive technologies are understood as
instances of modernisation. This is the first main argument of this thesis. I argue that in
the debates about new reproductive technologies paradigmatic concerns about the nature
of modernity and modernisation are expressed. These concerns, and this is the other part
of my core argument, are contradictory. They are contradictory because modernisation
proves to be an ambivalent process. It is this ambivalence that lawmakers have to come
to terms with. They do so, and this will be argued in later chapters, by creating laws that
are themselves ambivalent, that envelop the contradictions they are facing rather than
dissolving them.

The debates in parliament are concerned with expert medical and scientific practices
and with the ‘users’ of these services: women, couples, families. New reproductive
technologies are based on technological and scientific processes that were impossible 50
years ago. Technological skills have advanced, and lawmakers are confronted with this
 technological progress. Thus the lawmakers talk about the nature of progress and
science and whether there should be any limits to what science is allowed to do. They
also talk about individuals’ needs and wishes and whether there should be any limits to
what individuals are allowed to do with the new technological possibilities. Both these
themes of science and progress and the question of individual freedom versus the
authority of tradition or nature represent two sets of concerns about the nature of
modernity or modernisation.

It is therefore possible to read the debates on embryo research, genetic screening,
surrogacy or so-called single motherhood as debates about modernisation. They reflect
upon the nature of modernity itself. As they are legislative debates, the immediate task
of the speakers is to make laws. They are therefore debating how laws should respond
to the challenges of modernisation, be they individualisation or permanent scientific
progress. They (at times directly, at other times less consciously) address the role and
status of law within modernity. This reflection will be the main theme of this thesis.
Where and how can law be under the conditions of permanent modernisation? How can
law engage with the modern parameter of progress? Before entering the core of this
argument, it is necessary to define - briefly - in which sense the essential terms 'modernity' or 'modernisation' will be used.

**Modernity: first a disclaimer**

Despite many writers' focus on the concept of modernity, not many set out to explain what they mean by this term. Different authors pick up on different aspects of the modern condition. It is not the purpose of this thesis to find the one coherent explanation of what modernity is all about. Rather, in this brief section I will clarify the way I will use this term in the course of the following chapters. This will also lead to the theme of ambivalence, which is central to the further argument. Modernisation, I hold, is a contradictory process, because 'modern' is an ambivalent paradigm.

My concern is not with modernity as a precisely dated historic period. I happily leave the question of when modernity started to the historians. Neither do I understand modernity as the term used by art historians, describing a specific school of painting, design or architecture, roughly spanning the first half of the twentieth century. I am concerned with modernity as a *project*, and as a certain way to make sense of and change the world. This thesis discusses "modernity rather as an attitude than as a period of history [...] , a mode of relating to contemporary reality" (Foucault 1984: 39, also see McGuigan 1999). This understanding of modernity is closely linked to the idea of the Enlightenment (see Douzinas et al 1991: 6), of which I want to emphasise two strands. Firstly, the enlightenment idea of putting man centre stage. Man and, more importantly, the individual is the central figure of the enlightened universe. Man is to be emancipated from God, religion and tradition, from tribe, village and monarch. The individual is the central character of the enlightenment discourses of emancipation, equality, human rights and humanism. Adorno and Horkheimer speak of "man’s likeness to God [which] consists in sovereignty over existence" (1999: 9; also see Fitzpatrick 1992: 34). Thus "individualisation", 'detraditionalisation' or 'disembedding' can all be seen as

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7 See for example Beck, who does not establish a definition of what he means by the term. He does, however, vaguely define the term 'modernisation' (1994: 2). For an attempted definition see: Zygmunt Bauman 1991: 34, footnote 1.


The second strand of the project of modernity, which I want to emphasise here, is to do with knowledge. For the way the term modernity is used in the following chapters, a certain claim about knowledge is central: Human rationality can ‘know’ the world. It can understand it, and look at it ‘objectively’, with the eyes of an outsider (Douzinas et al 1991: 9; Adorno and Horkheimer 1999: 9) For Hannah Arendt it is the invention of the telescope and the subsequent ‘discovery’ that earth was turning around the sun, which exemplifies the particular nature of modern knowledge:

“...The modern age began when man, with the help of the telescope, turned his bodily eyes toward the universe, about which he had speculated for a long time – seeing with the eyes of the mind, listening with the ears of the heart, and guided by the inner light of reason – and learned that his senses were not fitted for the universe [...].” (Arendt 1993: 54/55)

According to Arendt, modern man, in order to understand the world, in modernity, had to stop thinking from his (one might add: her) own subjective standpoint. People must look at the earth and at each other as if they were placed in the universe. This, of course, leads to a very prominent place for the natural sciences in modernity’s world-view (Arendt 1993: 55). The natural sciences represent everything that modern knowledge is about (also see Giddens 1990: 40; Bauman 1998b; 2001): it is ‘objective’, it is instrumental, it is concerned with the universal, not the particular, with the rule and not the exception, with order and not with ambivalence; and because of all of this, it allows to control certain phenomena in the natural (or by means of transfer) the social world.9

For me, engineering, both as a profession and as a philosophy, seems to signify most effectively this strand of the project of modernity. Engineering is based on the natural sciences’ knowledge of the world. It then makes this knowledge useful and acts on the world. It is the “certainty of the technician” which is distinctive for modern knowledge, “we know an object insofar as we can make it” (Habermas 1974: 61). Based on the

9 For Bauman the typical feature of modern knowledge is that it tries to eradicate ambivalence. It wants to construct order and clarity. Ambivalence, “the possibility of assigning an object or an event to more than one category” (1991: 1) is intolerable to the modern mind: “Amongst the multitude of impossible tasks that modernity set itself and that made modernity into what it is, the task of order (more precisely and most importantly, of order as a task) stands out – as the least possible among the impossible and the least disposable amongst the indisposible; indeed as the archetype for all other tasks, one that renders all other tasks mere metaphors of itself” (1991: 4). Similarly: Law 1994.
knowledge of earthquakes, engineers might build the basement of a house in a certain way, thus attempting to control the effects of earthquakes. Based on the knowledge of the atom, engineers might build a reactor and attempt to channel the generated energies for human use. Based on their knowledge of the human gametes, they might develop the technique of IVF and attempt to fertilise an egg outside a woman’s body. The English language also has the term ‘social engineering’, highlighting the way in which this line of thinking can not only be applied to the ‘purely’ natural, but also to the human world. Along the same lines, policies can be based on assumptions about who is or is not fit to parent, or who is or is not a deserving poor. These assumptions can then be implemented in an instrumental and technical manner, once again concerned with the rules and not the exceptions, with the universal and not the particular. Humans can be turned into objects of a planning mind, just like nature turns into a mere object seen through the lens of the natural sciences. A ‘who’ is turned into a ‘what’ (Arendt 1998: 10).

In the following, these two strands of the project of modernity, a tendency for individualisation and detraditionalisation and the modern planning mind, utilising science to shape and change the world, stand for my use of the terms ‘modern’, ‘modernity’ and ‘modernisation’. This is less than a coherent definition of modernity as such. Rather it points to some trajectories that in my opinion shape the dynamics of modernisation. These trajectories already point at some of the problems that the later chapters will be concerned with. Importantly, I will now argue that these two ‘strands’ of the modern mind or project are to a certain extent conflicting, which is particularly visible in the field of biotechnology or ‘modern’ medicine.

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10 What this ‘working definition’ of modernity particularly does not do justice to is an important body of work that identifies as the core dynamic of modernity the concept of ‘structural differentiation’ (Parsons 1951). Here, the assumed coherence and unity of ‘traditional’ societies is seen to be replaced by relatively autonomous spheres or ‘systems’ (see for example Luhmann 1984, 1998) following their own logic and based on their own assumptions.

11 Santos describes two ‘pillars’ of modernity: regulation and emancipation. Each ‘pillar’ “tends to develop a maximalist vocation” which leads to tensions (1995: 2). There is obviously an overlap between Santos’ and my conceptualisation of modernity, but I prefer to think of what he calls pillars as dynamics or trajectories as this implies their ongoing movement and thus points to the problems law has in achieving closure in the face of modernisation.
Modernity: a first glimpse of the problem
The two strands of the modern project outlined above illuminate the tensions that are inherent in modernity itself, that were the concern of the lawmakers in the British and German parliaments, and will be the focus of this thesis in the next chapters. They highlight both the tendency to the subjective and the objective, to the rebellion against order, and the move towards order itself. If it is right that modernity puts the subject, the individual centre stage, then this side of modernity conflicts with its other side sketched above as the project of engineering. The emancipated subject of humanitarian enlightenment discourse contradicts the notion of humans as objects for social engineering. The modern subject, God-like and supposedly free, might resist simply being treated as an object of some rational 'master-plan'.

Moreover, if modern knowledge is based on a claim to objectivity, on a clear distinction between what is and is not reasonable, then modern rationality will find it difficult to accommodate for the desires, ideas and identities of all these emancipated, differentiated individuals who want to be in charge of their own biographies rather than being told what is rational and what is not. If to the modern mind rationality is what makes us human, what turns us into the subjects of the enlightenment discourse ('I think, therefore I am'), then how do you protect this treasured rationality from being radically redefined, twisted and disgraced by all the subjects that you have just declared to be the central characters of your universe (they are, and therefore they think – whatever they want)? It is difficult to reconcile that the “Cartesian cogito expresses both the most individual experience and the most objective truth” (de Beauvoir 1991: 17).

The difficulty becomes very apparent when thinking about human 'nature', or the physical, 'biological' side of human life. The typically 'modern' way of dealing with nature is, as outlined above, to treat nature as the object of human action. Nature is material and resource, to be manipulated and managed. However, the idea of 'putting man centre stage', to proclaim that humans are always to be treated as subjects rather than objects, creates an immediate tension when thinking about 'human nature' (on this already see Freud 1985: 274 – 277; also see Grendstadt and Selle 2000). What about human materials, tissues, organs? Are they to be used as resources, as objects of manipulation and exploitation? Or is there something inherently and 'already' 'human'
about any tissue deriving from man's body, which means that it has to be thought of as subject rather than object, something "grown rather than made" (Habermas 2001: 15; also see Santos 1995: 28/29)? We can see these difficulties very clearly in the controversies for example about organ donation, brain death as a medical concept, the Human Genome Project, or about embryo research. Are we dealing with something 'natural', i.e. the object of human knowledge, waiting to be dissected and turned into something useful? Or are we dealing with parts of the human subject that deserve to be treated with dignity and not to be used for any other purpose than its own benefit? The claim to rationality and to individualism, to objectivity and subjectivity, which shape the modern project, are difficult to reconcile (Cooke 1990: viii; Mc Guigan 1999: 37; Connolly 1987). And it is this difficulty that keeps the lawmakers of this case study, and thus this thesis, busy.

Both strands of modernity hold a promise, the promise of emancipation and of safety from destitution and the perils of nature. Modernity certainly can claim that through establishing control over nature and through the liberation of man from the limits of nature or tradition lots of benefits have been achieved. Yet both trajectories of modernity also can be seen as potentially damaging: too much individualism can erode the safety and meaning of social structures, of tradition and 'the norm' (see Giddens 1994: 79). Too much cool and rational planning discloses different fears: people might be turned into objects, some 'master-mind' might attack individual freedom, difference and plurality. "Totalitarian possibilities are contained within the institutional parameters of modernity rather than being foreclosed by them" (Giddens 1990: 8)

The debates about new reproductive technologies that are the focus of this thesis will be read as discourses about the ambivalent nature of modernisation and progress. It is not surprising to then see that, as the lawmakers often cannot make up their minds about whether modernisation is an entirely good or bad thing, the concerns they are discussing are contradictory. It is hard to decide whether modernity is dangerous or not (Douzinas et al 1991: 15), and further, the dangers seen in the context of modernisation

12 Also see Owen 1994: 125 who traces this liberating and totalitarising potential back to Weber's ambivalent construction of modern reason.

13 I got the initial idea to look for contradicting anxieties about new reproductive technologies when reading Eric Hirsch's interviews of English couples regarding their concerns about technologies of reproduction (Hirsch 1995).
are contradictory in nature. The contradictions of the discourses will be explained with reference to ambiguities about modernisation and modernity (see Bauman 1991; Cooke 1990: viii; McGuigan 1999: 37). In a next step, technologies of reproduction will be characterised as instances of modernisation, combining both strands of the project of modernity outlined above: instrumental rationality and individualisation. The argument that we observe a controversy about the effects of modernisation when we read debates about technologies of reproduction is essential to the further reasoning of the thesis.

**New reproductive technologies as instances of modernisation**

New reproductive technologies are technological or medical interventions into the processes of human reproduction. For the purpose of this thesis, technologies of reproduction will serve as an example of processes of modernisation. The 'working definition' of modernity outlined above is based on two 'strands'. Firstly, there is the modern claim to a distinct, objective, scientific rationality. Secondly, there is a tendency to individualisation, to the erosion of limits imposed by nature or tradition on individuals' lives. Individuals want to (or have to)\(^\text{14}\) determine for themselves which lives they lead. One of the central assumptions of this thesis is that both these strands of modern thought shape the development, use and understanding of reproductive technologies. On the one hand, there is the scientist's mind, turning towards human reproduction. Just like any other natural process, just like the reproduction of animals or the growth of cells, the phenomenon of human reproduction can be analysed and dissected. What was hidden can be made visible, what seemed mysterious can be explained, and repeated under controlled conditions. Elements of it can be altered, or manipulated. The creation of human life can be understood as the succession of distinct steps of development, that can each be the object of scrutiny and *engineering*.

On the other hand, there are those who use the technologies, sometimes they are called patients, mostly they are women. For them, technological intervention into reproduction can mean that they can liberate themselves from limits imposed onto them by nature or tradition. Even if your fallopian tubes are blocked, you could conceive. Even if your partner has a fertility problem, you could conceive from him. Even if you do not want to have sex with a man, you could achieve pregnancy. Even if you are white, you could

give birth to a black child. Even if you are post-menopausal, lesbian or single, with the help of new reproductive technologies you do not have to forfeit your wish for a child. You can go ahead. You could even try to take the ‘gamble’, the element of fate and uncontrollability, out of having a child. You could –theoretically speaking - specify that you only want a genetically first-class baby, a black baby, a baby girl or a genius child. Life “as it has been given, a free gift from nowhere” could be transformed into something man “has made himself” (Arendt 1998: 2/3).

Both these potentials of new reproductive technologies are potentials of the modern. They are expressions and effects of processes of modernisation. Reproductive technologies are based both on the logic of individualisation and on rational planning and engineering. They deal with humans as both possibly powerful agents, designing their biographies according to their own wishes and as possibly vulnerable victims of someone’s evil ‘master-plan’. Parliamentarians talking about new reproductive technologies debate the promises of modernisation: the relief of suffering, the control of hitherto uncontrollable processes, the creation of happy families and healthy children. But they also get caught up in the contradictions created by fears of ambitious scientists, engineering the human race, and reckless single women, who selfishly insist on having a child outside of the limits imposed by tradition or nature.

Technologies of reproduction offer at once opportunities for liberation and for enslavement” (Lee and Morgan 1989: 2). They stand for everything moderns have learned to fear about and hope from modernisation. Those making laws about them face many difficulties. Shall they enter the risks of modernisation and embrace the promises that modernity holds, or shall they err on the side of caution, and prevent certain aspects of human life from being modernised? Can humans be treated like resources? Should gametes be made available for the market? Are women allowed to sell their reproductive powers? Is the embryo a clot of cells or a subject? The next chapters will read the controversies about technological intervention into human reproduction as the attempt to come to terms with the ambivalent effects of modernisation. Referring back to the theme of order introduced in the methodologies chapter, the legislators of this case study can be observed attempting to order the effects of modernisation, to legislate on ambivalence. They are reflecting the problem of decision-making, of ordering modernisation.
Of risks and order
Some of the major contributions of recent years to the problem of ordering modernisation are informed by the concept of risk. According to some relatively recent thinking, modernity (or at least our understanding of it) increasingly becomes concerned with risk (Beck 1986; 1988; 1993; Beck et al. (eds.) 1994; Lash et al. (eds.) 1996; Adam et al. (eds.) 2000; Giddens 1990; 1994b; 1998; Luhmann 1993; Douglas 1992; Franklin (ed.) 1998; Gabe (ed ) 1995; Baldwin (ed ) 1997). Broadly speaking, the risky nature of modernity here stands for the difficulty to order an increasingly anarchic reality in which every decision made can backfire with unforeseen consequences. Others argue that the strategies of those who are trying to govern, be it with regard to crime, disorder, the environment or sexual identities, are increasingly shaped by the notion of risk (Ewald 1991; Simon 1987; 1988; Carter 1985; Castel 1991; O’Malley 1992; 1997; 2000b; Petersen 1997; Turner 1997). This school of thought is informed by Foucault’s notion of governance, at times by the concept of biopower or governmentality. Accordingly, ordering or governing is not exactly made more difficult through the emergence of risk. Risk is simply another way of stabilising order, another epistème of power.

Both expressions of this theoretical concern with risk have in common a focus on the problem of order or ordering in the context of (‘late’, ‘reflexive’ or ‘actuarial’) modernity. Despite important differences, these different writers would argue (to varying degrees) that focussing on risk allows us to see what ‘we are about’. This is an ambitious claim. It will form the core of the discussion in Chapter Six. For now, this thesis will focus on the actual parliamentary debates themselves. This procedure is the outcome of a methodological commitment to a ‘bottom up’ approach. Rather than testing a theory by applying it to data, this commitment attempts to develop a theoretical response to the empirical world, through a close reading of the discourses themselves. As acknowledged in the above methodology chapter, this trajectory of research can never fully be achieved, as we always already embark on the world with some ideas about reality. So, there is no purity in this argument: first, pure data, then pure concepts. Yet, before developing further the conceptual argument of this thesis, it is now
necessary to turn to the debates themselves in order to see what concerns the lawmakers. The remainder of this thesis will proceed on the basis of those concerns.

**Conclusion and outlook**

I have previously argued that modernisation is an ambivalent process, that it has contradictory effects. This finds its expression in the concerns expressed by the lawmakers both in Bonn/Berlin and in London. Part Two will analyse these concerns and their discursive 'treatment'. The next chapter will start off with a list of all the concerns expressed in both parliaments. We will see that they fall into certain categories and that they are contradictory. These contradictions, once again, will be read as the outcome of ambivalent processes of modernisation.

This list of conflicting considerations will then be followed by a more detailed analysis of the problem of law, morality and modernisation. We will see that the lawmakers of both countries find different ways of 'grounding' law (Fitzpatrick 2001): each of these ways is problematic and efficient at the same time. How they are effective and problematic will be worked through in the following chapters. These chapters are concerned with the construction of knowledge, progress and rationality (Chapter Four) and with the construction of the (feminine) subject of law within modernity (Chapter Five). *This* chapter introduced the main conceptual commitment of the whole thesis: Debates about technologies of reproduction are debates about modernisation. Modernisation is an ambivalent process, which leads to contradictory concerns about its effects. This thesis tells the story of contradictory concerns, opposing anxieties and the tensions and ambivalences they create. And it is the story of legislative attempts to dissolve these tensions into apparently coherent laws. It will thus focus on the rhetorical, discursive and mythical resources which are mobilised by lawmakers to relieve or deny certain tensions.
Part Two: Legislating for Modernisation – Dilemmas, Ambivalence and the Question of Law

Chapter Three: Morality, Democracy and Legality – Modern Laws

“... To fill a Gap Insert the Thing that caused it - Block it up With Other - and ‘twill yawn the more – You cannot solder an Abyss With Air.” (Dickinson 1997: 51)

This chapter will do two things. It will establish a list of the conflicting concerns which are expressed in the debates on technologies of reproduction in the German and British parliaments. As we have seen above, it is difficult to decide whether one needs to be worried or hopeful about modernisation. Therefore concerns about technologies of reproduction address both the promising and dangerous potential of modernity. The following list of concerns illustrates the massive problem confronting the lawmakers in both national parliaments. The second half of this chapter is dedicated to establishing the two distinct legislative approaches the British and the German lawmakers take towards the dilemmas of modernisation in the field of human reproduction. In a way, they can be read as two sides of a coin. In Britain it is assumed that law has to adapt to change and has to respond to the challenges of new reproductive technologies by finding a new solution to new problems. In Germany, the answers law provides for the challenges of modernisation are thought of as somehow timeless. They have to be applied to changing circumstances, but they do not have to change. The two approaches correspond to a certain extent with positivist and natural law perspectives. However, it will turn out that straightforward constructions of ‘positivism’ or ‘natural law’ do not fully represent the approach taken by either national parliament. When attempting to justify their decision-making, the lawmakers in both contexts make use of (in Britain) positivist and utilitarian and (in Germany) natural law arguments. Yet they also have to reach beyond the constraints of each of these ‘schools’ in order to achieve a sense of legitimacy for their respective decisions. It was argued above that the difficulties of making laws about reproductive technologies could be seen to be exemplary for the difficulties of legislating for the effects of modernisation. Building on this argument, I will hence suggest in this chapter that facing the dilemmas triggered by modernisation law cannot simply be legitimised by reference to notions of positivism or natural law. In
fact, both concepts can be seen as failing to give coherent answers for the problematic relationship between law, morality and political decision-making.

We will see that building a (jurisprudential, political, legal) ground from which to proceed when making legislative decisions is a difficult task, and that any easy solutions (law is distinct from morality vs. law is morality) are self-defeating. So this chapter introduces the theme of failure (see Fitzpatrick 2001a: 12, 4; White 1990: xii): The lawmakers' failure to come up with coherent answers, and the two laws' failure to achieve closure on the question of law, morality and social change. Yet, it will be argued that this failure should not be read as the ultimate ‘death’ of law (or the dethroning of ‘King Nomos’). Both legislatures manage to establish some sense of legitimacy for their decision-making. Indeed, I will argue in this and the following chapters that it is the two laws' failure to establish ultimate certainty and coherence which enables them to deal with the inescapable ambivalence of modernisation.

A: A list of all the concerns discussed

It will not be possible to highlight every mentioning of every concern in the months of parliamentary debates. A few examples each from both the British and the German discourses for every type of consideration that surfaces in the debates will have to suffice. It can further be seen that the concerns can be grouped into different categories; these will later be constructed as distinct strands of reflection about processes of modernisation, and about the future of human reproduction. The following list will start off with concerns about too much, too reckless and too radical forms of modernisation. It will conclude with the opposite anxieties: the fear of losing out on the positive, humanitarian potential of modernisation.

The "excess manipulation of human integrity"¹

This concern mostly focuses on the human embryo as vulnerable and precariously placed at scientists' hands. Many speakers present the embryo as a "feeling, responding being" (Baroness Cox, 18 October 1990, House of Lords, vol. 522: col. 1047). Thus,

any manipulation of the embryo, research with living embryos, and every creation of embryos for other purposes than to create a pregnancy is dangerous and morally wrong as such ("experimentation on little children")\(^2\). This is the accepted belief in the German debates\(^3\); in London this view is contested, but is still expressed frequently:

"I fail to see how, in the face of biblical and scientific evidence, anyone can be 100 percent sure that the embryo is not the developing human being in the image of God." (Lord Robertson of Oakridge, 20 March 1990, House of Lords, vol. 517: col. 240)\(^4\)

Another strand of this concern is that, independently of whether the embryo itself is a human being, or even a person, many speakers agree that the scientific access to the embryo enables manipulation not only of this embryo, but also of *humankind as such* (also see Brazier 1999: 187). The concern for 'human integrity' is thus extended beyond the individual embryo and applies to 'all of us'. "The embryo became a vehicle through which several issues about science, the future and the interconnectedness of humanity were discussed" (Strathern 1999: 191).

The manipulation of the embryo could lead to genetic engineering, the "breeding of humans"\(^5\), "eugenics and selection"\(^6\), a loss of diversity and tolerance, and decreasing acceptance of disabilities and the disabled\(^7\). Further, one could even think of more 'sci-fi' scenarios like the creation of hybrids\(^8\), "artificial humans"\(^9\), or the cloning of

\(^2\) Mr. Duffy, 2 April 1990, House of Commons, vol. 170: col. 941.

\(^3\) "The Government Bill will be based on the assumption that with fertilisation, i.e. with the fusion of the nucleus of both the egg and sperm, human life has developed. This is why clear boundaries have to be imposed on any handling of human life" (23 February 1988, *Bundestagsdrucksache* 11/1856: 7). Also see the Socialdemocratic Bill: "The creation of human life for any other purpose than the development into a human person, especially for research purposes, is irreconcilable with the legal and ethical qualities of human life" (16 November 1989, *Bundestagsdrucksache* 11/5710: 13). Further: Dr. Seesing, 8 December 1989, *Plenarprotokoll* 11/1471.


\(^7\) See for example Dr. Seesing: "What is the human who we want to manipulate supposed to look like in the end then? Do we eventually want a world with only beautiful and healthy people? Are we still willing to accept disabled people and disabilities?" (24 October 1990, *Plenarprotokoll* 11/239: 18209). Also see: Dr. Ruediger, 9 November 1990, *Bundesratsprotokoll* 624: 637.


At times the concerns do not focus on particular expert practices or individual manipulations of certain human genes, they rather express a general worry about the effects of subjecting human reality to a mere scientific rationality:

"[Human life] may be reduced to a form of mechanisation in which the comparable grandeur of the human spirit, the genius of the human mind and the noblest virtues of the human heart are asphyxiated by the exhaust fumes of our technological wonders." (Lord Jakobovitz, 7 December 1989, House of Lords, vol. 513: col. 1075)

Scientists and science feature prominently in this anxiety, as do embryos. Because this anxiety often is concerned with things science cannot do yet, but might do in the future, the concerns in this scenario rely on thoughts about the predictability of the future, about the inevitability of certain developments, about slippery slopes and about scare-mongering. Questions often addressed are whether we can assume that certain things will happen, whether we can trust science to prevent the worst abuses and whether it makes sense to talk about problems that are still lying in the future. Many of these questions will be addressed in Chapter Four.

The (health) risks for the women involved

The next group of concerns focuses on the (health) risks women might face if they use new reproductive technologies. Often, it is ‘women and children’ the speakers are concerned about; through this the embryo might still feature in the contributions about women.

In the German discourses there is considerable agreement among all parties that in the public perception of the technology these risks are generally underestimated, whereas

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11 Also see Dr Jahn who speaks of 'Machbarkeitsswahn', which directly translates as the delusion that everything is manageable'; the most meaningful translation for this concept in the English language probably is megalomania (24 October 1990, Plenarprotokoll 11/18217).

12 See for example Lord Merton: "We have heard a great deal about the slippery slope. I do not subscribe to the view of the slippery slope. Those who believe in it must accept that we are already on the slippery slope, like it or not. The Bill gives us a firm foothold" (7 December 1989, House of Lords, vol. 513: col. 1106).


the chances for a successful treatment are exaggerated.\textsuperscript{15} Many speakers highlight that women might only seek treatment because of social expectations that women have to be mothers in order to be proper women, and it is suggested that it might be better if childlessness was simply accepted\textsuperscript{16}. During the debates in parliament speakers of all parties emphasise how vulnerable women can be subjected to exploitation and harm in the context of the high hopes of IVF.\textsuperscript{17} Particularly the Greens stress this concern and criticise that the Bills of Government and Socialdemocratic opposition do not contain any provisions for the protection of women:

"Women in the existing Bill only appear as egg-donors and as carriers-to-term for embryos, and not as persons that need to be respected." (Ms Schmidt, 24 October 1990, \textit{Plenarprotokoll} 11/230: 18213)

The Greens are also the only party that extends the concern for women beyond those women who actually seek treatment in infertility clinics.\textsuperscript{18} To them,

"The merely functional relationship to women that is inherent in IVF, does not only lead to a loss of feelings of self-worth for the women concerned, but it means an attack on the physical integrity of all women." (Green Bill, 19 October 1990, \textit{Bundestagsdrucksache} 11/2179: 4)

On the other side of the channel, risks for women's health and well-being are also seen, however they feature less prominently in the debates. One typical example from a House of Commons debate:

"IVF is inefficient, time-consuming and dangerous for women. It can lead to cysts, coagulation, strokes, heart problems, ovarian cancer and many other problems. Babies born from IVF have three times the rate of low birth weight, five times spina bifida rate and four times the perinatal death rate. [...]" (Alan Amos, 23 April 1990, \textit{House of Commons}, vol. 171: col. 106)

This contribution is typical for those who mention risks for women at all. In the whole speech the concern for women is mentioned in one sentence. Immediately the speaker turns the focus back onto the embryo, the baby. The speakers in London who express

\begin{footnotesize}
\begin{enumerate}
\item See for example Dr. Dauber-Gmelin, 8 December 1989, \textit{Plenarprotokoll} 11/183. 14168, Green Bill, 19 October 1990, \textit{Bundestagsdrucksache} 11/8179: 3.
\item See for example Ruehmkorf, 9 November 1990, \textit{Bundesratsprotokoll} 624: 639.
\item They are also the only ones who mention the global dimensions of reproductive technologies, where for poor women in the South fertility is seen as a problem, whereas for women in the North, infertility is constructed as a tragedy (19 October 1990, \textit{Bundestagsdrucksache} 11/179: 4).
\end{enumerate}
\end{footnotesize}
concerns about women's well-being do not do this from a women-centred perspective. It is important to note the other side of this coin: The women who speak from a more women-centred perspective do not mention health or other risks for women in the British discourses. Women who broadly identify with the left in London do not emphasise women's vulnerability, whereas they do in Bonn.

The reasons and effects of these differences will be investigated below, mostly in Chapter Five. For now it is sufficient to state that risks for women are seen and debated in both discourses. Both discourses also have in common that risks for women and embryos or children are often mentioned together, with the 'mainstream' of the debates emphasising the concern for women's offspring.¹⁹

**Concerns for the 'traditional' family form and for children's identities**

The next anxiety discussed by speakers of both countries regard tradition, families and children's 'best interest'. Women feature again in this concern, but in a different role than above: Whereas above they were potential victims of reckless scientists or social pressures, here they rather enter the discourse as predators. Women who make choices that contradict the laws of 'nature' or 'tradition' are the villains, not the victims of this concern.

A few remarks have to be made about the concept of tradition. Those who claim that something is 'traditional', make a claim of authority, an authority handed down to the speaker by the past. 'Tradition' thus relies on a view of the past that supports the speaker's claim to authority (also see Kerruish 1991: 79/80). Tradition further allows the speaker to construct certain behaviours or values as *self-evident*, as obviously appropriate. Tradition then signifies what is 'normal' and 'safe' (see Emundts 1999: 195; Berger 1988: 226; Giddens 1998: 26). The concept of 'tradition' in family life has been the target of much criticism and heated debates both in the real lives of people and in political and academic discussions.²⁰ Those making claims about the traditional family (and this also holds true for the discourses in question here) mostly believe this

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²⁰ See on the debates: Silva and Smart (eds.) 1999. Also see Collier (1995), for the particular importance given to fathers in a discourse on traditional families; Golombok 1998; Barnett and McIntosh 1982.
family to be a family of one father and one mother, ideally married, with children, who are all genetically related and who all look after each other. It has been argued by many historians and sociologists of the family that this family might not be so traditional: "It was only in the immediate post-World War II period that a specific form of this ideal became a mass phenomenon, particularly in the United States" (Nicholson 1997: 27). Before, other, more extended family forms were dominating, and later, other, more pluralistic family forms took over.21

However, this thesis is not concerned with the truth of claims about tradition and traditional families (as it is also not concerned with establishing the truth about claims to 'the natural' or deciding what the status of the embryo should be). When this thesis talks about 'traditional' families, it does so with the meaning given to this term by the speakers of the discourse. Undoubtedly, technological interventions in reproduction allow the erosion of the family form considered traditional (see Lee and Morgan 1989: 2): women can have children without male partner, children might be born with no known fathers, children can have more than two parents (genetic, birth, social).22 This potential of new reproductive technologies is seen as very problematic by the vast majority of speakers (there are a few English female MPs who do not subscribe to the notion of 'traditional' families). One example each from the debates in Bonn and in London highlights this concern:

"Up until now fatherhood and motherhood stood for biological descent, for love between parents and children, for familial and social unity. Now, Ladies and Gentlemen, this is all going to change. [...] But what about humanness? What about human relations, and most importantly: what about the children?" (Dr. Däubler-Gmelin, 8 December 1989, Plenarprotokoll 11/183: 14167/14168)

"It is clear to me that the traditional family unit in this country is, for better or worse, a unit of a mother and a father in a stable, long-term relationship. That value and standard is deeply embedded in our own culture. It is no coincidence that it is deeply embedded. It is a tried and tested way of giving a child the best possible start in his or her life. We tinker with that social unit at our own peril." (Mr. Wiltshire, 20 June 1990, House of Commons, vol. 714: col. 1022)

21 On the question of continuity or change in family life see Irwin 1999; Morgan 1999.
22 For the very extensive literature in this area see Firestone 1970 (still on the level of speculation); Stanworth 1987; Smart 1987; Zipper 1987; Dewar 1989; Morgan and Douglas (eds.) 1994; Eekelaar 1994, Milns 1995; Thomson 1997; Chavo 1997; Dewar 1998, Edwards 1999.
Family clearly is here not solely understood as a biographical choice of some individuals. It is expression and basis of 'our culture', it stands for 'humanness' and paradigmatic 'human relations'. An attack on this family form thus is a threat to what makes us human. It seems that "threats to the integrity of tradition are very often, if by no means universally, experienced as threats to the integrity of the self" (Giddens 1994:80). What both speakers further have in common is that they justify their judgement through pointing at children's welfare. Children would suffer, if families stopped being what the speakers believe them to be. In Germany children's welfare is seen to lie in unambiguous genetic relations between the child and the parents:

"Through his [sic] genetic origin, the human being is integrated into a net of responsibilities. For the child in need of care, it is clear straight away who has to look after it." (Dr. Würmeling, 9 March 1990, Bundesrechtsausschuss 11/73: 38)25

This emphasis on genetics is less pronounced in Britain, where the focus is more on the need for a "long-term commitment between adults in a family setting" (Mr. Wiltshire, 15 May 1990, Standing Committee B, vol. 1: 145). The British HFE Act allows all the practices that effectively 'split' parenthood (and thus loosen genetic links): surrogacy, egg and embryo transfer and sperm donation. Of all these practices only sperm donation was allowed, albeit not regulated, in Germany. Without pre-empting the discussions in Chapter Five, it turns out that the main concern in the debates of both countries is with women's behaviour and reproductive choices. In Britain the focus is on single women, in Germany on egg-donation. Women's decision-making in the field of sexuality and reproduction is seen as more problematic than men's.

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24 Also see Sauter, 9 November 1990, Bundesratsprotokoll 624: 638.

25 Even more rigid sounds Dr. Eser: "familial relationships have to be kept pure" (ibid: 81). The German term he uses is Reinhaltung, which has historical connotations of its fascist use in the context of 'maintaining the purity of the race' [Reinhaltung der Rasse]. Also see: Bundesratsprotokoll 604: 377/378; Dr. Berghofer-Weichner, 25 November 1988, Bundesratsprotokoll 595: 430, 22 September 1989, Bundesratsprotokoll 624: 350.

26 This is not to say that genetics are irrelevant for British law. See for example O'Donovan who shows the belief "that we are our genes, that blood matters" to lie at the heart of much British law too (1989:102). There also is some concern about children's identities and rights in the British context, yet it seems to be followed through in a less rigid way than for example in Germany. See on those debates: O'Donovan 1988; more recently O'Donovan 2000.
'Wunschkindmentalität' and commodification of children

The desire to model one's own family without being restricted by either nature or tradition might even extend to the wish to shape the child her- or himself. Not only could women decide to have children without a partner, or receive a sperm donation from someone else than their partner. Their wish to form a family according to their own ideas might extend to creating a child with desired characteristics. The speakers debate their concern that women or parents might only want healthy children, or children with certain features or of a certain gender. Elisabeth Beck-Gernsheim, who was invited to speak as an expert at the 1990 hearing of the Standing Committee [Bundesrechtsausschuss], paints the following picture:

"Such interventions [selection of embryos] undoubtedly can reduce suffering, but at the same time they allow for a merely instrumental rationality, a mentality of constant improvement, that as such does not recognise any limits." (9 March 1990, Bundesrechtsausschuss 11/73: 6)

She continues by quoting from Jaques Testart, the French IVF-specialist and 'creator' of one of the first IVF babies:

"Soon new couples will come forward asking for IVF treatments. Couples, who already have five daughters, couples who do not want a son. What are we going to reply to their demand? Suffering is always authentic." (ibid)28

This concern is much more prevalent in the German than the British debates. In London, the soundness of those who want to access IVF-treatment is only rarely questioned. The wish for a child is never challenged. The wish for only a healthy child is very rarely criticised. The wish for a child with very definite features ("a blond child or a blue eyed child")29 hardly ever gets mentioned, whereas it features quite prominently in the German debates.

The discussion about the prevention or selection of disabilities will be looked at in more detail below. Yet at this point it becomes apparent that the very different role the prevention of disabilities plays in the two national debates seems to impact on the

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27 Callahan calls this attitude 'child as a trophy mentality', which seems a good translation for Wunschkindmentalität (1997. 1999)

28 Also see Dr. Seesing, 9 March 1990, Bundesrechtsausschuss 11/73. 71

discussions about a possible commodification of children. In London, when discussing a clause according to which only 'suitable' embryos shall be placed inside a woman, the question arises whether it is up to parents to decide which embryo is suitable or not. Baroness Hooper rejects that idea:

"I believe that that does not mean that they [the embryos] conform to the desire of the woman for a baby with blue eyes or other such characteristics, but are suitable for the purpose of implantation and creating a viable embryo" (8 February 1990, House of Lords, vol. 515: col. 997).

However, it is then clarified that a sex choice might be allowed, because "with some of the diseases that are sex-linked there is a definite need" (Lord Brain, ibid). Some preliminary conclusions can be drawn from this exchange. Firstly, decisions that are 'unsafe' when made by women or couples (the example only speaks of women), simply based on their wishes, become safe and reasonable, if a doctor or medical specialist makes them, based on an assumed 'medical need'. The boundary between unreasonableness and reasonableness seems to follow the definition of what is 'medically necessary' (more on the concept of medicalisation in Chapter Five).

Further, we can learn from a comparison with the German discourses, that as the selection (and destruction) of 'disabled' embryos is very much supported by the majority of MPs in Britain, it appears more difficult to criticise the selection and thus 'commodification' of children for other reasons. However, it is held that a boundary can be drawn between medically necessary selection and unreasonable individual wishes for a super-baby. This boundary seems to be more difficult to draw in the German debates where the prevention of disabilities through preventing the birth of disabled children is a far more contentious issue.

To a certain extent the concerns about the commodification of children resemble the ones about genetic manipulations of humanity by powerful scientists introduced above ("the brave new world scenario")\textsuperscript{32}. In both cases it is feared that the selection of

\textsuperscript{30} I find the terminology of 'disabled' embryos problematic, as the 'disabled' embryo is not 'unable' to do things that 'normal' embryos can do. In a way, the disability only starts once the child is born.

\textsuperscript{31} The change of abortion laws during the same debates in 1990, providing a eugenic cause for late abortions supports this judgment. More on the abortion debates in Chapter Five.

\textsuperscript{32} The Duke of Norfolk, 8 February 1990, House of Lords, vol 515: col. 998.
desirable over undesirable genes, and consequently humans, could take place. However, in the above scenario this renders individuals powerless to the grip of 'men in white coats', who do not respect individual rights for freedom and privacy. In the current scenario, individuals 'overuse' exactly this right to individualism and a life according to their own wishes. Put differently: the above concern is based on abuses of power in the 'public sphere', whereas this scenario is concerned with abuses of power in the 'private sphere'.

Arguably, the notion of 'commodification' of children contains an element of critique about the market as a degrading system that should not be extended to include for example the creation of babies. Babies are not products, this line of reasoning goes. It is o.k. for some goods to be exchanged in a market-like system, with consumer demands and quality checks, but children should be different (see on the critique of markets: Duxbury 1996). This idea also turns up with regard to other bodily services in the context of technologies of reproduction, like the 'donation' of gametes, or the service of a surrogate mother (see Nussbaum 1998). When debates about technologies of reproduction are concerned with commodification, like here, they show quite effectively "how our culture stubbornly insists on conceiving of the person as a moral agent, as a subject distinct from a world of objects, yet how at the same time our culture persistently commodifies and objectifies" (Radin 1996: 131).

The other face of modernisation – things get (more) complicated
All the above concerns were based on the negative effects that new reproductive technologies might have for children, for women or for the whole of society. At times individuals (mostly women) were thought of as victims, at times as villains of these scenarios. Yet in each case, technologies of reproduction were feared as potentially destructive. However, if new reproductive technologies can be understood as instances of modernisation, and modernisation, as outlined above, cannot simply be thought of as dangerous or negative, then reproductive technologies are not simply thought and talked

33 As the fears about genetic breeding of humans seem to concern decisions made in the private and the public sphere, it could be argued that anxieties about new reproductive technologies both confirm and undermine the concepts of public and private and the individual and society. "The modernist relationship between the 'individual' and 'society' is potentially subverted" (Hirsch 1995 142)
of as destructive. On the contrary, modernisation always also holds a promise: A promise for a better future, for the relief of human suffering, for cures and solutions. Consequently, the solution to the risks outlined above cannot be a simple prohibition of all new reproductive technologies. The vast majority of speakers believe that good use can be made of the techniques and that society cannot afford to simply outlaw them. Consequently, there is a group of concerns that is based on the belief that we cannot afford to lose out with regard to the liberating, promising potential of new reproductive technologies. As the laws in both countries do not simply prohibit the technological interventions into human reproduction, obviously all the concerns discussed so far must be counter-balanced by other, fundamentally juxtaposed, concerns. The next three concerns are those that pull legislators in the direction of promoting new reproductive technologies. Thus parliamentarians also see problems with a regulation of the field that might be too strict, and thus might also lead to negative effects. We can now see the struggle with ambivalence in action.

**Concerns about infertility and childlessness**

The most frequently mentioned reason why a prohibition of new reproductive technologies is not feasible is the suffering of the infertile. The Government in Germany, after having outlined some of the past legislative steps, starts off its considerations with the heading: "unwanted childlessness as a mass phenomenon". It estimates that in Germany around 10 - 15% of married couples have fertility problems (23 February 1988, *Bundestagsdrucksache* 11/1856: 2). Similarly, when introducing the HFE Bill to the House of Commons, the then Secretary of State for Health, Kenneth Clarke, after having outlined the historical background to the Bill, starts his substantial representation with arguments about the "considerable unhappiness and stress which childlessness can cause individual couples". He continues:

"The numbers are far from insignificant. About one in 10 couples are thought to be infertile [...] Those of us who are lucky enough to have had children naturally should not forget the considerable stress and strain posed for childless couples. Obviously, *it is a perfectly legitimate medical and scientific activity* to enable them to satisfy the

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34 There is the exception of the German Greens (and some Socialdemocrats in the debates of 1990 Some of them argue in favour of a total ban. They do not mention any positive potential of the technologies.
wholly worthy objective of having families of their own." (Clarke, 2 April 1990, House of Commons, vol. 170: col. 917 - my emphasis)\textsuperscript{35}

This moral claim that we now can do something about this, so we have to, allows the lawmakers to balance the concerns discussed so far with their wish to go ahead with some uses of reproductive technologies. In London, embryo research too (at least in 1990, to a lesser extent in 2000) is justified with the suffering of the infertile, because research with embryos will help to find causes and better treatments for infertility. Infertility\textsuperscript{36} and avoidable human suffering are the backdrop in front of which the risky potential of new reproductive technologies is discussed.

Underlying this discursive structure is an interesting idea about the dangers of both human technological intervention into 'natural' processes and of nature itself. The logic seems as follows: if we don't enter some of the risks that technological interventions into natural processes pose, we are left with the dangerous potential of nature itself. Nature does not always take care of things in the best possible way. Just leaving things up to nature (accept infertility, accept illness and so on) might seem like a very inhumane thing to do. People are and will be suffering. Not to listen to their wish and hope for help is inhumane. "With so much at stake in terms of human happiness, and so many hopes pinned on that vital research effort" (Lord Ennals, 7 December 1989, House of Lords, vol. 513: col. 105), it is possible to paint a picture of unnecessary human suffering that can serve as a counter-scenario to all the concerns about technological progress.

\textsuperscript{35} Almost identical: the introductory speech of the Lord Chancellor when presenting the HFE Bill to the House of Lords. After making some general remarks about the importance of the Bill and the hope for constructive debates he holds: "It would be wrong for me not to remind the House that infertility can cause individual couples considerable anguish and distress. I hope that a more sympathetic attitude towards those who suffer these difficulties will be one of the beneficial results that will flow from the detailed examination in public debate which these issues have been given in recent years" (Lord Mackay of Clashfern, 7 December 1989, House of Lords, vol. 513. col 1004).

\textsuperscript{36} Interestingly, while hoping for the alleviation of infertility, many speakers also talk about the chance to find more effective contraception, especially in the context of third world populations, where "however illiterate and primitive" the population, "no discipline is required [...] one is immunised with a needle once and for all" (Earl of Halsbury, 7 December, House of Lords, vol 513: col. 1047). The speakers display unreconstructed attitudes towards the "world population crisis" (Lord Butterfield, ibid. col. 1065) that seem almost paradoxical when the majority of the debate is concerned with peoples suffering if they cannot have children, and with the legitimacy of couples' wish for children. This confirms much of the critique of discourses around new reproductive technologies that have highlighted the double-edged nature of the technologies in a racialised global context, encouraging white Western women and discouraging black Southern women to have children (see for example Raymond 1993; Steinberg 1997, Correa and Reichman 1994, Bulbeck 1998).
'Avoidable' disabilities

The argument about disability is informed by a very similar conceptual framework as the one concerning infertility: even if technological intervention into natural processes is risky, leaving things up to nature implies problems too. This argument is much more prevalent in the British debates. Many speakers justify their support for embryo research with the hope or belief that this research will alleviate the suffering of both the disabled and their families:

"We should not imagine the dread of the parents is any less than the dread of their offspring. For all of them it means a cloud of uncertainty hanging over the family, with so much pain felt by so many people; a pain which so often is silently borne." (Lord Ennals, 7 December, House of Lords, vol. 513: col. 1014).

Typically, the parents and families of disabled children are not portrayed as demanding, aggressive and pushy, but as silently, bravely struggling with the effects of disabilities on their lives.\(^{37}\) This can be seen as another discursive strategy to distance the position on 'avoidable' disabilities from the concern about selfish parents who have unreasonable demands regarding the characteristics of their children and who treat children as commodities (see above).

In the German debates the potential of new reproductive technologies to allow for a selection of embryos and thus to prevent disabilities also features. However, it is contentious whether it is legitimate to conceptualise the birth of a disabled child as a problem. Especially the speakers of the Green party are adamant that this belief is based on a eugenic logic and refer to the German history of fascism as a warning\(^{38}\). The Socialdemocratic Party also want to prevent sex-choice and embryo-selection.\(^{39}\) However, the \textit{ESchG} contains a provision that allows sex choice in cases of "Duchenne's muscle-dystrophy or a similarly severe sex-specific congenital disease" (§ 3 S.2 \textit{ESchG}). Those Government MPs who argue in favour of allowing the selection of

\(^{37}\) See for example Viscount Caldecote, who claims that most parents of disabled children "bear the burden with immense devotion and courage" (7 December 1989, House of Lords, vol. 513 col. 1056/1057).


\(^{39}\) See Dr Däubler-Gmelin, 24 October 1990, \textit{Plenarprotokoll} 11/230 18211: "Of course I know that you have the best intentions, let me repeat that However, are you aware that you are making the first legal step into positive eugenics? Is that what you really want? I cannot believe that " Further see Amendments of the SPD to the Government Bill, 24 October 1990, \textit{Bundestagsdrucksache} 11 8191 31
'healthy' offspring do so less self-confidently than we have seen in the British discourses:

"For a long time I argued for a total prohibition of sex-choice through the selection of sperm. [...] I have learned however, that it cannot be demanded of a married couple to enter the full risk of having a sick child in the case of a gender-specific genetic condition, if in the future there will be the possibility to give birth to a healthy child through sperm-selection. I myself also see the connection to a possible abortion that can be avoided. The Standing Committee really defined some very strict boundaries, and limited the exceptions to very few genetic conditions." (Dr. Seesing, 24 October 1990, Plenarprotokoll 11/230 18208)

The German statement too is based on the belief that having a healthy child is better than having a disabled one. However, the issue is constructed as a difficult one, as one of private choices, the words “law of natural selection” or “elimination” (Lord Flowers, 7 December 1989, House of Lords, vol. 513: col. 1061; Lord Zuckerman, ibid: col. 1040) are never used.40 No German MP argues that it would simply be progress "to do away with the awful prospect of gambling with the odds" of having a disabled child (Lord Glenarthur, ibid: col. 1043) or that society needs to “reduce by every means possible the proportion of handicapped children in its midst” (Lord Rea, 8 February 1990, House of Lords, vol. 515: col. 975, *my emphasis*).

The globalised market of science and scientists

There is one more concern about making the use of reproductive technologies too difficult. One of the effects of a too restrictive legislation might be that scientists who want to work in the field could simply go to another country to do so. This also applies to international corporations that might decide to spend their money, and thus create jobs, infrastructure and scientific reputation elsewhere. What the speakers talk about here is the global nature of technology and investment (and again, we can read this as a concern about the global nature of modernisation). The MPs are concerned that their country might lose out in the context of globalisation. Lord Ennals argues that a prohibition of embryo research would only stop research in the UK, where it is at least controlled and supervised. Elsewhere "research could never be stopped [...] it would

40 Examples of a more cautious approach can also be found in the British discourse. See for example Lord Ennals, 7 December 1989, House of Lords, vol 513 col 1014, Ms Richardson, 2 April 1990, House of Commons, vol 170 col 926. But there are no examples of the more 'zealous' approach in the German debates.
continue in Germany, in the United States and in other countries" (7 December 1989, House of Lords, vol. 513: col. 1013\(^{41}\)). It is interesting to see that even Germany, despite its prohibition of embryo research, can serve as an example of international competition that Britain has to fear. In Germany the fears to be ‘left behind’ are even more urgent, as embryo research is actually prohibited by the ESchG, whereas it was not strictly outlawed before. One of the experts in the 1990 hearing of the Standing Committee thus warns:

"I just want to mention that the IVF- and reproductive technologies of Germany are at the moment at the top of the league\(^{42}\) internationally, and that this is also acknowledged by the international scientific community. The question is how much longer this is going to be the case." (Dr. Rehder, 9 March 1990, Bundesrechtsausschuss 11/73: 61)\(^{43}\)

In both countries there are also other voices, which emphasise that ethical decisions cannot be subjected to the eroding forces of international globalisation.\(^{44}\) Ethical considerations are seen as somehow beyond the reach of the forces of modernisation, be they global or not. This is an argument about taboos and how one has to resist the erosion of these taboos by international pressures. Others also use as an argument that other countries, and most prominently Germany, have decided not to allow embryo research, and thus seem to have stepped out of the logic of international competition.\(^{45}\) Lord Kennet exemplifies this argument:

"An interesting fact which emerges [...] is that the German parliament has before it, but has not yet considered, a Bill which would choose to outlaw embryo research altogether. The significance of its being Germany which is going in this direction cannot be lost to anybody." (7 December 1989, House of Lords, vol. 513: col. 1025)

\(^{41}\) See also on the same day: Lord Chancellor, ibid: col. 1007. Lord Adrian, ibid. col. 1029; Earl Jellicoe, ibid: col 1038.

\(^{42}\) Dr. Rehder uses the term an vorderster Front which refers to a military battle situation, where fighters have to give their best at the very frontline.

\(^{43}\) Also see: Wollersheim, 9 March 1990, Bundesrechtsausschuss 11/73: 60; Dr. Eser, ibid: 72, 112.

\(^{44}\) Also see for example a representative of the protestant church, Dr Barth, who argues that German strictness might be an example for other countries to also make the right ethical choices (Bundesrechtsausschuss 11/73: 64, 158).

\(^{45}\) Also see Duke of Norfolk, ibid. col 1032; Baroness Ryder of Warsaw, ibid col. 1067. In other debates Mr Duffy, 2 April 199 , House of Commons, vol. 170 col 944
Imposing a boundary on boundless dynamics

Just looking at this list of concerns that surface in the debates of both parliaments, it becomes obvious that the legislature is positioned in a place without easy answers (also see Smart 1989: 105). Not all these matters can logically be addressed and satisfactorily be solved in one piece of legislation. It is impossible to consistently follow through one line of reasoning that does justice to all these concerns. If we want to 'help' the infertile, we might have to allow practices that could well be harmful for embryos or even 'humanity'. If we take the suffering of the childless sufficiently seriously, it might mean allowing unconventional family forms. On the other hand, if the 'traditional' family has to be protected by all means, then even sperm- and egg-donation can pose a threat to the biological and social links that constitute this institution. Possibly, the traditional family must be protected from the wishes of those who suffer because they want, but cannot have, children. Yet maybe the institution 'family' has to be radically changed, if one listens to those who want a child of their own, in whichever circumstances. Something has to give. Decisions have to be made about how to dissolve or overcome these tensions. It is the process of this decision-making that interests me. How is it possible to cut through the thicket? Which ground do lawmakers claim, from which to speak with the voice of law? Which foundation do they assume or build, onto which they can then model a piece of legislation?

The problem of disentangling the dilemmas faced by the legislators is immense: If one utilises the language of alleviating individual suffering, as it is done with regard to the childless or those at risk of having disabled children, it becomes increasingly difficult to think of reasons to stop individuals from demanding that their wishes are listened to. As Beck-Gernsheim says above: "Suffering is always authentic". Buying into the logic of individual fulfilment, it is not coherent to then praise the wish of a heterosexual woman (or rather: couple) for a child as "obviously perfectly legitimate" (Kenneth Clarke, above), when at the same time discrediting other women's wishes (single, lesbian, 'old') for children as irresponsible and selfish. The notion of individual suffering and its possible alleviation is in itself endless. It is expression of a paradigm which is boundless, knows no limits: "It is simply not possible to be against the healing or prevention of diseases" (Van den Daele 1989 212; also see Kollek 1998: 52 53). On the basis of this paradigm (someone claims to be suffering, we need to help), no demand for
‘one’s own baby’, or for a cure, can ever be rejected. The boundary or limit has to be imposed from the outside. It has to draw upon another logic, another paradigm or consideration. Similarly, there is the in itself boundless claim to scientific progress:

“What matters in science is to get interesting and accurate results, and to get them fast and cheap. Other considerations are mere hurdles to be jumped over or kicked out of the way. They cannot be anything but ‘constraints’, regressive factors, manifestations of obscurantism and forces of darkness.” (Bauman 1991: 50)46

If the increase of human knowledge is always and under any circumstances ‘progress’, if gaining control over processes that hitherto were ‘natural’, and thus beyond control, is always positive, then how can one impose limits on this movement? How can one argue that there are things scientists must not do in order to gain knowledge? If scientists then also claim that what they do is to try to help the suffering, the two boundless paradigms of scientific progress and alleviating suffering combine to an even more powerful dynamic. What earlier on in this thesis was described as the two strands of modernisation – a claim to knowledge and rationality, and the emphasis on individual freedom and happiness – can be understood as boundless, yet contradictory movements, which, taken seriously, must disable the law (Murphy 1997: 5/6). They are forces of erosion that chip away at any boundary erected before them. They both can be seen to be infinite, interminable, a law unto themselves.

Remaining on the outside or inside

The dynamics of modernisation resist boundaries, because they are themselves boundless. Their internal logic does not recognise limits. It cannot acknowledge that some things must be excepted, that parts of its demands are legitimate, yet others aren’t. Alleviating individual suffering, or promoting scientific progress are normative claims which can be used to attack any limit imposed on either the provision of services for the infertile (or those ‘at risk’ of disability) or on the pursuit of knowledge. On the basis of either claim nothing can be excluded, nothing is per se unthinkable. And yet the lawmakers in both parliaments meet and talk in order to do just that: draw boundaries, define limits, construct exceptions. How can the laws passed embrace some aspects of reproductive technologies (because they help the infertile, they can prevent disabilities), and yet exclude others (although they would help the infertile or could prevent

46 Also see Fitzpatrick 1992 153 154. M iri 1 7 194
disabilities)? How can the HFE Act legitimise embryo research on 14 days old embryos, yet not on 15 days old ones? How can it encourage embryo and egg donation, yet not surrogacy? How can the ESchG allow sperm, but not egg donation? How can it support treatment, yet not research? In short, how can the law establish a normativity of 'yes, but'? Attempting to answer this question involves an investigation of three problems: How do the lawmakers in London and in Bonn/Berlin conceptualise the law? How do they talk about science, knowledge and progress? And how do they construct the users of technologies of procreation?

We will see that the lawmakers in both Parliaments are ambivalent about both 'rational', scientific knowledge, and about the autonomy and responsibility of the modern individualised subject. This ambivalence, I will argue, is also present in the way legislators conceptualise law and lawmaking. The question which the lawmakers cannot answer in a simple and straightforward way is whether the law makes an autonomous normative claim which can thus impose a taboo, an external limit, on the ambivalent dynamics of modernisation. Or whether the law has to take up and simply 'manage' or 'channel' the (normative) claims made by scientists or users of the technologies. The first standpoint seems to conceptualise the law as standing outside of modernisation. The second one seems to suggest that law must be placed inside the dynamics of modernisation in order to be relevant. Without pre-empting the following discussion, it is possible to announce that the lawmakers in Great Britain argue the case of law within modernisation, whereas the German legislators ground law outside modernity and its eroding forces of progress and individualism. However, in either case this statement and decision has to be modified. Ambivalence, only just overcome and ordered out of existence, enters the scene again through the back door. By way of a further outlook on the finding of this thesis, I will argue that this admission of ambivalence, the inescapable dilemma of its 'yes, but no, but'-nature must not be simply understood as a fatal flaw of law. It might constitute a productive feature which enables law to acknowledge the ambivalent nature of modernisation, without being paralysed by it.
B: The law – of ordering ambivalence and ambivalent orders

“The newspaper lined a bandbox. The newsprint had not yellowed. ‘Obviously the glue is a preservative,’ he thought. ‘We might think what there is in the glue to preserve the clarity, and, so, arrive at a new process [...] to lengthen the life of newsprint.’ He smiled. ‘But is not longevity in opposition to its very nature, which is temporariness? And if we had begun with newsprint which resisted time, would it not be an advancement if, by extraction of the preservative glue, the cost or difficulty of manufacture could decrease?’ [...] ‘Yes’, he thought. ‘Yes. You could take it either the one way or the other. And either would be as astounding.’” (Mamet 1999: 1, emphasis in the original)

This section will focus on arguments about lawmaking exchanged in the debates themselves. What is it that the speakers think they are doing, when they are making laws? What is the law regulating technologies of reproduction supposed to do, according to the MPs who speak in the debates? How can it be grounded? By way of recapitulation: legislating about technologies of reproduction is legislating for processes of modernisation. These instances of modernisation are potentially boundless, they do not necessarily recognise limits. They are erosive of order. So what we are investigating is the imposition of limits on dynamics that are per se limitless. We are also seeing how order is asserted in the face of inescapable ambivalence. And as “legal closure demands an authority which is grounded in some way” (Lacey 1998: 168), we can read the debates as attempts to ground lawmaking, to ground the laws passed in Parliament. Once again, moving from the actual Bills debated in both Parliaments to more general considerations about law and lawmaking vis à vis the challenges of ongoing modernisation, this chapter will, particularly towards the end, attempt to combine the analysis of a particular event with a wider argument.

In a nutshell, the argument in this section will go as follows: The lawmakers in Germany and Great Britain have very different conceptions of how legislation for the relatively new technologies of reproduction can be constructed. In Germany, legislation in the face of the changes triggered through technological progress is seen as the application of answers which are already there to new circumstances. In Britain, there is instead a belief that a new answer needs to be developed. This has to happen in a democratic, rational and balanced way. These different approaches, I will then go on to argue, are expressions of divergent assumptions about the law within or outside
modernity, and of different levels of trust vested in majorities, democracy and politics. They can also be identified as connected to the positivist or the natural law perspective on law and morality. We will see that the speakers themselves make use of positivist and natural law reasoning, but that they also employ arguments that contradict those jurisprudential frameworks in fundamental ways.

Positivism makes the claim that laws are distinct from morality, that law is man-made and cannot be 'found'. Law is thus to a certain extent autonomous from morality or from political reasoning. Law can then only be grounded in law, in a legal recognition (Hart 1958; 1961; Kelsen 1934; 1991). And we can see the British Parliamentarians make those claims. Yet, we can also see that they argue for the moral nature of the law they are passing, that they justify their decisions through reference to morality. On the other hand, natural law is based on the assumption that law and morality are necessarily connected, that law must reflect values and a justice that somehow precede it. Law is thus less autonomous, it ceases to exist or it is not true law if it fails to recognise its dependence on morality (Fuller 1958; Radbruch 1946; Mangoldt 1985). The MPs in Bonn set out to legislate in this spirit, asserting that they must construct a law that is the expression of values which precede their lawmaking, the values laid down in the constitution. Yet, at the same time they have to acknowledge that the constitution does not give all the answers to their questions. They have to make space for political decision-making that cannot simply be thought of as 'interpreting' natural law.

Speakers of both countries can be seen to re-allow ambivalence into the nature of law and lawmaking, after they had seemingly clarified the law's position and foundations. They cannot talk of law as simply distinct from or identical with morality. This section will first introduce the British discourse about lawmaking, and then contrast it with the German perspective. This is followed by a further comparative step showing that, despite starting from different and almost opposite angles, both discourses end up with a more complicated, ambivalent concept of what legislation is about. They both have to include into their legislative discourses what they have explicitly excluded: The British MPs acknowledge law's dependency on morality; the German Parliamentarians admit that policy making is to a certain extent independent from the constitution.
The British view: new challenges – majority answers

The nature of the task facing parliament is first explained in the Warnock Report (DHSS 1984, Warnock 1985). This report explicitly addresses the question of what it is Parliament is doing when regulating reproductive technologies. Warnock assumes that the law as it stood in the 1980s did not contain an answer to the new technological challenges and their implications for families and society. This necessitated a political response to these challenges.

“The development of science and medical technology in the field of human fertilisation opens up many new issues for the law. In vitro fertilisation, for example, has brought about situations not previously contemplated, in relation to which there is either no law at all, or such law as exists was designed for entirely different circumstances. We believe that new laws will be necessary to cope with the new techniques [...]” (DHSS 1984: 7)

“It is, as I have already said, idle to pretend that there are rules, somehow already laid down, which tell us what to do in these wholly unfamiliar matters [...]” (Warnock 1985: xvi, emphasis in the original)

According to this approach, law has to adapt, it has to change in order to stay relevant and meaningful. When facing social changes, here triggered through medical intervention in human reproduction, law has to change too. Permanently confronted with new developments, it has to permanently provide new, appropriate answers.

How shall these new answers be formulated, then? On which basis can new solutions to new challenges be found? The answer for Warnock lies in a set of considerations that utilise notions of majority, minority and democracy and that rest on distinct attitudes to reason, feelings and the law:

“We have been accused of making recommendations which attempt to compromise between incompatible moral positions; of proposing arbitrary limits; or suggesting that things offensive to numbers of people should be legally permissible. But law is not, and cannot be, an expression of moral feelings. It must apply to everyone, whatever their feeling, it must be both intelligible and enforceable. We were bound, if we were to fulfil our task, to bear in mind the differences between the law and morality.” (Warnock 1985: x, my emphasis)

This statement has to be read in the context of another of Warnock’s arguments: That there is (no longer) a sense of morality that is shared by everybody, “common morality is a myth” (ibid: xi). The Committee then sets out to formulate “a coherent set of proposals for how public policy, rather than the individual conscience, should respond
to a range of developments which many people will not wish to participate in, but which others find entirely acceptable” (DHSS 1984: v, *my emphasis*). So Warnock sees herself (and her Committee) confronted with diverse, pluralistic notions of what is morally right or wrong. Their job is not to join into that debate about moral beliefs. It is their job to make a law that ‘applies to everyone’. This law then is not based on diverse moral feelings, but on ‘reason’. It is not particular, but universal. It can claim to be a good law, not because it is based on a “single correct view”, but because it is “generally seen as beneficial”. It does not “outrage the feelings of too many people; but it cannot reflect the feelings of them all” (ibid: xvi).

Warnock thus proclaims some important philosophical and strategic choices the Committee has made: Law is different from morality. This has to be the case because in questions of morality there cannot be agreement amongst all the members of a pluralistic society like Britain. Law then has to formulate a reasonable position that creates private spaces in which people can live according to their *private moralities* and the public space in which the law defines which behaviour needs to be tolerated and which behaviour merits legal interventions (*public morality*). In doing so, the law has to acknowledge people’s sensitivities and moral concerns, but it cannot set out to satisfy everybody’s sense of morality. This sense of morality is made up from *feelings and reason*; the law, occupying the public space, has to be primarily based on reason.47 It has to ‘apply to everyone, no matter what their feeling is, it must be both intelligible and enforceable’. The distinction between public and private morality is central to Warnock’s argument, without her ever explicitly defining what these concepts entail. In her later work on ethics Warnock holds:

“Moral decisions/problems can be understood with the help of the private public dichotomy. We will find that it will not work perfectly; but where there are overlaps, the complications of the issue will become more apparent.” (1998: 23)48

In her introduction to the Warnock Report she traces the idea of *private vs. public* back to another Committee Report investigating legislation on ‘moral’ issues, - the 1957
Wolfenden Report on (amongst other issues) homosexuality in private between consenting adults. This Report recommends the decriminalisation of sex between consenting men, if it takes place 'in private'. It, too, rests on ideas of privacy, the public sphere and the law that are similar to Warnock's frame of reference:

"We clearly recognise that the laws in any society must be acceptable to the general moral sense of the community if they are to be respected and enforced. But we are not charged to enter into matters of private moral conduct except in so far as they directly affect the public good." (HO 1957: 9, my emphasis)

Wolfenden warns not to confuse "the sphere of crime with that of sin" (ibid: 24) and thus also inscribes a position which separates law from morality. But how can law and morality be distinguished? The British legislative discourse provides an indirect and fairly pragmatic answer. It turns out that the boundary separating proper law from mere morality corresponds with a distinction between the majority of MPs and their minority. Many majority speakers frequently argue that the minority who is opposed to embryo research must not impose their moral sentiments on the majority of people who feel embryo research and infertility treatments are legitimate medical and scientific practices. The minority must accept that they can reject the use, for example, of donor sperm, or can refuse the screening of embryos. They cannot however demand that their moral concerns are made legally binding, beyond the recognition of individual conscientious objections. Two typical examples from a House of Lords Debate:

"Democratic legislators accept that the beliefs of minorities should, if possible, not be outraged by the majority. But they know too that minorities cannot be permitted to coerce that majority, the more especially in this instance because no member of the minority will be compelled by this Bill to use or benefit from the results of the research which the minority find repugnant." (Lord Mc Gregor of Durris, 7 December 1989, House of Lords, vol. 513: col. 1018)

"I would be the first to acknowledge the strength of the conviction of those in the House and elsewhere who would hold another view on these matters. [... But] is it right, however strong one's convictions may be, to seek to impose them through restrictive legislation on others who take a different view in our multicultural, pluralist and free society?" (Earl Jellicoe, ibid: 1038)

These statements imply the distinction between private morality and public policy: The 'moral minority' must not be coerced to act against their beliefs in their private actions;

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49 Newburn provides an elaborate analysis of this argument (1992: 49 – 70).

50 Doctors can also refuse to work in the field of embryo research s 38 HFE Act.

their strength of conviction must be acknowledged. Yet laws cannot be based on the beliefs of only a few. A good law is not necessarily one that sticks the most strictly to some high moral values. A good law is one that is accepted by a majority as right.

**Justifying law**

What does this tell us about the problem which we have introduced in earlier parts of this chapter – how can the law be grounded when it faces permanent social change triggered by modernisation? First of all, we have already seen that in the debates in London it is argued that as the law addresses new circumstances, one cannot rely on some given legal rule or pre-existing legal statement that can give satisfactory answers to new challenges. Addressing constant social change means changing laws. Secondly, whether the law is making the right judgements or not cannot be decided by reference to some abstract moral considerations. The law has to be accepted by the majority (of lawmakers, hopefully also of the wider public) as the right response to new challenges.

It is here where we can see first cracks in the so-far positivistic conceptualisation of lawmaking in Britain. To say that laws are distinct from morality, that they must reflect reason rather than feeling, does not yet give an answer to the question which values law should support and which it should reject. It does not say anything about law’s content. To address this problem the discourse introduced notions of ‘not offending too many’, and ‘being thought of as beneficial by most’, which are utilitarian arguments. Laws are good laws if they overall are thought (by a majority) to increase happiness, health or well-being. And yet, this linking of law to the majority, one could also say to the value of democracy, in a way undermines the claim that laws are autonomous from morality, that legal norms can only be based on yet another legal norm.

This conceptualisation of law and lawmaking is based on high levels of trust in the soundness of the value-judgements of majorities. Maybe the MPs would not go as far as saying that majorities always get it right, but they certainly seem to think that they do not tend to get horribly and dangerously wrong. The law (and society) is in safe hands, if it lets itself be ruled by the democratic majority. Therefore law is distinct from morality, and yet we could distinguish between good laws and bad laws. Good laws do
not offend the majority, they do not force the minority to engage in practices offensive to them; good laws are based on a notion of reason that is constructed as universal. Before we move on to see that this rather simplistic reasoning about law and morality needs to be quite dramatically modified, we must first investigate the way German MPs approach the question of law and lawmaking. We will see that the German response to this question is fundamentally different. Yet, in a final step, it will become clear that this simplified contrasting of the two distinct approaches needs to be modified. The speakers themselves at times address the other side of the coin. That aspect of the tenuous link between law and morality, which their general line of reasoning eclipsed, is partly re-introduced.

The German approach: the “constitutional law emergency break”

The British legislature assumes that the answer to new challenges from technologies of procreation is yet to be found, it is not contained in existing law. In Germany, however, the opposite is the case. The answer to the ethical and practical dilemmas posed by technological progress – however new they themselves might be – is already there: it can be found in the constitution. It is the job of the legislature to interpret what they find in the constitution in the light of new developments. All the political parties, and in the expert hearing also many non-legal experts, use the German constitution, the Grundgesetz, as a reference point. No matter how much they disagree with each other, they all ground their reasoning in a particular reading of the constitution. The Government explains in their Bill:

“The growing use of IVF and the application of genetic technologies to humans confront the legislature with a new task. Addressing the issues, it is bound to make far-reaching decisions where colliding constitutional value judgments have to be balanced. […] Balancing these values, the legislature primarily has to do justice to the constitutional commitment towards human dignity and life. At the same time, it has to acknowledge the freedom of science as one of the conditions for a principally liberal order of society [freiheitliche Grundordnung] […]” (25 October 1989, Bundestagsdrucksache 11/5460: 1)

The Government thus names three initial constitutional provisions which have to be consulted in order to reach a legislative conclusion: Art 1 I and 2 II (dignity and life)

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52 Vitzthum 1985: 209.
53 There is an English translation of the most important rights guaranteed by the German constitution in Lloyd and Freeman 1985: 175 – 179.
and Art 5 III (freedom of science). The Greens hold that the Government Bill with its provision for sex choice and the storage of embryos violates Art 1 I and Art 2 II of the constitution. Some scientists argue that a restriction of their professional freedom violates their right to freedom of science and research. The Government further holds that access to treatment for unmarried couples would violate the constitutional protection of marriage – Art 6 I. The Socialdemocratic opposition on the other hand argue that the exclusion of unmarried couples violates their right to equality and a family life – Art 3 I and 6 I.

A good example of how the constitution is used as a foundation for lawmaking in Bonn is a statement by a Green MP, Christa Nickels. She refers to three constitutional provisions, - Art 1 I (human dignity), Art 2 II (right to life and physical integrity) and Art 20 I (commitment to social justice):

"When I argue on the basis of these constitutional provisions I want to ask the experts [...] whether the very disintegration of human procreation into technologically manageable single parts is not an attack on these provisions in the constitution. Is it compatible with the constitution [...] when procreation as a personal act, where humans meet, where there is a unified experience, and where the personal dimension is preserved, is technocratically [sic] torn apart, and when you get all these problems, these technological and legal problems that we have been told about here?" (9 March 1990, Bundesrechtsausschuss 11/73: 69)

Nickels makes a statement about human nature and the nature of human procreation. Human implies a ‘good’, a ‘right’ way of procreating. It is a ‘unified experience’ with a ‘personal dimension’, where ‘humans meet’. Nickels’ understanding of the constitution seems to imply that the constitution not only protects individuals from direct interference by state agencies, it also seems to protect this whole concept of ‘human nature’, of the ‘good life’ from change. For her, technological intervention (‘technocracy’) poses a fundamental threat to the very nature of what it means to be human and to its constitutional protection. It is the role of the constitution to preserve the ‘naturalness’ of human interaction, of the social sphere, the “human dimension of the social” (Nickels, ibid).

54 For a discussion of this Wissenschaftsfreiheit see: Kaube 1998; Puntscher-Riekmann 1998: 57/58.
55 Also see Benda: “The new man, whose natural imperfection would be overcome through genetic surgery, would not be the man we know today and not the man assumed by the constitution” (1985: 1732).
Fundamentally, Nickels asks a question about alienation - alienation not through direct violations by the state and its agencies, but alienation through technological change and its impact on human relations. In short, this is the alienation of modernisation, the alienation described above as one of the ambivalent effects of the modern drive to know, to manage, to engineer. And Nickels argues that the constitution is not only in place to protect us from distinct acts of humiliation by the state, it is there to preserve ‘human nature’ from the eroding forces of modernisation and ‘progress’.56

The law and ‘human nature’ reaching beyond the empirical
Nickel’s construction of the law and human nature reveals a commitment that is alien to the British debates. Because humans suffer from alienation if they are permanently forced to modernise, if their life is managed and engineered like the rest of nature, human nature has to be granted protection from the forces of modernisation. The constitution, and good laws based on the constitution are such protection. Laws based on the constitution thus are anchors in a sphere external to processes of modernisation. It is the sphere of the natural; it is natural law, a law going beyond the empirical, beyond the question of simple majorities.57

This also leads to a fundamentally different understanding of the role of majorities and minorities than in the British context. In London it was held that the law needed to be based on views that are shared by the majority of people. Minority values were seen as unfit to inform the standpoint of the law. This is seen as the expression of the democratic principle, - the law must not offend too many people, but it will offend some. The conceptualisation of the democratic principle and the law is very different in Germany. The core statements made by the constitution, particularly Art 1, the proclamation of human dignity as the guiding principle of all government and law, are placed beyond the reach of even the biggest possible majorities. No matter how big the majority in parliament, some core elements of the constitution cannot be changed (Art. 79 GG). The principle of democracy is subordinated under the principle of legality

56 See von Münch and Kunig: Art 1 “remains significant through always new threats for human dignity, to which social change, particularly technological progress, contribute” 1992. Art 1, no. 7.

57 See von Munch und Kunig: “the law is placed in a supra-postivist context this also against notions of the voluntary [volontaristisch] sovereignty of the people” (1992. Preamble, no 7).
grounded in supra-positivist law.\textsuperscript{58} The major principles of the constitution are “insurmountable boundaries for any state action” (von Münch and Kunig 1992: Art 1 – 19, no. 3).

This positioning of law somehow outside of the reach of majorities, of law being based primarily on notions of (morally charged) legality, rather than democracy, is the agreed German conceptualisation of law only since the Second World War. It represents a break from pre-war understandings of lawmaking, which were informed by legal positivism.\textsuperscript{59} In 1946, Radbruch, one of the jurists of the Weimar Republic, explains his turn away from mere positivist understandings of the law and thus introduces a major paradigm-shift to a natural law perspective. To him, democracy as a principle cannot justify the alteration of certain guiding principles of the law, he calls it Rechtsstaat, which vaguely translates into ‘legality’ or ‘rule of law’:

“Democracy surely is a value that deserves to be praised, the rule of law however is like the daily bread, like drinking water, and like air to breathe, and the best thing about democracy is exactly its ability to protect legality and the rule of law.” (1946: 357)\textsuperscript{60}

The post-war German constitutional framework thus displays a deeply held distrust\textsuperscript{61} against the moral soundness of simple majorities. It is exactly the man on the ‘Munich omnibus’ who the German constitution and legislature do not trust. I argue that this distrust can lead to legislative stance that potentially is opposed to modernisation. If what is technologically possible changes, or if the moral values of the majority of the people move on through modernisation, then it is not necessarily the main concern of German legislation to keep up with this change. Ultimately, it does not matter, whether the moral statements of the constitution do or don’t find the support of the majority of Germans. The morality of the constitution has to stand. Laws can then be seen as based on a morality which actively resists change, they explicitly exempt some things from change; technological or social change must not affect some moral commitments.

\textsuperscript{58} For a discussion of family law and social change in the light of this principle see Stinzig 1999.

\textsuperscript{59} On the impact of the so-called Third Reich on natural law discourses see Cotterrell 1989: 128 – 132; also see the debate between Hart and Fuller about the treatment of NS-laws Hart 1958; Fuller 1958).

\textsuperscript{60} Similarly, see Dürig 1958: Art 1, RN 103; von Münch and Kunig 1992: Art 1 – 19, no. 66.

\textsuperscript{61} Also see Deutsch 1991: 724/725.
It is the positioning of the German constitution, and laws based on it, beyond the reach of processes of modernisation that allows German lawmakers to declare certain legal provisions as out of their reach “as independent of human enactment” (Cotterrell 1989: 120). This in turn enables them to declare certain technological or medical practices as inherently and fundamentally wrong, as wrong not because the majority thinks so, but as wrong, because they are against nature and natural law. Ultimately, modern politics and lawmaking are subordinated under the moral requests of something that must remain outside of modernisation.62

Reintroducing ambivalence: morality on either side of the debate in London

As announced above, these rather purist statements about the conceptualisation of law and lawmaking in the German and British debates cannot entirely be upheld. It is important to keep in mind that the starting points and ideological or philosophical ‘grounds’ of the debates are fundamentally different, even though it will become clear that both conceptualisations have to partly re-admit what they only just managed to exclude. Ambivalence re-enters the political and legal arena despite both legislatures’ claims that the nature of law can be explained by reference to positivist (and utilitarian) or to natural law perspectives. Once again, we will first discuss the British and then the German example, before reaching some conclusions for this chapter.

The MPs in London and the Warnock Report argued forcefully that laws occupying the public sphere and applicable to everyone, cannot be based on moral sentiments. This is because one cannot agree on morality: “Because of its very nature, there will never be a consensus on that subject, or a solution that is acceptable to all shades of opinion” (Kenneth Clarke, 2 April 1990, House of Commons, vol. 170: col. 915). There are different moral beliefs, this is part of contemporary, modern Britain, and it is vain to pretend that the law can reflect all of them. So the law has to move out of the deadlock of insurmountable moral conflict. It has to be based on reason, rather than feeling (Douzinas and Warrington (1994) speak of the ‘de-ethicalisation’ of positivist law). It

62 This can explain why the debates about technologies of procreation are phrased in much more legalistic terms than in Britain: “After several periods in German history when politics manipulated law, the scales have turned to the language of law dominating the discourse of politics” (Blankenburg 1996. 314).
will offend some, but it must not offend the majority. Obviously, this conceptualisation of what good legislation means is much criticised by the ‘moral minority’:

“If the people who pitted themselves against slavery in this Parliament 200 years ago had listened to the utilitarians of their day and accepted that it was merely a matter of private morality, the slavery laws would still be on the statute book. I do not accept that this is merely a matter of private morality. It is an issue on which everyone in this Chamber has a right to a view. It goes to the very heart of how we perceive humanity.” (David Alton, 2 April 1990, House of Commons, vol. 170: col 964)

Mr. Alton here picks up the obvious other end of the stick than that held by the majority. How do we know, he asks, that the majority are right? How can we rest assured if the law is based on nothing but a majority vote, the logic of the highest number? Can we not all think of examples where the majority were wrong? Progress often is about overcoming the resistance of an immoral majority, like in the example he uses about slavery. Just because many people think in a certain way, does not make it right. This is an obvious challenge to the majority position about the nature of the law outlined above. It is a position that would probably be shared by the German MPs we discussed above. It displays mistrust against the moral soundness of simple majorities. It plays on past experience and acknowledges that many ‘civilising’, ‘moral’ ideas often were first held by a minority, before they became broadly accepted by the majority, or before they were made into laws. Law must be the expression of what is right, and not of what is accepted as normal. A struggle about morality cannot be avoided. Douzinas et al argue that,

“Despite law’s protestations of neutrality, the problem of (lack of) value cannot be avoided. A theory of legislation is by definition a theory of choice and policy. It must explicitly address the questions of priority between conflicting values and versions of the good in an epoch of nihilism.” (1991: 13)

How does the majority of MPs deal with this challenge? We have seen them argue that because the HFE Act is based on the vote of a majority, it is right, and that because the beliefs held by those who oppose the Act are those of a minority, they cannot be the basis of the law. They argued that private morality or moral sentiment could not be the basis for law. However, this positivist notion of law and morality cannot ultimately be upheld. The strict distinction between what is legal and what is moral breaks down within the Warnock Report, and also during the parliamentary debates. When it comes

63 Also see Mr. Benyon, ibid.
to the status of the embryo, and decisions that needed to be made about what we can and cannot do with embryos, Warnock explicitly states: "This then, was a matter of judgment; and no-one would deny that it was a moral judgment" (1985: xv). Accordingly, the majority of the Committee members and Members of Parliament who decided that early embryos could "quite legitimately" be used for research (ibid) did not arrive at a statement of law that was somehow distinct from a statement of morality. They made a "genuinely moral" choice (ibid: xvi), and turned this choice into law (or the recommendation for legislation to begin with). The law thus does not represent something entirely distinct from morality or moral sentiment. Drawing a line between moral sentiment and the law must not mean that only those who resist the legislation, only the minority, can claim to make a moral choice:

"Neither side can claim to have exclusive moral virtue on its side. Both profoundly believe that their judgment is ethically correct and will argue and vote with a clear conscience for the best solution and the legal framework that they think is best for our society." (Kenneth Clarke, 2 April 1990, House of Commons, vol. 170: col. 921)64

"It has not been a debate between those who have a moral conscience and strongly held moral convictions, and those who do not or, as [...] Mr. Alton] said, a debate between moralists and utilitarians – rather it has been a debate between those whose moral convictions would have them ban research and those, like me, whose moral convictions lead us to support the continuation of research." (Ms Harriet Harman, ibid: col. 978)

So, according to these and other speakers, law and morality are not two entirely distinct institutions after all. The majority on which the Act has been based is not just a simple majority, unconcerned with the moral implications of its position. It is a moral majority. Not only is the law thus the expression of the majority will, it is also the expression of what is right and good. Embryo research is not just what most parliamentarians do not have a problem with, it is something they believe to be good. It can help people. Here we can see ambivalence in action: On the one hand, law cannot be based on moral feelings, because there can never be agreement on morality in modern, pluralistic societies. On the other hand, the notion is rejected that the majority willy-nilly pushes through a (mere utilitarian) law, emptied of all moral content.65 So, in a way, we are back to square one. We proclaimed that questions of morality could not be decided once

64 Also see Ms. Richardson, ibid. col. 926; further. Mr. Jimmy Hood, ibid: col. 954.
65 See Douzmas et al, according to whom arguments about the necessary link between law and morality have "lingered in types of legal thought that would claim to be as far removed as possible from natural law" (1991: 20) Also see Goodrich 1987. 55
and for all. Law is distinct from mere morality. But after the admittance, or proud insistence, that the majority too acted on the basis of moral considerations, we have re-engaged in the debate about what is morally right or wrong that we have only just excluded. The law, as conceptualised by the majority, is thus inherently contingent. It is at the same time an expression of moral sentiment, and more than or distinct from mere moral sentiment. It is of moral considerations, and at the same time beyond moral considerations. Modern law and morality are in a relation that is ambivalent.

Reintroducing ambivalence: the German constitution as “small change”? We have seen above that the German legislative discourse places law somehow beyond the profane, beyond the political, beyond democratic majorities. Law is intrinsically linked to morality, a morality that is conceptualised as beyond the reach of majorities, even the majority of lawmakers. It was argued that this conceptualisation expresses deep mistrust of the process of political decision-making. We cannot trust politics, we cannot even trust democratic politics, we have to rely on something more profound, we have to ground lawmaking on a legality that is beyond politics.

This transcendental form of legality is seen as unchanged and unchangeable. It is natural. The speakers talk of the constitution with reverence and respect. Margot von Renesse, the chair of the Enquete in 2001 speaks of “our wonderful constitution” as a boundary for possible abuses of humans (31 May 2001, Plenarprotokoll 14/173: 16885). However, Dr. Albecht, in one of the first speeches on the subject matter, makes clear where the difficulty lies:

“We have to assess and decide which limits we want to set. We orient our decision to the value judgments of the constitution. But the complexity and the multi-layered nature of the issues do not allow simple deductions from the constitution.” (25 November 1988, Bundesratsprotokoll 595: 429)

Dr. Albrecht raises a point which is fairly obvious: Of course the constitution of 1948 does not contain any straightforward statements about technologies that are relatively new. Rather, it contains general commitments to values which are declared pivotal for a moral legal order: “Human dignity is untouchable” or “everybody has the right to life and physical integrity”. The tricky part of legislative decision-making obviously begins where one needs to decide whether human dignity demands or prohibits the legalisation
of IVF, embryo research or therapeutic cloning. It is obvious that the constitution written just after 1945 did not provide the answers to the challenges of modern medicine and science in a straightforward way. However, the speakers keep referring to the constitution as an argument for all sorts of different positions.

One of the legal experts in the expert hearing in 1990 challenges this tendency of the German MPs to read the constitution as some kind of obvious solution to their dilemmas:

"Against this tendency it is necessary to maintain that exactly the high value of the constitution should prevent its use as a substitute foundation for decisions which really have to be justified politically because the constitution does not conclusively determine their solution. Legislative politics must not deteriorate into mere interpretation of the constitution, legislation has to be understood and practised as a process of rational judgment and decision making." (Prof. Dr. Eser, Bundesrechtsausschuss 11/73: 29, my emphasis)

Ironically, Eser who criticises the use of the constitution as 'a substitute foundation' for political arguments, argues himself with reference to the 'high value of the constitution'. It seems that even the perceived over-use of the constitution cannot be criticised on the basis of political arguments alone; it again has to be backed up by an argument about the relevance of the constitution. It is this argument about the 'high value of the constitution' which is important here. What Eser effectively says is that the constitution is somehow too 'good' to be used as a back-up for simple political disagreements. Recapitulating the above interpretation of the German constitution as somehow beyond the profane, this argument is not surprising. However, it means that some of the desire to make law 'safe' and reliable by turning it into a transcendental force outside of the messy world of politics possibly 'backfires'. Maybe the constitution is so set apart, so not part of modern, changeable society that it must not be used in any old political debate. Maybe, paradoxically, it is so significantly different from simple politics that it loses its relevance for political disagreements. The constitution could then be thought of as almost sacred. And we do not bother the sacred with the profane too much: "The sacred and the profane have to live together yet separately" (Fitzpatrick 2001a: 57). An early, and one of the most important commentaries on the German constitution (Dürg 1958) picks up on this need to keep the constitution somehow apart from profane politics. According to Dürg, the constitution must not be turned into
Kleingeld, the ‘small change’ of politics, used in minor little arguments: “As bad as a lack of its appreciation would be its depreciation through overuse” (1958: Art 1, no. 16).

Returning to the theme of this section, we can, once again, observe ambivalence in action. Grounding law on a morality that is beyond (even democratic) politics, on natural law, attempts to pull policy making beyond the profane, mere utilitarian decision-making, beyond power and into legality. At the same time, this drawing politics into the realm of the law, of the transcendent, means the ‘pollution’ of the constitution, of the legal order, by the profane. Law and politics have to be kept apart, yet together. They must coincide, yet remain separate (Hunt 1997: 120). It was argued above that the German legislators conceptualise the law as supra-positivist and apart from profane decision-making. They claim that only then can the law be a safeguard against the eroding and alienating forces of modernisation. This means the constitution must dictate political decision-making, i.e. it must be used as an argument, as a guideline for political debates. It also means, and this is the ambivalence of law, that it has to be kept out of political decision-making, it has to be kept out of the messiness of political debates.

Conclusion and outlook
In this section we followed the speakers and their arguments about the nature of law and lawmaking. We saw that the starting point for both national debates was very different. The British discourse relied on some positivist notions of law: the separation of law from moral feelings. This was because in modernity one cannot reach agreement about moral issues. The German discourse about the law and lawmaking believed not only that law had to be based on an unchangeable morality, set down in the constitution, but that this morality must be beyond the fallible and volatile grasp of politics, and even beyond the reach of majorities. However, we then saw how this simplified conceptualisation of the law eclipsed another aspect of what law and its response to the challenges of modernisation must be about. And law’s eclipsed side re-entered the discourse through a blurring of those definitions that had just been established.66 Both positivist and natural law notions of lawmaking had to be annexed by what they

66 Norrie speaks of the “duality of law” (1993: 17).
logically exclude. In London, this complication eroded the boundary between public law and private morality (‘we are all moral’, this argument goes). In Bonn, this complication reclaimed a space for the political that had to be kept apart from the dictates of the constitution, and also a space for the constitution, where it must not be used for any profane political quarrel. The relation between law and morality remains “complicated” (Morgan and Lee 1991: 5).

Both legislatures, despite attempting to clarify their position and to build safe ground under their feet from which to proceed, are back to, as it were, square one. Law cannot be thought of as grounded on uncomplicated notions of positivism, distinct from the messiness of moral disagreement, nor on unambiguous notions of natural law, conflating politics with the transcendental sphere of morality. Positivism had to acknowledge that “a broad measure of coincidence between them [law and morality] may be essential to the making of human society”, while “natural lawyers have recognised that the two do not altogether coincide, and that there is a field of positive law not deducible from any pre-existing or pre-supposed system of natural law” (Lloyd and Freeman 1985: 61/62). Both jurisprudential schools, concerned with ‘showing law’s legitimacy’ cannot successfully maintain that law’s justification “is embedded within the law itself” (Kerruish 1991: 9). Laws do not actually “carry within themselves their reason for existence” (O’Donovan 1985: ix).

What remains is the need for decision in the face of ambivalence, moral uncertainty and political disagreement: “Every order rests on a decision, this includes the legal order” (Schmitt 1934: 16).67 And what also remains is the need to legitimise this process of legislative decision-making. How, in the face of inescapable ambivalence, and without an obvious ground from which to construct the law, can lawmaking be thought and talked of as legitimate? Davies, drawing on Derrida’s work on decision (Derrida 1978: 38; 1988: 116; 1992), claims that the decision is properly placed as both within and outside the law, no decision is ever fully determined, every decision-making process has

to necessarily run through a stage of undecidability: "The refusal to reflect upon this [...] is a refusal to admit responsibility" (1996: 149).68

The following two chapters will investigate two major concerns of this decision-making, and also two of the ambivalent strands of modernisation outlined in Chapter Two. The first one is the nature of scientific knowledge and of progress. The second one is the creation of families through individual reproductive decision-making, mostly by women. In the first one, scientists and doctors feature as the main actors (if one does not count the embryo). In the second one, the focus is on women (the same disclaimer applies). Reading the debates as discourses about modernisation, the next chapter (Four) can be understood as addressing the question of modern rationality (what is it reasonable to fear, what is it reasonable to hope for?). Chapter Five can be read as addressing the question of the modern subject: the autonomous individual.

Announcing the general themes of the next two chapters, this outlook gives away the following: In its need to make a decision, to overcome ambivalence, the law (here the two pieces of legislation, the ESchG and the HFE Act) incorporates parts of the two boundless and unlimited dynamics of modernisation referred to previously: rationalising, engineering or managing the ‘natural’ on the one hand, and the emancipation of the individual on the other. This could be read as law simply being ‘infiltrated’, overwhelmed or swept away by the forces of modernity. However, it will be argued that the picture is more complicated than that. In picking up certain aspects, certain arguments of the dynamics of modernisation, the law at the same time engages in the construction of these dynamics. The law grounds itself through constructing a certain notion of rationality (and importantly: through rejecting other notions of rationality). It grounds itself through a certain construction of the modern subject. Once again, and not surprisingly, the next two chapters come down on the side of ambivalence. It is true that law needs to borrow its content and legitimacy from dynamics and phenomena that lie ‘outside’ the law69. But this process is more than a

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68 For the necessity to consciously make decisions in order to prevent unethical outcomes in science rather than law, also see: Unger 1994 240.

69 Agamben (drawing on Kant) argues that law in modernity is emptied of any autonomous significance. It is "in force without significance" (1998. 51/52).
simple borrowing, the law shapes the discourse about what it incorporates, it engages in its construction. The modern individual would not be (the same) without the law. The law would not be (the same) without this autonomous individualised subject (see Murphy 1997: 196/197). The law needs a particular construction of 'modern' rationality to be grounded, but this construction of rationality also needs the law. Fittingly, we have to conclude this chapter and proceed with the next in the knowledge that things are rather complicated.
Chapter Four: Scientists, Progress and Embryos: Modern Reason

“It often happened that when we thought we were experimenting on others we were really experimenting on ourselves.” (Wilde 1908: 49)

A: Outline of the chapter and argument

In Chapter Three it has been argued that making laws about reproductive technologies is a formidable task. Once again, this is because new reproductive technologies stand for everything we have learned to hope for and fear about modernisation. On the one hand, the hope for a better future, with the possibility for preventing or curing disabilities, help for the infertile and happy couples with healthy children. On the other hand, concerns about eugenics, about breeding and manipulating humans, about the breakdown of the nuclear family and about children being turned into mere commodities. This chapter will specifically look at the discourses in the German and British Parliaments about science, about reproductive technologies as the practices of scientists and doctors. It is clear that science plays an important part in this ambivalence of modernity. Science and its progress form the basis of modernity’s promising future: we will be able to do things that we cannot yet do. We might be able to understand and possibly cure more illnesses; we could take the ‘risks’ out of reproduction and we might avoid the ‘tragedy’, i.e. the uncontrollable occurrence, of disability. Yet science, in its quest for ever more knowledge, ever more control, might also lead to the manipulation of humans; it might treat humans simply as material, the world as a big test-lab, and could therefore violate people’s integrity and dignity. Scientists might hold “the promise of a brighter future” (Durant 1998), yet they might also “be up to no good, and must not be allowed to proceed without scrutiny” (Warnock 1985: xiii).1

1 Also see Giddens: “Science has thus long maintained an image of reliable knowledge which spills over into an attitude of respect for most forms of technical specialism. However, at the same time, lay attitudes to science and to technical knowledge generally are typically ambivalent.” (1990: 89). Lee and Morgan argue that only in the late 20th century have we learned to view scientific progress “with profound scepticism” (2001: 2). Others maintain that this might never have been different and that one must be careful to not assume major epochal changes or major differences in the nature of ‘lay’ or ‘expert’ knowledge (Wynne 1996).
In the British and German debates about legislation for technologies of reproduction this ambivalence about the dangerous and the promising potential of science is expressed frequently. Science, it is argued, “can both create and destroy” (Kevin Brown, 2 April 1990, House of Commons, vol. 170: col. 962). Some MPs speak of their concerns about the ‘logic of helping’, which might lead to the nightmare of an engineered humanity:

“Naturally politicians want the cure of illness, too. But the question is a very different one. Maybe today we only talk about illness. Tomorrow we might already be talking about other characteristics of humans. What is the human who we want to manipulate supposed to look like in the end? Do we eventually want a world with only beautiful and healthy people? Are we still willing to accept disabled people and disabilities?” (Dr. Seesing, 24 October 1990, Plenarprotokoll 11/239: 18209)

Others express disquiet about the very nature of medical knowledge and methodology:

“You do not justify research in terms of the benefits it might bring. If we adopt this reasoning, then any atrocity could be allowed if the prize seemed great enough.” (Baroness Ryder, 7 December 1989, House of Lords, vol. 513: col. 1067)

Both speakers identify science as potentially boundless. The last chapter argued that not only does the law face the potentially limitless, infinite dynamic of permanent scientific and medical progress. Lawmaking was also found to have major difficulties in finding unambiguous ground from which to proceed. It turned out that it was difficult, if not impossible, to logically justify legislative decision-making only from within. Legitimising decisions in a legislative context requires that law turns towards those dynamics it sets out to control.

This chapter will now look at how the lawmakers in both Parliaments do exactly that. It will be argued that in order to achieve legitimacy, the lawmakers have to try to dissolve some of the ambivalences regarding the negative and positive potential of science. This is done through drawing boundaries between a ‘safe’ and a ‘dangerous’ side of science. But then this boundary needs to be legitimised. How can it be argued in London that the 14-days-limit for embryo research is not simply arbitrary? How can a distinction between good doctors and safe medicine on the one hand, and dangerous scientists and research on the other be sustained in Germany? “What is the difference in law, in logic, in morality or in science” (Mr. Benyon, 2 April 1990, House of Commons, vol. 170: col. 963)?
We will see that in order to legitimise the boundaries that are constructed, and thus the
law itself, the lawmakers draw upon and construct distinct notions of rationality, of the
‘natural’, and of the strategy of ‘helping’. Moving once again from the particular
instance to the more general argument, I will suggest that law, in order to ground itself
when confronted with the eroding forces of modernisation, borrows arguments from
those very forces. However, it does not follow them through in a logical, non-
contradictory way. This ‘failure’ to be coherent in the light of ambivalence, once again
should be read as a productive failure. It is only this lack of coherence that enables the
law to step out of (and yet remain inside) the boundless and indeterminate logic of
modernisation. I will first look at the German case, then at the British, and will finally
conclude with some remarks about the construction of modern law and its ‘other’.

B: Making decisions about the ambivalence of scientific and
medical progress - the German case

The argument I want to make about the German legislative approach of dealing with the
ambivalence of science is that the (majority of) German legislators assume an important
difference between technologies of reproduction as ‘treatment’ and as ‘research’.
Treatment is deemed acceptable and safe, whereas research is thought of as
unacceptable and dangerous. The distinction between these two aspects of the
technologies relies on assumptions about where humans fit into an order that is talked of
as natural. It implies certain beliefs about both the ‘natural’ order and human ‘nature’.
Science is dangerous because it manipulates and aims to control nature; medicine is safe
because it helps. This shows that ‘nature’ in the German debates is an ambivalent
concept. On the one hand, and on a more abstract level, it stands for the proper way
things should be. On the other hand, when it comes to individuals’ suffering, it is
appropriate to intervene into ‘nature’, because the natural can then be seen as ‘tragic’.
Ambivalence, once again, can be seen to re-enter the law, just at the point where order
is established. The ‘natural’ helps the German legislators to establish an order when
talking about scientific progress, but it also means that, as it is ambivalent itself, it re-
introduces ambivalence into the legislative order, into the law. “The ambiguities of the
concept of natural law derive from the ambiguities of the concept of nature” (Lloyd and
Freeman 1985: 82). This ambivalence, it will be argued, allows the German \textit{ESchG} to
legitimise some aspects of technologies of reproduction, while criminalising others despite their connectedness.

Embryo research as everything that is wrong about science

In the German parliamentary debates, research on human embryos stands for everything that is wrong about technologies of reproduction and about science in general. Embryo research is the epitome of what is dangerous about modern science: the manipulation of humanity and the objectification and use of human beings without regard for their inherent dignity. All MPs of all parties agree that research with embryos must be outlawed (see on this agreement: Engelhard, 25 November 1988, Bundestagsdrucksache 11/5460: 442) and that embryos must not be manipulated and ultimately destroyed for research, because “human life” must not be used for “any reason” (Government Bill, 25 October 1989, Bundestagsdrucksache 11/1856: 5). “Experiments with human life are impossible” (Government Paper, 23 February 1989, Bundestagsdrucksache 11/1856: 5). The objectification of human life implied in embryo research is seen to lead to wider scientific and social consequences that cannot be controlled:

“If the creation of embryos for certain research questions was allowed, it would hardly be possible to exclude future extensions to this catalogue for new research questions. This would trigger a development, the future of which could not be predicted.” (Dr. Seesing, 8 December 1989, Plenarprotokoll 11 183: 14171)

The speakers of all the different parties sound quite similar in their condemnation of embryo research. The real disagreement between the parties lies in the question whether any fertility treatment which does not directly lead to the destruction of embryos should be outlawed too (the Green position), whether it should be very strictly regulated (the

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2 Only some few scientists, during the expert hearing in 1990, demand that embryo research should be kept legal, but no MP takes up their cause. The Benda Report of 1985 still suggested legalising embryo research for important projects under strict conditions. However, by the time legislation is discussed in Parliament, no one supports embryo research at all (see on the developments before legislation: Betta 1995; Keller et al. 1992: 65 - 80; Eser et al. 1989: 510/511). On this agreement between ‘left’ and ‘right’ politics see Henschel and Wiedemann 1993. On German science politics see Krüger 1997.

3 Also see: Dr. Berghofer-Weichner, 22 September 1989, Bundesratsprotokoll 604: 350; Walter Remmers, ibid: 352; Engelhard, ibid: 357.

4 See Dr. Peter, 22 September 1989, Bundesratsprotokoll 604: 357. It is interesting to see that what the speaker feared is exactly what happened in Great Britain.

5 Some few Social democrats, too, favour a total ban not only of embryo research but of IVF (Bundesratsprotokoll 604: 376/377). On the Green party's self-conceptions and philosophies see Bause 1999; Brockmann 1992.
Socialdemocratic position), or whether the national legislature can leave all the aspects of ‘treating’ women to the regulation of the medical professionals’ body, Bundesärztekammer, itself (the conservative Government’s position).

The natural order: where science and medicine fit in
A concern shared by everybody in the German discourse is the problematic nature of scientific progress and the scientific mentality as such. One MP states that there is a shared “basic outlook” on scientific progress in the German debates “which is predominantly negative” (Einert, 25 November 1988, Bundesratsprotokoll 595: 439). Another one notes “with satisfaction” that during the course of the debates the general opinion about “IVF in the broadest sense” developed into an even “more restrictive”, “more sensitive one” (Dr. Peters, ibid: 444). The concerns about science reach beyond any left-right-divide in the German Parliament. Differences between ‘left’ and ‘right’ positions only come into play when the shared belief that there is something deeply troubling about science is turned into legislative provisions. Speakers from the left demand a more radical restriction of the scientific and medical practices of new reproductive technologies. The conservative majority in Parliament favours an ESchG that criminalises research on embryos, but enables fertility treatments to go ahead. In order to understand the German discourse, it is necessary to look at the argumentative structures which bring about the majority’s distinction between dangerous research and safe treatment. One of the speeches of Dr. Albrecht, a conservative politician in the Bundesarat, can serve as a good example of the majority’s conceptualisation of science and medicine in the natural order. It makes sense to quote at relative length from his speech, in order to highlight the characteristics of the German discourse that are typical for the majority position, but are also shared by many speakers from the left-of-centre parties:

“The human power over nature has now reached humanity itself. […] Man can become the creator of himself. We have to doubt that we would be able to come up to the role of creator. Our best intentions, according to experience, tend not to suffice for that role. Not only can they be terribly abused, they also are not immune against ignorance and negligence. […] There is a possibility] for profound sacrilege, sacrilege against what constitutes man in the creational order. On the basis of my Christian beliefs I confess that I reject the opinion that man should take the responsibility for
all of human life in the world [...]. This power does not become us.” (25 November 1988, Bundesratsprotokoll 595: 428/429)6

Maybe not surprisingly for a speaker from the conservative Christian Democratic Union, CDU, Dr. Albrecht mentions Christian values to underpin his position. However, other speakers from other parties argue along similar lines without referring explicitly to Christianity. Furthermore, bearing in mind the British debates analysed later in this chapter, it is interesting to notice that no-one in the German Parliament picks up on this reference to religious values, labelling his standpoint irrational or particular. A Socialdemocratic politician expresses this attitude:

“It does not matter where one has one’s roots. Whether they are of a general philosophical or moral nature, or whether they are based on Christian beliefs and ethics. It is all important that in many questions we are moving on shared ground.” (Einert, ibid: 441)

So what is this shared ground the parliamentarians refer to? Returning to Dr. Albrecht’s speech, we can see that it is a very distinct conceptualisation of a natural order, and the space that humans and their science must occupy in this order. Nature is a complex system. Whether it is held to be God’s creation or not, man is part of this complex system, not its master. Humans must think of themselves as creation, not as creators. When humans think they have established enough knowledge to be able to manipulate and control nature, this attitude manifests a ‘profound sacrilege’. To go ahead with research on embryos would mean to “meddle with nature’s or God’s business” (Dr. Seesing, 8 December 1989, Plenarprotokoll 11 183: 14171, my emphasis). Not to accept the natural order, and one’s place within it, is immoral. Humans are too small; their knowledge is too deficient, in order for them to claim control over natural processes.

This means that science and scientists have to be constantly reminded of the role they can or cannot play. The scientific drive to decipher, to control, to manipulate has to be viewed with much mistrust and concern. Science can only be good science if it acknowledges that it must accept the natural order, the ‘creation’, as something found,

6 Also see: Walter Renner, 22 September 1989, Bundesratsprotokoll 604: 352.
not made, nature (also human nature) as a subject, rather than an object. The attitude expressed in German Parliament towards science relies on the conceptualisation of nature as limit. What is deemed natural has to be the limit of what people and science should be allowed to do.

There is much concern expressed by speakers of all political persuasions about the 'artificiality' of the procedures of IVF or even sperm donation. Dr. Berghofer-Weichner speaks of 'Naturwidrigkeit', which roughly translates as 'being contrary to nature' (25 November 1988, Bundesratsprotokoll 595: 431; also see a Government statement which describes IVF as "a complicated procedure with a substantial degree of artificiality", 23 November 1988, Bundestagsdrucksache 11 1856: 4). The 'natural' way to procreate is seen to lie in the loving union of a man and a woman ('a personal act, where humans meet, where there is a unified experience'). Everything that deviates from that natural norm, and particularly the insertion of other parties, is highly dangerous, because it is 'artificial'.

The natural order must therefore be thought of as essentially good, as right and meaningful. It becomes humans, and scientists in particular, to appreciate this essential 'rightness' of the natural order, rather than to embark on short-sighted projects of manipulation and control. All speakers share a concern that things can go horribly wrong if science does not limit itself, if it assumes control over the uncontrollable:

"We know now that nuclear power cannot be mastered. [...] Our children and their children will still have to live with the consequences of Chernobyl. In the face of this experience we have now made, we must not repeat the same mistakes." (Dr. Peters, 25 November 1988, Bundesratsprotokoll 595: 443)

All these statements have one thing in common: they agree that humanity must not delude itself: humans are not omnipotent, they are unable to control the effects of their doing and it does not stand in their power to assume control over the world and themselves. And scientists are included in this view of humans. Scientists are more prone to believing that they must be allowed to do whatever they can do, that they know what they are doing, and that they can control the uncontrollable. But scientists should do their work in modesty, too. Many speakers from different political backgrounds
agree that modesty, extreme caution and vigilance are the right way to approach scientific and medical innovation.

**Helping the infertile or those at risk of disabilities – ambivalence reintroduced**

Keeping this general agreement in mind, it is maybe slightly surprising that the **ESchG** does not simply outlaw all aspects of reproductive technologies: embryo research, fertility treatments, the lot. As outlined above, only the Greens demand this total ban on technologies of reproduction. The law itself does not reflect this position. In order to understand how this negative, cautious conceptualisation of science and scientists can be reconciled with the **ESchG** that gives much freedom to doctors who work in the field of reproductive technologies, it is necessary to look at another aspect of the German debates. The most effective quote representing this further characteristic of the German debates will feature again in the next chapter, but for other reasons. In my opinion, it is one of the core statements of the German parliamentary debates:

> “There are some who have a distinct position, because they see the dangers that come with the new possibilities. They say: alright, childlessness just is fate. [...] This might well be the case, Ladies and Gentlemen, and I do understand this standpoint.

> However, I do not share the consequences that are drawn from this, namely that none of the methods of artificial insemination should be allowed. I am of the opinion that there might be cases, for example if a woman cannot have children of her own with her husband or long-time partner due to an accident or an illness, *cases in which one can help*, if the new insights allow it. I think this is right and justifiable.” (Dr. Däubler-Gmelin, 8 December 1989, *Plenarprotokoll 11* 183: 14168, *my emphasis*)

What we can see here is the introduction of a further consideration to the debates. Dr. Däubler-Gmelin concedes that one needs to be critical and cautious about science. She also claims to understand a position that wants to see nature as a ‘natural’ limit of human freedom. If nature made you infertile, then this might need to be accepted. We must not tamper with nature; nature has to be thought of as the ultimate boundary. The first half of her speech supports the understanding of nature and the natural order outlined above: nature as limit, the natural order as the good and moral order, any attempt to ‘meddle with nature’s or God’s business’ should be resisted.

However, in the second half of this quote, she moves on to argue that she herself does not entirely subscribe to this logic: there are cases, and then she refers to the suffering of
a childless woman, where we should not point at nature as the ultimate limit of what can and should be done - cases where one can help. It is the logic of helping in circumstances where new technologies, new medical treatments, can alleviate suffering that helps the German parliamentarians to 'overcome' their generally negative assessment of scientific progress and science itself. Däubler-Gmelin's speech implies that not helping the infertile, not giving in to their wishes, would be a merciless thing to do. In a way, one could argue that the morality of 'the natural', of the 'natural order', is supplemented by a different morality: the morality of care, of helping those who are suffering.7

What does this argument imply for the conceptualisation of the 'natural order' or 'creation' analysed above? On the one hand, nature is seen as limit, as an order that needs to be accepted. It is beyond the power and control of humans, and too precious and big to be tampered with. Yet on the other hand, in the case of individuals, in the case of a concrete infertile woman or man, nature also is or can be a tragedy. If science and medicine allow us to alleviate suffering, to overcome the limits of nature for these individuals, then we should do so. We should help. What we can see is that 'nature' as a discursive resource remains ambivalent. Nature, in the German debates, on the one hand and very clearly serves to distinguish what is proper from what is inappropriate: humanity must not assume it could gain control over nature or even manipulate it. Yet at the same time, in "individual cases", where science or medicine allows us to overcome the limits of nature, to help the infertile, this is the right thing to do. Nature, as that which has to be accepted without being questioned, is modified by the logic of helping those who suffer.

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7 Dr. Peter, in an earlier debate, argues along similar lines. She too lists all the problems which can be caused by the use of technologies of reproduction. She then concludes: "I want to say today that in front of this background, thinking about all the things that we might face in the future, a complete rejection of IVF, as it is demanded by some groups in society, to me is a possible position which adequately addresses the severity and the size of the problems [...]. I do not share this position. [...] I have thought about this for a long time and soon I did not see myself as entitled to exclude married and other couples from attempts to fulfil their wish for a child" (22 September 1989, Bundesratsprotokoll 604: 357). Also see: Dr. Seesing, 8 December 1989, Plenarprotokoll 11 183: 14171.
The intentions of scientists: ‘serving’ or ‘controlling’ nature?
This ambivalent use of ‘nature’ as a discursive resource - at once the limit for scientific ambitions and a tragedy that can be alleviated – leads to a certain way of talking about scientists and their actions. On the one hand, the natural order needs to be accepted as the ultimate limit of what is morally sound scientific behaviour. At the same time it is morally right to overcome the ‘natural’ inability of a woman or couple to have children. Good and moral scientific behaviour of scientists accordingly depends on their intentions. Do they try to manipulate or control, or are they merely trying to ‘help’? One of the earliest legislative statements on the issue of new reproductive technologies is the Benda Report (which roughly is the equivalent of the British Warnock Report). Here, the Commission of Enquiry states:

“That the doctor can take part in the creation of an individual does not at all imply that therefore he [sic] may exercise control over that individual.” (Bundesminister für Forschung und Technologie 1985: 2, my emphasis)

Similarly, a speaker in the Bundesrat, Dr. Berghofer-Weichner, explains that the line between terrible abuse and appropriate use of the technologies has to be drawn where the doctor is no longer “the servant of nature”, but claims “the role of co-creator” (25 November 1988, Bundesratsprotokoll 595: 431).

It seems that the doctor is only acting responsibly, if s/he ‘takes part’ or ‘serves’ in an otherwise ‘natural’ process. S/he must not claim authorship, control or ‘the role of the co-creator’. It further seems that the difference between these two understandings of the doctors’ profession is less based on what doctors actually do, and more on the spirit in which they do it. If a doctor fertilises a woman’s egg with her husband’s sperm and transfers it back to her, s/he is doing a good and responsible job if s/he thinks of that work as ‘helping nature’, helping “the whole person, the whole couple” (Government Paper, 23 February 1989, Bundestagsdrucksache 11/1856: 2). The work is abusive, however, if it is done in the spirit of ‘playing God’.

The conceptual basis of the ESchG should have become clearer by now. Research, most prominently the research on embryos, is outlawed, without any controversial debates. Everybody agrees that it is bad and dangerous. The treatment of individuals, however, is sanctioned by the ESchG. The following section will now focus on the ESchG itself and
the controversial nature of the boundary it represents: the boundary between research and treatment. It will turn out that the distinction between these two aspects of reproductive technologies is controversial, yet in the end successful (in so far as it becomes law). After this insight into the structure and the conceptual basis of the German *ESchG*, this chapter will then turn to the British legislators’ thoughts and arguments about science and scientists.

**The *ESchG*: ‘the intention to bring about a pregnancy’ as boundary marker**
The *ESchG* reflects the then Government position on new reproductive technologies: research is outlawed, treatment is barely addressed at all, and left to the Bundesärztekammer to regulate. The *ESchG* does not contain a section that explicitly states: ‘embryo research is illegal’. The prohibition of embryo research is incorporated in § 1 (1) 2, and § 2 (1) and (2) *ESchG*, according to which it can be punished with up to 3 years imprisonment either “to fertilise an egg *for any other reason* than to bring about a pregnancy in the woman whose egg it is”; or “to acquire, use […] or keep” an embryo “*for any other reason* than to bring about a pregnancy [my emphasis]” (see on this: Geilen 1991). It is thus illegal to fertilise an egg, or to do anything with an embryo that does not aim at the ‘treatment’ of an individual woman, i.e. does not try to bring about a pregnancy for this individual woman. It is not sufficient that, in the long run, certain uses of embryos might lead to more efficient or better treatments for infertility. Every handling of a fertilised egg has to have the aim to bring about a pregnancy and the birth of a child. The intention to bring about a pregnancy distinguishes what is allowed from what is not allowed, and thus what is deemed safe from what is deemed unsafe. From looking at what a doctor does, one cannot necessarily conclude whether s/he breaks the law or not. One has to analyse his or her intentions. Does s/he try to create a pregnancy or not? The same practices can thus be criminalised or sanctioned depending on what the scientist intends. This reflects the above discourse about the ‘spirit’ in which science, and also medical science, has to be pursued: it has to be a spirit of modesty, of servitude, definitely not the self-confident spirit of control or even manipulation of nature.

*8* Unlike the British parliamentarians, the German MPs voted according to party lines.
About the ‘treatment-side’ of new reproductive technologies, the *ESchG* says hardly anything at all. Unlike the *HFE Act*, it does not contain provisions about for example the duties of clinics to inform their patients, to offer advice and counselling, to record their treatment and its success, or to establish data about children being born after IVF or sperm donation. It does not contain provisions about which women should receive treatments, or how good practice is to be established or guaranteed. All the regulation of *everything that is not explicitly outlawed* is left to the medical profession itself. The *Bundesärztekammer* controls the actions of its own members via professional guidelines (see *Bundesärztekammer* 1988; now also: 1998). The legislature is not directly involved in this control. The legal regulation in Germany therefore combines both a strict criminalisation of *some scientific practices* and a ‘lenient’ decision for self-regulation of *other medical practices* in the field of new reproductive technologies. It expresses a deep mistrust about scientists, when at the same time giving a lot of (unsupervised) responsibility to the doctors’ professional organisation (on this also see Betta 1995; very critical: Waldschmidt 1993). It seems to believe in horrific abuses and unproblematic uses of the technologies of reproduction. The abuses are criminalised, the uses not even supervised. And the difference between use and abuse seems to lie in the *intention to ‘help’* a woman to conceive, rather than to use medical and scientific knowledge and power for any other reason.

Many commentaries claim that the *ESchG* is one of the strictest laws in the world regarding the regulation of reproductive technologies (see for example Deutsch 1991; Stellpflug 1992; also see: Keller et al. 1992: 124/125). However, the lack of regulation regarding anything that is not simply criminalised suggests that this assessment might be wrong. “Not regulating is as significant as regulating” (O’Donovan 1985: 19). The *ESchG* criminalises some practices that are sanctioned in for example Britain (like embryo research, egg and embryo transfer and surrogacy), but at the same time it does not concern itself with questions of supervision, control, documentation or information

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9 As outlined above, a part explanation of this incomplete regulation of the technologies is that the national legislature at the time did not have the constitutional power to fully regulate reproductive medicine. It thus could only use criminal law, and not administrative (health) law to oversee the use of reproductive technologies. Yet, the *Länder* would have been happy to give this power to the national legislature by agreeing to an amendment to the constitution. The opposition thus claimed that the constitutional limitations were used as a token argument. The constitution was subsequently changed, yet the *ESchG* was not extended.
that are important aspects of for example the HFE Act (see Keller et al. 1992: 89; critical: Coester-Waltjen 1992). The ESchG leaves more issues to the professional self-regulation of doctors than the HFE Act.

The ESchG concurrently displays a deep mistrust of scientists and significant levels of trust in the reliability of doctors. The ambivalence about the effects of scientific progress in the area of human reproduction essentially is 'dissolved' through drawing a boundary between research and treatment, and declaring what happens on one side of the boundary to be different from what happens on the other side of it. As we have seen above, the boundary between research and treatment does not only reflect the ambivalence about scientific progress, it also is based upon ambivalent notions of the 'natural'. Scientific interventions into nature are dangerous or morally right depending on whether they are aimed at 'helping' an individual woman or serve any other (scientific) purpose. Not everybody agrees that this is an efficient way of dealing with the ambivalence of scientific practice and progress.

The contested nature of the distinction between research and treatment
The boundary drawn between research and treatment, one being unsafe and the other safe, one deserving to be criminalised and the other not even to be regulated by statute, is - of course - contested. During the debates this boundary attracted criticism from two very different groups of speakers: scientists and the left opposition to reproductive technologies. Both argued that to allow IVF, but not embryo research, did not make sense, yet both pursue different aims through their criticism. The scientific community would like to see the label 'safe' extended to the research that successful treatments are necessarily based upon:

"Of course, if one does not want IVF, one then also does not need embryo research. If one however wants IVF, and that seems to be mostly agreed […], then doctors have to apply the duty of care when using IVF. This duty of care is based on medical experience and on scientific research." (Dr. Buchborn, 9 March 1990, Bundesrechtsausschuss 11/73: 142, my emphasis)\(^\text{10}\)

\(^{10}\) Also see the guideline of the Bundesarztekammer, where it is stated very clearly that "the birth of 1000 extra-corporally conceived children" would not have been possible without embryo research (1985: 267). This argument is modified, if not undermined at times by other speakers from the scientific community, when they want to diffuse criticism of controversial aspects of the new technologies. Some of the doctors, or medical scientist, on numerous occasions pick up the distinction between research and
On the other hand, the MPs of the more radical left argue that the label ‘unsafe’ should be extended to the treatment-side of new reproductive technologies, because it too is based on dangerous research and relies on equally dehumanising principles and practices. To them, it is impossible to distinguish between the doctor who simply ‘helps’ a woman to conceive and the scientists who might want to ‘play God’. IVF is the “Trojan horse”, which will introduce the “manipulation of human life” (Schmidt, 8 December 1989, Plenarprotokoll 11 183: 14172). Moreover, because of the low success rates of IVF and the many risks involved, IVF is not seen as an “uncontroversial, reliable therapy”, but as a “purely experimental method” (Green Bill, 19 October 1990, Bundestagsdrucksache 11/8179: 2). The notion of the experiment is thus not only applied to research on living embryos, but to the ‘treatment’ of women. It is argued that IVF is in fact an experiment on women (ibid: 7).

Their criticism of the majority position, and the law, further regards the discourse of protection and caution displayed by the majority as mere ‘rhetoric’. They argue that the conservative majority do not want to actually prevent abuses of humans and genetic engineering; they really want to re-assert “the interests of research under the cloak of pro-life declarations”:

“This law is merely symbolic. It appeases the public, yet gives enough freedom to scientists – there is indeed no criticism of the law from that corner.” (Schmidt, 24 October 1990, Plenarprotokoll 11/230: 18213/18214)

Effectively, both these sides of opposition to the Government proposal hold that the ambivalence of scientific progress is not ‘solved’ or overcome by the Government Bill; rather it is simply eclipsed. To them, drawing a boundary between safe treatments and

treatment provided by the legislature. They do so in order to distinguish what they are doing (treating women) from what is deemed dangerous by the parliamentarians (embryo research). See for example: “I regret that in the case of this debate, a medical treatment [...] has been discussed, again, together with questions of insemination by a third party, research and these things. I do not think this is adequate” (Dr. Krismann, 9 March 1990, Bundesrechisausschuss 11/73: 132; also see Dr. Krebs (ibid: 144): Thus, when confronted with anti-embryo-research sentiments, and when it helps to render their own doing harmless, doctors tend to deny the link that exists between treating women, and finding out about how to conduct this treatment. It seems that, although they can show that the boundary drawn by the law does not make much sense, the scientific or medical community can live with this arbitrary boundary, as it enables them to do at least part of the work they are interested in.

11 This perspective is shared by many feminist writers and critics of reproductive technologies. See for example: Raymond 1993; Steinberg 1997; Waldschmidt 1993; Corea and Ince 1987; Mies 1992; Raiser and Holtzhauer 1993; McLean 1999: 37.

12 Also see: Schmidt, 8 December 1989, Plenarprotokoll 11 183: 14173.
dangerous research does not make sense. The scientists argue that as treatments for fertility problems are beneficial, one has to logically also support the research that makes these treatments possible. The Greens argue that as everyone agrees about the dehumanising potential of the technologies, one must simply not enter the whole arena of technological interventions into human reproduction. Be they labelled research or treatment, they are simply the same thing.

Both these standpoints imply an argument about the law: they both appear to criticise the fact that the law does not address or represent the true nature of science and medicine. Both argue that the ESchG denies the essential dependence of medicine on research. A law that slices up the nature of medical science into safe application and unsafe research does not do justice to what science is about. One cannot embrace the benefits of modern medical science when disowning the risky research it is based on (also see Jackson 2001: 182). Both parties therefore effectively argue that the law does not adequately comprehend the ambivalent nature of science: one cannot have the benefits without the risks. Ironically, those MPs who are more critical about technological interventions into human reproduction share their understanding of the technologies in that respect with the scientists themselves: to both groups, research and treatment cannot logically be separated. Those who reject the whole reproductive 'business' seem to have listened better to what the scientists said, than those who are in favour of allowing some aspects of the technologies while outlawing others. Both scientists and opposition argue that the ambivalence, the risky nature of scientific progress, cannot be dissolved in the way the majority suggests. However, the ESchG is based on the assumption that it is possible to do exactly that: one can have only the medical benefits (treatments for fertility problems), without having the risks seen in embryo research (the manipulation and commodification of human life). Apparently, the law can have its cake and eat it.
C: Similar anxieties, different solutions – the British case

As outlined in the previous chapter, there are ambivalent feelings about the nature and effects of scientific progress in the London debates too. This ambivalence and the anxieties it triggers, however, are dissolved in very different ways in Britain. We have just seen how the German legislature constructs the role of human nature, the natural order and medicine, in order to allow the use of reproductive technologies, without openly embracing the risks associated with scientific progress. We have seen that the German legislative strategy of coping with the ambivalence of science relied heavily on the distinction between embryo research (bad and dangerous) and treating infertility (worthwhile and positive). The situation is very different in Britain, where a large group of MPs want a continuation of embryo research. These pro-research parliamentarians however were still confronted with the many anxieties about the destructive and dangerous potential of science that were outlined in the previous chapter. They thus needed to find ways of distinguishing the embryo research they wanted to continue from the horrors envisaged if science was allowed to proceed without any restrictions or taboos. This section will investigate those strategies. Again, the ambivalence of scientific progress was not thought of as inescapable by the majority (and thus by the HFE Act). Rather, the ambivalence could be ‘sliced up’. One could draw a line between what is good and what is dangerous about science. The law represents this line, and the law will hold, thus keeping safely apart the dangerous and the promising.

In the following, I will work through three steps of this boundary drawing, three interrelated, yet distinct ways the lawmakers attempt to legitimise their legislative decision about embryo research. Firstly, I will look at the construction of the embryo. I will argue that the early embryo is constructed by the majority discourse as something that is fundamentally different from us. Scientific arguments play an important role in this strategy. However, we will see that the law does not simply make way for scientific ‘facts’. Rather, it imposes a distinct legal view on what ever might happen on a ‘factual level’. The facts as such “do not speak for themselves” (Fitzpatrick 2001b: 264). Secondly and thirdly we will look at distinct constructions of science vs. sci-fi and reason vs. irrationality. We will see that the majority of lawmakers in London engage in the construction of a boundary that separates these concepts. Once again, moving from the specific instance of legislation to more general considerations, the chapter will then
lead to an argument about modern law and its 'other'. We will see how the British majority strategy is based on a modern myth, and how this helps to see the law as reasonable, universal and legitimate. In a final step of the analysis, this conceptualisation of law in modernity will be contrasted with the German construction of law and modernisation. We will see how the German notion of natural law and natural rights, based on a distinct understanding of the place for humans in the natural order, leads to a very different positioning of law in the face of processes of modernisation. In a similar mode as for the previous chapter, it will turn out however that each position, despite being different, is not unambiguous. Both laws do not achieve ultimate closure with regard to the questions triggered by the promises and risks of scientific progress.

Divide and rule: the embryo as 'the other'

The legitimacy of embryo research is the focus of the debates in London, the "moral heart of the Bill" or the "pivotal question" (Archbishop of York, 7 December 1989, House of Lords, vol. 513: col. 1019). "One could have been forgiven for being under the impression that it [the Bill] only consists of one clause" (Lady Saltoun, ibid: col. 1088). Whether you belong to the minority or the majority, whether you are a conservative (with a small 'c') or a liberal depends on where you position yourself with regard to the question of embryo research.

According to Mary Douglas, the status of the human embryo represents like few other phenomena the problem of ambiguity. Its status is "indefinable [...] its present position is ambiguous, its future equally" (1966: 96). In 'traditional societies' it is "often treated as both vulnerable and dangerous", it can affect the harvest or the weather (ibid). When looking at the debates in London, one can see the lawmakers struggle with this very ambiguity. However, the embryo is never spoken of as a source of danger. It only ever is thought of as vulnerable, innocent and helpless. And yet it seems that the lawmakers are dealing with a danger, the danger of ambiguity, of not being able to decide clearly where to place "this thing so intimately bound up with our own personal origins" (Archbishop of York, 7 December 1989, House of Lords, vol. 513: col 1021). "Danger

lies in transitional states, simply because transition is neither one state nor the next, it is indefinable.” (Douglas 1966: 97).

Bearing this in mind, one could understand the embryo research debates as trying to eliminate ambiguity. As long as it is not clear that the embryo really is different from us, we cannot be sure that it is ‘safe’ to do embryo research. As soon as we have decided that the embryo is different, we will find it difficult to explain how “everyone of us started our lives as embryos” (Sir McNair Wilson, 23 April 1990, House of Commons, vol. 171: col. 88). The 14-day boundary, and the emphasis on ‘individualisation’, which will be looked at in much detail in this section, serves both ends: it declares the embryo ‘other’, and it provides us with a narrative that explains how we, the ‘individuals’, in the end developed out of embryos. Especially those opposed to embryo research feel that there is a lot to lose, if the status of the embryo is not properly defined:

“The conclusion that we reach about the tiny, vulnerable, powerless human embryo will later shape how we regard the status of every individual and how we perceive his or her human rights.” (Mr. Alton, 2 April 1990, House of Commons, vol. 170: col. 965)

The question of how we treat the embryo is so important for this group of speakers because the embryo is one of us. Essentially, the embryo is not different from born people. It is just smaller:

“The difference between what we call a baby and what we call a foetus is that we can see one and we cannot see the other, and if we inflict pain on one we could see it.” (Miss Widdecombe, ibid: col. 949)

Accordingly, embryo research is “experimentation on human beings” regardless of the “stage of their development” (Dame Jill Knight, ibid: col. 955; also: Mr. Duffy, ibid: col. 941), or even “a daily massacre of innocents” (Mr. McGrady, ibid: col. 959). This language and perspective is mocked by the majority of speakers as “total misnomers” (David Steel, ibid: col. 936), as “improper language”, “used to obfuscate discussion by the calculated misrepresentation and personal abuse of opponents” (Lord McGregor, 7 December 1989, House of Lords, vol. 513: col. 1018; also: Mrs. Wise, 2 April 1990, House of Commons, vol. 170: col. 973). Those opposing embryo research in turn attack the language of the pro-researchers, particularly the notion of the ‘pre-embryo’, which
they believe “was invented to confuse and baffle and to dehumanise the early embryo” (Sir Bernard Braine, ibid: col. 934). It is “a sanitising term to cover up what we are doing” (Miss Widdecombe, ibid: col. 949).

With mutual accusations of misrepresentations and linguistic tricks, it is perhaps not surprising to see that both sides of the argument frequently attempt to back up their definition of the embryo with biological ‘hard facts’ rather than religious or openly political convictions. Sir Bernard Braine answers the question “is the embryo human?” with the following reasoning: “The answer is undoubtedly yes. It comes from a human sperm and a human egg, so what else could it be but human?” (ibid: col 932). Those in favour of embryo research also refer to science to argue that the boundary they draw between “early” or “pre-” embryos and us is not arbitrary. It is based on biology. Their argument is that some of the cells that form the early embryo “go on to form the placenta and the membranes which surround the foetus” (Lord Ennals, 7 December 1989, House of Lords, vol. 513: col. 1015). Up until then, the “human embryo is basically a fertilised egg which may or may not grow into a foetus” (Lord McGregor, ibid: col. 1016).

This is also the perspective of the Warnock Report. It too distinguishes between “a loosely packed configuration, similar to that of a blackberry” and “the embryo proper” (DHSS 1984: 58/59). It seems to be only this ‘embryo proper’ from which an individual derives. The ‘individuality’ of the human embryo appears together with its “primitive streak”, its first “recognisable feature” (ibid). If two primitive streaks develop, this will lead to identical twins. This is used as a further argument for why it is only after 14 days that we are dealing with a potential individual and not simply with “a fluid filled space”, “a blastocyst” or an “embryonic disc” (ibid). It is this boundary drawn between the ‘early embryo’ and ‘individuals’ which allows the Warnock Committee and the HFE Act to safely proceed from the assumption that embryo research is different from “experiments on little children”.14 This construction of the early embryo as entirely different from born people is worthwhile looking at in more detail. It reveals two

14 In the end, the terminology of the pre-embryo is not actually included in the HFE Bill, and is later on dropped by some of those who favour the continuation of embryo research (on this see Mulkay 1997: 135 – 139). However, the boundary drawn between ‘early’ embryos, and ‘embryos proper’ remains a useful tool for those who try to keep embryo research legal.
important aspects of how the law gains 'control', at least discursively, over the question of what the embryo represents.

The early embryo: of legal fictions and individuals

It has already been stated that science and the knowledge and arguments it provides play an important part in the construction of the embryo by the majority discourse. They argue that scientifically the early embryo is different from proper humans (or even from the 'embryo proper'). The 14-days-limit for embryo research, and thus the construction of this 'early embryo' is thus not based on an arbitrary political judgement or ideology, but on 'biological facts', established through scientific research: "the reference point in the development of the human individual is the primitive streak [...]. Most authorities put this at about fifteen days after fertilisation" (DHSS 1984: 66). 15

We have seen above, when dealing with the German discourses, that some aspects of medical or scientific reasoning were integrated into the legislative decision about reproductive technologies (the medical model of 'helping'). However, the German ESchG never simply explains its decision with the occurrence of a biological fact. It asserts its right and moral obligation to see humans, human beings, human material in the way the constitution demands, not in the way science claims to understand human 'nature'. The reliance of the HFE Act on the viewpoint of science itself (when at the same time regulating or controlling science) goes further than that. The utter dependence of the law on knowledge and arguments provided by science in order to justify its decision for embryo research could be seen as the complete 'colonisation' of law by science. However, a closer look at s 3(3)(a) and (4) HFE Act leads to a more complicated picture:

"A licence cannot authorise keeping or using an embryo after the appearance of the primitive streak, [...]. For the purpose of subsection (3) (a) above, the primitive streak is to be taken to have appeared in an embryo not later than the end of the period of 14 days [...]." (my emphasis)

15 Also note the connotations of 'primitive' – it would undoubtedly be more difficult to discursively justify embryo research, if these cells were called 'very complex', or 'hugely advanced'. See the Earl of Cork and Correry who also comments on the terminology of the 'aptly named' primitive streak (7 December 1989, House of Lords, vol. 513: col. 1094/1095). On the role of metaphors, such as 'primitive', for scientific knowledge, see: Stepan 1996.
This provision refers to the scientific argument, the biological fact, that after 14 days of development the 'primitive' streak tends to occur in the embryo. This occurrence is the reference point, the ground on which the law bases its decision. However, this provision also means that for the Act it does not really matter whether the biological phenomenon of the development of the primitive streak actually occurs. The law 'takes this fact to have appeared'. It thus replaces biological 'hard facts' with legal fiction. This concurrent dependence on and independence from the realm of the 'factual', and from scientific knowledge of this factual world, can be read as law re-asserting its sovereignty over science. A scientist in each and every individual case could judge whether the law got it right or wrong, whether the primitive streak actually had occurred after fourteen days or not. But the law does not make itself rely on this actual occurrence. It moves beyond the knowledge a scientist can provide, and proclaims that it proceeds on the basis of a legal fiction. "Insufficient as a foundation for legal certainty or authority, the biological facts are displaced" (Franklin 1999: 135). Legal fiction, the legal fiction of the primitive streak, can be understood as law's expression of dependence on and independence from the reality outside itself:

"Through the fiction, law can assert what is clearly contrary to recognised truth. [...] The legal fiction, then, reveals law as the most dependent yet the most independent thing. With the fiction, law remains the same, whilst it has changed completely." (Fitzpatrick 2001a: 88)

There is a second argument to be made about the construction of the early embryo as a telling instance for how the lawmakers (and thus the law) utilise scientific knowledge or arguments, without this implying that they (or the law) entirely 'surrender'. The law does not simply dissolve through internalising parts of the scientific rationality. It also asserts itself. We have seen that the pro-research majority in London take the occurrence of the primitive streak as a significant, as the decisive factor for their decision-making, because only after this occurrence it is clear that the embryo cannot develop into two foetuses, or even the placenta. The primitive streak is what renders the embryo an individual\(^\text{16}\). Before the occurrence of the streak, we cannot think of the embryo as an individual. This allows us to do things to it that the law would not allow to be done to 'individuals'. Once the embryo reaches the maturity of being this individual, it deserves more protection, it is then more similar to born people. The legislative

\(^{16}\text{It is interesting to note that the Latin root of 'individual' means exactly that: it cannot be divided any further.}\)
discourse in London ties the *individualisation* of the embryo to the occurrence of the primitive streak. Once again, this could be understood as the law ‘giving way’ to the rule of science. However, the protection afforded to, or the *status* of the individual is nothing that can be founded on science. It is a legal, a political or a moral commitment. Modern law constructs the individual as the centre of its legal order. This is not a scientific, but a legal statement. Or rather: it is a legal judgment read into science, as much as it is a scientific judgment incorporated into the law.

On the basis of scientific ‘facts’ alone, the status of the embryo cannot be decided (also see Jackson 2001: 226). Whether the embryo is ‘one of us’ or not, is a question that goes beyond any scientific rationality. Either the embryo is, on the basis of facts, seen as identical to born people, only smaller (it has got the same DNA, it is the logical starting point of a development, it does not contain anything human organisms don’t contain), or it is, once again on the basis of facts, seen as a mere ‘collection of cells’ (it can still develop into a placenta, or into twins). On the basis of mere scientific facts, one could equally say that, “every human being, of whatever age or size, is just a collection of cells” (Mr. Alton, 2 April 1990, House of Commons, vol. 170: col. 965). Seen through the eyes of mere scientific rationality, one cannot see concepts like human dignity or individuality. Seen through a microscope, all of us look like a mere collection of cells. Scientific ‘facts’, then, can never be the sole basis of decision-making about the status of the embryo. And we have seen, when looking at the occurrence of the primitive streak and the question of embryonic ‘individuality’, that the law does not simply replace its judgment with a scientific one. What we can see is an amalgam17 of scientific and legal considerations (or “of factual and moral judgements” Archbishop of York, 7 December 1989, House of Lords, vol. 513: col. 1019) that enabled the majority of pro-researchers to decide that,

“In practical terms, a collection of four or sixteen cells was so different from a full human being, from a new human baby or a fully formed foetus, that it might quite legitimately be treated differently.” (Warnock 1985: xv)

17 Santos speaks of a “co-operative relationship and circularity of meaning between science and law” (1995: 3). However, he assumes that this co-operation takes place “under the aegis of science” with law being “subordinate” (ibid). The above examples do not seem to support this assumption. On this also see the Chapter Eight.
It is this conclusion that allows the pro-research speakers to assume that embryo experiments are not 'human vivisection' or 'experiments on small children'. The embryo is 'the other'. The embryo is not yet an individual; it does not yet occupy this prominent position in the modern universe. The embryo is not yet differentiated from 'nature'. We can treat it like nature, rather than like a human.

If it is true that the majority of MPs in favour of embryo research rely on scientific arguments to legitimise their decision on the 14-days-limit, and it is also true that scientific arguments alone cannot 'decide' what the embryo is and how it should be treated, then the law is, once again, built on shaky ground. Science can support a 'pro-life' view just as much as a pro-research one. The law backs up one set of scientific arguments, but ignores another. Science remains a contingent foundation onto which to build laws. In the following, another strategy with which the lawmakers of the pro-research majority deal with this dilemma will be investigated. We will see that science has to be constructed as a distinct rationality that only the pro-researchers can claim to possess. The minority of MPs opposed to embryo research is thus constructed as irrational and as missing the point of the debate. In making legislative decisions, the majority discourse therefore not only writes a law, it also constructs a particular notion of scientific rationality. This notion is then incorporated into the law as the necessary foundation for legislative decision-making: law has to be optimistic, self-confident, universal and rational. Once again we can see how the law relies on science, and notions of progress, as a legitimising force for legislative decision-making. This reliance, again, is not 'passive'. It is based on a distinct construction of what modern science is and how the law has to embrace it.

The majority construction of science and scientists
In the British debates we can find images of scientists that are entirely absent from the discussions in Germany. Over and over again, the majority of speakers in London praise the decency, courage and trustworthiness of scientists. A typical feature of the discourses in London is an account that goes like this: "I was very sceptical, and had all sorts of anxieties, but I have spoken to scientist X, or I went to see the doctors in clinic
Y, and now I know that these people do brilliant work that will make a major
correction to human happiness.” A very typical example:

“My first reaction, believing as I do as a Christian in the sanctity of life, was that
there should be no research [...]. However, after visiting one of the units engaged in
this work, and seeing what is done, the marvellous pictures, the superb instruments
and the equipment – to which I am proud that my profession of engineering has made
some contribution – and talking to the dedicated team and to other knowledgeable
people in this field, whose views I greatly respect, and after much thought of my
own, I am now convinced that research on embryos of up to 14 days should be
1056)18

Similar narratives of trust are entirely absent from the German debates in 199019, but
they are relied upon very much by the majority discourse in London. So it seems that,
apart from the anxieties that are shared in both national discourses, there is a major
difference between the way the majority of German and British MPs talk about science
and scientists. In London there is an alternative, radically different story being told
about the nature of science: science is not only to be feared; science is good. Scientists
are described as “wonderful, dedicated and brilliant people, their work is carried out
with much love, with a great deal of service to humanity” (Lord Ennals, 7 December
1989, House of Lords, vol. 513: col. 1013). Scientists who do this “complex and
frustrating work of trying to improve the chances of couples to have children [...] have
the highest and most sympathetic motives” (Lord Glenarthur, ibid: col. 1042).

As outlined above, German parliamentarians could only ‘tolerate’ doctors’ interventions
into ‘nature’, by ascribing to them characteristics like modesty, altruism and respect.
But these traits were not extended to scientists. In the context of scientists, German
Parliamentarians often talked about corporate power, about science being driven by the

18 Lord Ennals (in the same debate) urges his fellows Lords to go to “meet the research workers at some
of our great hospitals” and demands that they “pay tribute [...] to those in the front line of research” (ibid:
col. 1013). More examples of this narrative starting with a visit to a hospital: Baroness Llewelyn-Davies
of Hastoe (ibid: col. 1023); Baroness Lockwood (ibid: col. 1033); Earl Jellicoe (ibid: col. 1038); Lord
Glenarthur (ibid: col. 1042, 1043); Sir David Steel, 2 April 1990, House of Commons, vol. 170: col. 937;
Sir Charles Morrison, ibid: col. 938. There also is a parallel narrative about being convinced of the merits
of embryo research because one has talked to parents of disabled children or to the infertile.
19 Interestingly, this form of narrative enters the German discourse of the years 2000/2001, exactly when
the German Government tries to overcome resistance to embryo research; see for example von Renesse,
financial interests of very few powerful agents. The contrast could not be bigger to for example Lord Ennal's praise of scientists, which he concludes with the remark that they do all this wonderful work "at not very high wages" (ibid: col. 1013). In England, those in favour of embryo research do not distinguish between scientists and doctors, research and treatment: In their examples, scientists 'help' and doctors demand 'research'. The majority discourse about science is fundamentally different from the German discourses we investigated above. However, as has by now been stated several times, there remains the problem that science, firstly remains an ambivalent, a potentially beneficial and dangerous part of ambivalent modernity. Secondly, it also cannot serve as a sufficient replacement for legislative decision-making. The ambivalence of science, its open-ended nature, must be overcome. It must be ordered out of existence. Once again, we can see that the lawmakers attempt to do this through drawing a boundary.

There is science and there is sci-fi

One strategy employed by the majority to dismiss anxieties about science, and thus about embryo research, is to draw a boundary between 'what we really talk about here' and 'science fiction'. The majority of speakers hold that certain scientific practices, which cause much concern, are not what the Bill in Parliament really is about. The most frequently referred to examples are that of cloning and hybridisation, - the argument being that these unanimously condemned practices are not what Parliament should

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20 See for example Engholm, 25 November 1988, Bundesratsprotokoll 595: 435; Einert, ibid: 440 (who speaks of "medical-industrial interests").

21 Implied in this distinction is a whole range of arguments about the future, and whether we can know it or not. To investigate these over-stretches the current analysis, and so they can only be hinted at here. Similar to the distinction between science and sci-fi, the debate about the future is one about what we really are debating. Those opposing embryo research predict that for example the 14-days-limit is only a first step on a slippery slope, and that scientists will return with more far-reaching demands in the future. The majority rejects that one can know the future, and argues that it is irrational to talk about things one cannot know. A typical exchange:

"The hon. Gentleman is making a valid point, but does he accept that, at some future date, some other people will be sitting here debating whether the advances made by experimentation meant that the 14-day stage stated in the Bill is inadequate? [...] If the experts in experimentation were to tell us today that experiments on an embryo of 17 days could well result in a cure for one of the genetic diseases, what would we then do?"

"I wish that I could foresee what might happen about an issue. With all respect, the hon. Gentleman is making a hypothetical point. I do not know what will happen in the future [...]" (Mr. Mallon, Sir Charles Morrison, 2 April 1990, House of Commons, vol. 170: col. 939).
concern itself with, because no responsible British scientist demands the legalisation of cloning. Lord Ennals represents a good example of this approach:

“I hope that the Bill will not be distorted by hair-raising, horrific stories of genetic manipulation; that is, of the creation of monstrous hybrids, being half human and half animal, of cloning, and so on. Let us start by recognising that everyone [...] is in agreement that this kind of research should be banned and that such a ban should be enforced with stiff penalties. We must be clear about what we are discussing.” (7 December 1989, House of Lords, vol. 513, col. 1013, my emphasis)

The speakers of the majority try to banish anxieties about the objectification and exploitation of humans onto the far side of a boundary they are erecting. The boundary separates science from science fiction, and thus also that which we need to be concerned about from that which we can laugh off:

“We have heard much scare talk about hybrids, clones and designer babies, but such talk comes from people who do not understand the limitations of the work [...]. They remain in the science fiction arena.” (Mr. Turnham, 23 April 1990, House of Commons, vol. 171: col. 64, my emphasis)

Mulkay, in his study on the embryo research debates (1997), shows that those in favour of embryo research use the vocabulary and images of science fiction (Frankenstein, Brave New World) more often and more effectively than those opposing embryo research. They use them to discredit their opponents’ concerns. This moves the arguments of those opposed to embryo research “from the factual realm to an unreliable, non-factual domain of supposition, fantasy and mere belief” (1997: 126). The distinction between science and sci-fi implies a further distinction, a further boundary drawn, between those who are able to distinguish the two, and those who are not. This allows the majority discourse to construct itself as rational and enlightened, and its opposition as irrational and unenlightened.

**Universal reason versus particular irrationality**
The strategy of labelling the opponents of further embryo research as irrational deserves a more detailed analysis, because it reveals an important insight into the dynamics of the

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22 On the later debates about cloning, and the move towards drawing yet another line between therapeutic and 'reproductive' cloning, see Chapter Seven.

majority discourse about embryo research (and thus about the structure of the HFE Act). This majority discourse is based on ideas of nature, the human mind and progress that are radically different from the German perspective.

Those opposing the continuation of embryo research in Britain often argue within a Christian frame of reference. Yet not all the speakers who claim to ground their opinions in Christian beliefs reject this research. The majority in favour of embryo research highlight that Christians are not united in their opposition. At the same time they emphasise that those who refer to their Christian beliefs in order to explain their concerns cannot be taken very seriously:

“It is quite clear that there are some who oppose research on the basis of their beliefs and they will never be convinced by the arguments based on the value of research, however great that value is perceived to be.” (Lord Meston, 7 December 1989, vol. 513: col. 1102, my emphasis)

The majority speakers argue frequently that those opposing embryo research are only informed by unworldly religious doctrine. A rational discourse with them is thus declared to be hardly possible. They frequently assure the minority that they are very welcome to keep their belief (after all, we live in a “multicultural, pluralist and free society”), but that they must not impose it on others. The majority discourse successfully constructs contrasting identities for itself and the opposition to embryo research. The anti-research standpoint, constructed as belief, religion and superstition, is


25 The most prominent example is the Archbishop of York, who in the first House of Lords debate on the HFE Bill makes it clear that Christian values do not necessarily dictate a ban of embryo research, and that he, “speaking in a personal capacity,” supports research “as itself a basis for respecting and enhancing human life” (7 December 1989, vol. 513: col. 1019/1022). His speech attracts much criticism and much praise and is continuously referred to in both Houses.

26 See for example Ms Richardson, 2 April 1990, House of Commons, vol. 170: col. 926; Mr. Key, ibid: col. 952.

27 Also see Lord Ennals: “Yes, some of the research work may take time to bring positive results. That is the way of research. To stop the attempt, on the basis of doctrine rather than experience, surely cannot be right” (ibid: col. 1015, my emphasis).

successfully contrasted with the majority's own mindset: They base their judgement on facts, not on irrational beliefs. And they argue that the whole House should do so:

"I recognise that there will be wide differences in hon. Members' standpoints, but I trust that we will respect each others' views and will vote to replace semantics and scruples with science and sense." (Dr. Goddson-Wickes, 2 April 1990, House of Commons, vol. 170: col. 962)

The identification of the minority position with religious belief also allows the majority to employ another discursive strategy. Many majority speakers tell a story that begins with papal intolerance and the conviction of Galileo, and leads via the prohibition of anatomy lessons to the burning of books, and now to the banning of research on the human embryo. This narrative has a well-known end: the church has lost every battle ever since it tried to tell science what not to do. Those resisting scientific progress on the basis of religious convictions will lose this battle too. The opponents of embryo research therefore find themselves being placed in a narrative that presupposes its ending.

Using well-known constructions of history as resources in the debates does not only place their opponents in a certain disadvantaged historical and political position. Those using these images also make bold statements about themselves. In short, they tell the story of the enlightenment battling with the 'forces of darkness'. Based on superior reason and heroic efforts of 'the enlightened', the force of reason will overcome the obstacles erected by those informed by unenlightened and irrational world-views. An important speech, making that claim, is one of Lady Warnock's:

"The point of what I am saying is this: We are now in the twentieth century and irrevocably as it is, part of an age where we must be allowed to take the possible risks of our own knowledge. We are not in the same position as people were in the

31 Lord Sherfield, ibid: col. 1100.
32 Lady Warnock's perspective remains central for the majority discourse throughout the debates. See for example Dr. Goodson-Wickes who states that "there are few if any absolutes in this contentious issue. If reassurance is in the air, Warnock provides it" (2 April 1990, House of Commons, vol. 170: col. 961). Also see: Ms. Richardson, ibid: col. 924; The Earl of Halsbury, 7 December 1989, House of Lords, vol. 513: col. 1046; Lord Henderson of Brompton, ibid: col. 1097. Morgan and Lee hold that "the [HFE] Act is a Warnock Act" (1991: 4).
seventeenth century. We must be able to take risks and take them into account when we pursue knowledge. [...] We cannot undo the enlightenment. In my view it would be morally wrong to place obstacles derived from beliefs that are not very widely shared in the path of science [...] ." (7 December 1989, House of Lords, vol. 513: col. 1036)

Warnock places herself, and ‘us’, categorically in a discourse of enlightenment. The pursuit of knowledge is the consequential way forward, and any attempt to stop science is a futile effort to ‘undo’ the enlightenment. This assumes that the enlightenment dictates only one direction in which to proceed: forwards, on the wave of scientific discoveries. Every idea that one could move into different directions accordingly is a ‘step backwards’.33 ‘We’, the subjects of Warnock’s enlightenment discourse, seem to be a rightly self-confident bunch of people. We know that it is alright to take risks. We can control possible negative effects of scientific progress, and our ambition must be to overcome irrational anxieties and lack of knowledge. It seems that the difference to the German view on ‘controlling nature’ could not be much bigger. In Bonn the speakers confirm again and again that ‘we’ must not delude ourselves to assume we could successfully assess all the relevant risks and then even go on controlling them (this would indeed be ‘a profound sacrilege’). Warnock and other majority speakers in London on the other hand claim that there is no reason to be overly modest about human abilities. It would indeed be “paradoxical” to assume anything but human grandeur “at a time when freedom is expanding in a glorious way in so many fields” (Lord Ennals, 7 December 1989, House of Lords, vol. 513: col. 1015).34

We can observe the majority’s attempts to draw a boundary between themselves and the anti-research minority. This is a boundary that separates progress from regression (‘undoing the enlightenment’), the scientific mindset of openness and rationality from religious intolerance and superstition, and universal reason from particularism. It has been argued previously that it is difficult to decide whether it is reasonable to fear or to

33 According to Kosselleck (1975) the assumption that not only is there progress in the history of humanity, but that we also have to believe in this progress in order for it to happen, is a fairly recent one in historical terms (1975: 408). Warnock here clearly demands this belief in the existence of progress.

34 Some speakers in London attempt to reconcile this view of humans as legitimate designers and controllers of ‘natural’ processes with Christian beliefs: “As a Christian, I believe that God gave us the ability to put our brains to good use so that progress can be made, but he also gave us the wisdom to build in the necessary safeguards to prevent our misuse of that ability” (Lord Glenarthur, 7 December 1989, House of Lords, vol. 513: col. 1042).
trust science. However, in London the majority of speakers successfully erect a boundary that neatly distinguishes between these sentiments: to be concerned about embryo research is plainly superstitious, old-fashioned, regressive irrationality - to trust science is modern, responsible reason.

The belief in progress and its other
Taking this boundary seriously would mean that there was no superstition, irrationality or religious sentiment to be found on the majority side of the fence. However, pro-research speakers who claim to be informed solely by facts and reason, regularly get carried away into mystic and enthusiastic descriptions of a brighter future: They speak of “fantastic advances” in science, of possible vaccine-based contraception as “the magic substance” (Earl of Halsbury, 7 December 1989, House of Lords, vol. 513: col. 1046), of the “scientific miracle of gene-mapping” (Lord Glenarthur, ibid: col. 1042). The “miracle of the tube baby” (Lord Ennals, ibid: col. 1015) is based on “marvellous pioneering work” (Mr. Dafydd Wigley, 2 April 1990, House of Commons, vol. 170: col. 948) by scientist who have “the highest and most sympathetic motives” (Lord Glenarthur, 7 December 1989, House of Lords, vol. 513: col. 1042). Scientists even are presented as “crusaders for those who are infertile” (Baroness Nicol, ibid: col. 1062). Viscount Caldecote shows himself very impressed by “the marvellous pictures, the superb instruments and the equipment” of an infertility clinic he went to see (ibid: col. 1056). It is evident that the claim of the pro-research lobby to be nothing but rational and cool-headed when making judgements about the nature of scientific progress is false. The pro-research speakers fall back onto the language of religion, wonder and fairy tale when they describe the work of scientists. They construct a universe that is peopled with heroic scientists, doing wonderful work and improving the lot of mankind. Scientific findings are miraculous and magic: “We are walking hopefully into the scientific foothills of a gigantic mountain range” (Sir Ian Lloyd, 23 April 1990, House of Commons, vol. 171: col. 97). This attitude has been called modern Fortschrittsglaube, i.e. an almost religious belief in progress:

“It is a form of secular religion of modernity. All features of religious belief can be found: Trust in the unknown, unseen, incomprehensible. Trust against all odds, without knowledge about the way, the how. The belief in progress is the self-confidence of modernity based on its own creational power in the form of technology.” (Beck 1986: 344 345)
One has to conclude that actually both sides to the argument share most attitudes and discursive strategies: They both heavily rely on 'facts' to justify their judgements. They both depend on science and scientists to 'explain' and define these facts. And they both make moral judgements about the nature of humans and scientific progress that go well beyond the reach of what is 'merely scientific' (also see Mulkay 1997: 105, 114). The majority's self-construction is based on a typical process of 'othering'. One set of characteristics is ascribed to the minority (irrational, religious, particular, narrow-minded) and the self is then assumed to be anything the other is not. Bauman describes this strategy - to overcome ambivalence by creating a distinct other - in terms borrowed from Schmitt:

“Only by crystallising and solidifying whatever they are not (or what they do not wish to be, or what they would not say they are), into the counter-image of the enemies, may the friends assert what they are, what they want to be and what they want to be thought of as being.” (1991: 53)35

Modern belief in “the forces of progress – with a capital ‘P’ if one wishes” (Lord Ennals, 20 March 1990, House of Lords, vol. 517: col. 234) thus per se is not essentially different from for example Christian belief in God (on science as religion see Freud 1985: 280). Both cannot claim to be per se rational, or only to be based on ‘facts’. However, the self-confidence of modernity is based on the rejection of everything that is perceived to be irrational or particular. The difference between the majority and the minority in British parliament is not that one is rational and the other irrational, but that the beliefs of the majority, supporting embryo research, are constructed not as beliefs, but as sober and rational judgements. The majority’s trust and dependency on science is held not to be as desperate and blind as religious faith, because it is seen as based on reason and knowledge. Somehow, ‘us, the moderns’ are compelled to turn our backs on religion and embrace the ‘inebriation’ of science:

“It was once said of Spinoza that he was drunk with God. There is, I accept an equal danger that modern man can become drunk with science. If I am compelled to

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35 It is also possible to describe this process with Derrida's concept of difference. Here too a term does not derive meaning from a direct relationship to the thing it represents (i.e., the majority cannot be described as more rational, because they are in the place of reason), but solely from its relationship to another signifier which is placed in a position of difference (the majority only represents reason because the minority is made to represent irrationality): “The elements of signification function not due to the compact force of their nuclei but rather to the network of oppositions that distinguish them, and then relates them to one another” (Derrida 1982: 11).
choose, as we are by measure tonight, I have no doubt which form of inebriation I prefer [...].” (Sir Ian Lloyd, 23 April 1990, House of Commons, vol. 171: col. 98)

The majority of speakers in Britain can be observed to engage in the construction of a 'we' of the enlightenment discourse. 'We' can self-confidently proceed with risky behaviour. In this discourse, we, the human subjects, have skills that allow us to understand and control the natural world, even to 'make it better', i.e. to become agents of progress ourselves. We can overcome the limits imposed on human life and free ourselves from natural restrictions. And scientists, probably more than anyone else, represent this enlightened, self-confident, rational self.

D: Returning to the law question
The final part of this chapter on legislators' perceptions and constructions of science will link the argument so far with the conclusions drawn in the previous chapter. This will also, yet again, lead to a more general argument about lawmaking in the face of modern challenges. As a reminder: in the previous chapter I concluded that lawmakers must look for a foundation from which to make their legislative decisions. I have argued that in order to legitimise their judgements, decisions made in the face of inescapable ambivalence, they turn to specific constructions of science, nature, knowledge and progress. We have seen how German lawmakers heavily relied on notions of the 'natural' order, whereas British parliamentarians more readily turned towards scientific 'facts' in order to legitimise their decision-making about the ambivalence of scientific progress. However, we have also seen, that this process was not unbroken or free of contradictions. This 'borrowing' from nature or science did not ultimately overcome the ambivalence that was supposed to be ordered out of existence. Both nature and science could be seen to be contingent, ambivalent grounds onto which to model a law. Ambivalence, once again, entered through the backdoor, just as it was thrown out through the main entrance:

"The struggle against ambivalence is, therefore, both self-destructive and self-propelling. It goes on with unabating strength, because it creates its own problems in the course of resolving them.” (Bauman 1991: 3)
In the remainder of this chapter this insight will be discussed with reference to the main question of this thesis. Can law be seen to rule over science? How do arguments about science and (its) nature come into play in law’s attempts to find a position, a ground from which to judge modern medicine? It will be argued that the British HFE Act can be read as a paradigmatic ‘modern’ law, in the way it takes up modern ideals of progress and rationality. It grounds itself in a rejection, the rejection of anything that can be constructed as ‘counter-modern’. irrationality, religious beliefs or the anxieties of the anti-research minority. The German ESchG on the other hand does not wholeheartedly embrace the rationality and ‘spirit’ of science. It is modelled onto an order that is perceived to be ‘natural’, and thus timeless. In this perspective, law is there to resist changes to this natural order. Yet, we will see once again that the rejection implied in either of these legal positions cannot be upheld without contradictions. The British discourse’s rejection of religion and beliefs is pursued quasi-religiously, the German dismissal of modern science breaks down where the ESchG denies that modern medicine necessarily relies on modern science.

The HFE Act: rejection as foundation

In both national discourses, we could see how the majority was engaged in drawing a boundary. Things on either side of that boundary were not only held to be gradually but actually qualitatively different. In Britain, we saw this distinction applied to science vs. sci-fi, to reason vs. irrationality and also to the identities of those for and against embryo research themselves. The starting point for this analysis was the question how the law manages to legitimise its decisions, here its decision for embryo research and the 14-days-limit. I concluded that the law heavily borrows from science in order to back-up its decision. However, this borrowing does not eliminate the contingent, because science on its own, firstly, cannot make decisions about the status of the embryo. Secondly, science itself plays an ambivalent part in the ambivalent project of modernity. What we therefore observed in the final step of the previous analysis is that the pro-research majority expressed a quasi-religious belief in progress, coupled with a denial that their judgment is based on anything but cool-headed rationality. Feelings, irrationality, lack of judgment are ascribed to the minority position. I have described this dynamic as the process of ‘othering’.
I argue that the problem of positioning, the inability to make a clear-cut statement about the nature of law, is overcome through this process of rejection: The HFE Act can be seen to imply the above exclusion of ‘irrationality’ when at the same time depending on this excluded notion as a reference point to ground itself. We can conclude that the HFE Act is grounded on a rejection. Fundamental ambivalence, the lack of solid ground from which to legislate in the face of ambivalence, is turned into a brave assertion of difference: It is those who oppose embryo research, those who fear the consequences of technological progress, who do not have any solid ground from which to proceed. They argue on the basis of superstition, religion or fear, all of which are unsuitable grounds for the law. Modern law has to reject this mind-set as grounds for itself. It is this rejection on which the HFE Act can be seen to be built. And this rejection is what makes the HFE Act a ‘modern’ law.

According to Warnock and the majority, the law is everything the anti-research minority is not. We have seen, however, that the pro-research majority do not come up to the standards they erect: they are not entirely rational; they themselves display signs of religious belief, unfounded hopes and ‘irrational’ excitement about scientific discoveries. They at the same time reject any transcendent ‘nonsense’ and subscribe to a transcendent view of science as the driving force of modernisation, leading away from a dark and oppressive past, into a brighter future. Fitzpatrick argues that the tension revealed in this analysis is foundational for modern law: “Modern secular law takes its identity in the rejection of transcendence” (1992: 10). Law in modernity claims to be no longer based on religion, on God’s will, or on the law of nature. Law is not particular, situational or irrational:

“Law is imbued with this negative transcendence in its own myth of origin where it is imperiously set against certain ‘others’ who concentrate the qualities it opposes. Such others are themselves creatures of an occidental mythology, a mythology which denies its own foundations by consigning myth in general to the world of these others.” (ibid)

Read in this way, the ‘victory’ of the pro-embryo-research majority could then also be read as the assertion of a certain way of conceptualising law. The legislative debates in London can be understood as an affirmation of modern law’s “mythology against myth”
In the debates about embryo research, through ideas about minority concerns, reason and rationality, modern law is re-enacted as belonging to a sphere in which there are no irrational beliefs, and where judgments are derived through the cool appreciation of ‘facts’ only. Those opposing embryo research are ‘the other’ of this thoroughly ‘modern’ law. Their concerns mean that they are about to ‘undo the enlightenment’. Their anxieties about scientific progress and the modernisation of human reproduction are deemed irrational and based on religious dogma. In the drama of enacting modern law, these views can be tolerated as ‘private morality’, but they cannot form the basis of modern legislation.

We can now see that a certain way of talking about the law, the enactment of law’s ‘mythology against myth’, helps the British legislators to overcome concerns about progress and science. At the same time, a certain way to talk about science and about reason and irrationality helps the lawmakers to ‘ground’ their law. The majority discourse about science (and about reproductive technologies as science) gives legitimacy to the legislative decisions made. The ambivalent and contradictory concerns about the beneficial and dangerous potential of science, about too much or not enough modernisation and progress, can be dissolved into an (anti)mythological conclusion. This conclusion interdependently constructs opposed roles for those who favour and those who oppose embryo research and for the law. The law occupies the space of progress and what is deemed to be modern: rationality, optimism and openness; it signifies the absence of dogma or superstition.

It might seem peculiar to argue that the lack of any unambiguous ground onto which to build the law appears to be overcome with ‘an absence’ or ‘a rejection’. However, thinking through the inescapable ambivalence of processes of modernisation, the above analysis suggests that this is what happens in the debates about the HFE Act. Using positivist notions of lawmaking does not reduce law’s need to be legitimate. We have seen how the lawmakers, in order to find legitimacy for their decision-making, turn to science as a provider of ‘facts’ and arguments. However, it has become clear that this incorporation of science into legislative reasoning cannot do away with ambivalence. Science, too, remains contingent. To ultimately proclaim that the law is on the safe side
requires the exclusion of concerns and anxieties that are constructed as irrational. This exclusion displaces transcendence and lack of rationality and knowledge onto the law's other: the minority of those who oppose embryo research. It is in this dependence on the contrast between them and us, between them, who 'want to undo the enlightenment', and us who are 'walking hopefully into the scientific foothills of a gigantic mountain range' that the lawmakers can find a solid enough ground for their decisions. It is on this rejection that they can ground the HFE Act, and that modern law "takes its identity" (Fitzpatrick 1992: 10).

The German case: rejecting science, fictionalising medicine
I have argued above, that where British lawmakers turn to science and the 'facts' provided by science, German legislators rather turn to 'nature'. There are no particularly positive images of science and scientists available in the German debates. Accordingly, the dynamic outlined above, by which the law can ground itself through, firstly, identifying with science and its rationality and, secondly, by constructing this rationality as the only 'reasonable' because universal and objective one, is not available in the German discourses. The German ESchG therefore cannot be said to be grounded on the above rejection of modernity's 'other': anxiety, ignorance or religious belief. On the contrary, the belief in progress displayed in the British debates is at times explicitly critiqued in the German discourses. Some of the German contributions sound like a direct dismissal of the British 'solution' to the dilemma of grounding law. Mr. Engholm argues:

"I doubt whether it is appropriate to always label those who are critical as ideological. Or whether it is not the case that those who have a total belief in progress are not in a way far more ideological [...]. We should be very careful not to sacrifice our concerns on the altar of a false belief in progress […]" (25 November 1988, Bundesratsprotokoll 595: 435/436)

But what do the German discourses offer as a means of solving the problem of legitimate decision-making about scientific and medical progress? What is the German alternative to the path chosen by the British majority and the HFE Act? We have seen above that the German discourse rejects any ambitions to 'manipulate' or control nature, and this includes human nature. This leads to a deep mistrust of science, of the scientific mind, which is always attempting to decipher, to understand and to establish control
over natural processes. Following the above argument about rejection, one could argue that the German discourse rejects science as a foundation for its law. If science was allowed to proceed without boundaries, the argument goes, human ‘nature’ and the natural order would come under attack, and that would mean that law had failed. Good laws, according to this perspective have to resist the erosive forces of science; they have to preserve both human nature and natural law that predate scientific innovations. I suggest that this position be read as a ‘counter-modern’ stance, based on the rejection of the dehumanising and alienating potential of permanent progress.

“It is progress [Fortschritt] that we have made a decision for retrogression [Rückschritt]” (Dr. Peters, 22 September 1989, Bundesrat 604. Sitzung: 356)

And yet, as we have seen in the above case of the British HFE Act, this rejection never works without contradictions - it can never be complete. In the above case of the British discourse we have seen that the majority’s claim to be fundamentally different from the minority, to ground their legislative decision-making on nothing but hard facts and rational judgement, was wrong. The rejection of beliefs, irrationality and anxiety implied in the majority discourse helped to justify the law, but it was essentially fictional. Returning to the German debates we can see that here too the rejection of modern science is not coherently maintained in either the legislative debates or the ESchG itself. The discursive boundary drawn between a ‘natural’ order (humane and safe) and modern science (inhume and risky) cannot ultimately be sustained: the discourse and the law embrace medicine and its notion of helping the suffering. This acknowledges that nature is not only humane and safe. Illness, infertility, disability are all instances where the lawmakers want to intervene, want to overcome the limits of the ‘natural’.

We have seen in the British case, that the majority discourse implied an element of denial\(^\text{36}\): the denial that what is rejected (irrationality, belief) and what is embraced (belief in progress) are not fundamentally different. We have further seen that the majority ultimately rely on what they reject. The same can be said for the German debates and the ESchG. Here, too, we can conclude that the dependence of modern medicine on scientific progress is denied. And that therefore what the Act legitimises is

\(^{36}\) On law’s denial of problems regarding its own legitimacy also see O’Donovan 1993c: 434.
not fundamentally different to what it de-legitimises, but actually in a relationship of
dependence. While the British HFE Act and its discourse is less rational and 'scientific'
than it 'wants to be and wants to be thought of as being' (Bauman 1991: 53), we could
argue that the German ESchG is less 'natural' or 'counter-modern' than it is presented.
Like the HFE Act, a typically modern law, the ESchG is based on a rejection and a
fictionalised difference between itself and its other. It is the fiction of the difference
between safe medicine and unsafe science. Rejecting yet embracing scientific progress
and modernisation, the law is grounded on the fiction that you can have your cake and
eat it.

Conclusion and outlook
This chapter investigated how lawmakers in Germany and Britain talk about science and
medicine, when they discuss the effects of technologies of reproduction. I have shown
that attempting to justify their legislative decision-making, they borrow arguments
from science and medicine, the very practices they set out to control. However, this is
not an utter failure of law to find an independent foundation for its decision-making.
Law is not simply replaced by science. We do not have a simple rule of scientific
'facts'. Rather, in its borrowing from science and medicine, law also engages in
constructions: the construction of legal facts and fictions, the construction of scientific
rationality, of medicine as 'doing good' and so on. Law thus gives way only in so far as
it claims space, it only can ground itself in so far as it opens up, it controls through
giving in.

When trying to balance the incompatible (the deep fears and high hopes implied in
science), law does not coherently cut through the dilemmas and reach seamless
solutions. Rather, we have seen that fiction and denial play an important role for both
national discourses and their attempts to achieve closure and legitimacy. Returning to
the wider perspective of reproductive technologies as instances of modernisation, and
thus reading the debates once again as concerned with the 'consequences of modernity'
(Giddens 1990), we can draw conclusions for both pieces of legislation, and for both
legislative approaches. The debates about the HFE Act seem to have lead to a typically
'modern' solution: the majority claimed to be the sole owners of reason and rationality,
defending the modern spirit against irrational trends to ‘undo the enlightenment’. And yet, the fundamental difference between their own and their opponents’ mindset or rationality is fictionalised. Those debating the ESchG claim to have reached the opposite conclusions: they insist that they made a principled stance against the erosions and dangers of permanent scientific progress. And yet, the dam against the perils of modernisation has a hole in it that is so massive it looks like a floodgate. Through embracing modern medicine’s desire to ‘help’, modern science and its permanent progress are firmly part of the ESchG’s legislative framework.

In the next chapter, the discourse analysis will move onto the question of how the two laws conceptualise the users of reproductive technologies, mostly women. This will be read as the two Acts’ construction of their ‘subjects’, the subjects of law. Of the two strands of modernity, which featured in earlier parts of this thesis (a claim to knowledge and individualisation), the following chapter will turn to the second strand, the dynamics of individualisation. This allows us to see how the law, when confronted with the dangerous and promising potential of individualisation processes, conceptualises the individual. We will see again that it is oversimplified to say that the law simply is swept away by the dynamics of reproductive individualism. Rather, we can see how the law is engaged in a process of construction: only certain subjects and their wishes are listened to by the law. The law, by constructing women either as consumers, patients, victims or perpetrators, constitutes a certain legal subjectivity for those using technologies of reproduction.
Chapter Five: Parliamentarians and Patients – Modern Subjects

“If we look upon freedom with the eyes of tradition, identifying freedom with sovereignty, the simultaneous presence of freedom and non-sovereignty, of being able to begin something new and of not being able to control or even foretell its consequences, seems almost to force us to the conclusion that human existence is absurd.” (Arendt 1998: 235)

A: Introduction
This chapter will investigate how the lawmakers in both national Parliaments conceptualise the (mostly female) users of reproductive technologies. Their discourses will be read as constructions of the legal subject. Making decisions about the benefits and problems of technologies of reproduction necessitates a distinct construction of the legal subject. Only when decisions have been made about the trustworthiness, responsibility or vulnerability of the users of fertility services, can the law effectively position itself with regard to these technologies. Once again, based on a close reading of the particular debates, I suggest a more general perspective on them: I propose that the debate about the subject of law, too, is a discourse that is concerned with justifying legislative decision-making. Constructing its subject properly enables law to claim legitimacy. In some ways, concerning itself with the ‘individual’ seems to “save law from its nihilism” (Murphy 1997: 195).

This chapter consciously chooses to focus on women, both as users of the technologies and as actors in the debates themselves. The discourses in the two Parliaments to a large extent are concerned with women (their decision-making, their supposed wishes, their biology). To a lesser, but still significant extent, they are also discourses by women. This chapter will investigate how the female MPs position themselves within the controversies about women. In fact, this is where the biggest difference turns out to lie between the two legislative discourses: the strategies and arguments pursued by the women of the ‘left’ (in the broadest possible sense) in both national contexts could not be more different.

This approach recognises that there is not just one monolithic legal discourse about women. Later on in this chapter, ‘mainstream’ constructions of femininity will feature prominently. Yet, the statement that “the law sees and treats women the way men see and treat women” (MacKinnon 1989: 161/162) without further qualifications seems oversimplified. This chapter wants to be more specific. It wants to recognise some different voices, and focus on a specific instance of legislation.
In summary, the 'feminists' (defined broadly as female Parliamentarians who criticise the majority discourse about women\(^2\)) in London argue that women are autonomous subjects. They insist that the law has to acknowledge women's autonomy and has to allow them to make their own decisions. They thus promote a liberal construction of both the feminine subject and the law. The feminists in Germany argue that women are made the victims of ambitious scientists and doctors. The women of their discourse are less than autonomous subjects; in fact the liberal discourse of autonomous decision-making is rejected. They therefore promote a non-liberal construction of both the female users of reproductive technologies and of the law governing fertility services. Their position is partly 'paternalistic' (the Socialdemocratic approach), partly 'radical' (the Green approach).

Yet both groups of female MPs also share some aspects of the discursive contexts in which they act: both are confronting a mainstream discourse which focuses its anxieties about reproductive freedom and individualism on women's reproductive decision-making. Both are dealing with conservative majorities that at times utilise the strategy of medicalisation to deal with the concerns about reckless individuals eroding the traditional basis of family life and child-rearing (on conservative family law discourses see: Douglas 1990; David 1986; Lewis and Cannell 1986; Thomas 1993). Following the female parliamentarians' arguments will allow us to see how their contributions are shaped by the parliamentary majority, but also shape some of the legislative outcomes of the debates.

The analysis in this chapter will follow this outline: First, I will introduce the majority or mainstream conceptualisation of the 'problem' of individual reproductive decision-making. Secondly, this chapter will look at the feminist responses to this mainstream discourse: in Germany there is a concern about possible exploitation of women, and a model of 'help' and protection. In Britain, there is an emphasis on women's freedom and autonomy and a rejection of legal or medical paternalism. In a third step, the significance of debates about abortion will be investigated for the respective national discourses. It turns out that abortion debates play an important role in shaping feminists' contributions to debates about the so-

\(^2\) For (only a few of the very many) definitions of feminism in critical legal literature see: Davies 1994: 172 ff; Lacey 1998: 3; Radin 1996: 149; MacKinnon 1987: 77.
called new technologies of reproduction and about women as legal subjects. Furthering the general argument of this thesis, this chapter will address the question how the law achieves a distinct position with regard to processes of individualisation by constructing women, the main users of reproductive technologies, in a certain ways in order to position itself with regard to these individualisation processes.

**B: The mainstream – medicalising the subject**

In Chapter Three, outlining the conflicting concerns that the legislators in both Parliaments struggle with, we have seen that new reproductive technologies have the potential to undermine 'traditional' or 'natural' family forms. Technologies of reproduction can reshape kinship; they highlight the problem of the “relationality” of the “Euro-American person” (Hirsch 1999b: 125; also see Morgan 2001: 80/81). They force us to investigate the role of biology for relationships, the role of sexuality for procreation, and of procreation for sexuality; they de-naturalise what we take for granted about families. Who is related to whom, who is someone’s parent, what is the meaning of one’s ‘own’ child? Individuals, through their decision-making about reproduction and family forms, with the help of technologies of reproduction, can de-limit the notion of the family (Morgan and Douglas 1994). Individuals’ reproductive decision-making has been identified as a source of anxieties:

"The new reproductive technologies might in one sense pave the way for extended family ties and a new formulation of parenting which goes beyond the model of the nuclear family. It is not surprising, however, to find that this very potential has been perceived as one of the greatest dangers of the new technologies." (Milns 1995: 81)

The following two quotes serve as a reminder that this anxiety is frequently expressed in the debates about the ESchG and the HFE Act:

"Many of us –from all parties – have asked anxiously whether the new methods of artificial insemination force us to drop our notion of family, fatherhood or motherhood. [...] We don’t want that to happen. We want terms like fatherhood and motherhood to be filled with the contents they used to have." (Dr. Däubler-Gmelin, 24 October 1990, Plenarprotokoll 11/230: 18209)

"People have an absolute right to be themselves, to reject contact with men or to shun any physical contact with them. That is their choice. But [...] child bearing is not a right. It is part of the unfathomable life force. That is why men and woman together

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must take responsibility for the well-being and love of the child. In so saying, I believe that that right cannot be extended in a way that suggests to people that as individuals they can make that choice without understanding those deep, often dangerous, but difficult choices.” (Mr. Blunkett, 20 June 1990, House of Commons, vol. 174: 1021)

The second quote also displays another characteristic of the mainstream discourse about family forms, children and tradition: the anxiety actually stems from women’s “dangerous choices”. When David Blunkett says ‘people’ have the right to not want to sleep with men, he is actually talking about women, and single women at that. Women as the main users of technologies of reproduction are the focus of the mainstream’s discourse about dangerous and destructive reproductive individualism or consumerism (more about this below).

**Medicalisation**

The national discourses differ in many ways, yet there are also similarities. Both discourses use the strategy of medicalisation to deal with the dangers of individuals’ reproductive decision-making. One way of controlling the destructive potential of technological progress in the field of human reproduction is to take away the decisions from the individual who might ‘want’ treatments and to shift the decision to a responsible authority that will judge whether the individual ‘needs’ treatment. In the case of new reproductive technologies this strategy involves leaving the decision-making not to the women themselves, but to doctors and the medical profession. This is the strategy of medicalisation. In the context of medicalisation, users become patients, unwanted childlessness becomes infertility and wishes become medical needs:

“By conceptualising individuals wishing to use the technologies of artificial procreation as patients, the law does not thereby conceptualise them as free consumers.” (Kratz 1997: 87)

Medicalisation is based on two elements: firstly, a problem is constructed as a biological one, eclipsing social or cultural dimensions. Secondly, doctors or medical experts are given the power and authority to judge whether we are dealing with one of the cases that require medical help for this medical problem. The doctor is thus placed in a powerful position of responsibility: on the one hand, he has to certify that the case in question is based on a real biological problem, and not just the case of a woman who fancies IVF,
because for example she does not fancy men. On the other hand, the doctor has to "make decisions beyond the purely medical" (see Susan Millns (1995) who quotes from the Warnock Report, DHSS 1984: 12) and has to for example decide whether a woman (and her 'partner') would be good parents, or whether they both are responsible and trustworthy individuals.5

Regularly, there is a third element to the strategy of medicalisation, and this element will feature prominently in this chapter: a focus on women and their special responsibility for all matters reproductive and moral. This "thorough medicalisation" of women's bodies is "carried out in the name of the responsibility they owe to the health of their children, the solidity of the family institution, and the safeguarding of society" (Foucault 1990: 146/147).6 One typical example for this strategy of medicalisation from the German debates:

"The wish for an artificial insemination without medical necessity is not to be given into, because it indicates a disturbed relationship of the couple which might have negative effects for the welfare of the child. [...] Especially, it has to be prevented that IVF is offered if the real cause of a woman's infertility is not in the somatic, but in the psychological sphere." (Socialdemocratic Bill, 16 November 1989, Bundestagsdrucksache 11/75710: 10/12)

The medical expert is given the responsibility to prevent abuses of new reproductive technologies: women must only be allowed access to treatments if they are biologically infertile. Only biological conditions for unwanted childlessness are seen as legitimate reasons for medical treatment.7 Unwanted childlessness is constructed as a mere medical problem, where it is held to be possible to distinguish real biological causes, and unreal psychological factors.8 Further, in this statement it is only women's desires and medical conditions that are problematised. Men's wish for a child and men's physical fertility

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5 On medical knowledge resting on a "degree of trade-off between technicality and indeterminacy", see Kelleher et al 1994: xii. The moral nature of many decisions that are labelled as medical is also emphasised by Dingwall. For him, "the medicine man is the ancestor of most professions, the specialist in the prevention of cultural disorder" (1994: 54).

6 Many others have found medicalisation to be a 'gendered' strategy. See for example Ehrenreich and English 1979; Smart 1989: 113.

7 The exclusive focus on biological infertility allows the German speakers to never even mention a possible use of new reproductive technologies by lesbian women. Although this question never gets openly debated, it is clear that all parties are against this option.

8 Raymond shows how problematic the definition of infertility is, and how a mere medical conceptualisation serves as a basis for medical interventions (1993: 2 – 7).
problems do not even get mentioned. It is the doctor's responsibility to prevent abuses of reproductive technologies through judging the merits of each case.

A similar focus on 'biological reasons' for technological interventions can at times be found in the British debates, too. The Warnock Report states that surrogacy as such should not be criminalised. However, there was agreement "that surrogacy for convenience alone, that is, where a woman is physically capable of bearing a child but does not wish to undergo pregnancy, is totally ethically unacceptable" (DHSS 1984: 46). This quote clearly displays a similar concern about women's dubious motivations and the belief that biological criteria can help to distinguish the ethically acceptable from the 'totally ethically unacceptable'. The belief that doctors know better than individuals how to use new reproductive technologies is also displayed when Warnock discusses the testing of foetuses for sex chromosomes, in order to prevent gender-specific disabilities:

"We see no reasons why, if a method of selecting the sex of a child before fertilisation is developed, this should not be offered to couples who have _good medical reasons_ for choosing the sex of their child. But if an efficient and easy method of ensuring the conception of a child of a particular sex became available, it is likely that some couples would wish to make use of it for _purely social reasons_. Such a practice would obviously affect the individual family and the children involved, and would also have implications for society as a whole." (DHSS 1984: 51, _my emphasis_)

What all these quotes have in common is that they want to move away from individuals' decision-making and towards expert-lead judgements within the framework of medicalisation. The possible marketisation of human reproduction is superseded by regulation that relies on medical models of reality and decision-making (also see Brazier 1999: 178). Medicalisation plays an important part in this regulation of reproductive individualism.

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9 This despite the fact that many women receive 'treatment' because their male partner suffers from fertility problems. At the time of the debates there were no treatments for male infertility, apart from 'treating' a man's female partner with IVF to increase the chances of conception. Also see Dewar 1989: 116.

The German mainstream: concerns about 'split motherhood'

Whereas concerns about the detraditionalising, de-limiting potential of reproductive technologies are widely shared by both national discourses, the actual legislative focus is on a different aspect of this potential in both Parliaments. In Britain, the speakers argue about single women and their access to fertility services. In Bonn, no one openly criticises the belief that only women in long-term heterosexual partnerships should have access to assisted conception. On the contrary, even the Socialdemocratic position that unmarried, but cohabiting, women should have access does not make its way into the law and is rejected by the conservative majority in Parliament.

The ESchG itself does not contain a provision for access, but together with the guidelines of the Bundesärztekammer, the law effectively prohibits the treatment of unmarried women. As no one demands access for 'single', let alone lesbian, women, their exclusion is not really controversial in the German parliamentary debates. Controversial is, however, the problem of split parenthood, i.e. the question of egg-transfer and sperm-donation. The ESchG allows sperm- and prohibits egg-donation and embryo-transfer. The distinction between the two practices remains controversial throughout the debates. Split parenthood is such a problem for the parliamentarians that they cannot agree on how to treat split fatherhood (even though they do not outlaw it). The roles of both the sperm-donor and the husband of the woman who receives treatments were not defined in the law, because they remained contentious. And even in 1998, when child law underwent a major reform, the question whether the husband who agreed to a sperm-donation could later deny his fatherhood was not solved (see Chapter Seven). Similarly, the status of the sperm donor remained unclear.


12 In the debates of both Germany and England the absence of a father figure for the upbringing of children is seen as dangerous and destabilising. "The presence of a father continues to be seen as a signifier of stability, 'normality' and, crucially, the 'healthy' adjustment of children. Ultimately, even riots and urban disorder have been laid at the door of the absent father" (Collier 1995: 201).

13 Also see Keller et al who argue that there might be exceptions to the requirement of marriage (1992: 91). However, Hagazussa, a lesbian interest group, seem to think that practically these exceptions do not play any role (1999: 27, 44).
However, it is agreed by a majority that egg-donation, unlike sperm donation, must be outlawed. This is how the Government justifies its non-intervention in the case of sperm donation:

"The sperm-donor wants to help a childless married couple to have a child [...] It can be assumed that he acts on the basis of altruistic motives. According to the declared will of all those involved in the artificial insemination he shall not be given the role of a social father. The position of a sperm-donor thus differs essentially from the status of a father due to natural conception." (23 February 1988, Bundestagsdrucksache 11/1856: 11)

On the other hand, the Government argues with regard to egg-donation that it would be problematic for the egg-donor that "a child that 'genetically belongs' to her, belongs to another woman". The statement continues:

"It cannot be entirely ruled out that the woman might in such a case [another woman lives with a child that is 'genetically hers'] seek to get involved in the fate of the child born to the other woman. This might cause significant mental [seelische] conflicts. The Bill assumes that the risk of negative effects of so-called split motherhood is not acceptable." (25 October 1989, Bundestagsdrucksache 11/5460: 7)

This obviously contradictory standpoint with regard to male and female gamete donation is frequently criticised. The SPD demands a complete prohibition of both egg- and sperm-donation, based on the significance of genetic parenthood for the well-being of children. Green members of Parliament are not involved in these debates as they favour a total prohibition of any use of new reproductive technologies. Thus, while the then opposition parties believe that egg- and sperm-donation are identical practices that merit the same legislative response, the majority in Parliament insists on the distinctiveness of the two practices:

"Split motherhood has been excluded. This is because a child born in this way has two parental figures [Bezugspersonen]: on the one hand there is the woman who donates the egg, and on the other the woman who carries the child to term. Now try to compare the sperm-donor to this situation. I cannot see the comparability of these situations, because the sperm-donor does not have the same relationship to a child that a woman has." (Dr. Jahn, 24 October 1990, Plenarprotokoll 11/230: 18217)

14 It is problematic to talk about women outside of heterosexual cohabitation as 'single', as this makes women's sexual and social relations outside of heterosexual, 'stable' relationships invisible. See on the debate on alternative motherhood: Zipper 1987; Hagazussa 1999.
The different treatment of the two practices rests entirely on the assumed stronger motherly instinct of women. Women could not bear to be separated from 'their' child. Unlike the argument about the sperm donor, with regard to women 'motives' or the 'declared will of all the parties involved' are not mentioned. It seems that men can make up their minds and stick to (possibly) difficult arrangements, whereas women are the victims of nature and circumstance. Moral agency, responsibility for one's decisions, is thus a deeply gendered concept in the context of the German mainstream debates about split parenthood. Possible emotional conflicts for sperm-donors who cannot cope with the distance between them and 'their' children are not mentioned. Fatherhood is obviously constructed as less compulsive than motherhood. It contains an element of choice, it is less dictated by 'nature' or 'instinct'. Men can choose whether they want to feel as fathers or not, women can't. And even if women think that they know what they are doing if they donate some eggs, they have to be protected from the false assumption that they would be able to distance themselves from 'their' children.

The concern of the British mainstream discourse: single mothers

On the other side of the channel, in London, the potential of reproductive technologies to disrupt traditional family forms and human reproduction is also seen as highly problematic and dangerous. However, the main concern of the debates in Parliament is not the 'splitting' of parenthood. The equal treatment of egg- and sperm-donation does not

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15 Seelisch derives from German die Seele [the soul]. Mental is thus an insufficient translation, as it does not speak of a spiritual aspect in human nature.

16 On the construction of men as moral agents and of women as victims of circumstance and 'tradition' (in cases of duress), also see: Lim (1996).

17 No-one in the debates mentions the actual differences between egg- and sperm-donation: Sperm-donation is a harmless, possibly even modestly enjoyable, experience. Egg-donation is not free of risks for the woman, and is a painful procedure. Further, egg-donors often are not altruistically acting, 'third parties', but are themselves trying to conceive through IVF. Their position is thus more susceptible to medical influence or exploitation (also see Bennett 1997). These factual differences between egg- and sperm-donation do not seem important to any of the parties of the debates. The only reason given for the different treatment of both practices is that women could not bear to be excluded from mothering one of 'their' children.

18 Slaughter speaks of the law's general assumption that women 'compulsively' seek motherhood (1995: 57). However, the law's assumption is inherently contradictory as it assumes that all women 'naturally' desire motherhood, but that in some women (lesbians, 'single' women, women who are 'too' young or 'too' old) this desire is dangerous and destructive (see Stanworth 1987: 15; further: Thomson 1997).
not attract any debate whatsoever. In London, the most controversial aspect of a potential disintegration of parenthood or families is not the question of split motherhood, as it is in Germany, but the issue of access to fertility treatments for 'single' women. Many hours of debates are concerned with this question. The legal 'solution' in the end does not categorically exclude women without male partner from treatment. However, when considering treatment for a woman, the doctor needs to take into account "the welfare of any child who may be born as a result of the treatment (including the need of that child for a father)" (s 13 (5) HFE Act).

S 13 (5) represents a 'compromise', after Lady Saltoun's amendment in the House of Lords (6 February 1990) to make the provision of treatment for unmarried women a criminal offence was narrowly defeated. Speakers supporting such an amendment stressed the importance of the traditional family for the welfare of children and the stability of society. The other side of the argument emphasised women's 'right to choose' and the responsible nature of women's decision making. In the end the majority adopted an approach that resembles the 'compromise' on abortion. It was held that, whether desirable or not, unmarried or even single women would go ahead and have children anyway. This meant that they would not get advice or counselling, and that they entered the risk of contracting a sexually transmitted disease for themselves and their children. Bringing these women into the reach of the law, by theoretically allowing them to receive treatment, could avoid "problems such as HIV that would occur with back-street treatment" (Mr Turnham, 15 May 1990, Standing Committee B, vol. 1: 152). Virginia Bottomley explains this strategy:

"We must aim to bring such people into the system and not prohibit their receiving appropriate treatment." (ibid: 156)

19 Both practices, together with embryo-transfer and surrogacy (itself rather controversial) are sanctioned by the HFE Act 1990. Warnock simply states: "Since we have accepted AID [Assisted Insemination by Donor], it would be illogical not to accept egg-donation, notwithstanding the minor surgical risk to the donor inherent in egg recovery" (DHSS 1984: 34). Unlike the German debates, the British discourse thus mentions the actual differences between egg- and sperm-donation (minor surgical risks), yet comes down on the side of treating both practices the same, due to reasons of logic.


Even the terminology of 'back-street' services is borrowed from the debates about abortion where the 'pragmatic' majority position in Parliament was that abortions could not be entirely avoided, and that thus the objectives of the pro-liers were better achieved through 'bringing women into the system'. Parallel to the abortion debates, women's desire for a child without a suitable long-term partner was seen as "a problem which was better dealt with by medical regulation than by criminal prohibition" (Sheldon 1995: 111). The doctor in both cases is constructed as a "parallel judge [...] who could administer and exercise power more quickly and effectively" than legal agents themselves (ibid; also see: Sheldon 1993).

Constituting the subject: gender, medicine, paternalism
In the introduction to this chapter it was outlined that the debates about dangerous reproductive individualism also can be read as the construction of law's subject. Only when the users of technologies of reproduction are configured in a certain way can the law position itself effectively towards the modernising potential of reproductive technologies. After we have looked at the mainstream legislative discourses in both countries we can now see that the majority of lawmakers in both national contexts are worried about this individual and its decision-making. We also have seen that this concern is deeply 'gendered': on the one hand, women's reproductive decision-making is seen as somehow more important and thus more dangerous. On the other hand, there is less certainty about women's moral soundness and agency: women's reproductive freedom is seen as more dangerous than men's. A woman disposing of her mother-role is fundamentally more dangerous than a man disposing of his father-role. We can identify a special responsibility of women for defending tradition or 'culture' against the pressure of modernisation that might not take as extreme forms as in the following statement, but that is nevertheless significant:

"Women are the standard-bearers of the nation' culture It is often only women, and not men, who are commanded to uphold tradition. By putting women back in their place (veiled, obedient to father, husband or son, publicly punished even unto death

23 Davies prefers the term "sexed", as it clearly treats 'sex' and not just 'gender' as a social construction (1997: 31). Also see: Butler 1990.
24 See for example Anthias and Yuval-Davis (1992) who speak of women as 'boundary markers' between communities or cultures.
for presumed sexual transgression or expressions), men seek to put the world back in order, safe and secure despite rapid changes and economic disorder." (Bulbeck 1998: 29/30, emphasis in the original)

In the context of our debates, the focus on women's responsibility for securing the normalisation of the nuclear family is justified discursively with women's biology. It seems that, as women are culturally more firmly associated with the concept of nature, this "women's identification with the natural realm" (Wajcman 1991: 6) makes it more 'unnatural' if women dispose of or alter traditional reproductive roles. And indeed, it is the changed biographical behaviour of women that has generated some of the major processes of individualisation and detraditionalisation in this century. Women using contraception, delaying the birth of their children, women having sex outside marriage, women going out to work, women leaving unsatisfying relationships, all these decisions by women have played a major role in throwing the family, the welfare state, the arrangements for child-care and for paid work, and also the law, into a major crisis. Whereas men's individualisation is seen as an essential part of what modernity is about, women's individualisation, their desire to shape their own biographies free from restraints of nature or tradition, is more problematic:

"What is new is the individual female biography, freeing the woman of family duties, and sending her out into the world with an impetus which as been increasing since the 1960s. To put it even more pointedly, as long as it was only the man who developed his potential and the woman was complementarily obliged to look after him and others, family cohesion remained more or less intact [...]" (Beck and Beck-Gernsheim 1992: 61, emphasis in the original)

If the family, childcare, the work-place and thus the law are based on more limited choices for women than for men, then women breaking supposed biological ties are indeed more threatening then men doing the same:

"The procreative autonomy of women seems in most countries to function to destabilise traditional legal concepts of family, perhaps revealing the extent to which those concepts have all along been patriarchally grounded." (Kratz 1997: 91)
Women as users of new reproductive technologies: either invisible or problematic

We have just seen that women's use of new reproductive technologies is talked about as highly problematic in both legislative discourses. This section will introduce another feature of the mainstream discourse about women and new reproductive technologies. In a paradoxical way, the discourses that on the one hand are obsessed with women's role and responsibility on the other hand seem to ignore women's actual participation in technologies of reproduction (see Hartourie 1990). When the speakers describe the technologies and their working, women are curiously absent from those descriptions.25

This is particularly the case for the British discourse (see Thomson 1998: 156). The German debates, too, at times eclipse women's actual and physical involvement in the procedures. However, as there is a more prominent concern about the 'artificiality' of the procedures, risks for women and their bodies feature more regularly in the German debates. For the British discourse, s 1 (2) HFE Act serves as a good example of the tendency to take less than seriously women's participation in reproduction:

"This Act, so far as it governs bringing about the creation of an embryo, applies only to bringing about the creation of an embryo outside the human body [...]"

Embryos are 'created' outside 'human' bodies, they seem to come from nowhere, the new thing about them seems to be that they are outside the 'human' body, as if they had ever been elsewhere than inside women's bodies. Embryos have always been outside men's bodies. According to Steinberg, this means that "embryos are defined without reference either to women's reproductive processes and bodies or to the sequence of events through which they come to exist [...] Women are the absent referents" (1997: 142). This eclipsing of women and their lived experience goes even further when women entirely disappear behind embryo-focused concepts of female body parts. For example Warnock writes about the embryo:

"A human embryo cannot be thought of as a person, or even as a potential person. It is simply a collection of cells which, unless it implants in a human uterine environment, has no potential for development." (DHSS 1984: 62, my emphasis)

Warnock manages to make the woman entirely invisible behind the incredible term 'human uterine environment'. Another term denying women's physical experience of reproductive technologies is the talk of 'egg-collection'. Women's eggs do not grow on trees; they need to be surgically extracted. One would not talk about 'appendix-collection' either. The description of 'egg-collection' also does not mention the use of super-ovulation drugs, or the difficulties of the procedure:

"The concept of IVF is simple. A ripe human egg is extracted shortly before it would have been released naturally [...]. The development of laparoscopic techniques during the 1960s made the collection of the egg, in cases where the ovaries were accessible, relatively easy [...]. The real difficulty related to the implantation of the embryo in the uterus after transfer." (DHSS 1984: 29/30, my emphasis)

This and other descriptions of what goes on during IVF treatments oversimplify and render harmless the actual procedures and ignore women's physical involvement in the practices (also see: Spallone 1987: 173; Raymond 1993: xv; for women's lived experience of IVF see: Franklin 1997; or the earlier study of Klein 1989).

In the debates of both Parliaments it can also be observed that many speakers often do not talk directly of women. They tend to talk of couples, families and babies. For example Baroness Elles introduces herself as a "simple mother and grandmother", but then does not actually talk about women, "after all, we are talking about children and births" (7 December 1989, House of Lords, vol. 513: col. 1075). The Lord Chancellor outlines the interests that need to be 'balanced' by the HFE Bill. He only mentions families, couples and embryos (ibid: col. 1011). It seems that this talking of 'couples' and 'families' renders discursively safe the problem outlined above: if women's reproductive autonomy is fundamentally threatening, it is simply 'safer' not to talk too much about women wanting or receiving treatments (also see Roach Anleu 1997: 105). Talking about couples and families shows that the women in question are 'good' women. Their use of new reproductive technologies is not to be feared too much.

Women themselves tend to get mentioned in two contexts: either they are simply mothers, or their behaviour is problematic. One example for the first attitude that sums up much of what shapes the mainstream debates is expressed by the Duke of Norfolk: "I fully support all efforts to relieve childlessness. As a father and a grandfather, I am in
favour of motherhood and babies, I am also in favour of scientific progress and medical research to conquer diseases [...]” (ibid: col. 1032). Glad as we might be that someone is ‘in favour of motherhood and babies’, this mentioning of women (as opposed to ‘couples’ and ‘families’) is not exactly based on a construction of women as the central characters of the debates. Women, however, do become the momentary focus of attention, if their reproductive behaviour is problematised, for example by Lady Saltoun who wants to exclude “single women, unmarried couples and lesbian couples” (ibid: col. 1090). Or by Baroness Lockwood, who speaks of “the older woman who perhaps has delayed starting a family”, and the “younger woman who still has plenty of time, but who perhaps is at the edge of a nervous breakdown because she cannot conceive” (ibid: col. 1033).

In Germany, we can find examples of all the above attitudes as well. The Government Bill states that the aim of the law is to protect embryos - not women (25 October 1989, Bundestagsdrucksache 11/5460: 1; also see Funke, 8 December 1989, Plenarprotokoll 11/183: 14174). Others constantly talk about ‘couples’ which have fertility problems and want to get treatment (Unterrichtung durch die Bundesregierung, 23 February 1988, Bundestagsdrucksache 11/1856: 2; Dr. Seesing, 8 December 1989, Plenarprotokoll 11/183: 14171; also 24 October 1990, Plenarprotokoll 11/230: 18208; Eimer, ibid: 18218). There is, however, one major difference between the German and the British mainstream discourse. Risks for women, risks of being exploited, harmed and traumatised feature very prominently in the German debates, and are discussed by speakers of all parties, whereas they are less common in London, and are not at all mentioned by those favouring a “highly permissive” (Morgan and Nielsen 1992: 56) HFE Act.

In the context of ‘risks’ and problems, and only there, women and their bodies are made more visible in the German than in the British debates. At both ‘ends’ of the discourses in Germany, the Green and the Conservative perspective agree that the risks for women using new reproductive technologies are to be taken more seriously than they often are
(in the media or in public presentations of these technologies). German speakers highlight some of the (perceived) implications of for example ‘egg-collection’ (in the context of intra-uterine gamete transfer) that have been absent from the British debates:

“No just the removal of eggs and the subsequent transfer of eggs and sperm into the fallopian tubes is a complicated procedure with a substantial degree of artificiality, although the fertilisation is taking place inside the mother’s body [Mutterleib].” (Unterrichtung durch die Bundesregierung, 23 February 1988, Bundestagsdrucksache 11/1856: 4)

This statement shows that, as in the British debates, a woman who receives treatment, whether she even gets pregnant or not, is already seen as a mother. But on the other hand it is clear that this description of the ‘actual’ procedures of technically assisted reproduction is very different from, for example, Warnock’s description above (‘simple’ procedure, ‘minor’ risks). It could be argued that the concern expressed in this quote is not really based on a ‘women-centred’ perspective. Rather it is an expression of anxiety about ‘artificiality’. I still hold, however, that this concern about the ‘artificial’ character of technological intervention into ‘natural’ processes makes women’s physical, their leibliche, realities of using new reproductive technologies more visible. Thus, as in the British debates, women’s role as mothers is still naturalised, their agency is often eclipsed in mainstream arguments, but their possibly vulnerable and precariously placed bodies are somehow more visible.

The next section of this chapter will look at how the women of the ‘left’ in both parliamentary contexts engage with these mainstream discourses about women. How do those women who would describe themselves as feminists in the widest possible sense position themselves in the face of the mainstream constructions of the female subject outlined above? We have seen that the majority in both Parliaments conceptualises women’s reproductive decision-making as problematic, with an additional tendency in Germany to think of the female users of reproductive technologies as potential victims.

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26 See for example the Government Bill and the Green Bill on this issue (Bundestagsdrucksache 11/5460; Bundestagsdrucksache 11/8179).

27 Eggs are extracted from the woman’s ovaries, but are then put back into the uterus where they are (ideally) fertilised with the sperm. So the fertilisation of the eggs actually takes place inside the woman’s body, rather than in-vitro.
Women's agency or autonomy are not assumed or positively embraced by either discourse. Through a discourse of medicalisation, women's consumption of fertility services is replaced by the provision of treatments according to medical need.

**C: Positioning women: female parliamentarians construct the subject**

"When compelled to choose between alternative conceptions, even when these are theoretical ones, one is already acting under duress. Such alternatives reflect coercive situations that in an unfree society are projected onto the intellect, which could do worse than contribute to its own emancipation by obstinately reflecting upon the nature of this bondage." (Adorno 1968: 234)

I will argue in this section that the mainstream has an important influence on the feminists' contributions. In Germany, female parliamentarians on the one hand speak of women's exploitation through reproductive technologies and on the other hand take part in a discourse of medicalisation. British female MPs of the 'left' speak the language of 'women's choices' and join a discourse that is set up as one of progressiveness versus conservatism. Thus I attempt to show two things at the same time: how the mainstream might shape the arguments used by women in parliament, and also how women's different strategic decisions are important for some of the outcomes of the debates (and consequently for the laws themselves).

It is important to bear in mind that the way parliamentarians choose to talk about the users of reproductive technologies is not only informed by their beliefs and assumptions about women. In the context of our debates, their assumptions about scientists and the nature of science and technology are also significant for their construction of women as the users of new reproductive technologies. If scientists are good and trustworthy, one needs to worry less about women than if one cannot ultimately be sure about the soundness of scientists and doctors. However, this chapter focuses on the contested constructions of women, and on female parliamentarians' involvement in these
constructions. Through analysing the construction of 'woman' in the parliamentary debates, it will be possible to understand the configuration of the two laws' subjects.

**The German 'feminist' contribution: protection against exploitation and 'cases in which one can help'**

In Germany, only Green and Socialdemocratic women take part in the debates. No woman speaks from the Government parties. The Greens, despite their small number of MPs, contribute significantly to the debates. They argue from the so-called radical feminist perspective. Seen from that perspective, new reproductive technologies are male medical control over women's fertility and reproductive freedom. They are firmly based on the logic of eugenics, and also re-inscribe patriarchal images of motherhood and family:

"After decades of research and application, IVF still is a large-scale experiment on humans. It does not only endanger the life and health of some women, but the dignity, the social status and the autonomy [Selbstbestimmungsmöglichkeiten] of all women. IVF also is exceedingly disdainful towards people with disabilities and illnesses, in short, towards those who do not come up to the genetic norms." (Schmidt, 24 October 1990, Plenarprotokoll 11/230: 18214)

The Greens thus demand a general prohibition of reproductive technologies. Their analysis agrees with the perspective of international networks of radical feminists, population-politics and disability-rights activists. Due to their general opposition to new reproductive technologies, the Greens thus do not argue for equal access to the services. They do not demand the opening up of services for women outside marriage, because the liberal concern with equality of access does not come into their perspective on reproductive technologies. If you believe new reproductive technologies to be simply exploitative, you do not think it is progressive to allow more women to use them. The women from the Green party accordingly were not contributing to the debates about

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28 There is one conservative woman, the representative for the Land Bavaria, who speaks in the Bundesrat. She is not supporting the Government Bill. Her position is more restrictive than the E SchG (Berghofer-Weichner, 22 September 1989, Bundesratsprotokoll 604).

29 See for example Mies (1987); Mies and Shiva (1995); Hanmer (1983); Corea (1985); Corea and Ince (1987), Raymond (1993), Steinberg (1997). The speaker whom the Green party invited to the expert hearing, Bradish, is a member of FINRRAGE, a feminist international network against genetic and reproductive technologies.
access for unmarried women, or on the debate about the unequal treatment of egg- and sperm-donation. The detailed regulation of fertility treatments was not on their agenda. They wanted an outright ban. From a radical feminist perspective there was thus no input into the discussion on regulating the access to and the different practices of assisted conception. This leaves the women of the Socialdemocrats, SPD.

The Socialdemocratic women to a large degree shared the Green concern about the exploitative potential of new reproductive technologies. They also questioned the supposed natural desire of women to have a child of their own (Rühmkorf, 9 November 1990, Bundesratsprotokoll 624: 639) or the eugenic implications of the new technologies (Tidick, 22 September 1989, Bundesratsprotokoll 624: 376). However, they did not as a party come down on the side of a simple prohibition of these practices. It is worth quoting at length from one of the speeches of Herta Däubler-Gmelin, a Socialdemocratic MP (we have seen this speech before):

"There are some who have a distinct position, because they see the dangers that come with the new possibilities. They say: alright, childlessness just is fate. [...] They also say - and I think this is at least partly right - that it often really is the pressure of society that is the reason for the problems and worries of childless women, and not childlessness itself. This might well be the case, Ladies and Gentlemen, and I do understand this standpoint.

However, I do not share the consequences that are drawn from this, namely that none of the methods of artificial insemination should be allowed. I am of the opinion that there might be cases, for example if a woman cannot have children of her own with her husband or long-time partner due to an accident or an illness, cases in which one can help, if the new insights allow it. I think this is right and justifiable." (8 December 1989, Plenarprotokoll 11/183: 14168)

Several conclusions can be drawn from this quote. Firstly, Däubler-Gmelin acknowledges feminist criticism of new reproductive technologies. She shares a critical perspective on their possible effects, and she also de-naturalises women's supposed urge to have children. However, she does not want to prohibit the use of these technologies under all circumstances. And then she goes on to tell a story about the type of woman who should be allowed access to the services. She feels it is necessary to state that the woman has a husband or a partner; she is not single or even a lesbian. Däubler-Gmelin also suggests reasons for the woman’s inability to have children: she has physical fertility
problems 'due to accident or illness'. These reasons imply one notion: *innocence*. We witness an argument about innocent suffering, and about how medicine can 'help' those suffering through no fault of their own. The woman in the example does not self-confidently use the opportunities the new technologies present in order to pursue aims that make sense within her own biography, whether she is infertile, she wants a child without a man, or she wants a child with a man who himself is infertile. She has not postponed having children for 'too' long, due to her career. She does not want children in a 'non-traditional' set-up. She is a *victim*; we can *help* her.

This is a discourse of medicalisation with all its typical features: a focus on women's 'problems', a distrust of non-biological explanations, a distinction between those who deserve to get 'help' and those who don't, and finally *paternalism*. This is definitely not a discourse of female autonomy and reproductive freedoms. Only the medicalisation of a woman's wish for fertility services makes their use discursively safe. The women of the SPD thus share with the mainstream discourse a deep distrust of non-medical uses of reproductive technologies. It is only the framework of medicine with its paternalistic rather than consumerist connotations that makes it possible for Socialdemocratic women to allow any use of the technologies at all.

As outlined above, the Greens have 'dropped out' of the debates on access to treatments, due to their general rejection of reproductive technologies. The Socialdemocrats subscribe to the mainstream concept of medicalisation, conceptualising women as incapable of using the technologies as and when they like. From the conservative government side, no woman speaks in the *Bundestag*. There are thus no women in the German debates who argue the case for women's choices or for the use of the technologies within the freely chosen parameters of women's own biographies. The story of women determining *themselves* what to use new reproductive technologies for, rather than having them *prescribed* by responsible doctors, never gets told as an acceptable story in Germany.
The mainstream pathologises any female role that is not based on an identity as victim. Women who are the victims of their biology, and who are 'safe', because they are with a man and suffer 'innocently', can be helped. All other women are potentially dangerous. Their desires are disruptive and dubious. This perspective is shared by the Socialdemocrats. Further, it can be argued that the Greens also pathologise women's desires and construct women as victims. If women's wish to partake in fertility services simply expresses 'false consciousness', if their use of the technologies is solely based on "pressures on women to subject themselves to the technologies and to leave nothing undone" (Green Bill, 19 October 1990, *Bundestagsdrucksache* 11/8179), then once again there is no positive story line on offer in which women know what they want and use reproductive technologies to get it.

**The British 'feminist' MPs: telling a story of autonomy**

The situation is fundamentally different in Britain: Here, the positive, liberating potential of new reproductive technologies is emphasised by the women of the Labour Party. Their argument basically rests on the classic *Pro Choice* standpoint that we know from the abortion debates. Women have to be allowed to control and determine freely their reproductive behaviour. Only women must decide whether to have or not have a child. It is not the job of MPs or the law to prescribe a certain reproductive role for women. Reproductive technologies extend women's control of their fertility from the contraception to the conception aspect of their reproduction. Whereas the pill allowed women to separate sexuality from reproduction, IVF allows women to separate reproduction from sexuality (see Betta 1995: 19/20). Infertility, this is the argument, does no longer need to be fate, just as fertility isn't. This approach is based on a liberal understanding of feminism. The feminism of British parliamentarians is firmly grounded in a liberal view of the world:

"I wish I had had the time to do more research as far back as 100 years ago, when hon. Gentlemen in this House were telling Queen Victoria that they positively knew that God was against the use of painkillers when giving birth - advice she rightly rejected. [...] I make this remark not in a frivolous spirit but to show that hon. members are not qualified to advise on ethical and moral decisions. Our responsibility is to frame the law in such a way as to make it possible for other adults to make their own decisions." (Ms Fyfe, 23 April 1990, House of Commons, vol. 171: col. 64)
All the elements of liberal enlightenment ideology can be found here. Ms Fyfe paints a picture of the past, the present and the future that is based on enlightenment ideas. For her the past was riddled with irrationalities and religious prejudice. The rise of reason and scientific understanding freed humans from the indignity of such erroneous beliefs and limitations. But still, in the present, there are those who hold back, and who want to stop humanity from progressing into a future of reason, freedom and an end of suffering. These forces must be resisted. They are anti-modern and in the future will be looked upon with the same mixture of amusement and disbelief that we now reserve for our dark and unenlightened past.

Further, Ms Fyfe subscribes to the positivist understanding of law that has been discussed in more detail in Chapter Three. She holds that law and morality have to be kept separate (also see Ms Armstrong 20 June, House of Commons, vol. 174: col. 1023). The law is not there to solve moral problems; it should simply enable the emancipated subjects of the enlightenment discourse to make reasonable and personal choices according to their own moral convictions. And these subjects are ‘adults’, i.e. they do not need to be controlled, supervised and protected. They know what they are doing. It is clear that in her perspective women are adults too, they too know what they are doing.

Ms Fyfe also argues against s 13 (5) HFE Act and against limited notions of the family:

"I should have thought that male members of a Westminster Parliament would have been the first to understand that a child can be brought up successfully without the presence of a father. [...] Family is not defined as a mother, a father, two children, a dog, and a house." (25 May 1990, Standing Committee B, vol. 1: 147/148)\(^{30}\)

Women's wish for a child is never questioned by British female parliamentarians. Unlike in the German debates, women of the left do not pick up on radical feminist criticism of reproductive technologies that questions the naturalisation of a woman's wish for a child.\(^{31}\) Labour women in London discursively 'protect' the female user of new

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\(^{30}\) Another Labour MP, Ms Richardson, uses arguments about rights and equality, another typical trademark of liberal discourses, to make her point: "It would be discriminatory to prevent lesbians from having children" (ibid: 150). For a critique of rights discourses in reproductive matters see Kingdom 1995; Millns 2000 2001; McColgan 2000.

\(^{31}\) See for example Corea et al who argue that "having de-biologised other aspects of women's existence, we cannot afford to let the ideology that motherhood is a 'natural' need or right stand unchallenged" (1987: 4). Further see: Stanworth (1987: 15); Hanmer (1983: 192).
reproductive technologies from any risks by equipping her with all the characteristics of the enlightenment subject. Women, constructed as powerful and self-confident agents of their own lives, can safely enter the risks of technologically assisted reproduction. Women of the left do not highlight the risks that women enter if seeking treatment. Women are seen as capable, reasoned subjects, notions of women as victims are rejected:

"Once again, we encounter this inference that women are stupid, and that those who desperately seek treatment for infertility are incapable of asking for advice to enable them to make an informed decision on whether to have treatment." (Ms Primarolo, 10 May 1990, Standing Committee B, vol. 1: 82)

We can see that the contributions from women of the 'left' in both countries differ in important ways from the mainstream's construction of women, but also share some important features of this mainstream they confront. Both groups of female parliamentarians add a distinct argument to the debates: in Germany, the feminists argue stronger than the mainstream does that women might be exploited and harmed in the context of technological interventions into their reproduction. They also question, unlike the mainstream, the meaning of women’s ‘desire for a baby’, arguing that women might be pressured or expected to ‘do everything’ for a child. In Britain, the feminist parliamentarians challenge the mainstream construction of families and the moral panic about single women and motherhood.

However, in both contexts, the feminists also share important features of the majority discourse. In Germany, no feminist argues that women should be treated as self-confident and autonomous agents who can make their own decisions. Just like the mainstream construction of women, women are not conceptualised as autonomous subjects of the law, which deserve respect and freedom, but as ‘victims’ either of their biology (the Socialdemocratic notion of the innocent infertile) or of the medical profession (the Green concept of alienated reproduction). The British women also join in some of the dynamics of the majority discourse. They too tell the story of the enlightenment, and of liberal laws, protecting individuals’ freedom for autonomous and self-confident decision-making. This correspondence, the fact that women’s contributions resonate with the dynamics of the mainstream, has an important effect on both national discourses. As both legislative discourses are silent on one aspect of
women's involvement with reproductive technologies, this silence is not remedied by the oppositional women. The discourse in Bonn does not speak at all of women as actors, as autonomous subjects and well-qualified decision-makers. The discourse in London ignores the vulnerability of women, the fact that they might, just might, occasionally be victimised in the context of high-tech medicine. And the feminists in both Parliaments do not fill this silence with a radically different story.

The remains of this chapter will look at one factor that played an important role in shaping women's responses to the challenges of new reproductive technologies. It can at least partly explain why the women pursued such different strategies in their national discourses. I will argue that one important factor for the conceptualisation of women by women in the parliamentary debates of both countries was the question of abortion.

The significance of the abortion debates: 'a rose is a rose'

In London, ever since their reform in 1967, the Abortion laws dissatisfied a significant number of members both of the House of Lords and the House of Commons, which they perceived to be too liberal. After 14 failed Private Members' Bills, the debates on the HFE Bill were seen as an opportunity to facilitate a debate on abortion.\(^{32}\) This opportunity was opened up by the Government's decision to define as the purpose of the Bill in the Long Title:\(^{33}\)

"To make provision in connection with human embryos and any subsequent development of such embryos." (My emphasis)

This was seen as a move to re-open the debates on abortion legislation through the back-door. Much criticism, especially from those members in favour of embryo research, was voiced against this move:

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\(^{32}\) Between 1969 and 1988, 14 unsuccessful attempts were made to restrict women's access to abortion. See Sheldon 1997: 105; Mulkay 1997: 13; Simms 1985.

\(^{33}\) It is not ultimately clear why the Government agreed to include debates about abortion in the already difficult legislative process about new reproductive technologies. However, it has been argued that in fact a trade-off took place, with the Government agreeing to include abortion legislation (in Government time), if the anti-abortion lobby stopped introducing private members' bills (see Millns and Sheldon 1998: 15; Mulkay 1997: 40).
"The issues tackled by the noble Baroness [Warnock] and her team and by the Bill are quite different from the issue of the medical termination of pregnancy. The Bill affords the chance for a profoundly important, ethical debate on pre-embryo research. My fear is that an orderly debate could be gravely damaged by allowing the abortion issue in a sense to be spatchcocked into the Bill." (Lord Ennals, 7 December 1989, House of Lords, vol. 513: col. 1012)

At a later stage in the debates, after the House of Lords had agreed by a majority of 234 to 80 votes to allow embryo research, the Government backed an amendment to the Abortion Act 1967. The clause proposed a reduction of the time limit for legal abortions from 28 to 24 weeks. Other MPs then tabled amendments demanding even lower time-limits.34 The focus of the debates was on the issue of the so-called 'late abortions'. Again, this move was much criticised by both pro-research and 'pro-choice'35 MPs. It was feared that the emotive issue of abortion would make a reasoned and balanced debate on the research question impossible. While pro-researchers and 'pro-choicers' criticised the blurring of the two issues, the anti-abortion lobby constructed them as basically one problem - the question of the status of the embryo:

"There is nothing illogical about combining legislation on abortion and embryonic research, despite the objection voiced in one of the opening speeches, because a human embryo is a human embryo whether it is in a test-tube or in utero. A rose is a rose not only by any other name, but no matter where it is or at what stage of its development. Therefore, it is not illogical to view the human embryo as something that should neither be killed in some circumstances or used for certain research purposes." (Mr Duffy, 2 April 1990, House of Commons, vol. 170: col. 941)36

The efforts of the anti-research, anti-abortion lobby to put their point across culminated in their distribution to every Member of Parliament of a life-sized model of a twenty weeks old foetus. This, and other material sent around by the campaigners, was

35 The terminology of 'pro-life' and 'pro-choice' is highly problematic and distorts the actual issues at stake. It presupposes that strict abortion legislation is aimed at protecting 'life', and that this concern for 'life' is not important for those who favour liberal abortion laws. It further constructs the issues around the parameter of the embryo as human 'life', and not for example around the parameter of human suffering, or the diverse meanings of pregnancy for real women's real biographies. According to Kristin Luker, the question of the status of the embryo is only ever the 'tip of the ice-berg': "Different beliefs about the roles of the sexes, about the meaning of parenthood, and about human nature are all called into play when the issue is abortion" (1984: 158). I use the terms here cautiously, but think that they allow readers to immediately understand which side of the debates is referred to. The alternative terminology of pro- and anti-abortionists seems to me to be even more misleading as it seems to suggest that women arguing for female self-determination in fact argue for abortion, as if abortions were a wonderful thing.
36 Further see on the same day: Mrs. Peacock, ibid; Miss Widdecombe, ibid: col 949; Dame Jill Knight, ibid: col 957; Mr. McGrath, ibid: col 958; Mr. Alton, ibid: col 966
subjected to harsh criticism by those in favour of embryo research and/or relatively liberal abortion legislation. The anti-abortionist, anti-research MPs focus on the nature of the embryo (see on this Chapter Four). Any warnings against unmediated or uncontrolled scientific progress are almost exclusively embedded in a wider discourse about the protection of the 'unborn life'. This seems to be what a lot of women in Parliament oppose. It is high on their agenda to defend a relatively liberal abortion law. They want to reject the construction of the embryo as a 'child' that has human rights and needs to be protected both from scientists, who want to conduct research, and from women, who might want to terminate pregnancies. The use of new reproductive technologies thus ultimately gets discussed in the light of the abortion debates.

To the British feminists in Parliament the issues of embryo research and of abortion raise the same question: the question of female self-determination and of autonomy. Their principle is to reject laws that claim to know better than women. Accordingly, laws must allow women to make their own choices. Whether they want an abortion, whether they want IVF, whether they want it with or without a man, all this, the feminists argue, must be left to the women themselves. This, they hold, is a 'common sense' approach rather than one based on abstract moral principles, like those of the anti-abortionist, anti-research MPs (see for example Mrs. Wise, 2 April 1990, House of Commons, vol. 170: col. 973).

The strong anti-abortionist opposition, which also argued against embryo research, significantly shaped the feminists' response to the debates on new reproductive technologies. In my opinion, the blurring of the two issues made it necessary for women in Parliament to argue almost exclusively from a pro-choice standpoint, both with regard to abortion and with regard to infertility treatments. None of the women from the...

37 Lord Ennals expressed his "horror at some of the publicity material sent to me about the supposed implications of the Bill" (8 October 1990, House of Lords, vol. 522: col. 1052-1053; also see: Lord Houghton of Sowerby, ibid: col. 1068).

38 It is problematic to describe British (or German) abortion law as liberal, because in both cases it does not rest on women's decision-making, but on medical 'prescription' (see: Sheldon 1997; Newburn 1992: 5; Jackson 2000).

39 For an excellent analysis of the respective views of pro- and anti-abortionists onto each other, see: Luker (1984: 158 - 190). Also see Callahan and Callahan 1998.
Labour Party adopted a standpoint that highlighted the problems of new reproductive technologies. They never talked about the possible exploitation of women, of the pressuring of women or of the inequalities between women that are going to determine whether someone is more likely to offer or to seek the services for example of surrogacy or egg-donation. Their resistance against anti-abortionists lead them to adopt an even more positive stance on new reproductive technologies than their male colleagues. Mulkay (1997) shows that women on the whole were more likely to vote in favour of embryo research than men. There were, however, important variations: women of the Conservative Party were far more likely to vote against embryo research than for it. "But they were outnumbered and outvoted by women from the Labour Party and from the Liberal and Social Democratic Parties who were unanimously in favour of embryo research" (1997: 89). Not only those opposing embryo research and abortion appear to believe that ‘a rose is a rose’. For the feminists, too, the issue of abortion and technologies of reproduction merited an identical response.

**The relevance of abortion in the German debates: ‘is there not a fundamental difference?’**

In the Bundestag, the question of abortion is mentioned every now and again, too. However, in 1990 no serious attempt is made to change the abortion laws while debating the *EschG*. The anti-researchers do not try to establish a discourse about embryos *in- and outside* women's bodies; they do not present the abortion and the research question to be identical. All parties agree that embryo-research has to be prohibited. Interestingly, it is the pro-research scientific lobby at the expert hearing that tries to use arguments about abortion in order to prevent the prohibition of embryo research:

"We further have to keep in mind that through strictly controlled research on embryos - other than through the legally sanctioned abortion of 200 000 healthy foetuses every year for social reasons - not a single child less will be born. Thus no violation of the protection of human life is taking place." (Prof. Dr. Buchborn, 9 March 1990, *Bundesrechtsausschussprotokoll* 11/73: 41)

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40 This is very different in the debates in the year 2000, where the controversy about PGD place German feminists in a similar position as British feminists found themselves in during the 1980s: either promote PGD or risk stricter abortion laws. On these more recent debates see Chapter Seven.
However, the women in Parliament manage to resist a parallel conceptualisation of the problem of research and abortion. Christa Nickels, one of the Green MPs, asks:

"Is there not a fundamental difference between a woman who carries a child to term, gives birth to it and brings it up, who we allow through a legal provision to decide against the pregnancy in a situation of distress, in a very personal predicament [höchstpersönliche Notlage], because she stands in with her own body [Leib] and her whole life, and the scientists on the other hand, who handle the embryo and deal with it, but who are not involved with their persons, with their bodies [Leib] and lives?" (9 March 1990, Bundesrechtsausschussprotokoll 11/73: 115)

Typically for the German feminist strategy, Nickels here takes up the issue of abortion but turns it into the question of control over scientists. This seems to be the biggest difference between the debates in the two countries: In Germany the most controversial issue is the extent to which control needs to be exercised over the actions of the scientific community.\(^4^2\) The German Greens, and at times the women from the Socialdemocratic Party, join this debate with a decisively technology-critical stance. To the question 'can we trust doctors and scientist?' the female reply in Parliament is: 'No'.\(^4^3\) In London, on the other hand, the most crucial question in the debates is the status of the embryo, because the majority in Parliament want to sanction embryo research.\(^4^4\) The embryo stands for the whole of humanity, its fate is held to be decisive for the whole moral and political character of the country. In this discursive context, women of the left in Parliament reject the fetishisation of the embryo and join the discourse of scientific progress, and the trustworthiness of doctors.

**Conclusion: looking for alternatives to given alternatives**

It is important at this point to highlight that I do not think that either the German or the British feminist approach to the discursive realities of Parliament or to reproductive technologies is superior.\(^4^5\) Both the British and the German feminist MPs are confronted

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\(^4^1\) Further see: Ms Wollersheim, ibid: 135/136.

\(^4^2\) For popular German views on this question see Hennen 1997.

\(^4^3\) For feminist debates on science also see Harding 1986; Wajcman 1991.

\(^4^4\) See for example Miss Widdecombe, 2 April 1990, House of Commons, vol. 170: col 958; Dame Knight, ibid: col. 958; Ms Winterton, ibid: col. 970.

\(^4^5\) What is important to keep in mind is the institutional, exclusive nature of the debates that women in both parliaments were engaged with. There was, for example, strong feminist criticism of reproductive
with a mainstream discourse that puts embryos and scientists centre-stage and eclipses women's bodies and lived experiences of their fertile or infertile bodies, their lives with or without children and with or without men. Both groups of women partly join into the mainstream discourses, without always effectively challenging the problematic assumptions that those discourses are based upon. In Germany, the Socialdemocrats uncritically buy into the logic of medicalisation, obviously based on the belief that the construction of reproductive technologies as medicine and the delegation of decisions to responsible doctors makes their use 'safe'. In London, Labour women uncritically take on board the rhetoric of 'choice', conceptualising women as good liberal subjects who know all the relevant information and then make the choices that are best for them (critical on the notion of choice: Bridgeman 1998; in favour of far-reaching reproductive autonomy: Jackson 2001).

In both countries, however, female parliamentarians of the left (once again in the broadest sense) also manage to make distinct contributions, which no other speakers make. The German Greens highlight the international implications of new reproductive technologies and the fact that increased 'choices' for women (to overcome their infertility, to test their offspring and themselves for genetic conditions) also increase the pressure on women, and might actually take away freedoms from them. In Westminster, many female speakers effectively criticise the myth of the 'traditional family', taking apart both beliefs about tradition and about a supposed normality.

But in both cases, women's opposition to the mainstream discourses also eclipses important feminist insights into the significance of reproductive technologies (see on this: Smart 1990: 223 – 224). In Germany women remain victims. No female parliamentarian manages to envisage and present women as capable moral agents who see the limitations of their choices, but who nevertheless make satisfying or meaningful decisions in the contexts of their own lives. In Britain, women only are seen as potential victims by those
technologies by academics and by activists that was not represented in parliament in London. The Warnock Committee did not invite a single feminist organisation to submit evidence (for further instances of marginalisation see Spallone 1987: 168 - 172).

Sheldon (1997) also highlights that the feminists in London share another view of the 'mainstream' they are confronting: They join into much of the eugenic logic supported by the majority of speakers (1997: 118).
opposed to embryo research (see Mulkay 1997: 87). The women of the left do not consider women's potential exploitation and the limited nature of their choices at all. Women are 'adults', and in liberal discourses that means that there are (or should be) virtually no limitations to what they can do. The implications of women's choices for other women or for society as a whole (eugenic, cultural, international) consequently do not have to be problematised (Morgan and Nielsen 1992: 52). British female MPs subscribe to "mythical" notions of the "ideal legal subject [...] a rational choosing person, capable of decision, an autonomous individual" (O'Donovan 1997: 47; very critical of this subject also: Pateman 1988: 184).

The two strategies, particularly those of the German Greens and the British Labour women, represent the problems with radical and liberal conceptualisations of new reproductive technologies and the female subject. In radical feminism, it is difficult to make sense of women's actual choices. Women who do things that feminist analysis disapproves of act with 'false consciousness' (but see Jackson 1993: 405). In liberal feminism, women's actual decision-making is mistaken for freedom and autonomy. The one denies the reality of agency; the other denies the significance of restrictive structures. Sally Sheldon concludes her investigation of debates about abortion by warning against an unreflective engagement of feminists with legal discourses:

"Feminist challenges must be more aware of the way they construct their subject, [...] the most successful short term strategies may be those which come closest to constructing the issue - and the legal subject - in terms which are closest to the law's own." (1993: 20)

It seems that women in both parliamentary contexts could not or did not afford to radically divert from the majority's construction of the subject: either women were victims or the liberal subjects of the enlightenment discourse.

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47 For an overview over the debates see: Millns 1995; Wajcman 1991: Chapter 3; Stanworth 1987; Morgan 1998.

The problem that both legislative discourses, and the female MPs within them, struggle with is difficult. They are trying to make up their minds about the users of technologies of reproduction, who mostly are women. Judging the users, their needs, their responsibility and trustworthiness is important for the wider decision-making about technologies of reproduction. We have seen that the users of the technologies are thought of as rather problematic. Most importantly, there is a concern about the recklessness or irresponsibility of women who ‘might just go ahead’, without consideration for the wider social implications of their doing. There also is a concern about women’s vulnerability, based on the alienating and exploitative potential of reproductive technologies (we have seen that this concern is more pronounced in Germany).

What the speakers of all persuasions effectively are attempting to come to terms with is one of the core problems of modernisation: the problem of autonomy and agency. Do women know what they are doing? Are they autonomous agents, self-confidently consuming new technologies and incorporating them into their lives? Are they pushing this modernisation (of family forms, of procreation) too far, not taking into account the harmful effects this might have for children or for society? Or are they not actually the agents of these modernising dynamics, and rather the victims? Are they themselves subjected to the potentially brutal and dehumanising effects of technological progress?

This thesis addresses the problem how law, how two pieces of legislation in two countries can position themselves when confronted with the effects of modernisation, here the modernisation triggered through technological intervention into human reproduction. We can now see that in order to achieve a legitimate position, law has to engage in the construction of its subject: it has to configure those subjects whose behaviour it attempts to regulate. In the following, it will be concluded that the conceptualisation of the legal subject in both legislative discourses is – and this should not be surprising by now – ambivalent. I will argue that the use of a medical notion of the subject, the ‘outsourcing’ of some legal control to medicine, is what enables law to handle the contradictory concerns triggered by individuals’ reproductive decision-
making. In Britain, the HFE Act complements its liberal rhetoric or posture with the strategy of medicalisation to enable a pro-research, ‘pro-progress’ legislation while at the same time exercising control over women’s reproductive behaviour. In Germany, the ESchG modifies its radically sceptical stance towards science with a medicalised model of technologies of reproduction and their use by women. In both cases it is the delegation of some decision-making to doctors that enables lawmakers to address conflicting concerns about women’s use of reproductive technologies.

The HFE Act: a ‘liberal’ framework for women’s autonomous decision-making?
It was argued above that the HFE Act is based on the rejection and dismissal of concerns about technological progress. It embraces scientific rationality as modern and as the only possible basis for modern laws. It constructs scientists and doctors as trustworthy and ‘us’, the moderns, as self-confident and capable of entering risks. We have further seen in this chapter that the majority who argue for embryo research now also argue for female autonomy, for the self-confident and emancipated use of reproductive technologies by women, without interference by the law. The majority, and particularly the women from the left, argue for a law that is through and through liberal: women know what they are doing, they can be trusted to make up their mind, they won’t damage themselves or others while using technologies of reproduction. Yet the actual HFE Act is not as liberal as this discourse seems to suggest. S 13 (5) is not a liberal clause. It takes the decision about IVF out of women’s hands and delegates them to doctors, referred to in s 13 as license holders. Women cannot simply access IVF according to their autonomous wishes. They cannot simply opt for surrogacy, without going through an official IVF clinic, or pay a ‘surrogate’ mother. They have to also fulfil all the conditions of s 30 (for example they have to be married). The HFE Authority only allows women to choose the sex of their offspring in cases of medical ‘need’, i.e. to prevent a gender-specific disability. In each case a doctor is placed in between the legislative discourse of liberalism and women’s reproductive decision-making.

Thus despite the discourse’s assertions that the HFE Act is written in the spirit of liberalism, that it allows individuals to get on with their decision-making and does not impose moralistic and fundamentalist reasoning on ‘adults’, it turns out that the female
users of reproductive technologies, through the model of medicalisation, are not fully included in this configuration of self-confident trust-worthy ‘adults’. Thus, women (particularly single women) are not quite members of this ‘us’ that has been constructed through the discourse; they are not quite part of ‘us moderns’. Or rather: their full inclusion is not self-evident, it is problematic and controversial (see O’Donovan 1996: 243).

Yet, especially compared with the German ESchG, it cannot be denied that the HFE Act also contains some liberal elements: it does not fully and effectively exclude women who are ‘single’, unmarried or lesbians from using IVF. It does not really prevent the birth of ‘fatherless’ children. This is what the model of medicalisation achieves for the HFE Act: it can accommodate both the liberalism of the majority discourse and the concerns about reckless women’s decision-making in reproductive matters. Constructing women as ‘adult’ users of the technologies is necessary to counteract concerns about the potentially alienating or exploitative effects of medical and scientific intervention into their reproduction. Yet constructing them also as not quite up to making their own decisions and as in need of a medical decision made for them by a doctor counteracts the concerns about the detraditionalising, delimiting potential of (women’s) individualisation. Delegating the decisions (about IVF, sex-choice or surrogacy) to doctors, thus turning them into clinical decisions, allows the HFE Act to be ‘relatively liberal’ (Jackson 2001: 183), while at the same time not giving up control over women’s reproductive choices.

The ESchG: paternalistic protection of women
In Germany, the debates are very different. Here, no speaker supports a construction of women as self-confident and capable agents. In Germany the main concern seems to lie with women’s vulnerability, with their potential exploitation through high-tech medicine. Women are obviously not configured as the autonomous agents of individualisation. They are the potential victims of medical and technical progress. This view is not only shared, but emphasised by the female left-of-centre parliamentarians. They extend women’s vulnerability and need of protection beyond those women who actually use the technologies, to all women, to their status in society in the age of technologically assisted procreation.
As discussed in Chapter Four this emphasis on the problematic nature of technologies of reproduction is basically informed by a deeply held distrust against science and scientists. Yet, the model of medicalisation delegates some of the decision-making about reproductive matters (who should receive IVF treatment, who can be allowed to choose the sex of children) to exactly those doctors the discourse elsewhere constructs as non-trustworthy and over-ambitious agents of alienation and exploitation. Once again, following the concerns expressed in the German discourses - and their construction of female users and scientists - through to their logic conclusion would mean that the legislature could only really come down on the side of a total ban on reproductive technologies. Scientists cannot be trusted to respect the limits of what is natural and good for people, and women cannot be trusted to make informed and adult decisions about using technologies of reproduction. And yet, the ESchG does not simply outlaw all uses of IVF. We can now see that the use of the medical model, the discourse of medicalisation, carves out a place in which doctors are trustworthy guardians of women’s best interests, and in which technologies of reproduction can therefore be used safely.

Conclusion: law, medicine and modernity
We can conclude this chapter by linking the above analysis to the general concern of this thesis with the question of how law/s can be positioned in the face of ambivalent processes of modernisation. Performing the by now familiar move from the particular to the more general, we can see that law’s incorporation of the medical model, in which paternalistic decisions are made on behalf of patients (rather than autonomous decisions being made by users or consumers), allows modern medical law to address and balance contradictory concerns.

We have seen how in London the (female) subject is constructed as an autonomous agent and decision-maker. This is important for the overall intention of the HFE Act to make the use of reproductive technologies (discursively) safe. Assuming emancipated subjects who make up their own minds about the risks and chances of fertility services
enables the **HFE Act** to construct technologies of reproduction as safe to use. Yet, there is also the conflicting concern about individualisation in reproductive matters, about the breakdown of the nuclear family and about ‘fatherless’ children. And this concern can be addressed and overcome through delegating decision-making about reproductive technologies to doctors. Rather than making a legislative commitment that simply excludes for example single women from using IVF, the lawmakers can continue to speak of women as autonomous agents, while at the same time subjecting them to medicalised forms of control.

In Germany, medicalisation of the use of reproductive technologies through the **ESchG** achieves the opposite. Rather than following through to its logical conclusion its dismissal of modern science and its concern for women as victims of over-ambitious doctors and alienating technologies, medicalisation creates this space (between a ‘good’ doctor and a ‘desperate’ woman) in which the technologies can be made use of after all. The lawmakers can still present the **ESchG** as highly critical of reproductive technologies, without slamming the door completely.

Picking up a theme introduced in earlier chapters, we can conclude that the model of medicalisation in both legislative discourses allows modern medical law to have its cake and eat it. The **HFE Act** can continue to be enthusiastic about the emancipating and liberating potential of technological progress, without having to fully embrace women’s autonomy in reproductive matters. The **ESchG** can continue to reject the alienating and exploitative consequences of technological interventions into human reproduction without actually outlawing their use. When attempting to justify their legislative decisions in the face of ambivalent modernisation, medicalisation allows the lawmakers to construct ambivalent identities for the subjects they are talking about. And women as users of reproductive technologies paradigmatically represent the ambivalence of this modern legal subject. In London, women are autonomous agents, and yet better screened by a medical professional. In Bonn, women are victims of alienating technologies, yet they should and can trust doctors to make the use of reproductive technologies safe in their individual case. Exercising control through delegating power to doctors, rather than exercising it directly (by specifying who can and who can’t use
which reproductive technology) enables the law to manage the ambivalence of modern individualisation in reproductive matters. Thus we have to conclude once again that law is not simply 'outdone' or swept away by an alternative mode of control called medicalisation. Law does have more “than a peripheral role to play in the regulation of medicine and health” (McVeigh and Wheeler 1992: vi). Law is important. Law effectively prescribes distinct subjectivities for those who want to access technologies of reproduction. It inscribes its rule into the medicalised use of reproductive technologies.
Chapter Six: Risks and Laws – Uncertainty and Modernity

“It would make an interesting survey (what kind would be your decision) to examine the present and divide the onlookers into two groups: those whose eyes fell upon a bleeding man, slumped across a table, and those who watched the getaway of a small brown rebel mouse.

Archie, for one, watched the mouse. He watched it stand very still for a second with a smug look as if it expected nothing less. He watched it scurry away, over his hand. He watched it dash along the table, and through the hands of those who wished to pin it down. He watched it leap off the end and disappear through an air vent. Go on my son! Thought Archie.” (Smith 2001: 541/542, emphasis in the original)

A: Introduction and overview

Up until now, this thesis has investigated the discourses that lead to the two laws, the ESchG and the HFE Act 1990. The main and guiding question was how the lawmakers in both Parliaments attempted to justify their legislative decisions in the face of ambivalent processes of modernisation. This chapter will review the previous discourse analysis, while investigating a theoretical perspective that is increasingly important for contemporary social science and theory. It will discuss theories of risk and investigate their arguments in the light of the foregoing analysis of the debates in both Parliaments.

Risks as uncertainty in modernity

So far, the ambivalence and inherent contradictions of processes of modernisation have been introduced to enable the analysis of the legislative discourses. How and why does it make sense to now introduce the concept of risk in order to further any new insights into what happens when lawmakers discuss technological interventions into human reproduction? I have argued previously, that the debates about new reproductive technologies can be read as the reflection about the potentially destructive and beneficial effects of processes of modernisation. Further, the decision-making about technologies of reproduction can be seen to be difficult, because the speakers are not sure about the possible future effects of the actions of scientists, the decisions of individuals and their own legislative decisions. Thus, lawmakers talking about the possible effects of technologies of reproduction are dealing with uncertainty; they are dealing with the unknown future. The need to legislate partly stems from a concern about what might happen. Legislation on new reproductive technologies tries to prevent
possible future harm. Or at least, one might feel tempted to add, the lawmakers want to be seen to be doing this: preventing possible future harm. This can be understood as an engagement with the risky potential of modernisation. Mary Warnock, in her conclusion to the Committee Report, states that:

“Law should be brought up to date, so that society may be protected from its real and very proper fear of a rudderless voyage into unknown and threatening seas.” (1985: 100)

Risks hint at potentiality. “They do not refer to damages incurred. [...] However, risks do threaten destruction” (Beck 2000: 212/213). Lawmaking can be thought of as a process of “assembling information, materials and practices” into a “strategy that minimises [...] exposure to harm” (O’Malley 2000b: 465). We can find the concern about possible harm resulting from present decision-making in the parliamentary debates:

“We stand at the beginning of a development, and the control of this development seems so very difficult – if I understand the issues correctly – because it is happening step by step. The changes are gradual and blurry. We have to assess the development and decide which boundaries we will draw.” (Dr. Albrecht, 25 November 1988, Bundesratsprotokoll 595: 429)

“I know that with the Bill we are skating on thin ice. The metaphor cannot be extended to cover all the dangers that we might be laying up in store for posterity. It behoves us to skate very carefully indeed.” (Earl of Cork and Orrery, 7 December 1989, House of Lords, vol. 513: col. 1014)

I suggest that the parliamentary debates we looked at so far are concerned with uncertainty, and the dangers associated with decision-making in the face of uncertainty, and thus that they can be read as concerned with risks. All the theorists who focus on the concept of risk in order to make sense of the contemporary world link their analysis to an argument about modernity. This thesis too suggests reading the discourses about new reproductive technologies as controversies not only about this particular technology, but about the impact and meaning of modernisation and about particular configurations of the modern subject or modern knowledge. For Beck, risk awareness is a form of reflexivity that modernity achieves when the side-effects of modernisation start undermining the foundations of industrial societies:
"Reflexive modernisation" means self-confrontation with the consequences of risk society that cannot (adequately) be addressed and overcome in the system of industrial society [...]" (1996: 28; also see Beck 2000: 213; 1986: 357)

According to him, modernity 'turns towards itself' (1994: 2), undermining those aspects of 'old', industrial style modernity that in fact remained pre-modern in the past (gender relations, family forms, the organisation of labour and employment, the uncritical reliance on science, see Beck 1986; 1988). Others too claim that our concern about risks is distinctively modern. Whether "modern life is more or less risky" is debatable, yet in modern times "risk itself has been made problematic" (Simon 1987: 61), it enables modern, actuarial 'governance'. Risk is a new "preventive strategy of administration" in modernity (Castel 1991: 281). This thesis thus shares with risk theorising an interest in the particularly 'modern' way of dealing with the fact that "knowledge always lacks, ambiguity always lurks" (Douglas 1992: 9). It makes sense to look at theories of risk, because they too, as this thesis does, investigate how order is being created and upheld in the face of complex modern realities (see O'Malley 2000a: 458).

Before delving any deeper into the discussion of risk theorising, I shall outline the general course of this chapter. First, risk will be introduced in more detail as an analytical tool. Secondly, instances of risk awareness and production will be highlighted for both sets of debates. The claims of different strands of risk theorising can then be investigated in the light of the parliamentary debates themselves. Bearing both the theoretical insights and the actual discourses in mind, the chapter will conclude with an argument that attempts to merge the analysis so far with a statement about law and risk, or rather: law and uncertainty. Without pre-empting the following discussion, the conclusion will reject any unified, mono-causal constructions of reflexivity in risk society; it will also critique the distinct theoretical approaches' tendency to eclipse important aspects of 'risk' as a theoretical construct. Risk, it will be argued, does not simply disable nor enable law to exercise its rule over science or medicine. Risk can both destabilise and stabilise the legal order.
B: Discourses of risk

The majority of writing on the notion of risk is of a technical or statistical nature, mostly concerned with the security or otherwise of financial investments in volatile markets, thus staying truthful to risk's earlier role as a concept that was significant only for economic decision-making about uncertain events. The term risk stems from the French risque (Gabe 1995: 1/2) or Italian risco (Ewald 1991: 199) and originates in statistics and the insurance context, where it was a neutral term that did not necessarily refer to anything bad, but simply represented the likelihood of a certain event. Nowadays, risk seems to be used in a much wider context, “apropos everything” (ibid) and has entered mainstream political discourse (Castel 1991; Conrad 1982: ixx; Johnston 1982: 105). It now refers to something bad or an undesired event. Douglas argues that in political and social controversies, “the very word ‘risk’ could be dropped from politics. ‘Danger’ would do the work just as well” (Douglas 1992: 46). On a conceptual level, however, Luhmann holds that danger and risk should be theoretically distinguished: Danger is fate, outside, natural disaster; risk is “the consequence of decision”, man-made, and raises the question of responsibility and accountability (1993: 25; also: 1998: 71). Giddens speaks of “manufactured uncertainties” (1994b: 4). This theoretical distinction between ‘natural’ and man-made risks will become important later on, when we look at how the speakers in Parliament actually use the term risk.

There is risk and there is risk

The contemporary theoretical or social science literature on risk can be seen to fall within two broad categories or ‘schools of thought’ (O’Malley 1998: xi) that arrived at the concept of risk coming from very different perspectives. The first one is broadly identifiable through the work of Ulrich Beck, together with other sociologists who developed similar ideas around the same time as him, or were inspired through his ‘risk society thesis’ (Beck first: 1986; last: 2000; Giddens 1990; 1994a; 1998; 1999; Szerszinski et al 1996; Lash and Wynne 1992). The second ‘school’ follows a “more Foucauldian line of thinking” (O’Malley 1998: xi; also see Simon 1987: 61) and is possibly more influential for studies on law, particularly for criminology (see Castel

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These two 'schools' will now be introduced briefly, before being discussed in the light of the previous discourse analysis. It turns out that both groups of writers connect their argument about risk with a critical perspective on modernity and modernisation. Yet, we will also see that their understanding of modernity, its stability or instability in the face of risks, is very different.

In a nutshell, Beck and others argue that risks not only lead to a radical break with the past, that we enter an entirely new phase and form of history, but that risks also destabilise order and make the regulation of reality more difficult, if not impossible. The Foucauldian criminologists hold that risks represent a different type of governmentality, a different dispositif of power, but do not fundamentally undermine the modern claim to control reality. The governance and control of populations and individuals, in their opinion, is not undermined through risk, rather it is enhanced. Risk is a new technology of governmentality that "allows power to be exercised more effectively and at lower political cost" (Simon 1988: 721; also see Turner 1997).

The most important difference seems to lie in the question of realism: are the new risks discussed in contemporary society real, i.e. do world-wide pollution or the risks of nuclear power trigger 'real' social consequences, because they are actually and 'really' qualitatively new and overwhelming? For example Beck argues that,

"Risk society is not an option which could be chosen or rejected in the course of political debate. It arises through the automatic operation of autonomous modernisation processes which are blind and deaf to consequences and dangers." (1996: 28, emphasis in the original)

Or do we rather need to be "fairly agnostic about any connections between risk consciousness and 'real' dangers" (O'Malley 1998: xi; also see Szerszinski et al 1996)?

Risks then are not necessarily the triggers of 'real' changes; rather, through

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2 There is (obviously) no total agreement in either of these 'camps'. For example O'Malley criticises the notion of 'effectiveness' as far from self-explanatory. For him, what is seen as effective always depends on political choices and values. To interpret the welfare state or other actuarial practices as simply a more effective system of control, underestimates how contested welfare issues are, and how political and ideological struggles shape technologies of power (1992).
conceptualising behaviours, identities or other social phenomena as risky, discourses establish order. Carter disagrees directly with Beck’s understanding of an ‘automatic’, culturally unmediated relationship between real dangers and risk awareness:

“Discourses of ‘risk assessment’ are themselves instances of ‘risk production’ in that they construct boundaries and connections to define sources of safety and danger. As we have seen, this is often not a neutral, or even democratic, production but instead a discourse which uses the ‘other’ as a useful source of danger.” (1995: 143)

**The all-new risk society**

Beck, as the most prominent representative of the first ‘school’ of risk thinking, makes a very particular claim for the connection between risks and modernity. For him, the new quality of (global environmental) risks means that they trigger profound social changes. Risk society is fundamentally different in nature from ‘orthodox’, old school modernity (also see Kühne 1998). Yet he fervently dismisses a postmodern view of the world, arguing that the term “points at a ‘beyond’ which it cannot name” and “gets stuck in those concepts it names and negates” (1986: 12, *emphasis in the original*; also see 1996: 27; similarly Giddens 1990: 3, 45 - 53). The changes he observes in society (loss of trust in science, re-politicisation of knowledge and economy, changes in the ‘private’ sphere) should thus be read not as a move away from modernity, but as a “second wave of modernisation” (1999: 18; also see Giddens 1994b: 4; 1990: 49), a “radicalisation of modernity, which breaks up the premises and contours of industrial society and opens paths to another modernity” (Beck 1994: 3; Giddens 1994a: 57). Moreover he insists that the threats posed by more radical modernisation have to be overcome by more, not less ‘rationality’, rationality here understood as rational reflection about the consequences of modernisation or technological progress.5

Beck’s perspective reverberates ideas and philosophies that clearly predate his ‘discovery’ of the risk society, even though he does not acknowledge the theoretical

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3 Also see Simon 1987: 65.
5 On this also see: Passerin d’Entrèves 1997: 4; Rustin 1994. For Bauman, one of the theorists of the postmodern, this “stubborn faith” in modern rationality renders Beck’s “solution into a problem” (1992b: 25).
context and background of his debates (Turner 1995: 224). There is the stream of
German sociology in the 1980s concerning itself with 'knowledge society', claiming
that science is penetrating all areas of society and policy making (see: Boehme and
Stehr (eds.) 1986; Meja et al. (ed.) 1987). More importantly, his assertion that
modernity’s risks can only be overcome through modern, yet more reflective, reasoning
resonates with Habermas’ thesis of ‘modernity as an unfinished project’ (1997 (in
German 1980); on the connection between Beck’s and Habermas’ thoughts also see
Lash and Wynne 1992). Even more evident is his borrowing from Adorno’s and
Horkheimer’s notion of the dialectical nature of the Enlightenment:

“We are wholly convinced – and therein lies our petitio principii – that social
freedom is inseparable from enlightened thought. Nevertheless, we believe that we
have just as clearly recognised that the notion of this very way of thinking [...] already contains the seed to the reversal universally apparent today. If enlightenment
does not accommodate reflection on this recidivist element, it seals its own fate.”
(Adorno and Horkheimer 1999: xiii, my emphasis)6

Yet, Beck’s claim that we are still firmly part of modernity, everything else seems to
have changed: Class, science, family, employment, all do not have the same meanings
anymore; and risks fundamentally differ from any other category of social theorising.
Particularly, social inequalities – the prime focus of modern sociology – are somehow
made irrelevant in risk society, they are “zombie categories” of social theory, “dead, yet
still alive” (1999: 18; also see 2000: 212). It all boils down to his well-known ‘slogan’:

“Destitution is hierarchical, smog is democratic. With the increase of risks of
modernisation [...] social inequalities and boundaries are relativised.” (1986: 47/48,
emphasis in the original)

So, we are still modern, but everything about modernity has changed. Beck’s work
seems to sit exactly at the “ironically, perhaps still under-theorised interface between
continuity and discontinuity” (Scambler and Higgs 1998: xv). His narrative “may be
considered conventional in that it assumes the shape of a “discontinuity, of a type
familiar in sociological arguments” (Scott 2000: 34; also see Turner 1995: 224). Particularly his assertion that risks hit the powerful and the disenfranchised alike
attracts much criticism. Williams et al note that the hazards faced by those “who most

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need something done to improve the physical environment in which they live [...] rarely sit centre-stage" (1995: 116; also see Lash and Wynne 1992: 4). Part of the problem with Beck's claim appears to be that he focuses almost entirely on 'the global', 'universal' risks present in large-scale environmental hazards, for example radioactivity (Scott 2000; Nowotny 1992; Cottle 1998). He tends to ignore more localised, situational risk scenarios, such as, for example, the risks in certain neighbourhoods, where traffic might cause noise and pollution, endangers children and might add to the deprivation and neglect that is already firmly established through bad housing, unemployment, bad health or lack of 'social capital'.

The same can be said for Beck's claim that the all-new, revolutionary risks of risk society entirely depend on knowledge. For Beck, risks cannot be perceived, they "are theory" (1986: 37; 2000: 216). When one looks at risks for health and environment caused by industrial modern activity, it can be observed, however, that in poor parts of the world (both outside the Western world and within the deprived areas of rich societies) these risks tend to be relatively easy to perceive: The pollution of water and air, cities and wildlife in some poor countries can be seen with bare eyes, it can be smelled and tasted. The same is the case for the health and environmental problems that for example many inner city areas in England suffer from: traffic, bad housing, noise. The dangers hidden in rubbish heaps do not have to be explained to the people living on the refuse pits of Manila. The effects of traffic do not have to be explained to people living next to a major inner city road.

The point is that 'the privileged' do not live either on refuse pits or in the middle of a constant traffic jam. From the safety of their homes it is true that the only risks they find themselves confronted with are the remaining few (or maybe not so few) that could not be perceived without more sophisticated knowledge, and therefore could not be avoided by spending some extra money. This is not to deny that this confrontation with formerly unknown and unforeseen risks might be a new social phenomenon, and that it might have an important impact on how modernity is perceived by the relatively privileged. Their changed perspective on security and risk might well have an important impact on political and social discourses. However, to thus conclude that all environmental risks
cannot be perceived by the general public, and are thus ‘equalising’, is displaying exactly the tendency that Bauman so pointedly criticises:

"Well maybe this is so [risks affecting rich and poor alike], equally plausible, however, is the obverse explanation - only such risks that also threaten the resourceful and vociferous sections of society have the chance to be forced into public awareness [...]; ruling classes always tend to represent their concerns as universal interests" (1992b: 25, emphasis in the original)

Risk and governmentality
We have seen above that those writers broadly (and to differing degrees) supporting the risk society thesis appear to be informed by modern sociology, ranging from Habermas to Horkheimer and Adorno (some also describe the risk society thesis as neo-Hegelian: O’Malley 1998). In contrast, the second ‘school’ of risk theorising is based on a theorist who rejects many of the assumptions of modern sociology - its realism, its idealism, its belief in reason overcoming obstacles and irrationalities, its commitment to foundationalist ontology and epistemology - Michel Foucault. Their choice of risk as an analytical concept describing what goes on in contemporary societies is informed by Foucault’s notion of different modes of governmentality (Foucault 1984b: 338; Ericson and Haggerty 1997: 128). Governmentality describes a distinct way of ordering and thus controlling the world. Foucault himself spoke of biopower and discipline as modes in which power is exercised in specifically modern ways. He argued that power must not be thought of as ‘held’ by a centre, or a tip of a hierarchy. We must ‘decapitate the king’ or deconstruct the image of Leviathan:

“By way of summarising [...] I would say that we should direct our research on the nature of power not towards the juridical edifice of sovereignty, the state apparatus and the ideologies which accompany them, but towards domination and the material operation of power, towards forms of subjection and the inflections and utilizations of their localised systems, and towards strategic apparatuses. We must eschew the model of Leviathan in the study of power. We must escape from the limited field of sovereignty and state institutions, and instead base our analysis of power on the study of the techniques and tactics of domination.” (Foucault 1980: 102)

Risk accordingly is conceptualised as a distinctly contemporary and modern ‘technique and tactic of domination’. This thought has been taken up by a number of writers, particularly in the field of criminology. Notions of risk (linked to actuarial practices, i.e. insurance systems) do not “conceive of individuals as sovereign subjects, with moral
and political dimensions” (Simon 1987: 62), they “make everything from receiving a prison sentence to getting into law school more or less easy, depending on how we fit into a comparative picture of the population as a whole” (ibid: 65). Those who rely on Foucault to explain the rise and rise of risk argue that risk as a dispositif of power has replaced previous modes of governance that focussed on individual guilt or fault. Crime is now ‘normal’, the concern is with its distribution and actual occurrence, rather than with the perpetrator’s motivation (O’Malley 1998: xii; 1992; Ericson and Haggerty 1997: 39; Simon 1988: 772). For example policing strategies are no longer primarily concerned with stopping drug use as immoral, rather they try to ‘educate’ drug users to make risk assessments and behave ‘prudently’ (O’Malley 1999; 2000b: 465). Assuming the constitutive power of discourses, these writers make a further point about risk discourses. Describing people’s behaviour as more or less risky is not a mere representation, it constructs identities or subjectivities: “To represent us in a certain way is also to shape how we actually are, if our society makes vital choices based upon such representations” (Simon 1987: 65; also see Novas and Rose 2000: 485).

There is no complete agreement between the ‘Foucauldians’ to what extent the new techniques of governance through risk actually increase the control over people, reducing our freedom (see Castel 1991: 294; Hacking 1991: 194) and making it more difficult to organise resistance (Simon 1987: 62). Some also argue that one has to be cautious to not oversimplify the break with the past, and allow for complexity and heterogeneity in one’s theorising (O’Malley 1992: 268; 2000b: xiii; Simon 1987: 78). Yet they all hold that risks, uncertainty and indeterminacy do not simply lead to less control over reality or populations. They do not undermine order or necessarily pose a threat to power. They can be deployed as forms of ordering, governance and control.

This is the major difference between the two ‘schools’ of risk theorising outlined here. The ‘risk society thesis’ argues that “the door of the iron cage of modernity is opening up” (Beck 2000: 222) or that “there is good cause for optimism” (ibid; 226; also see Franklin 1998: 1). The ‘risk as governance’ school on the other hand assumes that risk might be a technology of power rather than an obstacle to it. However, beyond this important difference, the two perspectives on risk also share a feature important for the further analysis and the general argument of this thesis. Their general attitude towards the question of the ‘rule of law’ is that it is in decline.
Risk and the rule of law

Beck and his ‘school’ argue that the current shape of policy making, parliamentary legislation, is relatively powerless when confronted with the new, manufactured risks of contemporary society. Politics are made in companies, through large-scale industrial style production of (environmental) risks, or in laboratories, through research and its unforeseen side effects. The legislature can only stick the label of legitimacy onto developments that are beyond its control:

“The primary decisions without the responsibility for unwanted side effects remain with the companies, whereas it is the responsibility of politics to democratically legitimise decisions that it did not make and to "cushion" their side effects." (Beck 1986: 344, emphasis in the original)

The power to order reality does not rest in the traditionally recognised place of sovereignty, the legislature and law, power rests in those places where Beck assumes ‘sub-politics’ to go on: science, medicine or industry (1988: 291). This power needs to be identified and adequately brought under democratic control. But this cannot happen simply through legislation or parliamentary politics. What is needed is a multi-layered, multi-agency approach to ‘sub-politics’ (1988: 277), involving expert-lead organisations, structured professional debate (1993: 241), ‘round tables’ (ibid: 189) and the ‘new’ social movements (see Beck 1986: Chapter Eight).

The other ‘school’ of risk thinkers might place less emphasis on the possibilities of new and unconventional politic. Yet, aligning themselves with Foucault’s notion of governmentality, they agree with the risk society thesis in so far as they also do not look for power in one central place, the traditional place of politics and law (Smandych 1999: 1). Rather, political power is exercised through practices and technologies as diverse as genetic testing (Novas and Rose 2000), insurance policies (Simon 1987; Hacking 1991), drug education (O’Malley 1999), advice on hormone-replacement-therapy (Harding 1997) or obstetric care (Lane 1995). This is the ‘capillary power’ Foucault speaks of and that leads to his marginalisation of the role of law (see Hunt and Wickham: 49). According to Foucault,

“[Law] is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory [...] We have entered a phase of juridical regression.” (1981: 144)
The debates in Parliament as instances of risk production or awareness

It is time to turn to the debates we looked at in much detail in the previous chapters to see how and whether theories of risk can contribute to their analysis. First, we can recapitulate that the debates in the two Parliaments turned out to be concerned with the uncertain outcomes of scientists’ actions or women’s decision-making. I have argued that they could be seen as concerned with risk. It is further interesting to see that the explicit use of the term ‘risk’ is very prominent in the German discourses. Committee Reports, Government White Papers and Bills all use the terms ‘risks and chances’ in their titles. Many speakers frequently speak of risks and chances, inevitably emphasising the risky aspect of technologies of reproduction.

Risk terminology itself is far less prominent in the British debates. However, we have seen in previous chapters that concerns about possible negative effects of technological intervention into ‘natural’ processes are still expressed frequently. But in London, worries about the effects of modernisation seem to be more effectively ‘balanced’ or ‘neutralised’ by concerns about human life without technological intervention: there is a much more openly acknowledged interest in the prevention of disabilities. In fact, the actual ‘language of risk’ is reserved for the perilous nature of life without the help and intervention of technology. In Britain, the case of parents 'at risk' of having disabled children is the only context in which speakers actually use the term risk, rather than simply referring to possible negative effects of technological progress. Even the Warnock Report, which elsewhere does not use the language of risks, speaks of "the risk of having handicapped children" and "couples at risk" (DHSS 1984: 48).

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9 See for example Lord Ennals, 7 December 1989, House of Lords, vol. 513: col. 1014; Lord Glenarthur, ibid: col. 1042; further see his expressions "these are no good odds" or the "awful prospect of gambling with the odds" (ibid: col. 1043).
If, with Luhmann, risks are man-made problems, whereas dangers are natural perils (1993: 20/21), what the lawmakers are referring to (in Luhmann's sense) are dangers, i.e. external, 'natural' threats to safety. Technology is then to be seen not as risky itself, but as the modern answer to natural dangers:

"To refuse pre-embryo research would be to slam the door in the face of parents at risk of passing on serious genetic conditions." (Lord Ennals, 7 December 1989, House of Lords, vol. 513: col. 1014)

As outlined above, it might not be appropriate to strictly distinguish between the two words of danger and risk as far as their actual use is concerned, as they seem to have become interchangeable (Douglas 1992; Ewald 1991). However, it is important to notice that conceptionally the 'risks of having a disabled child' fall into a very different category than the risky effects of technological intervention into 'natural' processes. The 'risk' of having a disabled child is not concerned with the destructive, but with the positive potential of technology. Particularly with regard to avoiding disabilities, in the British debates, technology can be seen in its role as a provider of safety and certainty and not as a source of risk.

In Britain, all the people in favour of embryo research use the possible prevention of disabilities as one of their arguments. The pro-research lobby in London, 'Progress', even advised politicians to use this argument in order to convince the yet undecided (Mulkay 1997: 29; also see Jackson 2001: 183). In Germany, particularly the arguments about disability remain contentious right until the end of the debates, and pro-selection arguments certainly do not seem to be considered 'vote-winners' (see Chapter Three). It is thus controversial whether the birth of a disabled child should be constructed as a 'risk', or rather as an expression of human diversity and the positively valued uncontrollability of human life and nature.

What we can therefore learn from the example of 'avoidable disabilities' is that the definition of risk is controversial and politicised. Risk is not a neutral or technical

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10 Also see Luhmann: "The result of technicalisation is thus the more or less successful insulation of causal relations with the consequences that (1) processes become controllable, (2) resources become amenable to planning and (3) faults (including wear and tear) can be located and attributed" (1993: 88).
category. In the following, the ‘risk discourses’ about new reproductive technologies will be analysed in the light of the two theoretical strands outlined above. First, we will look at the parliamentary debates in the light of Ulrich Beck’s risk society thesis, based on the notion of increased reflexivity about modern risks. It will turn out that Beck’s claim that everything is fundamentally new and different about risk society has to be rejected. ‘Risk society’ as a firm and precise set of dynamics in modern societies, does not describe properly what is going on in either national parliamentary context. We then turn to the more Foucauldian conceptualisation of risk and contrast it with the actual debates in parliament. I will argue that many writers in this ‘school’ make less grand claims and get it thus less spectacularly wrong. Yet, I suggest that their perspective, too, eclipses an important aspect of the concept of risk: no matter how perfected a system of control, a dispositif of power, a governmentality is, it will always reproduce unforeseen and unwanted side effects, it will break down in parts and will at times achieve the opposite of what it sets out to gain. This chapter will then conclude with a confirmed argument about law’s ambivalent rule over risk.

Test-case one: the co-existence of trust and distrust

If reflexivity is the awareness that modernisation is not all wonderful, but that it can have devastating effects for the dignity, safety and diversity of humanity, then the German lawmakers display a high degree of reflexivity. According to Beck, reflexivity is a type of social thought and action that is “no longer only instrumentally rational [post-zweckrational]” (1994: 9). Once the “possibility of a creative (self)destruction for an entire epoch” hits home, Beck argues, rationality itself becomes a problematic term and “linear models of technocracy” are invalidated (1996: 35). And together with instrumental rationality, science, expertise and progress too lose their unambiguously positive meaning (1986: 38). Reflexivity begins “where trust in our security and belief in progress end” (2000: 213).

We have seen above that the German parliamentarians display high levels of distrust of the logic and ambitions of science. ‘Trust in our security and belief in progress’ are not very prevalent in the German parliament. Beck’s notion of reflexivity appears to have picked up upon a tendency that is prominently present in the German debates. However,
this should not be read as a simple confirmation of Beck's general thesis. In fact, Beck includes a chapter on genetic and reproductive medicine in his 1986 Risk Society. His wife Elisabeth Beck-Gernsheim is one of the experts speaking at the parliamentarian expert hearing in 1990. Her work influenced his writing on medicine and genetic testing (see bibliography to Risk Society). One of the speakers, who is particularly critical of reproductive technologies, refers to Ulrich Beck's work (Dr. Rüdiger, 9 November 1990, Bundesratsprotokoll 624: 637). This might suggest that (the) Beck(s) possibly did not describe a general phenomenon, which I now uncover to also take place in the parliamentary debates analysed here. Rather, it seems feasible to assume that Beck and the debates in parliament might be part of one and the same phenomenon, which Beck not only described, but also shaped through his book and subsequent publishing (McGuigan 1999: 125). This is not to be misunderstood as discrediting his insights as irrelevant. The fact that Beck might be 'a child of his time', a part of the society he is investigating, does not mean that he cannot provide a useful insight into what went on in the mid 1980s in German political debates. However, the lack of reflexivity about his role in shaping a political language for German debates is striking for the theorist of reflexivity. Luhmann indirectly criticises Beck for this lack of insight:

"And by this we mean that sociology is not reflecting on its own role. For even if the sociologist knows that risks are selected: why and how does he do this himself? Sufficient theoretical reflection would have to recognise at least the 'autological' component when observers observe observers." (1993: 5)11

Bearing in mind that the social phenomenon investigated (the debates) and the theory describing it (the risk society thesis) are not totally independent, and have to possibly be thought of as different aspects of the same phenomenon, it is still possible to maintain that the speakers in the German debates display what Beck calls reflexivity, i.e. awareness of the dangerous potential of processes of modernisation, and a loss of unambiguous belief in progress. In previous chapters it was argued that this concern about modernisation led to a straightforward prohibition of embryo research and other techniques that were allowed for example in Great Britain (embryo transfer, egg donation, surrogacy). Yet, it also turned out that the German ESchG could not simply be

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11 On the 'double hermeneutics' of sociological research, also see Giddens: "The development of sociological knowledge is parasitical upon lay agents' concepts; on the other hand, notions coined in the meta-languages of the social sciences routinely re-enter the universe of actions they were initially formulated to describe or account for" (1990: 15).
thought of as ‘the strictest in the world’. Rather, we have seen how significant levels of
distrust in scientist and science and significant levels of trust in doctors providing
treatment were simultaneously present in the debates and in the law. The ESchG does
not control closely what doctors are doing; it does not contain any provisions like the
HFE Act demanding counselling, documentation or licensing. This leads to the
problematic situation that insofar as a scientist is dealing with an embryo, the law steps
in with a prohibition, whereas insofar as s/he is dealing with a woman, the law leaves
the regulation to the medical profession itself (Augst 2000: 220). Concerns about
controlling modern science and medicine are thus (to say the least) unevenly distributed.

The speakers in the German Parliament might not display a belief in progress, but they
certainly display a belief in modern medicine and doctors (which in turn rely on
scientific progress). I have argued in Chapter Five that they use the model of
medicalisation and delegate some decision-making to doctors in order to exercise
control over women’s reproductive choices. The massive concerns about technological
interventions into human reproduction expressed over and over again during the debates
do not lead to an effective control of their ‘medical’ application. Going back to Beck’s
claim that once reflexivity hits society, there is no way traditional politics can continue
(1996: 32 – 34), we can now see that the German MPs ‘reflexivity’ about the dangers of
unmediated modernisation are not translated into radical and new politics in Beck’s
sense. Rather, what we observe so far is that the concerns leading to reflexivity are
conflicting with the just as prevalent hope that modern medicine can improve people’s
lives.

The contradictions triggered by conflicting hopes and fears cannot effectively be
represented as being dissolved into new ‘radical’ politics of reflexivity. On the contrary,
next to Beck’s hopeful reflexivity, the German parliamentarians display uncritical,
traditional, at times reactionary beliefs about family life, women’s role and
responsibility or about ‘nature’ as the model for human relations. The contradictions are
being made sustainable on a discursive level, through drawing boundaries between for
example ‘bad’ science and ‘good’ medicine. Or between good victims of infertility
whom we must help, and bad egotistic women who want designer babies (and somehow
the two are distinguished by means of a marriage certificate). The *ESchG* naturalises (and yet medicalises) women’s desire for a child. With its provision that allows sex choice in cases of assumed ‘severe disability’ it even contains – despite fervent denials - a eugenic element (Augst 2001: 147; also see Waldschmidt 1993).

The fact that reflexivity (representing new, reflexive modernity) co-exists with unchecked trust in doctors or suspicions about women’s reproductive freedoms (representing ‘old school’ modernity) should not necessarily undermine Beck’s claim that what he calls reflexivity is an important and worthwhile phenomenon to investigate. Things start to go wrong, however, when he claims that reflexivity is ‘not an option’, that ‘real’ risks automatically trigger all these societal changes and lead to a totally new “risk society as the inevitable endpoint of ‘the way things are going’” (O’Malley 1998: xiii). What we can see when looking at the German debates is that ‘reflexivity’ can co-exist quite happily with pre-modern gender stereotypes or massive unchecked trust in doctors. There is no automatic second wave of enlightenment as soon as a society faces up to the destructive potential of modernisation.

**Controversy, heterogeneity and Beck’s risk society**

Looking at the British debates through the eyes of the risk society thesis, one might conclude that what we observe is a typical ‘old’, ‘industrial style’ modern discourse, lacking any sustained awareness of the destructive potential of modernisation. There is belief in progress; there are heroic images of scientists and high levels of trust that we, the moderns, can control the risks we enter. Beck argues that modern Western societies produce all the risks prevalent in risk societies; yet they might not in all cases ‘have reached a stage’ where these are reflected upon by public debates:

“Two phases may be distinguished. The first is a stage in which consequences and self-endangerment are systematically produced, but are not the subject of public debates or at the centre of political conflict. […] A completely different situation arises when the hazards of industrial society dominate public, political and private debates. […] The transition from the industrial to the risk epoch of modernity occurs
unintentionally, unseen, compulsively, in the course of a dynamic of modernisation which has made itself autonomous.” (1996: 27, emphasis in the original)¹²

Beck thus paints a picture of, as it were, automatic, necessary change that is independent from the actors’ will or conscience, - “bypassing all forums of political decisions” (Beck 1994: 3). Reflexivity and risk society are like natural forces; they are not culturally dependent or mediated. This perspective cannot be supported by the foregoing data-analysis. When looking at the actual debates in the British Parliament, the neatness of the distinction between the two epochs (pre- and post-reflexivity) becomes doubtful. There are many concerns being voiced in the British discourses about the possibly destructive potential of technological intervention into human reproduction. They are expressed by a minority of MPs, however. Their concerns are portrayed as irrational, particular, unenlightened and backwards by the majority. Yet, the majority or minority positions in the discourses are not simply fixed.

When the debates about the Warnock Report started in the mid 1980s, a majority of speakers rejected embryo research (see on the earlier debates, Mulkay 1997: 20 – 42; Lee and Morgan 2001: 57; Winston 1999: 141 - 144). Does that mean that Britain temporarily reached the state of reflexivity around 1984/1985 and then inexplicably fell back into pre-reflective, ‘orthodox’ modernity? Hardly. What it suggests is that in each individual political or legislative decision-making process more factors feed into the equation than simply the degree or level of ‘reflexivity’. We have seen for example with regard to the British debates around 1990 that the strategy taken up by the female MPs from the centre-left parties was very pro-research. Yet, we have also seen that this response might have been shaped at least partly by a conservative attack on relatively ‘liberal’ abortion laws taking place in the same debates. The female MPs seemed to be defending access to late abortions as much as they were arguing about embryo research and access to fertility treatments. This, I have argued, led to a certain construction of the users of the technologies (mostly women), as independent, self-reliant moral agents. The female MPs response was thus not solely shaped by a concern (or lack of it) about

¹² Also see Giddens 1999: 6.
technological progress; it rather wanted to preserve a space for ‘autonomous’ decision making for women.

Beck’s oversimplified two-stage account of societal development cannot reflect the complexities of (legislative) decision-making in the face of modernisation (see Scott 2000: 37). Similarly, Giddens’ parallel assertion that new ‘late’ or reflexive modernity represents a radical ‘discontinuity’ with simple, ‘traditional’ modernity (1990) has to be rejected. Wynne shows convincingly how both Beck’s and Giddens’ constructions of modern societies before our (radically new, difficult) time are a fictitious story of our innocent, unenlightened, ignorant past (1996: 50). He shows that trust and distrust, and the clash of different forms of knowledge always co-existed and continue to co-exist (ibid: 55; also see Castaneda 2000: 152).

**Between past and future**

Beck’s insistence that everything about risk society is new regularly culminates in the following assertion:

“The concept of risk reverses the relationship of past, present and future. The past loses its power to determine the present. Its place as the cause of present-day experience and action is taken by the future, that is to say, something non-existent, constructed and fictitious.” (Beck 2000: 214; also (in exactly the same words) 1986: 44)

This statement merits criticism on several grounds. Firstly, the juxtaposition of ‘past’ and future, and the assertion that the future alone is ‘non-existent, constructed and fictitious’ suggests that Beck believes the past to be factual, ‘real’, ‘out-there’, and obvious. However, the past, or at least its use as a resource for decision-making, too, has to be seen as constructed (we have just seen how notions of ‘simple’, ‘old style’ modernity were constructions) What motivates or determines present behaviour is a version of the past that is itself fractured, obscure and to a large extent unknown. Further, by reifying the past as something stable and solid, a notion of the subject as knowledgeable, non-fractured and thus ‘rational’ is created. This notion has to be rejected as too simple. It is too close to so-called rational choice models of behaviour.

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13 Also see Hunt, who speaks of legislation as “postmodern modernity” (1997: 166).
14 It could also be read as an instance where a fictitious origin is created in order to give meaning to the present (Fitzpatrick 2001a: 41 – 44)
that are "cruder and more artificially distorted and inapplicable than those which any so-called primitive culture affords for self-knowledge" (Douglas 1992: 41; also see Szerszinski et al 1996; Wynne 1996: 48, 50; Elston 1991).

The above statement oversimplifies the distinction between stable, easy, clear knowledge about the past and tentative, insecure, hit-and-miss knowledge about the future. It accordingly constructs two types of decision-making: one is the rational choice decision, by which all the information (about the past) is available and used to reach a decision. The other is mere speculation, where the decision suffers from lack of certainty and knowledge. Yet, as I have argued above, ‘knowledge always lacks, ambiguity always lurks’ (Douglas 1992). Secondly and possibly more importantly, Beck’s assertion fails to explain the numerous differences between the two discourses. It cannot explain how the speakers in the two national Parliaments seem to imagine very different futures. Even if it is right that discourses about the future are a significant feature of risk societies or late modernity (see Hiller 1993), the past does not lose all of its power to determine these discourses. When comparing the debates in the two countries one can’t help but notice that the debates are different. Fears are expressed differently; different weight is given to certain anxieties and the future imagined by the speakers is different. German MPs do not imagine that we ‘are walking hopefully into the scientific foothills of a gigantic mountain range’. British MPs in their majority do not believe that ‘our best intentions, according to experience, tend not to suffice’ (see Chapter Four).

Questions must be asked about the reasons for this. If it were true that the past (of a society, of a speaker, of the law) completely lost any relevance for debates about the future, these differences would be difficult to explain. One could have recourse to some dubious definition of ‘culture’ to explain the differences. But, unless one follows a totally essentialising and reifying understanding of the concept of culture, culture leads us straight back to the notion of the past. For what is a national, a legal or a social ‘culture’, if not a historically accumulated ragbag of experience?

In fact, if we talk about the future, we talk about the unknown. “The only certainty [of the future] is its indeterminacy” (Adam 1996: 98) When trying to make sense of the future, of the relevance of certain risks, of what could possibly happen, all we have as a
guideline is the past. Something seems more likely to happen, if it has happened before. Some risk might seem graver because we have a memory of the pain we suffered. If I get run over by a car while riding my bike it makes me more cautious the next time I am on the road. And this despite the fact that the risk of getting hit is technically the same before and after the accident. It seems more horrible, less justifiable to enter the risk of an accident. I might still remember some of the pain. Even my best friend might ride her bicycle more carefully after she listened to my account of what happened. If I live in London and work for an advice centre dealing with disability rights, the experience of meeting many former cyclists who find themselves disabled after accidents with cars, might even make me paranoid, that is, it might make my fear seem irrational seen through the eyes of someone who doesn’t share this experience. In assessing the risk of cycling through rush hour traffic in London one would rely on the past, consciously or unconsciously. It is all there is to guide us through the unknown.

Making decisions, whether as lawmakers or not, thus takes place in a space that is shaped by the future and the past. Hannah Arendt in 1961 theorised this space ‘between past and future’. She does so by telling a story of Franz Kafka:

“He has two antagonists: the first presses him from behind, from the origin. The second blocks the road ahead. He gives battle to both. To be sure, the first supports him in his fight with the second, for he wants to push him forward, and in the same way the second supports him in his fight with the first, since he drives him back. But it is only theoretically so. For it is not only the two antagonists who are there, but he himself as well, and who really knows his intentions?” (Arendt 1993: 7)

For Arendt this ‘he’ signifies an “experience in thinking”, battling with the forces of the past and the future (ibid: 14). However, she extends Kafka’s parable: According to Arendt, the insertion of man (and one might add: woman) into time does not allow these forces to clash without hindrance:

“The insertion of man, as he breaks up the continuum, cannot but cause the forces to deflect, however lightly, from their original direction, and if this was the case, they would no longer clash head on but meet at an angle” (ibid: 11).

The space that opens up through human presence, for Arendt, is the actual space of the political, of thought and action. Not denying that past and future will shape action and thought in this space, she still insists that this space needs to be claimed for decision-making.
"[...] Each new generation, indeed every human being, as he inserts himself between an infinite past and an infinite future, must discover and ploddingly pave it anew." (ibid: 13)

This perspective on the political balances determinism with political choice. It does not fall into the trap of Beck's assertion that the past, with the arrival of the future in political decision-making, has suddenly ceased to be of any relevance. But neither does it lead to a world-view that denies that, squashed between past traumas and anxiously anticipated futures, there is nothing we can do. It rejects the 'instrumentalisation of action and the degradation of politics' and defends "the human ability to act - to start new, unprecedented processes whose outcome remains uncertain and unpredictable whether they are let loose in the human or the natural realm" (Arendt: 1998: 230/231).15

We can thus conclude on the first test-case that has been investigated here: Beck and Giddens argue that trust in science and expertise together with belief in progress used to exist in old-style modernity, but has come to an end in our 'late', 'reflexive' modern times. This claim has to be deconstructed. It is based on a fictitious construction of our past as ignorant, naïve and unenlightened. Their assertion that once this trust is destroyed, everything becomes new and different about risk society or reflexive modernity has to be rejected as an oversimplified, mechanical model of social change. We have seen that controversy and complexity shaped the outcomes of the debates investigated here and that 'reflexivity' can at times be displayed by a majority, then be pushed into a minority position, or that reflexivity can co-exist with high levels of unchecked trust in doctors and medicine. Finally, Beck's insistence that the past has lost its power to shape the present, and has been replaced by the future as the major determining factor in decision-making, cannot be confirmed by the previous discourse analysis. If this was the case, the many and important differences between the two national discourses could not be made sense of. Rather, any response to (real or unreal) risks has to be understood as culturally and historically shaped. "Whenever we make our plans for the future, the past has left its mark on what we thought was virgin territory" (Grass 2001; also see Luhmann 1998: 63). If this is acknowledged in one's theorising, any automatism or fancy two-step scheme of development has to be rejected.

15 For connections between Arendt's and recent writing on the risky nature of modernity, see: Schindler 1996: 204 - 211.
Test-case two: governance through risk – risky subjects, morality and resistance

Unlike the previously discussed strand of risk thinking, those who take their starting point in Foucault’s notion of governmentality do not insist on the ‘realness’ of risks ‘out there’. Instead, they assume that risks are produced through discourses. This also entails the production of risky subjects or risky behaviours. Several instances of this risk ‘production’ spring to mind when thinking about the discourses investigated here.

First, we can recall how women’s reproductive autonomy was thought of as dangerous by the mainstream discourses in both countries. This also lead to certain types of women being labelled as risky (single women, lesbians, women who want IVF or surrogacy for ‘social’ rather than medical reasons). Another instance was the construction of couples ‘at risk’ of having a disabled child (on this also see: Novas and Rose 2000; Beck-Gernsheim 1996; 2000). In their case, the theoretical, constructed nature of risk can be well observed: they themselves are not ‘at risk’ from anything; their health is not in doubt. Neither is there another subject that can be seen as ‘at risk’. It is their potential offspring that has an increased chance of being born with a disability. ‘Offspring’ here needs to be understood as potentiality, rather than as a concrete embryo or child. Each individual child either is disabled or not, yet overall, on an abstract level, this reflects a certain likelihood of this occurring. Those who resist the labelling of couples as ‘at risk’, or who reject the screening and subsequent selection of embryos, try to bring this construct back to a more individual level, arguing that the risk of disability can only be reduced by rejecting ‘concrete’ babies. Yet, at least in Britain the notion of ‘couples at risk’ is discursively very successful.

Instances of risk production (rather than simple ‘facing up’ to real risks) can thus be found in both discourses. Yet, some of those writing within the governmentality tradition go further than just highlighting the constructed nature of risk. They argue that the rationality or dispositif of risk has replaced previous forms of governance. Instead of focussing on the guilt or mind of those causing harm, risk displaces moral arguments. The discourse is then simply concerned with actual occurrence and distribution: “Fault” is “pushed aside by risk” (Simon 1987: 74). There is a “shift away from the disciplinary
technology of power itself”, with “socialised risk-management techniques” working “invisibly and amorally” (O’Malley 1992: 253, 259; also see Ewald 1991: 202).

In a way, those arguing along this line also assume a model of history that seems to consist of a linear succession of steps leading from one form of modernity (disciplinary) to another one (actuarial), with arguments about morality being replaced by the management of the actual occurrence of harm. However, looking at the debates in both national Parliaments, we can conclude yet again, that any simple before-and-after models of history have to be modified. Despite arguments about risk being prevalent in the debates about women’s reproductive freedom (harm for children, the traditional family and so on), they do not actually replace arguments that draw upon morality, or that label certain behaviours as immoral. In fact, we have seen that the discourses impose a moral obligation on women to maintain traditional families through on the one hand having children, yet on the other hand to only do so when in a ‘stable’ heterosexual relationship or marriage.

Further, it has been argued for the case of genetic risks that they too, apart from being mere statements about facts, imply a moral “obligation to act in the present in relation to the potential futures that now come into view” (Novas and Rose 2000: 486). Beck-Gernsheim goes further than that when she links genetic testing to welfare state provisions and our obligation to be ‘healthy’16:

“Preventive measures easily obtain a status of legitimacy and rationality today, barely allowing for objections. For on the one hand, the option of avoiding health risks is seen as enlarging our freedom of choice, and on the other hand, such measures are turned against the state in the form of benefit claims. [...] Given these conditions, it becomes a public problem if people do not make full use of preventive measures and the possibilities of health-oriented lifestyles.” (2000: 129)17

It is thus over-simplified to argue that notions of risk can simply replace moral concerns or considerations. In fact, we have to conclude that notions of ‘risk and blame’ (Douglas 1992) belong together. Risks stand for disorder, governance through risk is about “separating, purifying, demarcating and punishing transgression” and they are thus deeply moral statements (Douglas 1966: 4). Even if risks were mere factual

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16 On this obligation to be healthy, see Bauman 1998.
assessments, void of any explicitly moral content, it would be naïve to assume that statements of facts could not be “dragged in to sanction the moral code” (ibid: 3). Discourses about risks still contain “the force of ‘the ought’” (Howell 1997: 4/5).

Some writers at times display an awareness that risk-governance can only ever constitute another form of moral reasoning, never fully replacing moral considerations (O’Malley 1992: 259; Simon 1987: 78). Yet overall, their writing tends to suggest that we witness a fundamental shift in governance: away from disciplinary strategies, towards risk calculation. It is true that the exclusion of for example single women from IVF treatment is (most of the time) not justified by labelling single women as ‘wicked’. Rather, the exclusion is legitimised through referring to the child’s needs or interests (the needs of someone who is not born, and who – as a result of the exclusion – will not be born either, assuming it is better for a child not to be born than to be born to a single woman; see on this Morgan and Nielsen 1992: 62/63). However, it has to be maintained that “dangers to the body, dangers to children, dangers to nature are available as so many weapons” to use in moral and ideological controversies (Douglas 1992: 13).

The writers relying on Foucault also make another claim about the nature of control and power in modernity. Instead of being held in some centre, or at the top of some hierarchy, they look for power as different ‘forms of subjection’ in ‘localised systems’ and ‘strategic apparatuses’. The medical profession with its absolutist reign in the clinic is one prime example of where power lies in modernity. According to Foucault, medicine constitutes “man’s being as object of positive knowledge” (1989: 197). I have shown some instances of this transfer of power to the medical ‘apparatus’ in the previous chapter. The foregoing discourse analysis has shown that, in fact, power is delegated to doctors in deciding who should be treated (and in which way). Only doctors can decide what is a case of ‘real’ biological infertility, meriting treatment, only they can decide whether a couple is ‘at risk’ and should thus be allowed to choose the sex of the embryo created or transplanted. In Britain, only doctors can decide whether the ‘child’s need for a father’ prohibit treatment

18 O’Donovan shows that talk of children’s needs or best interest effectively is still part of a moralising and moralised debate (1994; also see Chadwick 1994).
19 On the necessarily moral nature of medical arguments see Brandt and Rozin 1997; Lee and Morgan 2001: 1.
Yet, I would caution against the assumption that the doctor of s 13 (5) HFE Act, or the
doctor of § 3 ESchG (concerning sex selection) necessarily is the doctor of Foucault’s
clinic. Or rather: not all of them are at all times. In a market of private health care,
women who can pay for fertility services - and most treatments have to be privately
paid for (Winston 1999: 148) - can choose who they want to give their money to. And
doctors can choose whether they fancy themselves as enforcers of the law’s moral
concerns about single mothers, or whether they want to provide lucrative services (see
on the intense competition between clinics providing fertility services: Winston 1999:
148). And financial motivations aside, many doctors want to push the boundaries of
what is possible, they are less concerned with enforcing morals, and more with whether
it is possible to treat a 62 years old woman, and if it is, to get on with it.

In a recent row with the HFE Authority Dr. Taranissi attacked guidelines limiting the
number of embryos to be transplanted into a woman to 3 (now 2) for each treatment
cycle. He argues that decisions about appropriate treatments should be made by the
medical practitioner rather than the Authority, directly challenging the authority of
medical law for clinical decision-making (see on this Guardian, 23, 25 April 2001). If
the law empowers doctors to make decisions that go ‘beyond the merely clinical’, it
might face questions about why it is interfering with clearly clinical decisions. Further,
between 1987 and 1998, the Bridge Centre in London, one of the largest infertility
clinics in Britain, has treated 122 “heterosexual single women” (the question arises how
one knows that they were heterosexual – or single)\(^{20}\), 47% of whom became pregnant
(Guardian, 10 June 2000). It is difficult to see how these treatments were reconciled
with s 13 (5) HFE Act\(^{21}\).

This must not be misunderstood as claiming that women’s choices about which service
to use or not are not stratified. Poorer women especially have to rely on NHS care,
which is stricter about the profile of its patients (no singles, no women who already
have children, no ‘older’ women)\(^{22}\). White middle-class, heterosexual women have been
predominant in IVF treatment anyway (Morgan and Lee 1991: 146; Steinberg 1997: 8;
Winston 1999: 177), and they are most likely to be even more predominant amongst

\(^{21}\) Also see Douglas (1993), who shows that s 13 (5) had little or no influence on clinics’ decision-making
about access to treatment. On lesbian donor insemination see: Haimes and Weiner (2000).
\(^{22}\) The criteria for IVF treatment vary in different Health Authorities. Also see Jackson 2001: 197.
those who can pay for private treatment. The point I am making, however, is that the combined forces of (some) women's buying power, professional and commercial interests and the discourse of individuals' suffering (or right to have a child) mean that doctors are not safely on the side of 'discipline', taking over the law's control through medicalised power. They also are actively part of those dynamics which erode the moral statements embodied in the HFE Act or the ESchG. If the law uses medical authorities to 'discipline' the users of technologies, it also creates powers which it might then find difficult to control.

Which leads us nicely to the final argument of this section: the deployment of notions of risk to govern and order reality can never work one hundred percent. The discourse analysis undertaken in this thesis supports the insight that risks do not simply speak of the breakdown of power. The erosion of determinism does not necessarily "introduce a new liberty": "The argument that indeterminism creates a place for free will is a hollow mockery" (Hacking 1991: 194). Yet, to claim that under the new regime of risk it will "become technologically feasible to programme populations themselves" (Castel 1991: 294), that actuarial practices make it "more difficult to act together as groups, and to understand ourselves as members of a community" (Simon 1987: 62), seems to me to eclipse an important aspect of risk as a conceptual (or political) tool.

Risks can be deployed as technologies of power; they can be used to create order. Yet, they also point at the indeterminate nature of reality, defeating any ordering, undermining even more blatantly an order that is particularly perfect or exclusive. If the lawmakers in London attempted to achieve control over women through vesting doctors with the power to control women's risky desires, then they have not fully achieved their aim because doctors might decide to use their power in a different way. The boundary drawn between 'risky' reproductive autonomy and 'safe' medical need that was so important for both laws, can also be undermined by women themselves. Through phrasing their wishes as medical needs, they make it more difficult for the law, the HFE Authority or the doctor to resist their wishes. The boundary drawn in Germany between risky science and safe treatment can be used by doctors to render harmless what they are doing: they are only helping individuals and should not be held accountable for the wider social implications of their doing so. In short, governance of whichever type, and therefore also governance through risk, can backfire. It is never complete. It will always
have unforeseen side-effects. Risk discourses, identified as the offspring of modernity's concerns about its own effectiveness, can be seen to share modernity's fate: they are ambivalent; they can be used to stabilise, yet also to destabilise order (see Augst 2000: 222).

C: Conclusion
The two theoretical approaches to risk analysed here each highlight one side of the (yet again) inescapable ambivalence of risks. Beck and others emphasise their anarchical nature, and the breakdown of expert-lead or legal control over risks. However, his over-realistic account of risks and their effects neglects the culturally and historically mediated nature of risk-awareness or reflexivity. On the other hand 'the Foucauldians' give a credible account of the constructed nature of risks and risk awareness and highlight that control and power can be exercised through categories of safety, uncertainty and risk. Yet they seem to underestimate the fact that like every order, an order based on notions of risk is fragile, momentary and prone to collapse.

Risks and their calculation can give rise to ever more sophisticated systems and dependencies of expert knowledge and power. But they also stand for the breakdown of control, the anarchy of reality that cannot be sustained through systems of professional knowledge and power. They signify the helplessness of experts when it comes to the explanation or prevention of phenomena like the BSE-crisis, MMR-vaccinations or pollution (Grove-White 1998). Risk-arguments can serve the further control and containment of social problems. But like every form of instrumental rationality and expert-based power, the power of risk-governmentality is not total; it undermines itself through its failures, its unforeseen side effects and through the contested nature of expertise (see for an example from public health: Brown 1995; further: Kelleher et al (eds.) 1994).

Risks vs. the rule of law?
Risks have been understood as the acknowledgment of uncertainty; particularly of the uncertain effects modernisation has for society. We have seen in previous chapters that
the lawmakers in both Parliaments address this uncertainty, at times by using the
language of risk, at times by grappling with the question of how law can sensibly deal
with ‘consequences of modernity’ that are still unclear and which tend to be
indeterminate. We can now conclude that uncertainty or risk plays a role in establishing
legislative control over perceived harmful behaviours or identities. For example by
constructing ‘couples at risk’ the laws create a space for medical and legal intervention
into people’s reproduction. By assuming that children are at risk from selfish women’s
reproductive choices, the law creates medical and legal control over access to fertility
services.

The use of the medical model, of medicalisation, in order to gain control over
reproductive behaviour could be read in a Foucauldian sense as law’s regression. Law
loses control to the disciplinary power of medicine. Yet as was argued in the previous
chapter, this deployment of medicine and its authority does not simply disable law. It
also enables law to maintain a contradictory construction of the legal subject, which is
important for its general approach to reproductive technologies. For the HFE Act this
was the construction of the technologies’ users as autonomous, emancipated subjects.
For the ESchG this was the assumption that the female subject needs to be protected
from the alienating and exploitative forces of technological progress. Through referring
some decision-making to doctors, the two laws can maintain a coherent construction of
legal subjectivity, while delegating the control of other ambivalent or risky aspect of
this subjectivity to medical authorities.

Law thus successfully integrates ambivalence and risk into its own constructions. Yet
we have also seen how risks cannot be fully integrated into the law. Constructing the
birth of a disabled child as a ‘risk’ means that the law makes itself vulnerable to further
demands from those who want to exclude this or other risk. If the law allows sex-choice
through sperm selection, why should it not allows PGD? We will see in the next chapter
that this demand is for example made in Germany, and is difficult to reconcile with the
‘closure’ achieved by the ESchG. If it is the law’s aim to avoid disabilities, and the HFE
Authority therefore demands the screening of donor sperm for certain genetic
conditions, then where does one draw the boundary? What do donors get tested for, and
what is done with the information? Does one tell donors (HFE Authority 1997: 9)? If
decision-making is delegated to medical authorities, then how does one control these authorities if they turn out to be driven by commercial rather than 'moral' interests?

We can thus conclude that risks also destabilise the legal ordering of modernity. Risk production can enable legislative control, yet risk awareness can also complicate lawmaking and legislative closure. Risks can be understood as the 'fallout' of ambivalence, they are the unforeseen side effects of order imposed on disorderly realities. So it is not surprising that we can conclude this chapter with the insight that risks pose a serious challenge to law, yet that the law by integrating risk arguments in its own reasoning also can assert its rule over uncertainty.
Part Three: Modernising Legislation – Exceptions, Fictions and Legal Change

Chapter Seven: The HFE Act and the ESchG after Ten Years

"Transgression, then, is not related to the limit as black to white, the prohibited to the lawful, the outside to the inside, or as the open area of a building to its enclosed spaces. Rather, their relationship takes the form of a spiral which no simple infraction can exhaust." (Foucault 1977: 35)

A: Introduction

This final part of the thesis investigates how the two statutes discussed above are talked about in both countries ten years after they became law. At the time of writing this thesis, ten years have passed since both the ESchG and the HFE Act entered the statute books. We are now firmly placed in the future that the lawmakers debating from the mid 1980s onwards were concerned about. The laws have been lived and worked with for ten years. Scientists have been doing research and providing treatments, women have used fertility services and courts and the HFE Authority were called upon to make decisions. All of them, through their decision-making created facts and in more or less direct ways influenced the legal reality in both countries. This chapter therefore is concerned with law in action (as opposed to the ‘legislative moment’ that we talked about so far): people creating facts, facts impacting on rules, rules impacting on the choices available to those acting and so on.

In previous chapters of this thesis the problem of legislation in the face of ongoing medical and technological progress has featured as the main concern. It has been argued that modernisation, here triggered by technological intervention into human reproduction, throws law into uncertainty. This thesis so far has argued that law is precariously placed when facing the permanent changes of modernisation, but that it achieves some legitimacy through taking up its content from those dynamics it sets out to control. The following section will assess whether the ten years old legal position is still seen as sustainable. Now that a legal response to ongoing reproductive and medical innovation has been found, how can this position be sustained? Does it seem to be in need of modification or is it still ‘on top’ of things? This chapter will start off with a
necessarily sketchy overview of what happened with regard to both pieces of legislation in the last ten years. In a second step, it will introduce two sets of parliamentary debates in 2000/2001 which were directly concerned with the need to change the laws in question. They are the German debates about Preimplantation Genetic Diagnostics (PGD) and the British debates about cloning and stem-cell research. This chapter thus attempts a comparison or discussion on two levels: once again it compares the British and the German debates. Yet it also contrasts the debates of around 1990 with debates happening ten years later.

Not surprisingly we will see that scientific progress did not stop with the legislation in 1990. Also, the users of the technologies did not necessarily stop where the two laws had wanted them to. “The introduction of a statutory regime is far from a panacea for resolving the public choice or legal issues in regulating reproduction” (Lee and Morgan 2001: 6). This chapter is therefore a chance to review the question about law’s rule over modern medicine. Is law's “inevitable built-in obsolescence” (Jackson 2001: 317) all we are left with? I will argue that through different legislative and legal strategies (fiction, exception and the anticipation of change) both laws remain significant for the use and development of reproductive technologies. Law does not simply get washed away by a constant stream of changes. Yet it has to be responsive in order to remain significant.

**B: In the meantime**

In both countries, much has happened since the HFE Act and the ESchG have become law. On either side of the channel, many women have received fertility services and babies have been born.1 Scientists can now do many things that were beyond their reach in 1990. They can store egg cells, they can determine the sex of an embryo and they can test it for many more genetic defects. On the ‘treatment side’ of technologies of reproduction, rather than for research, things seem to go less well: IVF still is not a terribly successful technique to bypass fertility problems. Although more than 50,000

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1 Between 1991 and 1998, more than 700,000 embryos have been created in Great Britain, almost 50,000 of these have been used for research (DoH 2000: 32).
babies have been born following IVF treatment in the UK since the first success in 1978 (www.hfea.gov.uk/frame.htm, July 2001), the success rate has only risen from 14% to 16.9% for IVF without micromanipulation (21.8% with), and from 5% to 9.9% for donor insemination (HFE Authority 2000: 12/13). For Germany, no central register of IVF birth or success rates exists.

There were other developments too. Dolly the sheep has been cloned in 1997, HUGO (the Human Genome Organisation) was set up even earlier and claimed to have established a ‘map’ of the human genome in the summer of 2000. Two groups of scientists in Italy and the US have publicly set out to clone the first person, much to the despair of many other scientists and parts of the public. The more mainstream scientific communities follow another route. They too now believe that the cloning of embryos is acceptable. However, they don’t want to get involved in so-called reproductive cloning, which leads to the birth of genetically identical people. They hope to use cloned embryos to grow tissues that can be used to treat sufferers of serious illnesses (therapeutic cloning, more about the controversies surrounding this issue below).

Not only scientists, but also regulators have been active: The cloning of Dolly triggered emotive debates about whether and how the cloning of people can be prevented. The United Nations Educational Scientific and Cultural Organisation (UNESCO) and the Council of Europe have both declared reproductive cloning as contrary to human rights. In Germany, a Parliamentary Commission (Enquete) was set up to debate the law and ethics of modern medicine with a perspective to introduce new legislations. In London, due to the work of the HFE Authority, many debates have been conducted outside the parliamentary forum, but are still well documented and reported. The HFE Authority consulted and issued guidelines on several controversial issues: sex tests, the

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2 This means one birth out of 80 is the result of assisted conception in the UK (Jackson 2001: 161).
3 How this success rate is to be calculated, is a hotly contested issue. However, the figures used here come from the (rather generous) statistics of the HFE Authority (which for example does not include women who aborted treatment cycles).
4 Micromanipulation describes techniques of fertilisation where the sperm and egg are not simply mixed outside the woman’s body in order to achieve fertilisation, but where either egg or sperm or both are manipulated in order to ease fertilisation (inserting of the sperm, or drilling a whole into the egg etc).
use of eggs from aborted foetuses, cloning and PGD amongst others. In 1997, the Department of Health commissioned an Enquiry into the question of payments for surrogacy, after a number of stories about 'commercial' surrogacy had emerged in the press. The Brazier Report (DoH 1998) concluded that no payments beyond expenses should be made and interpreted 'expenses' more narrowly than it had been done in some of the reported cases (see Freeman 1999; Brazier 1999).

The HFE Authority
Payments were controversial in the context of gamete donation too. After holding several conferences the HFE Authority recommended that the usual £15 payment for sperm donors should be stopped, and that the practice of "egg sharing" (a woman donates eggs and in turn receives free or reduced price treatment herself) should be reconsidered (1996: 23). However, a few annual reports later, it was conceded that both the payments and the practice of egg sharing had to continue, if one did not want to stop people coming forward as donors (HFE Authority 1999: v). The regulation of this issue, debated in 7 consecutive Annual Reports, in the end thus remained unchanged.

Gamete donation created several other problems for the regulators: There was the question of screening of donors for genetic diseases (HFE Authority 1995: 34; 1997: 9), the problem of how many children a sperm donor should be allowed to father (HFE Authority 1992: 21; 1994: 11). The question of choosing donors from a distinct ethnic background was addressed (ibid); and the problem of consent and post-mortem donation was raised through the case of Diane Blood (see below, also see HFE Authority 1997: 2; McLean 1997). The HFE Authority consultation process that triggered the most responses concerned the use of foetal ovarian tissue for either research or for fertility treatments in 1994 (HFE Authority 1995: 19). The majority of those taking part in the consultation (9000 responses) rejected the use of foetal ovarian tissue for fertility treatments. The Authority decided to license the use of ovarian tissue from all sources (living and dead donors, foetal tissue) for research purposes; however, for treatments only the tissue from living donors can be used (on this see Mulkay 1997: 146).
PGD, the practice of testing embryos in vitro for genetic defects before implantation, was first discussed in the 1994 Report (HFE Authority 1994: 32), licenses to do research and to offer this practice to patients were available from then on. However, the Authority only started consulting the public on this issue in late 1999, together with the Advisory Committee on Genetic Testing (now absorbed by the Human Genetics Commission). The report is awaiting publication. Similarly, although cloning was first mentioned as an issue that needs more consideration in the first Annual Report of 1992, a public consultation about cloning of Human Embryos only started in 1998, and led to the publication of a report later that year (HGAC and HFE Authority 1998).

The users of the technologies and the courts
The users of reproductive technologies have been creating facts too, through pursuing a line that “runs from desire and longing to demands and litigation” (Morgan and Lee 1997: 855). Probably most famously, Diane Blood went to court and succeeded against the resistance of the HFE Authority in using her dead husband’s sperm for fertilisation (R v HFE Authority ex parte Blood [1997] 2 FLR 742). Since then, the press reported that another woman could convince the ethics committee of her clinic to impregnate her with her dead husband’s sperm. She then wanted her late husband to be named as the father of ‘their’ child in the birth certificate (Guardian 12 November 1999). This is not possible under the HFE Act. However, the Minister of Health, Yvette Cooper, supports a change in the law, so as not to have these children registered as father-less (Guardian 26 August 2000).

Post-menopausal women went to receive fertility services, too, and caused some public debate. In 1997, Elizabeth Butler became a mother aged 60; in 2001 Lynne Bezant was the oldest woman to become a mother of twins, aged 56 (see Guardian 23 January 2001). Likewise, ‘single’ women accessed reproductive services through private clinics (Guardian 10 June 2000). Recently, some users of donated gametes have been arguing that the 2000 children born after donor fertilisation each year should have access to the identities of ‘their’ donors, along the lines of the adoption register (see Guardian 8 December 1998, 25 April 2000; also see Millns 2000/2001: 34).
Paternal rights were the focus of a few court decisions, with s 28 and s 30 HFE Act coming into play. The ‘standard’ case of an unmarried man whose partner received donor insemination created little problems in the light of section 28 (see Re B (Parentage) [1996] 2 FLR 15; and most recently: Guardian 20 February 2001). However, it was held that the treatment had to take place in Britain itself (U v W (Attorney General Intervening) [1997] 2 FLR 282), and must not be complicated through a surrogacy agreement (Re Q (Parental Order) [1996] 1 FLR 369).

Looking at the case of Diane Blood and her late husband Stephen in more detail can provide us with an interesting insight into the dilemmas confronting efforts to contain through legislation and regulation the wishes and demands of the users of reproductive technologies. Blood offers the “opportunity to take stock, to re-examine the existing boundaries between the anomalous and the routine, between the normal and the pathological” (Morgan and Lee 1997: 842). How can the law respond to ever changing realities and yet insist that it is relevant, that it orders reality and does not just try to breathlessly follow permanently increasing challenges through medicine and individuals who are outspoken and ‘empowered’ enough to make demands?

Of Blood, exceptions and rules
It is best to summarise the facts of Blood (R v HFE Authority ex parte Blood [1997] 2 FLR 742) first. Stephen Blood died suddenly and young of meningitis. Just before his death, with Stephen in a coma, Diane Blood asked whether sperm could be taken from him and stored so that she could be fertilised posthumously. It is what he wanted, she insisted. But, after the doctors had consulted with the HFE Authority over what to do and had actually extracted sperm from Stephen’s body, no consent form or will containing any such explicit desire on Stephen’s part could be found. Yet, everybody, from the courts to the Authority stressed that they believed Mrs. Blood’s version of the events: The Bloods had been trying for a baby and apparently Stephen had said to her on previous occasions that in the case of his death he wanted his wife to be impregnated with his sperm. However, there is no consent by proxy in British medical law; Stephen himself was in no state to consent when the decision was made, and the extraction of sperm was not an emergency treatment to save his life. Thus, the taking of sperm from
him constituted a battery and further an offence under the **HFE Act** (s 41 (2) (b) in connection with s 4 (1) (a), s 12 (c) and paragraph 1 of Schedule 3 **HFE Act 1990**; also see Mason and McCall Smith 1999: 60).

Lord Woolf, in his judgment for the Court of Appeal, tries to play down this fact, and insists that the offence was somehow only committed “technically” (ibid: 764). Yet, the HFE Authority decided that the sperm was taken and stored illegally and that therefore Mrs. Blood could not use it. She went to court, lost, appealed and finally the Court of Appeal suggested that the HFE Authority should exercise its discretion in the light of Art 59 of the EC Treaty, and allow Mrs. Blood to take the sperm to Belgium and receive the treatment there. At the time of writing, Mrs. Blood has given birth to a son, and has since then been fighting to have his birth registered in her dead husband’s name.

The way the court reached this decision can be read as an interesting case study about rules, exceptions and the power of life over law or law over life. In a first step of his argument, Lord Woolf insists that the **HFE Act** did not strictly regulate the case before the court, because it did not foresee such a case. Mrs. Blood’s legal team even go as far as calling upon Mary Warnock, who in a statement certifies that she and her Committee did not foresee such a tragic case and that had they done so, they “certainly” would have seen “no ethical or public policy objections” (ibid: 749). When looking at the Warnock Report however, this version of the past, i.e. the history of the **HFE Act**, seems rather doubtful. It is (of course) true that the Committee did not discuss exactly the case in question. Yet, the Report contains a clear statement on the question raised in the case: AIH [Assisted Insemination by Husband] is considered unproblematic and positive, however the Committee members hold: “The use by a widow of her dead husband’s semen for AIH is a practice which we feel should be actively discouraged. Despite our own view in this matter, we realise that such requests may occasionally be made” (DHSS 1984: 18, 55). We can see that not only did the Committee foresee that ‘such requests may occasionally be made’, it also had a very strong and negative opinion on them, fearing “profound psychological problems for the child and the mother” (ibid). However, by insisting that the Report and thus the 1990 legislation did not foresee Mrs

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6 [1996] 3 WLR 1176.
Blood’s case, the court opens a space in which it can make a decision. The law as it stands does not reach to where this decision takes place. We are dealing with life outside law. The question the court has to address cannot be found in existing law, it is “strictly a matter of construction”, an “unexplored legal situation” (Lord Woolf, ibid: 751, 764).

The court opens a further space outside the HFE Act or, in other words, limits further the reach of the 1990 legislation: It stresses the importance of EC law, here Articles 59 and 60 of the Treaty of Rome. It argues that, yes, the HFE Act 1990 clearly prohibits what happened to Stephen Blood\(^7\), but that this does not mean it can stop Mrs. Blood from going abroad with her (illegally obtained) sperm. Again, we can see that the court constructs the authority of the Act as limited. The boundary of this authority is reached where Mrs. Blood’s guaranteed individual freedom under EC law is concerned. In a way, the 1990 Act thus becomes limited both with regard to time and to space. First, we are dealing with a new development; the law of the past does not contain a statement about this present situation. Second, we are dealing with (mere) national law. A space outside the Act has to be acknowledged, and Blood has to be allowed to access this space.

Finally and most importantly, the court overcomes the obstacle of the 1990 legislation through constructing the case as exceptional. The court holds that it is not creating a new rule. From now on, women or doctors can’t simply take sperm from dying men and then insist on insemination: “there should be, after this judgment has been given, no further case where sperm is preserved without consent” (ibid: 771; also: 754). Lord Woolf argues that an unclear situation has been clarified once and for all, and that now no doctor will ever agree to extracting sperm from a dying man without having seen a written consent form.

This presentation of the case neglects the fact that ‘no treatment without consent’ is one of the most established rules of medical law, and hardly needed much further

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\(^7\) The 1990 legislation does not prohibit any posthumous fertilisation, but it requests written consent (s 28 (6) (b)).
clarification. Yet, when Woolf describes how the extraction of sperm by Stephen’s medical team came about, one can’t help but doubt the claim that such a case could never occur again:

“No possible criticism can be made of the fact that storage has taken place because Prof. Cook of IRT [the hospital where Stephen was dying] was acting throughout in close consultation with the [HFE] authority in a perfectly bona fide manner, in an unexplored legal situation, where humanity dictated that the sperm was taken and preserved first, and the legal argument followed.” (ibid: 764, my emphasis)

The doctor had indeed rung the HFE Authority, whose chief executive made a note of their conversation, according to which,

“The current situation was so traumatic for the wife, in that the decision to turn off the life support system would be made in the next few hours, that it would appear uncaring and unnecessarily bureaucratic to insist on the provision of proper legal consent at this time.” (ibid: 746)

Storage accordingly took place to allow Mrs. Blood to clarify the situation and to find out whether her husband had, previous to his death, consented to the extraction and storage of sperm in writing. Bearing this description of what happened in mind, it is difficult to see how a situation like the Bloods’ cannot arise again. It is true, the professionals now should know that proper consent is required to extract sperm from a dying man’s body, but that is hardly a surprising or new development in law. Doctors have known this all along. What led to the extraction of sperm was the decision to give Mrs. Blood time to clarify whether consent had been given. And in the meantime, due to the dramatic nature of the situation it was necessary, indeed ‘humanity dictated’, that sperm was taken and stored to let the legal argument ‘follow’. So, possibly, all it takes is for a wife (or any other relative, see Deech (2001) who speaks of at least one other case where parents presented dubious evidence about their son’s wishes) to say that she is sure that the patient has consented, that she will go home and look for the document, and could the doctors in the meantime please do their job?

What is happening here is that the logic of care, of safeguarding the wife’s (perceived) interests, rather then the logic of ‘bureaucracy’ is applied. The law steps back, it does not want to be ‘uncaring and overly bureaucratic’ and lets life take over. It allows facts to be created, and we can now see how ‘the legal argument follows’. When the facts have been created (Stephen Blood has been in law violated, but actually we all know he
is now dead and he has left this desperate wife behind) what is the harm in letting her go ahead? After all, this is an exceptional situation. And the question now is about the “lawfulness of the use and export of the sperm”, which is “quite separate” from the question of how the sperm was obtained (ibid: 764). In other words, the law does not prohibit the creation of certain ‘exceptional’ facts, in order not to be overly bureaucratic. Once the facts have been created, the law then assumes it would be pointless to insist on a rule that has been emptied of meaning, as the ‘harm’ has already been done.

In the creation of this exception, the law suspends its rule. Law abandons its claim over facts, as they are deemed ‘exceptional’. At the same time, it takes the law to render facts into exceptions.

“The situation created in the exception has the peculiar characteristic that it cannot be defined either as a situation of fact or as a situation of right, but instead institutes a paradoxical threshold of indistinction between the two. It is not a fact, since it is only created through the suspension of the rule. But for the same reason, it is not even a juridical case in point, even if it opens the possibility of the force of law.” (Agamben 1995: 18/19)

Reading the Blood case as exceptional allows the court to maintain the rule of law, while allowing that which is outside the law to take over (also see Morgan and Lee 1997: 842/843): the ethics of care, the desperation of Mrs. Blood, the sympathy of the doctors. The point of the 1990 legislation however, as we have seen when we looked at the parliamentary debates of the times, was to limit the extent to which this logic of care, of helping those who desperately want a child, could be applied. There comes a point, the 1990 legislation declares, where we won’t listen to those who just want a child, regardless of whether they deserve sympathy. There are wider social implications to be considered, there is the perceived best interest of the child born as the result of fertility treatment. Just applying the logic of medicine, the limitless urge to ‘help’ individuals without any boundaries, will not lead to a desirable situation. In 1990 it was argued that both the power of doctors and the wishes of ‘patients’ needed to be bounded by the law.
In the case of Diane Blood, this claim to establish a boundary, this attempt to limit the limitless, has effectively been given up. This is not to say that the 1990 Act has been entirely emptied or devalued by the Blood decision. Yet it seems that the court could not bring itself to apply the limits of the Act to Mrs. Blood and her ‘exceptional’ case. It is not difficult to see that Diane Blood was constructed and perceived as a woman who deserved “universal sympathy” (ibid: 755). She “wishes to preserve an essential part of her late beloved husband” (ibid: 757). In effect, Blood is a single woman, who wants “fertility treatment for convenience” (Deech 2001: 18). S 13 (5) HFE Act 1990 provides that ‘the child’s need for a father’ has to be taken into account before providing services. However, Diane Blood obviously was not one of the ‘selfish’ single women that s 13 (5) attempts to stop. She “came to epitomise all the virtues of a ‘good mother’” (Biggs 1997: 230; also see Mason and McCall Smith 1999: 61).

Compared to other single women, Blood indeed receives exceptional treatment (Jackson 2001: 211). It is problematic, however, to portray her case as entirely exceptional, and thus to deny any relevance to the change of law the court in effect implements (Morgan and Lee 1997: 850, footnote 58). Because the exception does not lie entirely outside the law, it might be used for other legal conflicts. And one can think of a lot of situations where some body parts of a dying person are highly desirable to the person’s relatives or to doctors. Following the Blood case could mean that instead of insisting on ‘uncaring and overly bureaucratic’ legal requirements of consent, one does what ‘humanity dictates’ with the legal questions sorted out later. Blood then might have created a welcome exception for single women who desire access to fertility treatments. It remains to be seen whether it also created a dangerous new rule about how we deal with the dying and their physical integrity.

The German case: of facts and fictions
In Germany, there were no open controversies about the ESchG until recently. No woman, couple or scientist went to court and challenged any of the restrictions imposed by the 1990 legislation. No regulatory body triggered and conducted major public debates. It seems that the perceived strictness of the ESchG was, for almost ten years, no major concern for German scientists, users and regulators. With recently revived
debates about PGD, the attempt to prosecute a doctor for aiding and abetting in the possibly illegal practice of PGD - by advising a woman that she can receive PGD outside of Germany - has been reported in the press (see Die Woche 11 May 2001). The outcome of this case is not yet clear. It will determine whether the ESchG actually prohibits PGD or not (see more on this question below). Apart from this case, the ESchG has not been used in court so far.

However, in Germany too we have had debates about the actual use of fertility services. To recapitulate: In 1990, egg donation was criminalised, whereas sperm donation was not regulated at all. The ESchG did not make any decisions about the parental status of either donor or recipient of gametes (Wolf 1998: 1441). When it came to a general reform of child law in 1998 (see Coester-Waltjen 1998; Gaul 1997; Ramm 1996), the legal position of the egg donor and the woman giving birth were finally defined, whereas the status of the sperm donor remained unclear (Wolf 1998). Similarly to s 27 of the HFE Act, new § 1591 BGB provides that the “mother is the woman who gave birth to the child”, thus effectively rejecting the legal motherhood of the egg donor (and ‘commissioning’ woman in case of surrogacy). This regulation was deemed necessary as the criminalisation of egg donation and surrogacy might not in all cases prevent its use, requiring a decision about the status of those involved.

This argument was not applied to the case of sperm donation. It was held that, as the ESchG did not contain any regulations regarding sperm donation, to make decisions about paternal status would mean the “approval of insemination by a stranger through the lawmaker without defining the conditions for this method” (Bericht des 6. Bundestagsausschusses, 12 September 1997, Bundestagsdrucksache 13/8511: 69). So even after 10 years, the ‘problem’ of sperm donation has not been resolved by statutory regulation in Germany. As the practice itself has not been prohibited, some men and women approached the courts in order to get decisions on the legal status of the men involved in sperm donation. It is now case law that a man can successfully challenge his paternity, even if he gave consent to his wife’s donor insemination beforehand (BGH MDR 1995: 1033 1034; OLG Celle NJW 1992: 1516). Also, children born from donor insemination can challenge the paternity of their mother’s (ex)husband. The social
father is then treated like a stranger towards the child in any respect, for example with regard to succession (OLG Hamm NJW 1994: 2424) The sperm donor is the legal father of the child.

This has complicated consequences for the question of child support. After some confusion, it is now held that if the husband destroys the ‘fiction’ of his paternity himself, this does not end his obligation to continue financially supporting his child. This duty to support is then based on an assumed contract between the mother and him, benefiting the child, which he cannot wilfully destroy (no case of Wegfall der Geschäftsgrundlage, BGHZ 129, 297 – 311). However, if the children successfully contest his paternity, they can then not claim continuous child support for the future, because here the fundamental change of circumstances (threatening the validity of this assumed contract) has been caused by the children themselves (case of Wegfall der Geschäftsgrundlage, OLG Hamm NJW 1994: 2424).

It thus turns out that the absence of legislative decision-making has led to a rather complicated web of legal relationships between sperm donors, social fathers and children born after sperm donation, based on case law. In strict legal terms, there is no recognised relationship between social fathers and children born after sperm donation, however a financial obligation towards these children is upheld on the basis of an assumed contract and general civil law considerations about contradictory behaviour, which must not negatively affect the children. The fact that the children themselves can terminate this contract and thus end the ‘father’s’ obligation to pay child support leads to a legal relationship that is new for family law: relations between children and adults that can be ‘cancelled’ by one, but not by the other party.

This construct leaves untouched a principle that was shown to be very important for German family law: that legal relations should merely represent factual ‘biological’ relations and that parenthood should not be ‘split’ (see Chapters Three and Five). This

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8 Wegfall der Geschäftsgrundlage is a legal construct that allows to adjust or end legal obligations in case of a radical change of circumstances. However, the person who causes the circumstances to radically change (like here the children who challenge the man’s paternity) cannot rely on this construct.
principle, one could argue, is tampered with in the now regulated case of egg donation: the woman giving birth is the legal mother, even though a possible egg donor is also ‘biologically’ related to the respective child. This provision was only introduced, however, to stop surrogacy arrangements (and thus egg donation) from taking place. It renders surrogacy arrangements legally ineffective. So, in effect, the new regulation attempts to preserve the above principle.

To regulate the status of the sperm donor, on the other hand, would either mean to ignore and effectively outlaw a medical practice that has been going on for decades. By making the sperm donor the legal father who also has to support his children, sperm donation would probably come to an end, as this is not what those involved have in mind. Or it would mean undermining fundamentally the basic assumption of German family law, i.e. that legal relations should be derived from biological ‘facts’ and nothing else (critical on this: Ramm 1996).

We can connect these observations with our main argument about law’s positioning in the face of social change. The legislature avoided a decision on the question of sperm donation. Drawn between the sanctioning of an apparently unwanted, but widespread practice and the placing of law firmly outside of what actually goes on, lawmakers remained silent. The law dithers. No parliamentary, legislative decision is being made. This leaves a space for, firstly, people to try out and explore what is possible and, secondly, for the courts to decide on a case-to-case basis what the law actually is. The courts seem to employ a strategy that is typical for coping with the problem of law’s rule over unstable realities. This strategy entails what we could call a multi-layered approach, and legal fiction.

By splitting the relations within a family based on donor insemination into different levels9 (one of status, one of trust, one of child support), it is possible for the law to insist on the importance of biological relations for family law: the social father of donor children is not a real father in law. The law denies full recognition. However, at the same time, the law does not allow this decision against full paternal status to negatively

9 See on this for British family law: Eekelaar 1994: 87; Dewar 1998.
affect the children when it comes to the question of child support. Through agreeing to the donation, the woman’s partner has created a situation of trust, which the mother and children necessarily have to rely on. This trust he cannot illegally destroy. He cannot single-handedly destroy the actual relationship that exists between him and ‘his’ children. He remains obliged to pay child support, even if the ‘fiction’ of his paternity is destroyed.

I have argued above in the case of the fictionalised occurrence of the primitive streak that by constructing a legal fiction the law can effectively do both: it can acknowledge the facts and override them (the primitive streak in law occurs after 14 days, whether it does or not, the law is at the same time based on its actual and assumed occurrence). Here, we can see how this is played out for German law in the case of decisions about paternity. The relationship and dependency between children and their social father is at the same time acknowledged and fictionalised. It is a mere fiction in legal terms, but it deserves protection. Similarly, the ‘father’s’ consent to his wife’s insemination by donor is rendered meaningless or invalid and simultaneously the fiction of a contract based on this consent is imposed on the relationship between him, his wife and the children. Finally, the status of the sperm donor remains fictional. In law he is the legal father just like any other man who fathered a child. However, the law does not do anything to enforce the consequences of this paternity. He is not sought out and made to pay child support. If the children themselves do not try to find him and take him to court (if necessary), he is allowed to live with the fiction that he does not actually have these children by donation. If no one ‘rocks the boat’ the law does not intervene.

The law thus at the same time sanctions and invalidates the social reality of insemination by donor. Its principle, that legal family relations have to be based on biology, remains at the same time unharmed and emptied of meaning. The law assumes control over circumstances it is unable to fundamentally change, by layering and fictionalising both its response and the social relations themselves (see Fitzpatrick 2001a: 87). Legal fiction can, once again, be seen as a favoured coping strategy for law’s dilemma of position with regard to social change. Legal fiction allows control
without interference; it enables law to assert its sovereignty over developments it cannot stop.

**C: The new debates**

This section looks at the German parliamentary debates about PGD and the British debates about cloning and stem-cell research. They were the first formal debates explicitly assessing the **HFE Act** and the **ESchG**. Both Parliaments ask for the first time whether the substantial content of both statutes should be changed. The debate in London does not actually concern a change of the 1990 Act itself, but of regulations that are based on Schedule 2 of the Act, regarding limits and conditions for embryo research. This makes the procedure in Parliament less formal, and parliamentary scrutiny less thorough. The anti-research minority in Parliament criticises the Government for not actually proposing to amend the Act (primary legislation), which would mean that MPs could suggest amendments themselves. If only regulations are debated (secondary legislation), Parliament can only say yes or no.

Despite this procedural difference, it is still the case that both in London and (by now) in Berlin, the sets of debates analysed here form the first major parliamentary reassessment of the 1990 legislations. Looking at these debates thus enables us to see how the legislative decisions made in 1990 are viewed ten years later on. We will see that many observations from the earlier debates can be confirmed, but that there are also some major changes. This will lead to a final review of the argument made in this thesis about the rule of law over ongoing medical and scientific progress.

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1 In Britain, the **HFE Act** was in fact changed marginally through Parliament after it turned out that some of the provisions on confidentiality were too strict to be helpful in actual patient care. However, this change was of a more technical nature and was not part of a wider controversy over the moral and political value of the **HFE Act**. See on this: HFE Authority 1993: 3; and the **Human Fertilisation and Embryology (Disclosure of Information) Act 1992**.
London: the HFE Act and cloning
In Great Britain, the HFE Act needed to be discussed because of new possibilities in embryo research which were not sanctioned by the 1990 legislation. Paragraph 3 of Schedule 2 of the 1990 Act provided that licenses for embryo research could only be granted for five distinct research purposes, all of which are related to (in)fertility and abnormalities of embryos. However, in recent years, stem cell research has been based on the assumption and discovery that stem cells, which are contained in early embryos, but also in a different form in some parts of the adult body, can be made to grow into several types of tissue. Some scientists and doctors hope that one day, it might be possible to use these tissues for treatments of degenerative illnesses, such as Alzheimer’s, diabetes or sickle cell anaemia. Embryo research might in the long run help the treatment for such serious illnesses. But the 1990 Act does not allow research on embryos for the purpose of treating degenerative diseases.

Further, in order to avoid the rejection of the created tissues by the patient’s immune system, the technique involves replacing an egg cell’s nucleus with the nucleus from a cell from the patient’s body. This means the egg cell, which develops into an embryo (this is the technique used for ‘Dolly’), and therefore the embryonic stem cells, contain the same genetic information as the adult patient’s body. The stem cells thus are a clone of the patient. Those in favour of research using embryonic stem cells argue that the prohibition of cloning and any reasonable concerns about it should only target so-called reproductive cloning, where an embryo genetically identical to any other human being is implanted into a woman who subsequently gives birth to a child which has the same genetic make-up as another person. Stem-cell research is not about creating people, it is about creating tissues that might be used for treatments of sufferers from chronic and debilitating disease (so-called therapeutic cloning, see Winston 1997).

To enable therapeutic cloning thus required a change of the (regulations under the) HFE Act. In January 1998, the HFE Authority, together with the Human Genetics Commission published a consultation document about stem-cell research and human cloning (HGAC and HFE Authority 1998a) outlining the scientific, legal and ethical
implications of human cloning. Around 1000 copies were distributed, and nearly 200 responses received (HGAC and HFE Authority 1998b: 9). Their report lists the opinions expressed during the consultation process and recommends changing the regulations about embryo research in order to allow stem cell research (ibid: 32/33). It further indirectly recommends the prohibition of reproductive cloning through primary legislation (ibid).

The Government at first were reluctant to embrace the findings of the report, as they did not seem publicly acceptable (Guardian 21 June 1999). It then set up yet another expert group headed by the Chief Medical Officer, Liam Donaldson, in order to further review ‘the potential of developments in stem cell research and cell nuclear replacement to benefit human health’ (DoH 2000a) in September 1999. As in the mid 1980s, the Government seems to delay the introduction of legislation in the face of opposition.12

The Donaldson Report was published in June 2000 and recommended going ahead with stem cell research and argued (like the HFE Authority Report) for the prohibition of reproductive cloning. Finally, the Government supported its recommendations (DoH 2000b) and arranged parliamentary debates for November 2000. This led to accusations that it intended to rush through its amendments before the Christmas break, without any proper public or parliamentary discussions (see for example Lord Alton of Liverpool, 22 January 2001, House of Lords, vol. 621: col. 24).13 However, a large majority of MPs and members of the House of Lords, bigger than when the HFE Act was adopted in 1990, voted in favour of the Government’s draft regulation, accepting the use of embryos for stem-cell research and therapeutic cloning.

The whole process rested on the implied assumption that in fact the HFE Act also covered embryos created using the Dolly-technique, whereby the genetic information of

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11 It is interesting to note that the word ‘cloning’ was dropped from the title of this enquiry and report. See below for the problematic nature of the concept of cloning.

12 In 1985, after the publication of the Warnock Report, the Government did not produce a White Paper, but yet another consultation document (HMSO 1986, Cm. 46). A step widely condemned as unnecessary (see on this Mulkay 1997: 32).

13 Also see: Baroness Blatch, House of Lords, vol. 621: 30/31; Lord Rawlinson of Ewell, ibid: col. 41; Baroness Warnock, ibid: 44.
the possible recipient for treatment is transferred to an egg-cell in vitro, which subsequently develops into an embryo. The embryo is thus not created through fertilisation (but see: s 1 (1) (a) and (b) HFE Act; also see Jackson 2001: 249). If the Act was not applicable to embryos created using the Dolly-technique, the HFE Authority would be acting “beyond its powers” (Morgan 2001: 193) by issuing guidance and granting or rejecting licenses (on this see: Morgan 2001: 188 – 194; Brazier 1999: 189). However, the HFE Authority and the Chief Medical Officer’s Expert Group assumed that the 1990 Act simply covers all embryos ‘created in vitro’ (HGAC and HFE Authority 1998b: 12; DoH 2000a: 32/33; also see DoH 2000b: 3). Yet, some of those opposed to embryo research still argue that Parliament ignored the restrictions of the HFE Act when passing a regulation allowing cell-nuclear replacement. The ‘Prolife Alliance’ applied for judicial review at the High Court which is still pending. In the meantime, the HFE Authority does not grant any research licenses that involve nuclear cell replacement. Stem cell research without cloning, however, is going ahead (HFE Authority 2001).

**Berlin: The ESchG and Pre-Implantation Genetic Diagnostics**

In Germany, too, the 1990 legislation came under review due to the demands of doctors and scientists. Early in 2000, the Bundesärztekammer (BAK), the self-governing body of the medical profession, similar in its remit to the GMC, issued what it called ‘draft guidelines’ about PGD, the screening of in-vitro embryos for some genetic defects, before implantation into a woman’s body. They were published in the Ärzteblatt, its own journal, and distributed widely. The BAK draft guidelines suggested treating PGD as a legitimate service for couples at risk of having disabled children. Similar to rules on abortion, it required a doctor to certify that there was a risk for the woman’s (mental) health if she was forced to simply go ahead and get pregnant, in case the foetus would turn out to be disabled. This triggered a passionate and heated debate about selection, eugenics, helping those who are at risk of having disabled children and the general role of science, the law, and human dignity, inside and outside the medical profession, in Parliament, and the media (see the documentation of the debate: Bundesärztekammer 2001).
The *ESchG*'s position on PGD is unclear. It is controversial whether it allows or disallows PGD (see on the whole debate: Hepp 2000). For PGD, a cell or a couple of cells are extracted from the embryo in-vitro. This does not normally harm the early embryo, which can still develop into a whole person, as all its cells are still ‘toti-potent’, i.e. can still potentially grow into a person. The extracted cell is then tested for genetic defects, and only if it turns out to be ‘normal’, is the embryo then implanted into the woman’s womb. The *ESchG* treats every embryonic cell, which can still develop into a person like an embryo (§ 8 *ESchG*). This means that the cell taken from the embryo to test for genetic problems is, if still toti-potent, an embryo too. Using and destroying it for analysis is thus the destruction of an embryo. As the *EschG* prohibits the destruction of embryos, some argue that it outlaws the extraction and destruction of a cell which might still develop into a person. Others hold, however, that the cells extracted for analysis (at around the 8-cell stage of development) are no longer toti-potent (Beier 1999). This would mean that § 8 *ESchG* did not prevent the extraction and destruction of an embryonic cell.\(^\text{14}\)

There remains the further problem of §§ 1 and 2 *ESchG*, which prohibit the creation or use of embryos for any other reason than to achieve a pregnancy. Again, some argue that for PGD embryos are not created for implantation in any case. They are created to be tested and only those who turn out not to carry a genetic defect will be used for implantation. They are created conditionally. Handling the embryo for PGD does not serve the purpose of implanting it, and is thus not sanctioned by the *ESchG* (Laufs 1992: 79). Those who want to allow the practice of PGD, not surprisingly argue that §§ 1 and 2 *ESchG* do not prohibit diagnosing the embryo. They hold that PGD aims at achieving pregnancy. Those who set about the difficult creation of an embryo in-vitro (both doctors and women or their partners) want to implant the embryos they create. If it turns out that one or more of the embryos carry a defective gene, and will not be implanted, then this is not what the woman or doctor aimed at (Ratzel and Heinemann 1998).

\(^\text{14}\) Critics of this position state that it would turn general principles of the *ESchG* and other legislation on its head: the later embryo would be less thoroughly protected than the earlier one. See for example: Monika Knoche, 13 November 2000 Anhörung Enquete 4/11: 90, 93.
It is consequently not clear whether the ESchG needs to be changed in order to make PGD possible or not. And it is therefore not clear whether the BÄK supported an illegal practice by issuing a draft guideline. The debates about PGD reached Parliament in the spring of 2000, where some demanded the setting-up of a Select Committee (Enquete Kommission) to debate and assess developments in contemporary medicine and science and to make recommendations for Parliament itself. The setting up of the Enquete was in itself highly controversial and almost failed, as the government seemed reluctant to give a voice and forum to those who were opposing many of the new scientific and medical developments (the “fundamentalists”, see: Die Welt, 30 October 1999). Those members of the new Socialdemocratic majority who wanted to 'modernise' German responses to bioethical and medical challenges claimed that the 2 to 3 years an Enquete would take to reach any conclusion would be time wasted (see: Emmrich 1999).

Yet, reacting to public and parliamentary pressure (tageszeitung, 24 November 1999) the Enquete was finally and formally established on 24 March 2000. In May 2001, the Government also created an additional body charged with advising on questions of ethics, the Nationaler Ethikrat, a committee consisting of ‘experts’ from the medical, natural and social sciences, law, and politics. This move was immediately criticised by some parliamentarians as an attack on the parliamentary work of the Enquete (Dr. Böhmer, 31 May 2001, Plenarprotokoll 14/173: 16887). Others claimed that the Enquete was seen as too critical, and was thus sidelined by a more science-friendly, less troublesome body (Merz, ibid: 16894/16895). In the last week of May, finally the German Bundestag discussed PGD and the work of the Enquete and the Ethikrat. The following analysis will be based on the debates within Enquete and Bundestag on PGD (in November 2000 and May 2001). It seems now certain that no new legislation will be introduced before the end of this Parliament (autumn 2002), so that the Enquete and Ethikrat can conclude their work.

15 On this whole debate see: Deutsches Ärzteblatt 97, March 2000.
An overview: the debates, the argument

Once again, like in the 1980s, much of the formal parameters of legislative work remain the same for both countries. In the 1980s we had conservative governments in both Parliaments, and Labour (and other ‘left’) MPs in the opposition. Now, ten years later this has changed. In 1997, a Labour government took over in London, and in 1998 a Socialdemocratic/Green one in Berlin. We will see that the effect of these changed majorities seems to have been more profound for the German than the British debates.

At first glance, one might argue that indeed the new debates signify more of the old. Some of the observations made about the earlier debates simply seem to get confirmed. Again, German MPs seem to approach the new developments in the field of technologies of reproduction much more cautiously: that PGD might even be considered is deeply upsetting to many and leads to wide-ranging and fundamental debates inside and outside Parliament. The general approach to the newly raised questions is one of caution. In Britain, we seem to see more of the old too: there is a minority who, on the basis of their conceptualisation of the human embryo, reject embryo research, and even more so, the use of embryos for stem cell research. However, they again cannot stop the majority from going ahead with yet another purpose for embryo research.

In the following, the continuities between the debates of 1990 and the debates of 2000/2001 will be outlined briefly. On closer inspection, it turns out that some things have changed. I will argue that the British debates of 2000/2001 show signs of the earlier German debates: they include a more explicit element of distrust against science and technology. They show concerns about the alienating or exploitative effects scientific innovation might have, in a way that they did not do before, though these concerns were prevalent in the German debates of the 1980s. The contemporary German debates have changed even more. The new Socialdemocratic Government declared a new ‘openness’ on questions of technological progress. It wants to discuss the issues ‘open-mindedly’, without “ideological blinkers and the prohibition to think certain things [Denkverbote]” (Gerhard Schröder 18 January 2001, Süddeutsche Zeitung). In effect, this destroys some of the consensus that was characteristic of the German debates of 1980. Back then, embryos were unanimously put beyond the reach of science; there was not to be any testing or selection of embryos. The contemporary
German debates are thus characterised by a focus on the status of the embryo, as its status is suddenly controversial. This was, it has been argued, also the focus of the British debates about the 1990 Act. The re-assessment of the embryo research question also triggers a controversy about abortion politics and their ‘inconsistencies’.

In conclusion it thus seems that the debates in both countries have, despite all the obvious and striking differences, become more similar. The German debates resemble more those in London around 1990; the British debates have become more similar to earlier German debates. I argue that this similarity, or the tendency to correspond, can be explained by the effect a liberal mainstream has on debates about modernisation. The liberal mainstream, which seems to have been strengthened in both countries, forces opposition to its world-view into certain arguments and identifications. In other words, those arguing on behalf of ‘modernisation’, in its liberal, ‘progressive’, optimistic form, seem also to shape their opposition in certain ways: In effect, opposition seems homogenised.

More of the same in London: Drawing boundaries between science and sci-fi, reason and irrationality, and cloning and cloning
All the features of the earlier majority discourse resurface in the controversies about stem-cell research. To begin with, we again come across the distinction between science and science fiction which was identified in the earlier debates. In 1989/1990, it was often held that what Parliament was talking about was strictly regulated, ethically sound, cautious research, but not “hair-raising, horrific stories of genetic manipulation, [...] of monstrous hybrids [...] of cloning, and so on” (Lord Ennals, 7 December 1989, House of Lords, vol. 513: col. 1013). Cloning then was firmly placed on the sci-fi side of the boundary that separated serious science from fictional anxieties.

16 The anti-embryo research minority too employs the same strategies as in the previous debates. They focus on the status of the embryo and speak of “human vivisection” (see Mrs. Winterton, 17 November 2000, House of Commons, vol. 356: col. 1205). They claim there is something “unsavoury or unnatural about such research” (Mr. Swayne, ibid: col. 1180). They also accuse the majority of “semantic trickery” to avoid the term cloning (Mr Leigh, 19 December 2000, House of Commons, vol. 360: col. 259).
17 Also see Mr. Turnham, 23 April 1990, House of Commons, vol. 171: col. 64.
This time round, however, the mainstream wants to legalise a technique that involves cell nuclear replacement, the technique that led to the birth of the infamous Dolly, the technique of cloning. Cloning has unwanted connotations; it represents danger. The term has been used for the last ten years to "attempt to place a limit on the scientific endeavour" (Edwards 1999: 78). It is a "scare word that everyone will recognise as indicating the need for some outer limit" to what is possible (Strathern 1999: 180/181; also see Black 1997: 49/50). "Even with the qualification of the word 'therapeutic', the word 'cloning' sends shivers of horror down the spines of the British public and has done so ever since the day of Mary Shelley" (Baroness Warnock, 22 January 2001, House of Lords, vol. 621: col. 44; also see Wellcome 1998). So the parliamentary majority who want to legalise cell nuclear replacement and stem-cell research face a formidable task in making the technique of cloning discursively safe. By now, we can afford an informed guess that the way this is done is by redrawing the line between safe cell nucleus replacement aimed at creating tissues for treatment of illnesses, and unsafe, sci-fi, not-to-be-taken-seriously cloning of babies. And the debates are about the question whether this line is obvious and recognisable or arbitrary and unstable ("can the line be drawn and held? That is what we are discussing tonight – the firmness of that line in the sand," Baroness Kennedy of The Shaws, 22 January 2001, House of Lords, vol. 621: col. 46). Yvette Cooper introduces the important 'line in the sand':

"These regulations have nothing to do with human reproductive cloning. I know of no one in the house who advocates human reproductive cloning [...]. Claims that the regulations will lead to human reproductive cloning are based in science fiction, not in law" (19 December 2000, House of Commons, Hansard vol. 360: col. 220, my emphasis)\(^\text{18}\)

This distinction leads to further similarities between the more recent and the earlier debates. Firstly, there is an argument about language, secondly one about reason and irrationality. Dr. Ian Gibson takes up the strategy of criticising his opponents' use of language:

"The language in this debate bothers me somewhat, as we hear references to such things as neo-cannibalism and the trivialisation of life, which do not help the debate." (17 November 2000, House of Commons, vol. 356: col. 1190)

\(^{18}\) Also see Mr. Thomas: "therapeutic cloning is entirely different in purpose, impact and motivation," (17 November 2000, House of Commons, vol. 356, col: 1197); Ms Ruddock, ibid: col. 1201. Yvette Cooper, ibid: col. 1180; Campbell 1988: 7; HGAC and HFE Authority 1998b: 3; DoH 2000a: 43.
We already know the rest of this strategy. What we need is a “cold interpretation of the data” and “straightforward information”, rather than “scare stories involving human cloning and the creation of Hitlers, David Beckhams and so on” (ibid). “People’s intellectual assessment of the problem rather than gut instinct” (Dr. Brand, ibid: col. 1195). Instead of “extraordinarily emotive and exaggerated views of the proposed research” (Ms Rudock, ibid: col. 1210), “the facts and the hard evidence” must be allowed to speak (Baroness Warwick of Undercliffe, 22 January 2001, House of Lords, vol. 621: col. 33)19. Based on this assessment of the opposition’s intellectual ability and discursive honesty, it is then, once again, easy to discredit the minority position as based on emotions, beliefs, principle, dogma, but not the pragmatic and rational stuff that modern politics are made of. All of this, again, is put in the terminology of ‘respect’:

“Some members will be opposed to the regulations as a matter of strongly held principle. [...] I have considerable respect for those views and I shall listen with attention as they are raised [...]” (Ms Cooper, 17 November 2000, House of Commons, vol. 356: col. 1177, my emphasis)20

Once again, the majority position is characterised as that of reason, of pragmatism and fact. And within this self-image, many speakers position themselves in the enlightenment tradition. Once more, their enlightened universe is peopled by Galileo, Darwin, Aristotle and Columbus (Dr. Brand, ibid: 1195; Ms Rudock, ibid: col. 1210; Mr Harris ibid: col. 1219; Dr. Clarke, 19 December 2000, House of Commons, vol. 360: col. 249). Further, when looking closer at the self-image of those who promote the new regulations, we can see (again) that this majority does not quite come up to its self-proclaimed ideals. Its self-image is distorted. They see themselves as the vanguards of reason, rationality, cool-headedness and scientific rigour, but they frequently get carried away into mythical and emotive descriptions of the wonders scientific progress can achieve. Yvette Cooper speaks of the “holy grail” of medicine, which might be found through stem-cell research. It is a “revolutionary treatment”, and a “huge breakthrough” (17 November 200, House of Commons, vol. 356: col. 1180).21 “Should stem cell research lead ultimately to treatment for Alzheimer’s, nursing homes throughout the

20 Also see Mr. Hammond, ibid: col. 1183; Mr. Forth, ibid: 1184; Dr. Brand, ibid: 1195; Cooper, 19 December 2000, House of Commons, vol. 360: col. 211.
21 Also see Dr. Gibson, ibid: col. 1190; Baroness Northover, 22 January 2001, House of Lords, vol. 621: col. 33.
country could be emptied" (ibid: col. 1179) - thus confusing a possible treatment for Alzheimer's with a world in which we are all happy and healthy, until suddenly, one day, we drop dead without ever having bothered Social Services. Similarly, stem cell research "will allow future generations [...] to walk tall, freed from pain and disability" (19 December 2000, House of Commons, vol. 360: col. 261). As I have argued in more detail above, what we can observe is a process by which those who see themselves on the side of modernisation, discursively exclude characteristics, arguments and identities which are then constructed as modernity's 'other'. Whatever makes up this 'other', however - emotions rather than reason, belief rather than knowledge, particularism rather than universalism - is also an integral, if eclipsed, part of modernity's self.

This underlying tension in the construction of what it means to be 'modern' or 'progressive' also is reflected in an uneasy construction of the law the speakers are debating. To recapitulate, modern law, as constructed by the majority discourse in London, is supposed to be rational, not based on beliefs. It is universal, not particular; it is based on democratic process and majority vote, rather than on the convictions of minorities who pressurise society. Yet as we have seen above, the speakers themselves feel uneasy about a law that has been emptied of any intrinsic values, that simply follows wherever the majority leads. Somehow, it seems, law cannot do without some grounding in morality. And so we can see, once again, how on the one hand, beliefs and particular morals are rejected as the foundation for law, but how on the other hand, the speakers insist that this is not an "argument between ethics and science, because it is not. The ethical argument cuts both ways" (Yvette Cooper, 17 November 2000, House of Commons, vol. 256: col. 1181). At this point the speakers frequently refer to the fate of the disabled and how stem cell research might help to find cures. They conclude that theirs is an ethical, and not a mere majority, position too.22 They care for the living, rather than for an abstract notion of 'life'.

With regard to law, we can thus continue the theme we introduced for the concept of modernity. It includes and at the same time excludes the notion of beliefs, morals and convictions. Law is held to be distinct from mere moral sentiment, to be based simply

on reason, yet then a foundation in ethics, the ethics of care for the disabled is reasserted (in the 1980s, the infertile featured more prominently). Modern law, like modernity itself, seems to assert "a negative identification with what remains within itself. "That is, although constituted by what it is not, in being universal, modernity must extend to everything, including that which it opposes in its own self-constitution" (Fitzpatrick 2001a: 63).

So, one might ask, is there anything new then about the debates in 2000/2001 or are they just a rehash of those from 1990? And indeed, the similarities are overwhelming: the majority pursues the same strategy, with even greater success. The pro-research majority is even bigger this time round: 366 MPs vote for the changed regulations, 174 against. Yet, as I will show in the following section, there are some differences between what happened ten years ago, and what happened in 2000/2001. The differences are not overwhelming; they should not be overemphasised, but they must not be ignored either.

**Anything else?**

The first important difference between the debates of 1990 and 2000 is that the Government takes sides in the more recent debates. Like in 1990 it is held that the vote will not be held according to party line, but that each MP can vote on the basis of his or her conscience. However, unlike in 1990, the Government itself does not claim to simply facilitate the debates (for doubts about this claim even in 1990, see Mulkay 1997: 43 – 48), by introducing alternative provisions (for and against embryo research, see HMSO 1987, Cm. 259: 6). This time, Yvette Cooper and Lord Hunt in both Houses do not claim to simply express their own opinion, but that of the Government. Arguably, this adds to the appearance of the debates as less fundamental, more as a logical follow-up to the debates of 1990. This strategy might convey the message that the Government, on the basis of existing legislation, simply does its job (more on the need or not for principled and fundamental debate see below).

The next major difference between the past and the present debates is that now the controversy is almost exclusively about embryos. Recalling the debates of the 1980s, we can see that the other concerns which were so prominent and important then are now
(almost) entirely absent: concerns about family forms, about children and about women’s reproductive autonomy. Indeed, women as actors hardly get a mention, either by those who oppose technologies of reproduction or by those who argue for the new regulations. It seems that some of the feminist critique of the dynamics of technologies of reproduction is confirmed by this finding: women do not feature in the discourses anymore (see Raymond 1993: xxxii; also see Steinberg 1997: 146). The fact that eggs and embryos, and the entire business of reproductive technologies depend on women’s bodies is not visible (or audible) in the debates. Concerns about the traditional family, and its destruction, are also very rarely mentioned. This confirms an observation made for the earlier debates: women feature as problematic or they don’t feature at all. As this time round women’s actions are not thought of as problematic (the concern is about scientists), they do not really feature in the debates.

These differences between the earlier and the contemporary debates are not talked about by the speakers themselves. Yet, there is another difference which the speakers themselves introduce. They insist that things have changed since they last debated the issues of reproductive technologies. Mr. Hammond describes this change with the following words:

“I sense that much has changed in the climate of public opinion since 1990. I sense that public opinion has awakened to some of the potential dangers of the advances of science, and that public opinion has therefore moved. [...] The BSE crisis – remote as that might seem – and the genetically modified crops debacle have all caused the public to re-evaluate the role of science in our society. I suggest that the age of deference to scientists is over. “ (17 November 2000, House of Commons, vol. 356: col. 1184)

Problematic instances in the recent history of science and technology are mentioned by other speakers, too, as signs that “much has changed”: ‘BSE’, ‘GM foods’ (Ms Ruddock, ibid: col. 1209); ‘mobile phones’, ‘telecommunication masts’ (Dr. Gibson, ibid: col. 1190); ‘thalidomide’ (Dr. Fox, 19 December 2000, House of Commons, vol. 360: col. 223). There is another development. Doctors and scientists are now talked about as “not beyond commercial considerations” (Mrs. Winterton, 17 November 2000, House of Commons, vol. 356: col. 1206). A new terminology, which was entirely

23 See Dr Fox, 19 December 2000, House of Commons, vol. 360: col. 22.; Ms Keeble, ibid: col. 256; also see ibid: col. 242/243 and 247/248
absent from the earlier debates, is introduced by some speakers. Mr. Hammond claims that the Government is mostly concerned about the “risks to our biotechnology and pharmaceutical research industry of not proceeding” with embryo research (ibid: col. 1187, also see: col. 1188). Mrs. Winterton speaks of the “crude commercial potential” of stem cell research and blames the Government for trying to promote the “£50 billion science industry” (19 December, House of Commons, vol. 360: col. 243).

In short, some speakers (those opposing embryo research, but also some majority MPs) claim that society fell out of love with science. There is, they argue, a lot more critical consciousness about science and technology than there used to be 10 years ago. Trust in “politicians and scientists […] is at an extremely low ebb” (Baroness Warnock, 22 January 2001, House of Lords, vol. 621: col. 44)\textsuperscript{24}. However, this claim does not seem to be supported by the outcome of the debates: the majority for the changed regulations, allowing therapeutic cloning, is even bigger than it was for the original HFE Act in 1990. This gap between the discourse, and claims made within it, and actual political outcomes is significant. It confirms what I argued in the last chapter: that reflexivity (a critical awareness of the possibly destructive potential of ‘progress’) as such cannot fully explain the outcome of the debates in Parliament. What we observe in the debates in London could be called a growing reflexivity. Yet, the outcome of the debates clearly endorses optimistic and self-confident views about science and medicine and their legal control.

It is now time to look at the German discourses and their development over time. What do we recognise from the debates ten years ago? What is new? It will turn out that the German debates have changed more radically than the British ones, even though, at first glance, much seems to be the same.

The debates in Germany: More of the same?
Much of the German debates seems familiar, too. We recognise the concerns, the caution, the lack of enthusiastic endorsements of scientists’ work. Unlike the British

\textsuperscript{24} Also see Lord Dubs, 22 January 2001, House of Lords, vol. 621: col. 40.
debates of 2000, women and their involvement in technologies of reproduction still feature. It seems that the German speakers still have not made their peace with ‘new’ reproductive technologies, even after ten years of legislation, and at least 20 years of IVF. There still are concerns about the risks for women inherent in standard IVF (Knoche 13 November 2000, Anhörung Enquete 14/11: 22; Dr. Diedrich, ibid). The high costs of technologies of reproduction are criticised, accounting for 10% of all expenses in gynaecology, which will probably increase in the light of PGD (Schneider, ibid: 28). Most obvious is the unease about technologies of reproduction when it comes to the question of eugenics or selection, which is why the practice of PGD, in which a ‘healthy’ embryo is chosen over a ‘defective’ one, is so controversial. During the expert hearing on 13 November 2000, some of the members of the Enquete and the public at times loudly protest against ‘slips of tongue’ by those who are in favour of PGD. As soon as an expert uses the term ‘life worth living’ [lebenswert], or labels the birth of a severely disabled child as a “catastrophe” for the parents, people get very upset and protest about this attitude (ibid: 19/20; 31/32). The chair of the committee, Margot von Renesse, opens the meeting with the words:

“Talking about PGD means entering mined territory. A social consensus on this issue – and this is the condition for effective legislation – at the moment seems almost impossible. Supporters and critics of this technique and its aims accuse each other of anti-humanist cynicism.” (ibid: 4)

Technologies of reproduction seem like a wound that still has not healed in the German debates. As in the debates of 1990, MPs from the left, particularly women and representatives of the disability movement, often do engage in a discourse which is not the liberal discourse of emancipation and freedom through progress:

“The de-bodiment [Entleiblichung] of the female ability to give birth [Gebärfähigkeit] has profound effects on gender relations, on the cultural and social definition of motherhood and also on the concept of autonomy in a society. […] The fact that there is a technical domination through dispossession of the female Gebärfähigkeit has to be a huge part of the ethical and social discourse.” (Knoche, ibid: 71)

This is not a liberal discourse of autonomous patients. Again, the feminists in the Committee itself reject simplified notions of female agency (see for example Wegener, ibid: 57; Knoche, ibid: 18).
What is new, then?

We have seen in previous chapters that the women and the 'left' opposition in the German Parliament did not subscribe to the liberal world-view in their critique of reproductive technologies. Their universe was not peopled by autonomous subjects, who made the right choices, and who could control the risks of technology. Selfless scientists, battling against all odds and overcoming obstacles, prejudice and ignorance, did not feature in the German discourse of the 'left'. Looking at the more recent debates, we can see that much of that alternative world-view is still intact. So what has changed?

For once, the 'left' is no longer in the opposition. And parts of the Socialdemocratic party, now in the position of governmental responsibility, have moved away from a 'radical' critique of technology. Chancellor Schröder demands a debate 'without ideological blinkers'. The tensions within Socialdemocratic ideology - on the one hand an optimistic belief in progress and manageability, on the other a suspicion against some forms of power-blind liberalism – becomes apparent. This tension runs right through the Government and makes legislation difficult.

The discourse now introduced by parts of the Socialdemocratic Government (also by some MPs from opposition parties) shows many of the characteristics we observed in the British debates of around 1990. Interestingly, Chancellor Schröder insists that the constitution (Art. 1, human dignity) has to be the guideline for legislative decision-making, but that it does not actually give much guidance in the matter of PGD. It does not anticipate a decision for or against PGD; this decision has to be made politically (31 May 2001, Plenarprotokoll 14/173: 16893). Further, he argues that the German Verfassungsgericht (Constitutional Court) does not provide guidance in these matters (ibid). This is a similar starting point to the British debates from 1990, where it was held that the existing law did not contain an answer to the new challenges of reproductive technologies. In 1990, the British proceeded by declaring democratic, open-minded, unprejudiced debate as the way to construct a law that ‘might offend some, but not too many’. And this is what we now also find in Germany. Schröder asks for mutual respect for the differences in opinion and moral beliefs (ibid). Along similar lines, von Renesse
introduces the distinction between private and public morality that was found to be so central to the British debates:

“We are Parliament. We have to make laws [...] There is a big difference between what I find right for my own life and what I abide by, and that which I can demand and prohibit for everybody with the force of law. The ethics of the legislature demand restraint in questions of morality.” (31 May 2001, Plenarprotokoll 14 173: 16885)

The new discourse of the Government acknowledges that there will be “quarrel” and diversity of moral convictions (Schröder, ibid: 16892; Renesse, ibid: 16885). The way to deal with this diversity is for everybody to acknowledge that the law cannot represent all these diverse moral feelings. It has to provide a universally applicable and rational “ethical minimum”, Renesse, ibid: 16886). The issue of rationality, which was entirely absent from the earlier German debates, now can be found in this new discourse, which not only Government members take part in. “Absolutism of thinking” has to be rejected (Schmidt-Jortzig, ibid: 16891). There is a need for “extensive and unprejudiced information”, one has to “respect the religiously motivated approach”, yet cannot demand that the law must necessarily be modelled around it (Schröder, ibid: 16892/16893). “Fundamentalism” is dismissed as unhelpful, “fear” must not make us “lose our heads” (Dr. Gerhard, ibid. 16897). All these discursive elements are well known from the British debates, but are new for Germany. It is interesting to see that the liberal discourse of modernisation seems to include very much the same discursive elements in Britain and now in Germany. What we even find in the German debates now is an endorsement of the rationality of science, of the scientific mind, that was believed to be so problematic ten years ago (we even come across our old acquaintances Darwin and Freud):

“We have to stop demonising science. Science not only serves society by creating new possibilities for human action for healing and helping, but also by violating taboos. If not, there would be no anatomy, Darwin or Freud.” (von Renesse, ibid: 16866)²⁵

Those (within and outside) Government who want to ‘open up’ the debate, who want to ‘remove the blinkers’, also introduce another discourse which is new for the German context, but which we already know from the British debates. In the more recent debates in Germany, parallels are drawn between abortion and PGD, over and over again. Those

²⁵ Also see; Schröder, ibid: 16893; 16894.
in favour of PGD criticise the inconsistencies considering the regulation of pre-implantation genetic diagnostics, ante-natal screening and late abortions. Like the discussions of 1990 in London, the recent debates in Germany sometimes are about abortion more than they are about ‘new’ technologies of reproduction. This entails a discourse about the nature of women’s reproductive decision-making.

Finally, a debate about abortion
Both the German abortion law and the draft guideline on PGD by the Bundesärztekammer are expressions of a view on female reproductive decision-making which does not emphasise women’s autonomy. The aspect of abortion legislation which is subjected to the most criticism in the debates is the so-called ‘medical indication’. In the first 3 months of pregnancy a woman in Germany can have an abortion without any specific reason, simply after she received independent advice [Beratungslösung]. This was a compromise between those who wanted women to be given free access to abortion in the first three months, and those who wanted women to have specific reasons for an abortion (so-called ‘indication model’). In the course of reforms after German unification, the previously existing ‘eugenic indication’ was abolished due to the pressures of the disability movement. It allowed abortions at a later stage if the foetus was likely to be disabled. Since that reform, abortions for reasons of disability are hidden in the medical indication. The reasoning behind this goes as follows: under the medical indication abortions are legal at any time during the pregnancy to prevent serious harm for the woman’s health. This includes a woman’s mental health. In the legal construction regarding abortions of disabled foetuses, the birth of a disabled child is understood as a threat to the woman’s mental health. This technically allows last minute abortions of disabled foetuses. As the reformed abortion law tried to avoid any reference to disability, no provisions are made for the severity of disability that can legitimise the use of this medical indication. Accordingly, cases have been reported for abortions of foetuses that would have been born with relatively minor conditions such as cleft palate. This is heavily criticised by MPs who oppose both PGD and (at least

26 The former East German state, GDR, had liberal abortion laws, which necessitated new legislation for the unified Germany.
27 In Britain, the debate about the abortion of ‘disabled’ foetuses seems to be increasing, too, with a marked interest in debate in feminist circles. Apparently, mostly amongst the young, concerns about ‘eugenic’ reasoning are growing. See: Jackson 2000: 479/480. Also see Sheldon and Wilkinson 2001; Morgan 1990.
some abortion on general grounds (see Dr. Luther, 13 November 2000, Anhörung Enquete 14/11: 64; Hüppe, ibid: 100). However, it is also used as an argument by those who want to legalise PGD. How can it be, they ask, that women can go ahead with abortions at such a late stage for relatively minor conditions, when at the same time PGD is not introduced even for the most severe disabilities? Isn’t it better not to implant certain embryos, rather than having abortion later on (see Dr. Henn, ibid: 21; Dr. Diedrich, ibid: 34/37; Dr. Sewing, ibid: 79; Dr. Winter, ibid: 91)? A typical example of this position is expressed by Dr. Winter, himself a representative of the BÄK. He says he is “grateful” that finally the parliamentary discourse turned onto abortion:

“For a while, one could have followed the discussion and think we were in a different country than Germany, where hundreds of thousands of abortions take place each year. I think this is the reason why the Bundesärztekammer introduced the draft guidelines.” (ibid: 35)

And indeed, there are parallels between the regulation of abortion and the draft guidelines introduced by the BÄK. They concern the construction of women’s decision-making. As outlined above, the medical indication, allowing late abortions of disabled foetuses, is not based on the concept of choice. A doctor has to certify that a woman’s (mental) health would suffer, if the pregnancy continued. The abortion is thus a ‘treatment’ for a mental problem the woman has. This is also the case for the draft guidelines on PGD. PGD is only to be legitimised if the pregnancy (that has not even started yet) is likely to harm the woman’s (mental) health:

“Decisive is that the condition [of the embryo] could lead to a severe impairment of the future pregnant woman or mother.” (BÄK 2000: 526)\(^\text{28}\)

Thus, both in the cases of abortion and PGD, the regulative framework does not conceptualise women as agents who make their own decisions. They are patients, requiring the help of a doctor (this has been identified as a discourse of medicalisation in previous chapters). This does not stop those who are in favour of PGD, and who want to stress the inconsistencies concerning abortion laws, to paint a picture of both PGD and abortion in which women are autonomous decision makers:

“The mother [sic] has the right during the pregnancy to make decisions about the child’s life […] and, bearing in mind the health of the mother and the right to life of

\(^{28}\) Interestingly, the (health) risk for the woman lies in a pregnancy which does not exist.
the child, *the mother herself can decide* against the life of the child during the pregnancy. Why should she then not [...] make the decision, whether this embryo which is in a dish, which has a genetic disorder, instead of aborting it should be prevented from living on?” (Dr. Diedrich, *Anhörung Enquete 14/11*: 23, *my emphasis*)

Despite some reminders from a Green MP that German abortion regulations are not based on the idea of women making their own decisions (Knoche, ibid: 18; 90), those in favour of PGD keep using the argument of female self-determination. They warn against the ‘paternalistic patronising’ of women (Dr. Graumann, ibid: 55) and they demand that the woman has to be the ‘primary’ decision maker: “This is about [her] health and her right to determine herself [*Selbstbestimmungsrecht*] what she will do to her body and her health” (Dr. Hufen, ibid: 94/95).

We know this strategy from the earlier British debates. There, too, those in favour of embryo research constructed women as autonomous users of the technologies of procreation. This construction, it was argued, rendered the technologies and their use *safe*. A certain conceptualisation of the (female) subject, we concluded, allows the legislators to proceed with technological progress: subjects who know what they are doing, who make free and autonomous decisions. It is then not the role of the law to interfere with their actions. This is the liberal view on subjects and the law, in which the ‘right’ legal strategy depends on this particular construction of the (female) subject. Within this perspective (which is new for Germany, but which we have seen for Britain), good laws let adult, autonomous subjects make their own decisions. Good laws do not try to solve “complex and divisive” moral questions (Jackson 2001: 226). They try not to impose certain moral views on autonomous subjects.

We saw in the debates of 1990 in London that the female MPs of the left argued most fervently for this understanding of both the female subject and the law. They, more than anyone else, pursued the strategy of liberal legislation: respect for ‘private’ decision making, separation of law and morality, pragmatic legislative choices. And this is where there is still a big difference between the German and the British debates. In Berlin, those MPs who are best described as feminists in 2000 are still as critical about this construction of ‘woman’ as they were in 1990. They still do not think that women who use the services of the fertility ‘industry’ are making autonomous and free choices. To
them, the women who consider PGD are caught up in structures and ideologies which are based on eugenic beliefs and practices; any possible decision for a disabled child is discouraged. Their physical and emotional experience of conception and pregnancy is undermined and alienated by the high-tech interference of ambitious professionals, whose real motivation is not to ‘help’ women, but to further their professional or commercial power.

It was argued in Chapter Five that the feminist MPs in Germany could pursue this line of reasoning more easily, because the discourses of 1990 were not about abortion to the same extent as they were in London at the same time. Thus, whichever tensions there were between feminist and legislative reasoning about abortion and reproductive technologies, they were less apparent.

**German feminism cornered**

It seems that this time round the German feminists of the more radical type find themselves in an uncomfortable and discursively disadvantaged corner (Riegler and Weikert 1993). On the one hand, they are facing rather conservative ‘pro-lifers’ who are eager to not only prohibit PGD, but to also change the abortion laws. On the other hand, they are confronting those who wish to proceed with PGD (and possibly other technologies of procreation, like stem cell research), and who, in the course of this, use the ‘liberal’ abortion laws (a particularly bad term in this context, as we have seen above) as an argument. How can the feminists then possibly argue for a woman’s right to abort almost fully developed foetuses when simultaneously rejecting the testing of a small amount of cells of a few days for the gravest genetic abnormalities?29

Putting the embryo centre-stage, this inconsistency cannot be explained. If both questions (the one about abortion, and the one about PGD) are about the status of the embryo, then feminists get it badly wrong. They dismiss the relevance of fairly developed foetuses in vivo and bang on about the value of disabled life in vitro. Obviously, this is picked up upon by many speakers:

29 For feminist contributions to the question of PGD, addressing exactly this dilemma, see: Kollek 2000, Braun 2000.
"I have difficulties to understand why an artificially created embryo can be subjected to ante-natal diagnostics and can even be aborted, without this supposedly harming its dignity, whereas the combination of artificial creation and genetic diagnostics in the case of PGD is declared a violation of that embryo's dignity." (Lensing, 31 May 2001, Plenarprotokoll 14 173: 16914).30

Those women who want to resist PGD and still defend women's access to abortion highlight (like in the 1980s) that the situations cannot simply be compared, because in the case of abortion the woman is already pregnant, she is in a difficult situation in which the law allows her to put her interests before those of the foetus:

“This position [against PGD] does not conflict with our position on abortion. In the latter case the law refrains from asserting the child’s basic rights against the will of its mother. The woman has the right to make an autonomous decision. Yet in the case of PGD there is no pregnancy that could constitute this exceptional predicament, and in which conflicting life demands need to be weighed against each other.” (Fischer, 31 May 2001, Plenarprotokoll 14 173: 16890)31

The above quote highlights the difficulty feminists of more radical persuasions face in Parliament. Even if they attempt to reject the parallel construction of the problem of PGD and ante-natal diagnostics and abortion, they find themselves using language and drawing on concepts that undermine the feminist view of abortion. Ms Fischer here talks of the unborn ‘child’. She claims this child has ‘basic rights’. Talking about abortion in this way makes it difficult to assert an alternative approach to female reproductive decision-making. One could argue that even a ‘critical’ contribution like hers re-inscribes the mainstream construction of the ‘problem’ of abortion: the foetus has rights, they need to be balanced with the rights of the woman, only in exceptional circumstances can the woman’s rights be more important.

Further, contrasting PGD and ante-natal screening in this way means that the underlying tensions regarding the construction of women’s agency in their reproductive decision-making are not addressed. An analysis of Green party political statements about new

30 Also see Tauss, ibid: 16925; Parr, ibid: 16910; Dr. Merkel, ibid: 16902; von Renesse, 13 November 2000, Anhörung Enquete 14 11: 4, 32; Dr. Diedrich, ibid: 23, 34; Dr. Winter, ibid: 35; Dr. Sewing, ibid: 79.
31 Also see: Knoche, ibid: 16903; Hofsken, ibid: 16909.
reproductive technologies and abortion shows that the construction of women in the various texts is problematic, because contradictory:

"Striking is the fracture [...] of the argument: [...] The construction of women changes within the texts. The woman who acts self-confidently and autonomously with regard to abortion now becomes a victim of patriarchal ideology when it comes to using IVF." (Bause 1999: 137)

What we can learn from these observations is that the new liberal discourse engaged in by the Government (and some other speakers) puts particularly its feminist opposition in a difficult space, between PGD, abortion and a hard place. It is difficult for feminists to position themselves within a liberal-conservative dichotomy. The feminist position on technologies of procreation and abortion draws on ‘liberal’ and ‘conservative’ elements (see van den Daele 1989; Bause 1999). As we have seen in the earlier British debates, once the liberal mainstream discourse of modernisation is in full swing, it also offers an explanation for the existence of resistance: the opposition does not agree with the discourse of modernisation because it is fundamentalist, belief-based, unenlightened and so on. This is a difficult position for those who want to prohibit PGD to find themselves in anyway. It is aggravated by inherent contradictions in the feminist discourse about the agency of its subject, the woman making reproductive choices.

If real women’s real decision-making about reproduction would be conceptualised in a more consistent way, one would probably have to acknowledge that both in the case of abortion and in the case of PGD women make decisions under difficult circumstances. The decisions might not be ‘autonomous’, because women act within restrictions, they cannot influence some of the parameters that determine their choices (see Waldschmidt 1999). Yet, they still have some agency. The fact that women might make decisions one does not agree with for political reasons (for example that they might abort a foetus for a relatively minor disability, or might want to make use of PGD) cannot simply be ‘explained away’ through constructing women as mere victims of circumstance, of eugenic ideologies and debilitating technologies. Taking women’s agency seriously necessarily includes the possibility that women can make ‘wrong’ choices or choices one does not agree with.
**D: Judging the laws**

In both sets of debates views about the legitimacy of PGD or cloning are also wrapped up with distinct judgments about the two laws in questions. Whether one believes PGD to be legitimate at least partly depends on one’s assessment of the *ESchG*. Whether one thinks scientists should go ahead with cloning depends on one’s view on the *HFE Act*. The final part of this chapter will look at how the lawmakers in both Parliaments talk about the respective laws ten years after their initial enactment. This will lead to some more general remarks about law’s rule over the dynamics of medical progress in the field of human reproduction.

**Assessing the HFE Act: ‘the firmness of the line in the sand’?**

When deciding whether to extend the scope for research on embryos via the introduction of new regulations, the MPs frequently refer to the *HFE Act* itself and rate its effectiveness. They obviously do not agree, in that those who opposed embryo research before, now still oppose the 1990 Act and the HFE Authority. Those in favour of the new regulations argue that the *HFE Act* makes a fundamental and principled debate unnecessary. They argue that ‘those old debates’ should not be regurgitated (see Ms Ruddock, 17 November 2000, House of Commons, vol. 356: col. 1209; Mr Key, ibid: 1211; Baroness Northover, 22 January 2001, House of Lords, vol. 621: col. 35; Lord Hunt, ibid: col. 15). Similarly, the HGA Commission and HFE Authority state in their report:

“[Some] points of view are questioning decisions enshrined in the 1990 Act. Both the HGAC and the HFEA have respect for these opinions. However, the relevant issues were fully debated, both in Parliament and by the wider public, at the time of the passing of the HFE Act. [...] It would not be appropriate to use this limited enquiry into cloning to reopen the wider questions relating to work with embryos.” (1998: 11/12)32

Those opposing ‘therapeutic cloning’ on the other hand are obviously interested in attacking the 1990 Act and the work of the HFE Authority. For example Mrs. Winterton calls the HFE Authority a “quango”, which has proved “utter incompetence”, it has

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32 Also see DoH 2000a: 37.
"lost track of thousands of parents of frozen embryos" and concluded that when it comes to the Authority’s supervisory role, “the poacher is playing the game keeper” (17 November 2000, House of Commons, vol. 356: col. 1207; also see Lord Alton, 22 January, House of Lords, vol. 621: col. 27).

Bound up with conflicting understandings of the 1990 Act are procedural questions. The HFE Act provides that licenses for embryo research can only be granted for five specified purposes. It also states that the grounds for licences can be extended by simple regulation, rather than requiring a change of the law itself (s 44 (1), (4) HFE Act 1990). The HFE Act therefore makes the general decision about the legitimacy of embryo research and leaves any further extensions to a simplified procedure rather than demanding another decision on the principle of embryo research itself. Yet, those who want a more extensive debate argue that the 1990 Act cannot serve as a basis for regulations on cloning because cloning as realistic option was not anticipated in the earlier debate or by the Act itself (this also is part of the reasoning behind the judicial review against the regulations mentioned above). At the time of the debates, the anti-research minority argues, “human cloning was the equivalent of science fiction” (Mrs. Winterton, 19 December 2001, House of Commons, vol. 360: col. 236/237). A decision about cloning, this is their argument, needs to be another principled, rather than simply a consequent decision. This is rejected by the majority, who claim that cloning was debated at the time of the primary legislation, however, it was not a concrete enough option to be part of the regulatory content of the 1990 Act (see Mr. Key, ibid: col. 237; Baroness Warnock, 22 January 2001, House of Lords, vol. 621: col. 44). Yvette Cooper affirms that,

“It is true that Parliament did not envisage the possibility of cell nuclear replacement. [...] However, it was anticipated in those debates that science and medicine would move on rapidly. That is why provisions for regulations were put in place in the 1990 Act.” (19 December 2000, House of Commons, vol. 360: col. 215/216, my emphasis)

The HFE Act, conceptualised in this way, predicts changes in scientific knowledge and medical practice that will require its content to be modified. By making provisions for regulatory changes in the light of the decisions of the 1990 Act itself, the HFE Act thus
guarantees its own relevance throughout change. Rather than being out-dated through being over-deterministic, the Act might remain relevant through its own responsiveness.

Of quicksand and slippery slopes
This is hardly revolutionary. However, it might be somewhat more interesting in the light of the ‘slippery slope’ arguments often used by those who opposed the Act in the first place. To recapitulate, those opposing embryo research in the debates of 1990 argued that to allow it would be the first step down the slippery slope. From now onwards, it would be impossible (or at least even harder) to resist further demands of the scientific community. Once this step was taken, any other step would simply follow as a logical consequence of this first one, which is why the first step needed to be prevented. Even if in itself it does not lead straight into the horror-scenario of eugenics, selection and genetic manipulation, it will open the path into this territory. Looking at the debates of 2000/2001, one can see how they can be read as a confirmation of this belief. We might conclude that we observe the slippery slope in action. The first step (using embryos for research) was taken in 1990 (arguing it had nothing whatsoever to do with cloning). Now those who want to go another step (into so-called therapeutic cloning) argue that this step does not raise any new questions; it is implied in the logic of the 1990 legislation, and it is covered by the HFE Act’s permission to enact other regulations.

Moreover, both sides to the argument get caught up in contradictions between the slippery slope view and their assessment of the Act. The pro-research majority in 1990 rejected the slippery slope argument. The line drawn in the sand is firm; the law can guarantee to keep apart the safe and dangerous uses of technologies of reproduction (because they were constructed as qualitatively different – science rather than sci-fi and so on). However, in 2000/2001 they now argue that the HFE Act allows them to proceed without having to discuss the fundamental principles of embryo research again. The line drawn in the sand allows itself to be redrawn. The boundary between the obviously safe technique of therapeutic and the definitely outlawed technique of

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33 Mulkay counted that the slippery slope metaphor was used 33 times in the 8 major debates about the HFE Act: “It was accompanied by a cluster of supporting metaphors, such as ‘the thin end of the wedge’, ‘the downward path’” and so on (1997: 205, footnote 52).
reproductive cloning is a changed, but an equally reliable one. So the Act is not slippery at all, just, as it were, *flexible*.

Those opposing embryo research in 1990 predicted that this Act would allow all sorts of horrible abuses in the future that would then be difficult to resist. However, when it comes to the debate about cloning, they hold that the HFE Act did *not* foresee the existence of cloning techniques and that therefore on the basis of this Act (complemented by simple regulation) one cannot proceed into the territory of cloning. The line drawn in the sand in 1990 is totally insufficient, and a mere ‘fig-leaf’, but it quite firmly resists a reading that endorses cloning. So obviously the Act is slippery, but not *that* slippery. Those who reject the 1990 legislation on the basis that it is not a sufficient safeguard against abuses, try to use it as exactly this safeguard against the unwanted practice of human cloning. The law seems to have weight, regardless of whether it is liked or not.

Regardless of these inconsistencies, the government and pro-research MPs manage to unite a large majority behind their proposal. This majority decision has to be read like an endorsement and affirmation of the 1990 legislation. As in the debates of 1990, the majority utilises arguments about democracy, majority and minority rights in the debates. What makes the HFE Act a legitimate authority for the decision about cloning is that it was the outcome of a democratically conducted, extensively debated process of legislation. It would not be ‘appropriate’ to fundamentally re-visit the debates, as they are based on the democratic majority of Parliament. The minority cannot demand yet another discussion of the nature of the embryo. Ideas about democracy, parliamentary sovereignty and the rule of law feed into the conceptualisation of the 1990 legislation by the majority of MPs. Again, this construction could be understood as building a slippery slope: Once a parliamentary majority has spoken, it does not befit Parliament (and particularly a minority) to ask the same questions again. The original decision has to be taken as the basis for any further steps.
Talking about the *ESchG*

In the recent debates about cloning in London the *HFE Act* was extensively reviewed by both sides of the controversy. Despite the fact that the *HFE Act 1990* made the fundamental decision to allow embryo research, and the debates in 2000 were only about an extension of this research, the debates turned onto the effectiveness of the 1990 legislation. It might therefore be surprising to see that although the German debates are far more fundamentally different from their earlier predecessors, and the break with the 1990 legislation would be far bigger if embryo or stem-cell research or PGD were allowed, there is no explicit controversy over the *ESchG* in the German debates investigated here.

Interestingly, those who plead for a new, open-minded debate about medical and scientific progress, who want to ‘stop demonising science’ and get rid of the ‘blinders’, claim that there is no need to change the *ESchG* in this Parliament (Schröder, 31 May 2001, *Plenarprotokoll* 14/173: 16893; von Renesse, ibid: 16886; also see Merkel, ibid: 16902). And those who (still) resist many applications of new reproductive technologies, who were initially against the *ESchG*, unlike in British debates, do not reiterate their attacks on the legislation they opposed ten years ago. On the contrary, they are defending the status quo.

How can this be explained? First, I will address possible reasons for the strategies of the new ‘liberal’ government discourse. Then, the discourse of those opposing PGD (and other practices) will be investigated. To begin with, it has to be emphasised that the new liberal discourse of modernisation in Germany does not exclude any future changes to the law as it stands. In ‘this Parliament’ we do not have to expect any changes to the *ESchG* (i.e. until the end of 2002). This does not mean that the *ESchG* remains unchanged for much longer after that. Possibly, a commitment to having more debate, more ‘information’ before making legislative changes speaks of the same strategy that we have seen in Great Britain in the mid 1980s. There too the Government delayed the introduction of actual legislation for more than four years after the Warnock Committee had made its recommendations. This was seen to be informed by the hope that some of
the alarm about its content (particularly its endorsement of embryo research) would fade away, and that those in favour of continued research could gain some ground (see Mulkay 1997: 36/37). This might make even more sense in the German case, as the new discourse about ‘reasoned’ debate, respect for religious and minority concerns and the distinction between law and morality could benefit from being performed for some time, before the Government makes an actual move to allow PGD or stem-cell research.

Further, we have to recall that many who favour both PGD and also stem-cell research argue that the ESchG does not actually have to be changed for those practices to go on. We have seen above that opinion about whether the ESchG actually prohibits PGD is split. This allows those in favour of PGD to assume that it can take place within the boundaries of the ESchG. Moreover, there seems to be agreement that stem-cell research is not excluded by the ESchG. There are German laboratories that have imported American stem-cells; others want to (with the support of some Government politicians) import stem-cells from Israel. Embryo research itself is obviously illegal in Germany, and embryo research destroying the embryo is the source of stem-cells. But once the cells have been isolated, they are not embryos themselves, so their import and use for research is not strictly illegal in Germany. Those opposing embryo research, PGD and other practices of reproductive technologies (for example therapeutic cloning) argue for a moratorium on their import and use, yet scientists so far have rejected those demands and continue to create facts.

All this taken together puts the new liberal discourse in Germany in a relatively relaxed position concerning changes to the ESchG. There are ways of proceeding with further technological progress that do not necessarily require a confrontational approach towards the ESchG.34 The advantages of not ‘tampering’ with the law as it stands are obvious: leaving the ESchG untouched prevents the actual change, the actual break with the (law’s) past becoming too visible. This in turn helps to deny the responsibility of decision-making (Davies 1996: 148). If the parliamentarians are simply logically

34 There are some in this new discourse who favour a legislative clarification on PGD, regardless of where the ESchG actually stands on this issue. Yet, they too do not seem to want to change the ESchG itself. Margot von Renesse favours an extra ‘PGD-law’, similar to abortion legislation, generally prohibiting the technique and listing some ‘narrow’ exceptions to this general prohibition (see Die Woche 11 May 2001).
following where the law is leading them, they are not going through the perilous process of decision-making discussed in Chapter Three. They can avoid getting lost in endless contradictions and moral conflicts. Assuming that they are simply executing, rather than radically altering, the law helps them hide from moral dilemmas which they would rather not face.

What about those who ten years ago were opposed to the *ESchG*, and who now want to prevent a further erosion of (legal) protection of the embryo and therefore oppose PGD? Why do they now defend the *ESchG* despite having been opposed to it in the past? How come they (mostly Greens and feminists) now seem to ignore all those things about the *ESchG* that they criticised ten years ago (its eugenic tendencies, allowing sex choice through sperm selection in cases of potential severe disabilities, its sexism, constructing women as ‘natural’ mothers and denying IVF to unmarried women; see on this: Augst 2001: 146/147)? It seems to me that their re-positioning is a response to the new liberal discourse of modernisation that has been outlined above. This is the discourse of modern law, very similar to the one we have seen in Britain ten years earlier, a discourse of universal reason, plural and particular moralities, a discourse of scientific endeavour and democratic law-making that has to be based on reasonableness and ‘an ethical minimum’, rather than ‘fundamentalist’ concerns (see above and Chapter Four).

Further, this is a discourse that tends to place its opposition in a disadvantaged position: it is constructed as fundamentalist, ill informed, unfit to form the basis for any modern law. I think that this can explain why the opposition ‘takes refuge’ in the *ESchG*. The *ESchG*, we have seen earlier, is based on a discourse that (at least on the surface) rejected modern scientific reason and the scientific mind – permanently pushing boundaries, eroding taboos and so on. We have seen too that the *ESchG* did not actually and entirely step out of the logic of modernisation. It did not really position itself outside modernisation. Through its endorsement of modern medicine, the use of reproductive technologies as ‘treatment’, it remains dependent on the permanent scientific progress it publicly denounces. However, for those who now face the Government discourse of permanent modernisation, who now for the first time are confronted with endorsements of scientific ambitions and endeavours, the *ESchG* must
seem exactly that: an anchor that might hold back further modernisation, firmly placed outside the demands for modernised and ‘open-minded’ responses to further technological and medical progress. Defending the law therefore seems like the best chance they have to defend their position against demands to ‘move on’, to ‘stop demonising science’ or to leave behind their ‘absolutism of thinking’.

**Keeping the law open to change**

We can thus conclude for the German case that the speakers in the new debates do not openly attack the *ESchG*. Those who used to reject its legislative content and ideological basis now even defend it as the only safeguard that the new modernising discourse of the government will not get its way. Those who want to ‘modernise’ the responses of German law to further medical and scientific progress in turn do not openly attack the *ESchG* either. Rather, they are trying to find ways to work around this law, which might or might not involve further legislation. It was held that the *ESchG* might not actually prohibit PGD, if the cells extracted for diagnosis from the embryo are no longer ‘toti-potent’, i.e. are not embryos themselves in the legal sense (see Caesar 1999: 81). This might be surprising in the light of the debates that have been analysed in much detail in Part Two of this thesis. There, concerns about selection of ‘healthy’ over genetically ‘defective’ embryos or children were frequently and vehemently expressed (see Chapter Three). PGD was not yet clinically possible at that time, yet it was already part of the debates as a future possibility.

Hidden in the official commentary to the first draft Government Bill, we can make an interesting discovery. The comments to § 7 of this draft bill explicitly exempt Pre-Implantation Genetic Diagnostics from the general prohibition of cell-extraction and genome analysis included in this provision (*Bundesminister der Justiz* 1987: 361/362). **Because** PGD was not yet a clinically feasible practice, its exact methods and uses not yet entirely clear, the ministry decided that it would be premature to exclude it once and for all.\(^{35}\) What we thus have in the case of PGD and its legislative control in the 1980s,

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\(^{35}\) I was given this information by *Ministerialdirigent a.D.* Detlev von Bülow, who was in charge of the ministerial work on the Bill in the 1980s. He kindly shared this and many other aspects of his experience and memories with me. Like in the case of the other interviews I conducted, my long discussion with him coloured my analysis of the current and past debates in many ways.
is an instance where the law anticipated further medical and scientific progress and decided not to stop this from happening. It withdrew from a possible prohibition and kept its options open. This has the effect that in the year 2001 the *ESchG* might not need to be changed in order to allow PGD. Like in the case of the *HFE Act*, the law stays relevant because it does not fully determine its position with regard to future developments. We have seen how the *HFE Act* anticipated further developments in embryo research that might necessitate the extension of reasons for this research. It allowed this extension by way of simple regulation, thus remaining open for future changes. Had both laws been more deterministic, they would have both found themselves under attack from those who wish to ‘modernise’ the legal responses to further scientific developments. Their indeterminacy enabled them to remain intact.

The *HFE Act 1990*, unlike the *ESchG* acknowledges very openly within its text the fact that the future will bring new challenges, and will thus demand new answers. It contains a provision that enables the Government to pass other regulations, while leaving the Act itself untouched, in order to allow further types of embryo research (s 45 *HFE Act*). It makes specific requests about the procedure for passing new regulations. They have to be put in front of Parliament, (s 45 (4)). The specific nature of its provisions for future change, the formalised and explicit way future change has to be incorporated within a legal framework, also mean that the *HFE Act* itself becomes an issue for debate in 2000/2001. Passing new regulations for cloning is an operation of the *HFE Act*. Changing its regulatory content is thus a function of the Act itself. This also means that the controversy over its efficiency is taking place within the framework provided by the Act itself.

In Germany, on the other hand, the *ESchG* in 1990 did not openly acknowledge that what is scientifically and medically possible will change in the future and that therefore questions might be asked about the aptness of the 1990 legislation. However, the *ESchG* does not once and for all outlaw the controversial practice of PGD. The acknowledgment that this question should be addressed in the future is hidden in the official explanation to the Government Bill. Looking back at the discourses we analysed in much detail, it is not difficult to see why the open-ended nature of the 1990
legislation, its indeterminacy, could not be openly acknowledged in the legal text itself. The German legislative discourse at the time operated on the assumption that the law contained ‘eternal’, timeless answers to changing challenges. If the legal ‘truth’ is conceptualised as solid, as untouched by scientific and social debates and possibilities, then the actual legislation cannot contain a provision that says: ‘Let’s talk again, when we know a bit more, and let’s see what we think then.’

Ironically, it is this refusal to openly embrace scientific and therefore legal change that means that in Germany PGD might at one point go ahead without any legislative debates about its introduction. If the test-case about a doctor helping a couple to ‘commit’ PGD outside Germany ends with an acquittal (or not prosecution at all) for the doctor in question, then PGD could be officially acknowledged as not illegal under the ESchG (see on this Die Woche 11 May 2001). Or the BAK might simply confirm its draft guidelines on PGD and start offering the service, based on the assumption that the ESchG does not prohibit it. If the law is placed outside the logic of permanent change, then this change seems to go on without the law. Explicitly making space for future debate and openly acknowledging the preliminary nature of any legislative provision, the HFE Act at least can make provisions for how new changed medical or scientific practices should be introduced and debated within its own legislative framework, rather than having to watch scientific progress going on without its own explicit interference. Yet even with regard to the ESchG it is oversimplified to argue that scientific progress happens without any regard at all for the law or that all new developments simply happen outside the law. The ESchG, prohibiting almost any handling of embryos, makes an explicit exception for PGD. I have argued above (in the case of Mrs. Blood) that exceptions must not be thought of as simply lying outside the law. Exceptions are both within and outside the law; they allow the legal rule to persist, when at the same time denying its application in the exceptional case. If a case is deemed exceptional by law, it still remains within law’s definitional powers. Yet in either case or legislation, it seems that the 1990 legislations will not prevent further scientific developments and demands: either the law opens itself up to being changed (like the HFE Act) or it is possibly ‘circumnavigated’ by those dynamics it proudly declared to be independent from.
Conclusion

So there are similarities: both laws anticipated further scientific and medical progress and both laws opened themselves up to this possibility. And this indeterminacy or responsiveness shapes the debates in 2000/2001. Rather than having to attack the laws in order to move forward the scientific or medical agenda of 'progress', those who wish to move on by trying out new science or medicine can do so within the laws themselves. Yet there are also important differences. This conclusion will re-introduce the question of legal rule over scientific and medical change. It will address for a last time the general problem this thesis grappled with: is law relevant when it comes to permanent scientific and medical innovation? Does law rule scientific progress? Is the relationship between law and scientific progress best described as a race between two independent contenders? Is law "limping behind and in the rear" (Lee and Morgan 2001: 62) in this race? Does the law "fail to keep pace with developments of any kind" (Kennedy 1988: 4)?

We have seen that some conceptualise what has been analysed in this chapter as an ongoing race between new medical or scientific possibilities and legal control of them. We have seen that the law seems to be dealing 'better' with these changes, it seems to perform better in this race, if it embraces the possibility of permanent change in its initial statement. This does not mean that the law then effectively prevents certain new developments, that it can 'stop' the race. Yet it means that it remains relevant for how this race is conducted: if the law provides ground rules for anticipated change, and how that change should be integrated into the existing law (like the HFE Act does), then it is more visible in the following negotiations about what can and what cannot go on. In the case of the ESchG we have seen how fundamental change might now be introduced without a necessary consultation of the legislature.

Those opposing embryo research read the relationship between science, medicine and law as a race that the law necessarily has to lose. This is the core of the slippery slope
argument. My reading of the debates does not whole-heartedly endorse the slippery slope view, even though it has been outlined above why this perspective is not entirely implausible. To say that the law never will catch up, that science will permanently erode whichever standard the law attempts to safeguard, seems to ignore the crucial other side of the equation. Wherever science goes, it is being anticipated by laws that embrace change. This embrace is based on the fundamental ambivalence of law. Its inability to entirely reject or endorse certain arguments can be found in the exemption which is built into the *ESchG* and in the construction of legal change as legal functioning in the *HFE Act*. Scientists who want to clone embryos are not acting outside of the law. Their demands for new regulations are expressed by putting into action part of the *HFE Act* itself (s 45). Those who pursue PGD find themselves acting within a law that provided for them through constructing an exception. Both Acts predict and embrace changed scientific practices, thereby legitimising them.

The relationship between law and scientific progress could be described in terms borrowed from Foucault’s work on transgression (1977). Transgression, the ‘crossing of the limit’, for Foucault does not invalidate the limit, it ‘constantly affirms’ it (ibid: 37). Applied to the law this means that law and its transgression depend on each other: law comes into existence through being transgressed; (ibid: 44) transgression ‘emanates from the norm’ (Fitzpatrick 2001a: 59/60). This ‘non-dialectical’ relationship (Foucault 1977: 44) ‘replaces the movement of contradictions’ (ibid: 50). In a way, this resembles what I want to say about law and scientific progress: If the law opens itself up to the possibility of changing scientific realities, then those demanding recognition of these changed realities in fact act out a legal provision. Their demands are to equal parts challenging and affirming law.

If the relationship between law and scientific or medical progress can be described as a race at all, then it reminds me of a German traditional story about a race between a hare (fast and proud of it) and a hedgehog (slow, but resourceful). Challenged to enter a race against the hare, the hedgehog knows that, of course, the hare is going to be faster and

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36 Sarah Kyambi pointed out that what I was trying to say corresponded with Foucault’s thoughts.
will undoubtedly win. So it asks a mate to sit at the other end of the field just behind the finishing line of the race. Running as fast as it can, and apparently leaving the hedgehog safely behind, the hare arrives at the end of the field only to be greeted by a friendly hedgehog who, miraculously, is there already. They agree to yet another race, back to where they started, and the same thing happens again (and again): the hedgehog is always already there. In a way this is what happens when law anticipates scientific progress and builds this anticipation into its legislative framework. Wherever science goes next, law is always already there.

There is no untouched territory into which science ventures, which has never been touched by the rule of law. On the other hand, wherever law positions itself, it is at least in part based on the reasoning and knowledge of those scientific dynamics it tries to control. Law and medicine thus do not approach each other in a state of autonomous, untouched purity. They are always already the outcome of an interaction, and part of a relationship. And this relationship remains relevant despite change because it contains an element of anticipation; it is not fully determined and remains responsive. Law, in order to “maintain its ‘place’, must ever go beyond its own bounds and relate to such circumstance and possibility as would come to or be brought to it” (Fitzpatrick 2001a: 76, referring to Derrida 1992: 38). The two Acts analysed here anticipated modern medicine’s movements; they incorporated an element of flexibility or a lack of determinacy in order to respond to this anticipated change. Both through legislation and through ‘applying’ law by the courts exceptions were created; law suspended its rule, interacting with cases it would not otherwise be able to respond to.

In order to impose boundaries on the boundless dynamics of modernisation lawmakers need to make decisions. These decisions aim for closure without ever quite achieving it. And as has been argued throughout the thesis, it is this lack of closure that enables law to make decisions about ambivalence and to sustain contradictions. Through its own indeterminacy, its ambivalence and lack of ultimate cohesion, law can accommodate the tensions and contradictions of modern medicine. The “tragic choices” (Morgan 2001: 39) of medical law are sustained and legitimated at least partly through incoherence and
ambivalence, the oscillation between an embrace and a rejection of modernisation and its effects.
Chapter Eight: Conclusion

"[Blue] looks out across the street and sees Black sitting at his desk as usual. Black, too, is looking through the window at that moment, and it suddenly occurs to Blue that he can no longer depend on the old procedures: Clues, legwork, investigative routine – none of this is going to matter anymore. But then, when he tries to imagine what will replace these things, he gets nowhere. At this point, Blue can only surmise what the case is not. To say what it is, however, is completely beyond him." (Auster 1987: 147)

This thesis has investigated in detail the difficulties of making laws about medical and technological progress that takes place in the context of human reproduction. Comparing the efforts of lawmakers in two national contexts highlighted that the dilemmas confronting any legislation are shared ones, even if the legislative 'solutions' might differ (also see Morgan and Nielsen 1989: 54). Speakers of both discourses could be seen to turn to questions of lawmaking under the conditions of permanent scientific progress and ongoing individualisation. This move from the concrete focus on technologies of reproduction to more general concerns about law and morality, modern reason or individuals' agency enabled this thesis to read the controversies about new reproductive technologies as 'telling instances' (Fitzpatrick 1987; Sheldon 1997), as 'exemplary instances of modern legalism' (Dewar 1998). Through the close analysis of the parliamentary debates about technologies of reproduction (the particular) it was hoped to achieve an understanding of a wider dynamic: the problem of lawmaking in the face of modernisation (the general).

Early on in the thesis I argued that there are tensions in the 'modern project'. I identified two 'strands' of modernisation: the dynamic of individualisation (putting man centre-stage) and a distinct claim to objective and rational knowledge based on universal reason (the knowledge of engineering). The modern is ambivalent. Both strands are present, and they are in tension, in the case of technological interventions into human reproduction. Reproductive Technologies can serve as tools for further individualisation in the hands of users who wish to model their reproduction or family life according to their own ideas. Yet they can also be used to objectify or alienate humans, when science is used to manipulate and control processes that are thought of as deeply personal.
Technologies of reproduction have therefore been read as instances of modernisation; and the debates about a legislative response to them have been understood as concerned with the ‘consequences of modernity’.

Of course, one has to be careful when imposing a more general perspective on particular events or when deducing abstract explanations from concrete phenomena. I hope I have made it clear throughout that other readings of the debates, of the laws and of the modern ‘paradigm’ would have been possible. However, the dilemmas confronted by those who make laws, and by those who try to theorise about this, are such that it seems necessary to step out of a mere analysis of the particular arguments exchanged, the particular ‘solutions’ found, the particular problems left unsolved. In order to cut through the inescapable ambivalence of technological progress in the field of human reproduction the lawmakers themselves took recourse to general arguments: arguments about the general relationship between law and morals, the general rationality of science and law, the general understanding of individual decision-making and autonomy. And I found myself performing a ‘parallel’ movement in my analysis. In order to understand the dilemmas, the ambivalence, the productive failure of lawmaking on reproductive technologies it was necessary to stop picking up either end of the stick in the controversies. I had to stop asking whether embryo research was right or wrong, whether single motherhood was dangerous or not or whether scientists can be trusted or not.

Through “standing back from the dispute and becoming clearer about how the dispute itself is pictured by the protagonists, seeking to become clearer about the ‘self-images’ the protagonists have” (Porter 1996: 163), my analysis moved towards a set of questions about how these problems became so central, what they signified for those involved in the controversies, and why no agreement was possible. And finally, they crystallised into a concern about the ‘rule of law’, one of the ‘fundamental questions’ of modern medical law (see Morgan and Nielsen 1992). Does law, its creation and application, utterly fail to exercise control over the work of scientists? Is law ‘lagging behind’ scientific or medical progress (see Kennedy), inevitably obsolete (see Jackson 2001)? Is
the regulation of high-tech medicine "an oxymoron"; is technology "simply out of control" (Black 1998: 29)?

To answer these questions I analysed the debates taking place in both Parliaments about the *ESchG* and the *HFE Act* in great detail. Much attention was given to the way parliamentarians talked about science and about individuals making reproductive decisions, to their constructions. In a further step, the thesis moved onto more recent debates in both parliamentary contexts, about PGD and about so-called therapeutic cloning. This added perspective enabled us to understand how the two laws could remain relevant for changing scientific and medical practices and for growing 'consumer demands' through being responsive to anticipated change. Moreover, in Chapter Six, I reviewed a body of contemporary theorising concerned with the notion of risk. It turned out that there were two broad 'schools' of risk thinking, and that both corresponded considerably with some of the insights of my previous discourse analysis. The debates investigated for this thesis can suitably be described as risk discourses. The speakers in the two Parliaments often address the risky nature of technology or medicine. They also at times construct individuals' behaviours or identities as risky. And yet, I have argued that both 'schools' with their oversimplified accounts of risk either as disabling or enabling the governance of modern societies also partly miss the point. I concluded that risks, too, are ambivalent (like the modern condition they describe). They can stand for a new governmentality, for the labelling and blaming of others as dangerous, but they can also signify and trigger the breakdown of control, the back-firing of reductionist policy assumptions and agendas.

The answer to the question of law's rule over modern medicine did therefore turn out to be less than straightforward. But in summary mode this thesis argues that law does not cease to be relevant, even under the conditions of permanent progress and individualisation. This 'answer' has to be (and has been) modified in many important ways. Yet after all, it contains a commitment to the remaining significance of law for medical progress Picking up an argument introduced in Chapter One, I can now conclude that, despite many necessary and important qualifications, this thesis disputes that 'King Nomos does no longer rule' (Murphy 1997).
An ambivalent conclusion

This conclusion is far from clear-cut. I have argued throughout that law’s remaining significance for scientific and medical progress goes hand in hand with law ‘borrowing’ its content from the very dynamics it sets out to control: law to a large extent takes over scientific rationalities, the scientific view of the world. Its understanding of progress, of objectivity, of the embryo, all depend on scientific claims (claims which themselves always contain an element of normativity, as scientific knowledge is not neutral knowledge; see Santos 1995: 55; Black 1998: 66; Latour 1987; Wynne 1982) This, I showed, is also true for the German legislative debates, and the ESchG which on its surface rejects the logic of science with its permanent drive to dissect and control the world, yet through the ‘backdoor’ of modern medicine still embraces the notion of ongoing scientific progress within its legislative framework. It has also been shown that both laws delegate significant amounts of their authority to medical professionals themselves: doctors decide which women ‘deserve’ ‘treatment’, doctors decide what is ‘medical’ infertility or a ‘medical’ need for the use of sex choice techniques.

However, I have also argued that this borrowing of content (and the delegation of power), the opening up of law to those dynamics it tries to control, should not be understood simply as science ‘taking over’. Science does not simply fill an empty legal space with its own contents. While taking on the scientific view, medical law also is engaged in a process of construction. This thesis followed some of these constructions, particularly in Chapters Four and Five. Law constructs a particular version of scientific rationality; it also constructs a legal ‘subject’ (which involved an amalgam of liberal and paternalistic arguments). Law and science could thus be seen to merge, partly on an epistemological, partly on a normative, level into a “cooperative relationship and circulation of meaning” (Santos 1995: 4):

“In my view, both the presentation of normative claims as scientific claims and the presentation of scientific claims as normative claims are endemic in the paradigm of modernity.” (ibid)

This has led to the further argument (in Chapter Seven) that neither law nor modern medical practice (based on scientific progress and individualism) can be conceptualised...
as simply colonising the other’s space. There is no race between two independent and autonomous contenders. Rather, observing changing legal and medical practices over the last ten years, it could be seen that there is a relationship between on the one hand laws that are always already shaped by modern medicine’s claims and knowledge and on the other hand modern medical practices which are always already anticipated and embraced by law. The metaphorical hedgehog of law is undoubtedly slower than its counterpart, the metaphorical hare of medical and scientific progress. But it might have the advantage of sitting at both ends of the field, anticipating the arrival of its contender.

The two laws have been shown to be open for further changing scientific and individual demands. Their anticipation of that which cannot fully be predicted means that both laws are less than fully determined. Their responsiveness lies in their failure to fully determine how they will deal with future changes. This has led to the conclusion that it is law’s indeterminacy, its failure to achieve ultimate closure that helps it to stay on top of a changing world. Because the relationship between law and morality is not finally decided, because this relationship always also incorporates what it negates (see Chapter Three), the British HFE Act can at the same time claim to be distinct from mere moral sentiment, yet morally sound. Because the relationship between morals and law remains ultimately ambivalent, the ESchG can claim to be based on a counter-modern, timeless, natural morality and yet enable modern medicine to act lawfully despite its erosive effect on those ‘timeless’ standards.

Similarly, the British lawmakers claim to ground themselves in nothing but modern reason and scientific objectivity, while at the same time displaying a quasi-religious belief in science and its eternal progress (see Chapter Four). This enables them to make very particular claims about humanity’s ‘march into a brighter future’ while at the same time rejecting the particularism of those opposing embryo research. The law’s ambivalence makes its “antinomy between neutrality and particularity” (O’Donovan 1997: 49) sustainable. It makes it possible to legislate on the basis of hopes while asserting to be informed only by scientific rationality and scepticism. In Germany, the lack of clarity about the relationship between law, morality and ‘the natural’ facilitates a legislation that treats individual suffering (through infertility, through risk of disability)
as a tragedy that merits medical intervention, while simultaneously insisting on ‘the natural’ as the moral guideline for medical practice.

Along the same lines, both laws contain ultimately incoherent constructions of the legal subject, in the form of (female) users of reproductive technologies (see Chapter Five). The HFE Act concurrently displays (neo-)liberal notions of individual rational choice, autonomous and self-confident use of reproductive technologies and the paternalism and tutelage of s 13 (5). The ESchG conceptualises the female users of reproductive technologies as victims of alienation and exploitation, yet also creates a space, the relationship between a responsible doctor making good medical judgements and a desperate patient, in which the technologies are supposedly safe to use. This effectively enables at least some women to access technologies of reproduction via this space or relationship (at least if they resemble the ideal of the patient envisaged by German lawmakers or doctors), despite the ESchG’s scepticism about reproductive technologies.

I have argued that these tensions in the construction of the legal subject by both Acts speak of the problems both legislative discourses have in accommodating (or conceptualising) women’s reproductive decision-making. The woman of both Acts is not quite (HFE Act) or not at all (ESchG) the “ideal legal subject, […] a rational, choosing person, capable of decision, an autonomous individual” (O’Donovan 1997: 47)\(^1\). But these tensions enable both Acts to incorporate contradicting anxieties and hopes into their provisions. These were anxieties about individuals as victims or as villains of medical progress, about reproductive technologies as an attack on humanity’s physical or cultural integrity or as a dangerous tool in women’s hands (for children, traditional families and so on). And these concerns needed to be balanced against the hopes for reproductive technologies as a welcome aid to help women to become mothers of healthy and long-awaited babies (and what can possibly be wrong with that?).

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\(^1\) Pateman argues that women can never be these subjects of liberalism, as the ‘individual’ is “a patriarchal category” (1988: 184).
Assessing law's rule

So does this thesis tell the success-story of law? Am I arguing that all is fine and well, that we can rest assured because a cunningly efficient law prevents the worst possible effects of modern medicine, while allowing us to benefit from medicine's promising potential? Hardly. So I reject the claim that 'King Nomos does no longer rule' and rather argue that modern medicine does not simply leave law behind, that law remains relevant for scientific and medical progress and for processes of individualisation. But I am not arguing that we should congratulate the 'king' for his efficient and wise rule. To claim that law does not cease to be significant, that it is 'inevitable' (Fitzpatrick 1992: 163), does not mean that the relationship between legal or political steering, medical innovation and consumer demands for access to any conceivable 'treatment' is a very satisfactory one.

And there are some indicators that the legal regulation of medical innovations in the context of reproduction is far from perfect. Some of the inconsistencies and the problematic ideologies of the two laws investigated here have already featured. Yet, there are also political concerns that could not feasibly be addressed on the basis of the methodological and conceptual choices made for this thesis. For example studying the actual politics of licensing clinics in Britain might show the personal, professional and financial entanglement of those who are regulating and those who are regulated (Winston 1999: 148). These actual power-relations are represented and yet disguised by the British legal framework. Similarly, a focus on the role of patient-groups and their involvement with pharmaceutical companies could throw a critical light on claims that everybody with a chronic illness is desperate for genetic research to be conducted (Stockdale 1999).

And yet, this thesis does not tell an old or new Marxist (or radical feminist) tale of law as a veneer of legitimacy hastily applied to add respectability to obvious and clear-cut power structures. This thesis and its methodology take lawmaking and lawmakers seriously. And it comes to the conclusion that law's constructions of women, of doctors, of embryos, that its fictions and denials (its 'rationality', its 'naturalness') are far from
insignificant. So this thesis develops, yet again, an ambivalent argument. On the one hand it assumes that law matters; law does not suddenly (because we live in sophisticated and complicated ‘modern’ times) lose relevance. On the other hand, and nevertheless, law might not represent the right choices; it might not steer in the right direction; it might side with the wrong powers and leave unprotected those who are vulnerable. The fact that the laws investigated here might not represent the ‘right’ (or mine, or critical lawyers’) political values, does not translate into the irrelevance of law for the practices and development of reproductive medicine.

A layered approach
It seems to me that in order to judge the relevance or otherwise of law for modern medicine, it is important to keep in mind that law fulfils more than one function, that there is a ‘plurality of forms of law’ (Hunt 1997). And this is also true for the two pieces of legislation critiqued here. There is a level of very visible, interventionist controls to both laws, for example through threatening prosecution for those who try to create hybrids (s 4 (1) (c) HFE Act, § 7 I 3. ESchG). Yet, interestingly, no-one has been prosecuted for this offence in the last ten years. But both laws clearly also work on other levels. We have seen above that the Acts construct what I have called ‘modern reason’. They also construct or constitute what I have called the ‘modern subject’. These ‘architectural and engineering dimensions of the constitutive aspect of law’ (Morgan 1998: 195, emphasis in the original; also 2001: 35) have been shown to be important for both Acts. We have seen that both laws construct important aspects of the field they are addressing: they contain assumptions and decisions about agency, about reason, about women and about doctors. On the basis of the previous discourse analysis it is untenable to argue that law does not have a say, that it is irrelevant for the configurations and uses of modern medicine. The previous analysis shows that law is essential for constituting the users, the models and relationships that make up modern medicine. The legislative distinctions between research and treatment, between medical ‘needs’, and merely social ‘wishes’ or between deserving women who need treatment, and dangerous women who simply want to ‘consume’ assisted conception for reasons of convenience, are crucial for modern medicine’s day to day operations and its future developments.
On an even more fundamental level, both laws contain and emanate mythical or symbolic messages about modern law, modern science or medicine and about personhood. These can be thought of as mythical because they contain explanations for the inexplicable. “Myth serves to provide an apparent resolution or ‘mediation’ of problems which are by their very nature incapable of any final resolution” (Leach 1969: 54; in Fitzpatrick 2001a: 20). Both laws speak of highly individualised personhood, of identity as genes; and yet the reduction to genes implies in fact a genetic ‘link’. People or families are connected through genes, and yet not only through genes, but through relationships. Personhood in both Acts is an atomised, individualised version of subjectivity, and yet it craves for connection (the desire for one’s ‘own’ child, receiving treatment ‘together’). Both Acts can be seen to make very specific connections between people (and not making others): connecting some men and women, some women and children, some children and men. Both Acts also create the ‘mythical embryo’, “a most wonderful being” (Mrs Winterton, 17 November 2000, House of Commons, vol. 356: col. 1203) that signifies both universality and particularity (see Strathern 1999: 191). It stands for all of us, yet has to be thought of as already unique, a one-off. In the view of the ‘pro-lifers’ the embryo is the beginning of everything, it represents our vulnerability and potential. The pro-researchers too regard the embryo as crucial for humanity’s development: understanding the embryo will lead to a better understanding of people. Based on our connectedness, medical progress will be possible, we will be able “to walk tall, freed from pain and disability” (Ms Cooper, 19 December 2000, House of Commons, vol. 360: col. 261).

Both laws also contain a partly fictional self-image: they are fit to distinguish between good uses and bad abuses of reproductive technologies. They can draw a ‘reasonable’ line through ambivalence. “Ambivalence, the possibility of assigning an object or event to more than one category” (Bauman 1991: 1) does not stop the lawmakers to assign their concerns to very clear and mutually exclusive categories: science vs. sci-fi, universal reason vs. irrationality, wishes vs. needs and so on. Their laws can protect us from the alienating and exploitative potential of modern medicine, and yet they remain open for future developments. They allow themselves to be extended, to be challenged or to be amended. They somehow can be both: firm and flexible, determined and
sympathetic to what has been excluded (see for example the British case of *Blood*, or the German exception for PGD).

**A more “realistic” relationship between law and science?**

Bearing all these different functions and levels of meaning for both laws in mind, it is obvious that there can be no straightforward answer to the question of law’s rule over modern medicine and science. Once again, the picture that emerges is one of law’s important role for normalising and constituting medicine and its users and of law’s reliance and dependence on scientific knowledge, the medical perspective and individualistic claims to entitlement for ‘treatment’. And it is this reliance that leads to the claim that “the technological tail appears to wag the political dog” (Wynne 1982: 179). Some argue that democratic and legal control over “the unplanned excess [of scientific progress], the harmful effects of which are unintentional” (Morgan 2001: 33) could be improved if law- or policy-makers had a more “realistic view of technology” and its ‘progress’ (Wynne 1982: 174). Law might ‘facilitate integration’ if it rejected the ‘dominance’ of scientific language and started recognising other voices as ‘valid’ (Black 1998: 67/68).

However, on the basis of the previous discourse analysis it is difficult to be optimistic for such prospects. It is hard to see how lawmakers could afford a ‘more realistic’ discourse about science, how they could truly “recognise the limits of [scientific] objectivity” (Black ibid: 66). We have seen how the debates about the HFE Act give a certain quasi-religious account of scientific progress, of how “we are walking hopefully into the scientific foothills of a gigantic mountain range” (Sir Ian Lloyd, 23 April 1990, House of Commons, vol. 171: col. 97). We have concluded that this account was necessary to ground the law. Science had to be objective, because the law needed to be objective, and law identified with scientific rationality. And, equally importantly, the views of those opposing embryo research were discredited as irrational, particular and unenlightened because, again, the law needed to be anchored in this rejection. The above discourse analysis suggests that modern medical law could not de-mystify progress (“with a capital ‘P’ if one wishes” (Lord Ennals, 20 March 1990, House of Lords, vol. 517: col. 234) or science, because it would have to then demystify its own
modern’ character, its objectivity, its universalism and rationality. “The fetishisation of progress” (Adorno 1984: 118) cannot plausibly end as long as lawmakers justify their legislative decision-making through building a mystical universe of objective scientific reason opposing those who want to ‘undo the enlightenment’.

We have also seen in the above analysis that the German lawmakers’ attempts to question the big project of making the world and humans better by means of science fail, as the centrality of scientific progress cannot be avoided, even for the ostensibly science-sceptical ESchG. Drawing upon ‘nature’ as a boundary for that which should or should not be permissible, the German lawmakers have to acknowledge that ‘the natural’ can indeed mean a very unhappy state of affairs for those who suffer from infertility or are at risk of passing on genetic problems to their children. Complementing the ethics of the ‘natural’ with an ethics of ‘care’, and thus drawing upon the medical model to justify the use of reproductive technologies, they are equally unable to sever the law’s links to science, its progress and its fundamental role for modern medicine.

Reflecting law and scientific medicine
To “acknowledge greater and more fundamental uncertainties” underlying scientific knowledge (Wynne 1982: 174) would mean to also acknowledge this uncertainty at the heart of law. Because laws depend on science, and legal rationality depends on scientific rationality, lawmakers who reflect upon scientific medicine also reflect upon the rationality and logic of law. Lawmakers asking questions about scientific reason might find that any answer implicates questions about the reason of law. Because both modern law and modern science are the outcome of a mutually dependent, mutually formative relationship, law cannot approach science ‘objectively’ and from the ‘outside’. John Law explains the relationship between the ‘social’ and the ‘technical’:

“The social order is not a social order at all. Rather it is a sociotechnical order. What appears to be social is partly technical. What we usually call technical is partly

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2 I am equally sceptical of heralding ‘common sense’ as the radical alternative to the privileged, reductionist and anti-humanist reliance on science (Santos 1995: 47). We have seen in the debates analysed in detail here that ‘common sense’ can be filled with any meaning whatsoever, and that particularly scientific arguments are deemed common-sensical.
social. And the same may be said for the economic, the political, the scientific, and all the rest.” (1991: 10; *emphasis in the original*)

And it might thus also be said of the relationship between modern medical law and scientific medicine. Above I have argued with Santos (1995) that the circularity of meaning and the co-operative relationship between science and law are ‘endemic in the paradigm of modernity’. This means that law is important for the constitution of science (and thus modern medicine), which is what this thesis has been arguing. Yet it also means that law cannot simply ‘step back’ and have a good and critical look at science and medicine. It cannot afford a view on scientific medicine that is not largely informed by science’s or medicine’s own views.

I have opened this conclusion with a quote from a postmodern detective story by Paul Auster (1987). In this story, a detective called Blue gets given the job to observe a person called Black. Yet it turns out that Black was given orders to observe Blue. And thus both detectives end up in a deadlock of mutually dependent, yet opposing purposes. Staring at Black, Blue is being stared at. Trying to understand Black’s actions or thoughts leads him straight back to the question what he himself is doing. Confronting the other means confronting oneself. This is what the relationship between modern law and modern scientific medicine reminds me of. And this is also why it is hard to see how law could simply move beyond its dependence on scientific and medical rationality by means of better communication, or facilitation between conflicting knowledge claims (see Black 1998). If lawmakers attempted to radically change their approach to scientific medicine, they would have to also radically reconfigure the nature of lawmaking and of law itself. Both seem to be in a relationship that significantly shapes the other, but that also is based on a profound dependence.

Law is not irrelevant for the progress and practices of scientific medicine. And yet law could not find a radically different approach to modern medicine, without in turn radically changing itself, its own morality, its reason, its subject. Paul Auster’s novel does not suggest an optimistic ending to the dilemma of mutual dependence in the

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3 Also see: Latour 1987: 256 257.
context of opposing interests. Yet it shows that the paralysis could only be broken through reflection, through facing up to one’s own purpose and objectives. This thesis, too, does not suggest how the relationship between law and scientific medicine could be radically different. However, I believe that a demystification of science, a more critical approach to medicine, can only be achieved if law faces up to its own constructions: its own rationality, its myths about reason, subjects and legislative coherence. The insight that modern law and modern medicine are caught in a spiral of mutual dependence and clashing yet shared purposes - 'a spiral which no simple infraction can exhaust' (Foucault 1977) - is such an important step of self-realisation.
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