

## OUR MORAL OBLIGATION TO THE ABANDONED EMBRYO

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Is the choice to have an embryonic human person transferred into the womb of a woman who is not the genetic mother (heterologous embryo transfer, or HET) intrinsically wrong? In the first part of this paper, I argue that when the alternative is to let an embryo die, HET can be morally legitimate and even praiseworthy. In the second part I take up the question of how responsible parties should handle the problem of frozen embryos.

### THE MORALITY OF HETEROLOGOUS EMBRYO TRANSFER

Some faithful Catholic philosophers and theologians claim that HET is intrinsically wrong, and they offer a variety of arguments to defend this claim.

Mary Geach rejects HET because she denies that it is morally legitimate for a woman to perform “an act of admission whereby she allows an intromission of impregnating kind to be made into her,” except in marital intercourse.<sup>1</sup>

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<sup>1</sup> Mary C. Geach, “Rescuing Frozen Embryos,” in *What Is Man, O Lord? The Human Person in a Biotech Age: Proceedings of the*

Nicholas Tonti Filippini claims that HET is at odds with the consent a woman gives in choosing to marry, which he understands to include consent to the possibility of becoming pregnant only through her husband.<sup>2</sup> Tadeusz Pacholczyk rejects HET because it involves procreation—which he understands to include not only conception but also gestation—apart from the marital act.<sup>3</sup> William Smith argues that HET is intrinsically wrong because it involves the intrinsic evil of surrogate motherhood.<sup>4</sup> John Berkman does not consider HET intrinsically wrong, but he claims that it is morally legitimate only when the woman who chooses to become the gestational mother also agrees to raise the child.<sup>5</sup> I will present a positive defense of the position that choosing HET to save the life of an embryo can be morally good, and then respond to each of the objections.

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*Eighteenth Bishops' Workshop*, ed. Edward J. Furton (Boston: National Catholic Bioethics Center, 2002), 220.

<sup>2</sup> See Nicholas Tonti-Filippini, “The Embryo Rescue Debate: Impregnating Women, Ectogenesis, and Restoration from Suspended Animation,” *National Catholic Bioethics Quarterly* 3.1 (Spring 2003): 111–137; reprinted in this volume on pp. 69–114. In the following footnotes, references to this article are to the pages in this volume.

<sup>3</sup> See Tadeusz Pacholczyk, “Frozen Embryo Adoptions Are Morally Objectionable,” in *The Catholic Citizen: Debating the Issues of Justice*, ed. Kenneth Whitehead (South Bend, Indiana: St. Augustine’s Press, 2004), 84–101.

<sup>4</sup> See William B. Smith, “Rescue the Frozen?” *Homiletic and Pastoral Review* 96 (October 1995): 72–74.

<sup>5</sup> See John Berkman, “Gestating the Embryos of Others: Surrogacy? Adoption? Rescue?” *National Catholic Bioethics Quarterly* 3.2 (Summer 2003): 309–329. Also see Helen Watt, “Are There Any Circumstances in Which it Would Be Morally Admirable for a Woman to Seek to Have an Orphan Embryo Implanted in Her Womb? (2)” in *Issues for a Catholic Bioethic*, ed. Luke

*A DEFENSE OF HETEROLOGOUS  
EMBRYO TRANSFER AS RESCUE*

To determine whether HET as rescue is intrinsically wrong, we must consider the classical sources of morality: the end (or purpose) of the act, the object, and the circumstances.

The purpose—the reason why the choice is made—is clearly good: to save a child from death. Surrogacy is not at issue here, for while the external behavior of a woman choosing to rescue an embryo may be exactly the same as that of a surrogate mother, the latter has an entirely different purpose. She does not nurture the child for his or her own benefit but in order to supply a baby for a third party, and in so doing she treats the child as a commodity. Moreover, the project usually requires her consent to the creation of the embryo apart from the marital act, either through artificial insemination or in vitro fertilization (IVF). By contrast, a woman who agrees to have an embryo transferred into her womb in order to rescue him or her acts for the sake of the child, and does so whether she plans to raise the child or give him or her up for adoption. Any self-interest she has—her interest in being a rescuer, in nurturing the child in her womb, and perhaps in mothering the child after he or she is born—is perfectly compatible with the child's human dignity. Moreover, her agreement to have the embryo transferred into her womb need not presuppose consent to the creation of the embryo outside the marital act.

The object—the means chosen by a woman to accomplish her purpose—includes two elements: to have an embryo transferred into her womb and to nurture him or

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Gormally (London: The Linacre Centre, 1999), 347–352, and “A Brief Defense of Frozen Embryo Adoption,” *National Catholic Bioethics Quarterly* 1.2 (Summer 2001): 151–154.

her there until birth.<sup>6</sup> Nurturing the embryo in her womb until birth plainly cannot be wrong. After all, a pregnant woman is morally obligated to nurture her child in her womb until birth even if the child was brought into existence by means that were gravely wrong. That obligation holds whether the child was conceived through the woman's own bad choice (as in fornication, adultery, or incest) or through the bad choice of someone else (as in rape). The obligation to nurture the child until birth holds even if an embryo conceived through IVF has been transferred into the womb of a woman who is not his or her genetic mother.

Is the first element—to have an embryo transferred into a woman's womb—intrinsically wrong? *Donum vitae* treats IVF and embryo transfer as aspects of a single project and condemns that project as wrong in itself. The Instruction teaches that the practice of IVF and embryo transfer is wrong even when care is taken to avoid the death of embryos, when the sperm is not obtained through masturbation, and when the sperm and eggs are taken from a husband and wife rather than from a third party.<sup>7</sup> The reason for this teaching is that the practice of IVF and ET “establishes the domination of technology over the origin and destiny of the human person” by replacing the marital act with an act of technology. Fertilization “is neither in fact achieved nor

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<sup>6</sup> See Germain Grisez, *The Way of the Lord Jesus*, vol. 3, *Difficult Moral Questions* (Quincy, IL: Franciscan Press, 1997), 242. Also see William E. May, “The Morality of ‘Rescuing’ Frozen Embryos,” in *What Is Man, O Lord? The Human Person in a Biotech Age*, ed. Edward J. Furton (Boston: National Catholic Bioethics Center, 2002), 201.

<sup>7</sup> See Congregation for the Doctrine of the Faith, *Donum vitae* (February 22, 1987), II (B), 5. That the Instruction treats IVF and embryo transfer as aspects of a single project is evident in its consistent use of singular verbs to refer to that compound subject.

positively willed as the expression and fruit of a specific act of the conjugal union.” The Instruction explains that this “relationship of domination is in itself contrary to the dignity and equality that must be common to parents and children.”<sup>8</sup> In short, the child is treated as subpersonal, because he or she is not received as a gift of God in response to an act of loving marital intercourse, but is brought into existence, and inevitably regarded, as a product of technology. This is the case even when the parents plan to accept and cherish the child to be conceived in this manner.

It is worth noting that the Instruction neither condemns nor even considers HET apart from IVF,<sup>9</sup> and the reasons it gives for condemning “heterologous IVF and ET” as intrinsically wrong are limited to the reasons IVF is intrinsically wrong.<sup>10</sup> This treatment of ET along with IVF is understandable, because ET usually is a part of a project that includes IVF, and the Congregation is concerned to teach that IVF is wrong not only when it is done with a view to experimenting on embryos but also when it is done with a view to transferring an embryo into a woman’s womb and saving the embryo.

However, ET need not be a part of a project that includes IVF. We must clearly distinguish ET from IVF, for in itself ET does not involve generating a new human being. Although the problem of what to do with a frozen embryo

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<sup>8</sup> Ibid., II (B), 5.

<sup>9</sup> Indeed, in its definition of heterologous IVF and embryo transfer, *Donum vitae* says nothing at all about embryo transfer: “*Heterologous IVF and ET*: the technique used to obtain a human conception through the meeting in vitro of gametes taken from at least one donor other than the two spouses joined in marriage” (II, introduction).

<sup>10</sup> *Donum vitae*, II (B), 5.

arises only because someone brought him or her into existence through IVF, someone else—even someone opposed to IVF—may need to decide what to do with that embryo, and specifically to judge whether it would be licit to transfer him or her into a woman’s womb.

Consider, for example, the case of a woman who cooperates with IVF and then repents. She acknowledges that she was wrong to bring children into existence in this way, but because they now exist she must decide what to do with them. Nothing in *Donum vitae* suggests that she should not have her own embryos transferred into her own womb.<sup>11</sup> Having them transferred is not at odds with anything humanly good. It obviously is not at odds with the good of life, for it is aimed at saving life. It does not involve generating a baby outside the marital act for, again, the baby in question already exists. It also is perfectly compatible with the good of marriage. The technician transferring the embryo does not deposit semen but an already conceived child. We may conclude, then, that it is not intrinsically wrong to transfer an embryo into *a woman’s* womb, because there is a clear case in which it can be good and even morally

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<sup>11</sup> In fact, *Donum vitae* says that because they have been produced through IVF, “those embryos which are not transferred into the body of the mother and are called ‘spare’ are exposed to an absurd fate, with no possibility of their being offered safe means of survival which can be licitly pursued” (I, 5). This statement strongly suggests that, despite the wrongness of IVF, transferring these embryos to their mothers’ wombs is a licit way of saving them. The document does not consider the possibility of the transfer of “spare” embryos into the wombs of other women who wish to save them. See John Berkman, “The Morality of Adopting Frozen Embryos in Light of *Donum vitae*,” *Studia Moralia* 40 (2002), 117–21.

required to do so, namely, when it is a question of transferring an embryo into his or her *mother's* womb.

Circumstances include anything relevant about a case other than the purpose and object. Can circumstances make it wrong to transfer an embryo into a woman's womb in order to rescue him or her? Circumstances alone cannot make any act intrinsically wrong. Still, one can imagine circumstances that might make a particular instance of the act wrong. For example, if the woman has serious responsibilities that the procedure could prevent her from fulfilling or if her physical condition could make it especially difficult for the embryo to survive, then attempting embryo transfer might well be wrong. But there is no reason to think that the procedure would be wrong if the only changed circumstance is that the woman into whom the embryo is to be transferred is not the genetic mother.

I have concluded that the two elements of the object of HET are both good. Nurturing a child in the womb, once the child is there, is good and almost always obligatory, no matter how the child happened to get there (including rape and even the transfer of an embryo conceived through IVF into the womb of a woman who is not the genetic mother). And the choice to transfer an embryo into a woman's womb is good at least if the woman is the genetic mother. It is therefore hard to imagine why we should think that HET—having an embryo transferred into the womb of a woman who is not the genetic mother, and nurturing the child there until birth—should always be wrong.

That the woman is not the child's mother is a changed circumstance. That circumstance, though quite significant, cannot change a good act into a bad one, because it does not place the act at odds with anything that is humanly good. The act is still life saving and remains entirely compatible with the good of marriage. There is no violation of what is proper to marriage, for there is no sexual act. Indeed,

since those involved do not seek or experience any sort of sexual arousal, contact, or satisfaction, HET does not even resemble a sexual act. And the woman's relationship with the child is clearly not marital. Rather, the union she enters into with the child is similar to, though more intimate than, the relationship a woman would have with a foundling that she saves by nursing him or her at her breast.

Of course, other circumstances should be considered and addressed. For example, in arranging to have an embryo transferred into her womb, a woman might unintentionally scandalize others: she might give them the impression that she has consented to IVF, thus making it more likely that they will approve of and even cooperate with it. She might reasonably judge that given the value of the life she is trying to save and the child's bleak prospects without her help, she should accept the danger of scandal and other prospective bad side effects. However, she should do what she reasonably can to mitigate the bad side effects, for example, by making her opposition to IVF clear.

*RESPONSE TO OBJECTIONS*

*Mary Geach*

Mary Geach holds that HET is intrinsically evil because "the woman's act is a highly defective version of the marriage act."<sup>12</sup> She explains that in HET a woman performs "an act of admission whereby she allows an intromission of impregnating kind to be made into her," and argues that this sort of admission is essential to the woman's part in the conjugal act and should be reserved to it.<sup>13</sup> This argument avoids implying that it is also wrong for a woman to

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<sup>12</sup> Geach, "Rescuing Frozen Embryos," 221.

<sup>13</sup> *Ibid.*, 220.

breastfeed a child not genetically her own, since doing so plainly does not involve allowing an intromission of impregnating kind.

But is the wife's part in the conjugal act aptly described as "an act of admission whereby she allows an intromission of impregnating kind"? No. To understand her part properly, we must first consider what is necessary for marital intercourse.

A couple is able to have marital intercourse only if they are married, under no compulsion, and acting in a loving way.<sup>14</sup> Given those conditions, to have marital intercourse they need only do a reproductive type of act per se apt for procreation. Such an act need not be capable of causing conception; it need only be the behavior the couple would carry out if they could conceive and wanted to conceive a baby.<sup>15</sup> Thus, couples have marital intercourse when the husband's penis penetrates into his wife's vagina and he ejaculates. Assuming neither of them intends their infertility, couples who do this have marital intercourse even if they know they cannot conceive—for example, even if they know

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<sup>14</sup> According to *Gaudium et spes*, conjugal love "is uniquely expressed and perfected by the exercise of the acts proper to marriage. Hence the acts in marriage by which the intimate and chaste union of the spouses takes place are noble and honorable; the truly human performance of these acts fosters the self-giving they signify and enriches the spouses in joy and gratitude." "Pastoral Constitution on the Church in the Modern World: *Gaudium et spes*" (December 7, 1965), n. 49, in *Vatican Council II: Constitutions, Decrees, Declarations*, ed. Austin Flannery, O.P. (Collegeville, MN: Liturgical Press, 1996), 222.

<sup>15</sup> Nothing more is required for the act to "retain its intrinsic relationship to the procreation of human life" (Paul VI, *Humanae vitae*, n. 11) or for it to be "open to new life" (John Paul II, *Familiaris consortio*, n. 29).

the wife has no uterus or ovaries, and even if they would not choose to come together if they thought the wife might be fertile.<sup>16</sup> Such acts are not at all defective as acts of marital intercourse, for they can consummate a marriage.

Once we see what is and is not essential for marital intercourse, it becomes clear that inserting an embryo into the wife's womb is not at all connected with what is essential. If a couple engage in marital intercourse and have a baby, the conception, implantation, gestation, delivery, and the nursing of the baby are all consequent upon marital intercourse. But if a baby is just inserted, there is no connection with marital intercourse at all, and it cannot rightly be claimed that HET is a defective version of marital intercourse.

What about the wife's part in marital intercourse? *Pace* Geach, it is better described as willingly engaging in the same kind of behavior that she would carry out if she and her husband could conceive and wanted to conceive a baby. Or, to adapt Geach's language, the wife performs an act of admission whereby she allows an intromission that is per se apt for procreation. She does this if she receives her husband's penis into her vagina and he ejaculates.

Geach is mistaken in claiming that an essential feature of the female marital act is that the woman allows "an intromission which is of a kind to make her pregnant,"<sup>17</sup> for women who know they are sterile are capable of engaging in marital intercourse, and no act of intercourse is of a

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<sup>16</sup>Those who are unwilling to cause their own infertility cannot be said to intend their infertility even if they welcome it and limit their intercourse to infertile times. Those who deliberately cause their own infertility do intend their infertility unless they repent of having caused it as, for example, a man might do who regrets having had a vasectomy.

<sup>17</sup>Geach, "Rescuing Frozen Embryos," 220.

kind to make them pregnant. What is essential to the female marriage act is that the wife allow an intromission of the kind she would allow if she and her husband could conceive and wanted to conceive a baby. Such an intromission is radically different from the intromission a woman allows in HET. The former is a sexual act, but the latter is not, because conception has already occurred. The woman's role in HET therefore cannot be even a highly defective version of the female marriage act.

Respect for the marital good and the conjugal act that embodies it excludes not only seeking sexual pleasure or marital intimacy by engaging in intercourse outside of marriage but also seeking them by engaging in other complete sexual acts, outside or inside of marriage, which only imitate intercourse. Thus, respect for marriage and the conjugal act excludes not only fornication and adultery but also sodomy and even contraceptive intercourse with anyone, including one's spouse, because all of these are defective versions of the conjugal act. But respect for marriage and the conjugal act does not exclude HET, which is not a sexual act at all and therefore cannot be a defective version of the conjugal act.

*Nicholas Tonti-Filippini*

Nicholas Tonti-Filippini also argues that HET is a violation of marriage. He claims that "when a woman marries, she not only gives herself in such a way that she wishes to express her love in the marital act, she also surrenders her body, in willing that act, to the possibility of new life being formed within her and her state being changed to that of a woman who is pregnant with child."<sup>18</sup> He also claims that a

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<sup>18</sup>Nicholas Tonti-Filippini, unpublished letter to the Scholars Forum, October 2004.

woman's gift of "herself, her psychosomatic unity, faithfully, exclusively, totally, and in a fully human way *in marriage*" is such that "her capacity to become pregnant and to bear a child in her womb . . . may not be given outside marriage."<sup>19</sup> Thus, according to Tonti-Filippini, when a woman chooses to marry, she consents to the possibility of becoming pregnant only through her husband.

However, no one can choose or intend what he or she knows to be impossible. And a woman who knows that it is impossible for her to become pregnant through a certain man can validly marry him. In marrying, she is not consenting to the possibility of becoming pregnant only through him; she cannot consent to that possibility because she knows there is no such possibility. A woman's choice to marry, then, does not in and of itself include consent to the possibility of becoming pregnant only through her husband. Therefore, a woman's choice to marry does not exclude HET.

If they think the matter through at all, women who suppose their marriage will be fertile generally accept the prospect of becoming pregnant only through their husbands because they understandably assume that they could not otherwise become pregnant without being unfaithful. But consent to the possibility of becoming pregnant only through their husbands is not built into their marital consent, and therefore becoming pregnant in some other way would not in and of itself constitute infidelity and violate the good of their marriage. A wife would violate that good only if she became pregnant through sexual infidelity. This does not occur with HET, even though the pregnancy is brought about through the agency of a clinician, because it is not a sexual act. The child already exists, and thus the act of trans-

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<sup>19</sup>Tonti-Filippini, "Embryo Rescue Debate," 91 (original emphasis, citations omitted).

ferring the embryo into her womb is not at all ordered to the begetting of new life.

Of course, a wife should not consent to HET without making sure that doing so does not conflict with any of her other responsibilities, including her responsibility not to deny her husband's reasonable requests for marital intercourse. As with other very large commitments, husband and wife should strive to proceed in harmony. Although they could never reasonably agree that circumstances justify the wife's trying to become pregnant by having sex with another man, they might well reasonably agree that circumstances justify the wife's becoming pregnant through HET—for example, they might reasonably agree to save the life of the frozen embryo of a deceased relative by having the embryo transferred into her womb.

Tonti-Filippini also addresses the question of whether it is licit for single women to attempt HET. He claims that “impregnation is so linked to generation and objectively has a significance that is so aligned with generation, so much part of the goods of marriage,” that it cannot be licitly pursued apart from a conjugal act.<sup>20</sup> He concludes that it is wrong for both married and single women to attempt HET.

Normally there is a very tight link between generation and impregnation, for impregnation normally occurs, if it occurs at all, as the result of an act of sexual intercourse and without any technical intervention. Since the only generative acts that one can rightly engage in are conjugal acts, it is normally wrong for a woman to try to become pregnant apart from a conjugal act.

However, one cannot reasonably reject HET as intrinsically wrong simply because normally a woman can only be-

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<sup>20</sup> *Ibid.*, 103.

come pregnant through a generative act of intercourse and can only rightly have marital intercourse. For, as noted above, what is at stake in HET are the lives of children who have already been generated, and saving those lives does not require a woman to become pregnant through illicit intercourse or, for that matter, any sexual act at all. The normally tight link between generation and gestation does not give rise to a moral norm that excludes gestation without generation. We have already seen that a woman's marital consent does not in and of itself include consent to the possibility of becoming pregnant only through her husband. Her choice to become pregnant apart from a conjugal act can be morally good as long as it does not involve sexual infidelity.

We can now add that being unmarried does not make it immoral for a woman to choose to become pregnant through HET in order to save the life of an unborn child. Her choice to become pregnant apart from a conjugal act can be morally good as long as it does not involve sexual activity. Of course, it is preferable for the child to be adopted by a married couple and gestated in the womb of a woman who will raise him or her in an intact family. When that preferable alternative is available, a single woman should defer to the married couple. When it is not available, however, her choice to attempt HET can be moral and even praiseworthy.

*Tadeusz Pacholczyk*

Tadeusz Pacholczyk argues that HET is intrinsically wrong because it fails to “respect the total meaning of mutual self-giving and human procreation in the context of true love.”<sup>21</sup> One might reply that while IVF fails in that regard, HET need not fail, because the human life at stake has already

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<sup>21</sup> Pacholczyk, “Frozen Embryo Adoptions,” 87, quoting *Gaudium et spes*, n. 51.

been conceived, and a woman may simply be trying to save that life. Pacholczyk responds by claiming that procreation includes not just fertilization but “the entire act of marital self-giving with its attendant pregnancy, leading up to and culminating in the birth of a child.”<sup>22</sup>

However, the claim that procreation includes gestation is merely asserted and not proved, and therefore fails to ground a moral norm excluding HET as intrinsically evil. Strictly speaking, a child has been procreated as soon as he or she comes into existence. If a woman conceives a child through marital intercourse, we can rightly say that the woman and her husband procreated that child even if the child dies a moment later.

Of course, one might use “procreation” to refer to more than just conception. One might use it to include even breastfeeding, since conception initiates the changes in a woman’s body that eventually capacitate her to nurse a child at her breast. However, if one does understand “procreation” to include breastfeeding, one cannot reasonably argue that it is intrinsically wrong to “procreate” outside of marriage, for then one would be obligated to maintain that a woman should refuse to breastfeed a foundling even when the alternative is to let the child die.

Pacholczyk addresses that objection:

Pregnancy signals and embodies a unique relational exclusivity between mother and child. Nursing a baby does not signal or embody that same unique relational exclusivity, since the procreative threshold of birth has now been crossed, and the baby’s being out and away from his mother signals a new stage of availability for other relational encounters, including the encounter with other women who

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<sup>22</sup> *Ibid.*, 89.

may serve as wet-nurses. So pregnancy is procreative and exclusive in its essential nature, while breastfeeding is not.<sup>23</sup>

This response does not vindicate Pacholczyk's argument against HET. The claim that procreation includes pregnancy but not breastfeeding cannot be reasonably grounded on "the unique relational exclusivity between mother and child," for even a child in the womb is capable of some interaction with others, while breastfeeding children, though capable of more interaction with others, are bonded primarily to their mothers. We have just seen that it is unreasonable to expand the meaning of procreation to include breastfeeding and then to conclude that it is intrinsically wrong to breastfeed a foundling. So, also, it is unreasonable to expand the meaning of "procreation" to include everything up to birth but nothing beyond it, and then to conclude that HET is intrinsically wrong. Procreation apart from the marital act is indeed intrinsically wrong, but that statement means only that it is always wrong to attempt to conceive children apart from the marital act. If one uses "procreation" to mean anything more than conception, then one cannot reasonably assume that the statement remains true. Vindicating the claim that HET is intrinsically wrong requires not just an expansion of the meaning of "procreation" but an independent argument.

Pacholczyk offers several arguments, but each ultimately depends on the question-begging assumption that procreation, understood as including pregnancy, is intrinsically wrong apart from the marital act. For example, Pacholczyk decries the "fissure in parenthood" that he says HET inevitably involves. In support of his position he quotes *Donum vitae*: "The bond existing between husband and wife

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<sup>23</sup> *Ibid.*, 90.

accords the spouses, in an objective and inalienable manner, the exclusive right to become mother and father solely through each other.”<sup>24</sup> However, the question arises as to what kind of motherhood or fatherhood spouses can rightly take on only through each other. Pacholczyk has not shown that the bond between spouses accords them anything more than the right to become genetic parents only through each other. He denies that a woman can rightly become a gestational mother except by a conjugal act but affirms that one can rightly become a social parent apart from a conjugal act by “adopting an already born child,” because he assumes that the former sort of parenthood involves “procreation” while the latter, despite its own “fissure in parenthood,” does not.<sup>25</sup>

So, also, Pacholczyk invokes the “principle of inseparability” articulated in *Humanae vitae*, namely, that there is an “indissoluble connection” between “the unitive meaning and the procreative meaning” of the conjugal act and that one should not attempt to separate them. He concludes that HET violates this principle because it means wrongly choosing “to invoke some of the procreative powers of the woman in the absence of this unitive aspect, in the absence of the conjugal act between the couple.”<sup>26</sup> His evaluation of this choice, which he considers the essence of surrogacy, is accurate only if we assume the truth of what he is trying to prove: that the choice to become pregnant apart from a marital act is intrinsically wrong.

It is worth noting that Pacholczyk’s reasoning leads him to reject not only heterologous but also homologous embryo transfer. If it is wrong to become pregnant apart

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<sup>24</sup> *Ibid.*, 92, quoting *Donum vitae*, II (A), 2.

<sup>25</sup> *Ibid.*, 93–94.

<sup>26</sup> *Ibid.*, 90–91, citing *Humanae vitae*, n. 12.

from a conjugal act, then a woman who cooperates with IVF and then repents should refuse to have her own embryos transferred into her own womb.<sup>27</sup> Pacholczyk expresses this conclusion explicitly: “If [the wife] suddenly were to repent of ever having generated these embryos in the first place,” then

the morally proper step for her to take would be to immediately get off the table and walk out of the clinic, even though these embryos, of which she is the genetic mother, are truly her own children. By this bold step, she would put the brakes on the intrinsically disordered chain of events that she had initiated, and avoid involving herself in a second evil act of becoming a surrogate mother to the embryos that she and her husband had generated at the clinic.<sup>28</sup>

Although Pacholczyk’s consistency is admirable, his conclusion that homologous ET is intrinsically wrong, like his conclusion that heterologous ET is intrinsically wrong, is based on the unwarranted assumption that gestation is a part of procreation. On that assumption, any choice to become pregnant apart from the marital act is a choice to procreate apart from the marital act and must for that reason be regarded as wrong.

### *William Smith*

William Smith does not claim, with Pacholczyk, that a woman who has her own embryos implanted in her own womb ipso facto becomes a surrogate mother. However, he does argue that a woman who carries an embryo that she did not conceive ipso facto becomes a surrogate mother, and he

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<sup>27</sup> Ibid., 96–97. As mentioned in footnote 11, *Donum vitae* suggests that such a conclusion is mistaken.

<sup>28</sup> Ibid., 96.

concludes that HET is intrinsically wrong. He says that the surrogacy *Donum vitae* explicitly condemns is the plan to gestate the child and then surrender him or her once born, but he argues that “the foundational reasons for rejecting ‘surrogacy’ as licit” apply even when the couple intend to adopt and raise the child. According to Smith, this project fails

to meet the obligations of maternal love, conjugal fidelity and responsible motherhood; and the facts offend the dignity and right of the child to be conceived, carried in the womb, brought into the world and brought up by his own parents.<sup>29</sup>

As Smith notes, the facts of the case are indeed at odds with the child’s human dignity and right to have a unified parental principle. However, those problems are in no way attributable to, and would not be exacerbated by, the couple’s plan to gestate and raise the child any more than the problems of an already born child are attributable to, or would be exacerbated by, a couple’s plan to adopt him or her. Instead, carrying out the couple’s plan for HET would aim at solving those problems by saving the child’s life and offering him or her a loving home. Such an effort hardly constitutes an offense against the child’s dignity and rights; nor can it rightly be regarded as a form of surrogacy, for the couple is acting in the interests of the child and not in the interests of some third party.

*John Berkman*

John Berkman affirms the moral legitimacy of a woman’s choice to bear an embryo that she did not conceive, but only on the condition that she also intend to be the child’s social mother. He emphasizes the significance of the relationship that the woman enters into with the embryo in becoming his

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<sup>29</sup>Smith, “Rescue the Frozen?” 72, 74.

or her gestational mother, and argues that “the most adequate moral description of what [a woman] is undertaking in agreeing to gestate an abandoned embryo is that she is consenting to adopt the embryo.”<sup>30</sup> He therefore endorses Helen Watt’s view that the “choice to gestate with the intent to give the child up constitutes a wrongful form of adoption.”<sup>31</sup> He claims that without the concomitant commitment to raise the child, the woman would be a surrogate mother.

Berkman never justifies his claim that a woman who consents to HET necessarily consents to adopt the embryo. No matter how significant the bond is between embryos and the women who gestate them, and no matter what that bond suggests women who consent to HET *should* do, women clearly *can* consent to HET without consenting to adopt the embryo. The relevant question is whether HET is necessarily wrong if a woman does not consent to adopt the child.

Since Berkman assumes that a woman who consents to HET ipso facto consents to adopt the embryo, he naturally holds that it would be wrong for her to agree to HET while intending not to raise the child. But apart from that assumption, why does Berkman maintain that it would be

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<sup>30</sup> John Berkman, “Gestating the Embryos of Others,” 328.

<sup>31</sup> Berkman, “Gestating the Embryos of Others,” 327; Helen Watt, “Are There Any Circumstances,” 347. It should be noted that whereas Watt previously argued that HET is morally acceptable when a woman plans to serve as the social mother, she now holds that HET is defensible “only in the highly unusual scenario where an ectopic embryo conceived with a donor ovum is transferred back into the body of the gestational mother.” She rejects all other forms of HET because “they make a woman a mother by purely technical means.” Watt, “Becoming Pregnant, or Becoming a Mother? Embryo Transfer With and Without a Prior Maternal Relationship,” as presented at the Westchester Institute Scholars Forum in October 2004 (see pp. 55–67 of this volume).

wrong for a woman to attempt HET while planning to give up the child? He emphasizes the profound psychological and even biological bond that exists between the embryo and the gestational mother. He notes that there are “maternal cells in fetuses” and that “cells from the fetus in utero circulate in the mother’s blood stream and become integrated with her body.”<sup>32</sup> However, despite the significance of the bond between the embryo and the gestational mother, their bodies are perfectly distinct biologically. Of course, the whole baby is inside the mother’s body. The placenta is not common to the baby and the mother, however, but belongs entirely to the baby; it is an organ of the baby’s body. Indeed, there is not a single cell common to both. The cells are locked together tightly, like fingers of two persons locked together—or like a baby’s mouth locked onto the nipple of the mother or wet nurse.

We must conclude that although the bond between pregnant women and the embryos they gestate is profound, there is no reason to assume that it grounds a norm excluding HET whenever the woman intends to give up the child, or thus obliges a woman who cannot herself raise the child to refuse HET even when the alternative is to let the child die.

Of course, it is far better for the child’s gestational mother also to be his or her social mother, just as it is far better for the child’s genetic mother also to be his or her gestational and social mother. But when the child’s life is at stake, it can be morally legitimate and even praiseworthy for a woman to become his or her gestational mother even when she cannot reasonably commit herself to assume responsibility to be the child’s social mother. Despite the profound significance of gestational motherhood, the commitment to gestate the child does not *ipso facto* require the woman to raise him

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<sup>32</sup>John Berkman, “Gestating the Embryos of Others,” 322.

or her. The woman's choice need not be to adopt but could be simply to rescue the child, much as a foster mother commits herself to helping the child through a particularly difficult time until someone is able to adopt him or her.

Still, I believe Helen Watt is correct in claiming that "one should not deliberately become a mother—genetic or gestational—without a commitment to the child's future care."<sup>33</sup> Even a woman who conceives through rape should do what she reasonably can to make sure the child is properly cared for. *A fortiori*, a woman planning to become pregnant through HET should intend to do what she reasonably can to make sure the child is cared for and brought up properly, for she takes on responsibility for the child. But she need not plan to fulfill that responsibility by raising the child herself.

#### THE PROBLEM OF FROZEN EMBRYOS

I turn now to the question of what should be done with the many thousands of frozen embryos left in storage. Tonti-Filippini considers it an offense against their dignity to keep them frozen. He holds that they should "be thawed in moist conditions" and "restored to their natural dynamic state." Although their death is unavoidable "because they would develop to a state of maturity in which their vital needs could not licitly be met," he claims that "those few days in which they would return to their natural state of growth and dynamism would constitute a rescue, albeit short-lived because of the absence of any licit means ultimately of preventing death."<sup>34</sup>

As Tonti-Filippini freely admits, this approach offers no hope of saving any of the thousands of innocent lives that are imperiled. Those lives cannot rightly be saved if

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<sup>33</sup>Watt, "Brief Defense," 151.

<sup>34</sup>Tonti-Filippini, "Embryo Rescue Debate," 113.

HET is intrinsically wrong, for it alone can enable embryos that cannot be transferred into their genetic mothers' wombs to develop and flourish.<sup>35</sup>

But how, if HET is licit, should those responsible handle the problem of frozen embryos? Notice that I am not now asking a general question about what should be done with those embryos; rather, I am asking *what the moral agents who have responsibility for those embryos should do*. The distinction is crucial, because every real moral question concerns something that some individual or group of persons thinks that he, she, or it could do. Unless we ask about the responsibility of some moral agent, there is no moral issue to discuss.

Consider, for example, how even someone who considers HET morally acceptable might respond if the question fails to identify a moral agent, as in the formulation, *what should be*

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<sup>35</sup>The possibility of gestation within an artificial or animal womb does not alter that conclusion, because neither is at present technically feasible and because we can hardly assume that those opposed to HET would consider those options licit. Tonti-Filippini concludes "The Embryo Rescue Debate" with an expression of concern about these possibilities, noting that "there is something very disturbing about a child having an animal or a machine for a birth mother." (114). However, the Church does not condemn these possibilities in principle. *Donum vitae* teaches that "the gestation of human embryos in the uterus of animals," and "the hypothesis or project of constructing artificial uteruses for the human embryo" are "contrary to the human dignity proper to the embryo, and at the same time they are contrary to the right of every person to be conceived and to be born within marriage and from marriage" (I, 6). The document is concerned with these procedures as aspects of a project to bring human life into existence outside the mother's womb. It is not at all clear that the Congregation means to reject such procedures when the alternative is to allow an embryonic person to die.

*done with leftover frozen embryos?* One might argue that while freezing an embryo is not intrinsically wrong, it cannot be justified unless it offers benefits to the embryo that offset the burdens the freezing imposes. One might point out that freezing preserves the embryo's bodily life and makes possible any solidarity that others have with him or her and yet judge that these benefits do not offset the burdens that being kept in a frozen state imposes on the embryo, including his or her lack of consciousness and inability to develop organically, and the physical harms that may accrue to the embryo over time. The point might be reinforced by an appeal to the Golden Rule: Would *you* want to be kept frozen indefinitely? The argument might conclude that unless the embryo has a realistic possibility of being transferred into a womb within a reasonable amount of time, the continued freezing cannot offer benefits to the embryo that offset the burdens, and therefore—and here the conclusion is the same as that of those who consider HET intrinsically wrong—leftover embryos should be thawed and allowed to die.

Those arguments seem reasonable enough, but they are not arguments about a real moral issue, because we have not asked what a moral agent with responsibility for the frozen embryos should do. Until we ask that question, such arguments remain purely speculative, despite the sound premises from which they proceed. This point becomes clear when we see how dramatically the ground shifts when we do consider the responsibilities of specific moral agents: those who brought the embryos into existence with a readiness to freeze them if they considered it necessary—specifically, the genetic mothers who agreed to the procedure and the freezing, and government officials who have the authority to prohibit, permit, or regulate these matters.

Those who brought the embryos into existence with a readiness to freeze them are involved in several kinds of grave immorality. The choice to create human beings out-

side the womb was the initial wrong. Very often, those who engage in IVF also intend to kill deformed or excess embryos or to experiment on embryos, and those intentions are further wrongs. The willingness to make more embryos than could be implanted immediately, which could survive only by being frozen, also was a further wrong. However, the choice to freeze the embryos was not wrong in itself. The teaching of *Donum vitae* must be properly understood. The Instruction says:

The freezing of embryos, even when carried out in order to preserve the life of an embryo—cryopreservation—constitutes an offense against the respect due to human beings by exposing them to grave risks of death or harm to their physical integrity, and depriving them, at least temporarily, of maternal shelter and gestation, thus placing them in a situation in which further offenses and manipulation are possible. (I, 6)

The Instruction does not say that the choice to freeze is wrong in itself, but rather condemns it as an offense against human dignity when it is an aspect of a project to create life outside the womb, for such a project exposes embryos to grave risks and deprives them of maternal shelter and gestation. It is by no means clear that the document intends to condemn the choice to freeze embryos if it is made precisely with a view to limiting risks as much as possible and enabling the embryo to be transferred into a womb as soon as that can reasonably be done.

The following example illuminates the point. Imagine that a laboratory worker (who is not involved in IVF procedures and is not aware that they are being performed) is handed dishes with embryos growing in them and told to freeze them. He asks himself whether choosing to freeze them would implicate him in the evil of those who wrongly brought them into existence. Realizing that that evil has

already been done and that nothing he now does can facilitate it, he rightly concludes that choosing to freeze the embryos would be neither formal nor material cooperation with it. He then asks himself whether the choice to freeze the embryos would be a choice contrary to their good, and his answer is no: "If I freeze them they live; if not, they die." He rightly judges that his lifesaving choice to freeze them is morally good.

Neither the upright laboratory worker nor those who wrongly chose to bring human beings into existence outside the womb and who committed the further wrong of making embryos that could not survive without being frozen would be justified in removing them from the freezer—and *a fortiori* would not be obligated to do so—because removing the embryos would result in their deaths. Doing so would also prevent the relevant persons from fulfilling their responsibility to arrange for the embryos to be transferred into the wombs of the women who supplied the ova from which they were generated.

The genetic mothers who agreed to the procedure and the freezing never should have done so, but they would not therefore be justified in unfreezing their children and letting them die—and *a fortiori* would not be obligated to do so. Rather, their present and very urgent responsibility is to have their embryonic children transferred into their wombs and to see to it that those who cannot be transferred there are transferred into the wombs of other able women. The present responsibility of those who carried out the procedure and the freezing is to see to it that each embryo is transferred into his or her mother's womb if possible and, if not, into the womb of another woman who is willing and able to gestate the embryo.

What should government representatives do who have the authority to decide about these matters? They should recognize the terrible injustice of bringing embryonic

persons into existence outside their mothers' wombs in the first place and make doing so a crime. Indeed, given the magnitude of the injustice, they should attach the severest penalties that can be justly imposed to the laws forbidding these crimes. However, once embryos have been created and put in a freezer, government authorities are faced with a life-and-death situation for many embryonic individuals, and they should do whatever they rightly can to save as many as possible—as they would if the lives threatened were those of any other class of innocent human beings.

Because the women who chose to have their children brought into existence outside their wombs and frozen bear, or at least share, primary responsibility, and because these women are the embryos' genetic mothers, they should be required by law to have them transferred into their wombs if that is possible and medically appropriate. Obviously, the effectiveness of such a law would presuppose that abortion be prohibited by law. Of course, in many cases having the embryos transferred into their mothers' wombs will be impossible or unreasonable. Some women might try to abort their children even if abortion is illegal. And an increasingly large number of these genetic mothers will no longer be capable of gestating these children: some of these mothers will have died and others will have physical problems that preclude their safely becoming pregnant. Moreover, in some cases there will be too many embryos for all of them to be transferred safely into their mothers' wombs. What then should the government do? It should find women who are willing and able to have the embryos transferred into their wombs for gestation. In fact, the government should run a campaign to have these embryos gestated and adopted. It should launch an appeal for volunteers and make embryo gestation and adoption an attractive public service, by providing the necessary support for women who volunteer. The program should appeal to the altruistic

sensibilities of women capable of enabling these children to develop and flourish.

The goal should be to save as many lives as possible by having all of these frozen embryos transferred into the wombs of women who are willing and able to gestate them. Of course, the large majority of these pregnancies will not be successful, but that hardly shows that a concerted effort to save as many as possible should not be made. If only a very small percentage of the pregnancies succeed, then the effort is well worth it. Even a very small percentage of the hundreds of thousands of frozen embryos in storage is a very significant number of innocent lives that could be saved if the effort were made.

To argue that the effort to save these embryos should not be made suggests that their lives are not as valuable as the lives of other people. How strong an effort should be made? We would do well to reflect on the response of government public service agencies when a three-year-old child falls down a well: virtually no expense is spared in trying to save the child. Now imagine hundreds of thousands of children trapped in wells, only a relatively small percentage of whom could be saved. What sort of an effort should the government put forth on behalf of these children? What sort of effort would we expect the government to make on our behalf if we were in that predicament? A commensurate effort should be made to save the lives of our embryonic brothers and sisters who cannot speak for themselves and who need help if they are ever to develop and flourish.

Of course, one would be naïve to think that many government representatives will respond as I argue they should. But the unwillingness of moral agents to fulfill their responsibility does not remove it. Our task is not to assume that government officials and others will not fulfill their responsibilities and to recommend that they do something else instead. We should not, on the basis of a prediction

that those responsible will not arrange for these embryos to be gestated and adopted, urge them instead to unfreeze them and allow them to die. Rather, we should clarify the true responsibility of the relevant moral agents and urge them to fulfill it.

