

Navigating an Impasse in the Embryo Adoption Debate

A Response to Elizabeth Rex

Charles Robertson

Abstract. This essay responds to an article by Elizabeth Bothamley Rex titled “The Magisterial Liceity of Embryo Adoption” (*NCBQ*, Winter 2015), specifically to Rex’s critique that his objections to the liceity of embryo transfer distort magisterial documents. He then draws out the implications of the differences between his view and Rex’s on the relation between maternity and pregnancy. The essay concludes by pointing out that, if they are to change their minds, opponents of embryo adoption need to be convinced that it is morally licit to impregnate, or “introduce an order to birth,” in a woman by means other than the marriage act. *National Catholic Bioethics Quarterly* 16.3 (Autumn 2016): 409–417.

Many articles debating the liceity of embryo adoption are concerned with the interpretation of two documents published by the Congregation for the Doctrine of the Faith (CDF), *Donum vitae* (1987) and *Dignitas personae* (2008). Prior to the publication of *Dignitas personae*, the magisterium had not explicitly addressed the proposal to save the lives of cryopreserved and abandoned embryos by means of embryo rescue or adoption. *Dignitas personae* deems prenatal adoption to be well intentioned but problematic.

Unfortunately, the precise reasons for the CDF’s reticence are not spelled out in detail in the document itself, which only states that embryo adoption has “various

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problems not dissimilar to” those involved in the use of cryopreserved embryos as a “remedy for infertility” and does not specify which of the problems plaguing the latter apply to the former.¹ Consequently, debate has continued, with some, like myself, arguing that prenatal adoption is wrong in itself because it involves transferring an embryo into a woman, making her pregnant apart from marital coitus. Others, like Elizabeth Rex, argue that prenatal adoption is morally praiseworthy because it saves the life of a child and provides him with the care and upbringing that are due him.²

In her response to my thesis that embryo transfer is a use of the generative faculty, Rex asserts that this ultimately has no bearing on the morality of embryo adoption. Unfortunately, I am unsatisfied with her argument. Apparently, she thinks that it is sufficient to point out that “embryo adoption and embryo transfer are not ‘generative’ acts” (Rex, 704) because they do not result in the fertilization of an ovum. While I grant that “it is quite right to say that the natural motion of generation achieves its term at the moment of conception,” I also argue that the uterus is an organ of the generative faculty, and therefore its use in embryo transfer is a use of the generative faculty (Robertson, 694–695).

Consequently, I do not object to embryo transfer because it is a generative act, in the sense of being an act through which a human life comes to be, but because it is the use of a generative organ, where *generative* means “pertaining to the generative power” (Robertson, 695). A proper refutation of this claim should show, on the basis of the principles of St. Thomas Aquinas, that the use of the uterus involved in embryo transfer is not contrary to the order of reason governing the use of our generative potential. This could be done in several ways. One could, for instance, argue that the uterus is not an organ of the generative faculty³ or that pregnancy does not enter into the meaning of the marital act.⁴ Or, if one agrees that the uterus

1. Congregation for the Doctrine of the Faith, *Dignitas personae*, On Certain Bioethical Questions (September 8, 2008), n. 19.

2. Charles Robertson, “A Thomistic Analysis of Embryo Adoption,” *National Catholic Bioethics Quarterly* 14.4 (Winter 2014): 673–697; and Elizabeth B. Rex, “The Magisterial Liceity of Embryo Transfer: A Response to Charles Robertson,” *National Catholic Bioethics Quarterly* 15.4 (Winter 2015): 701–772. Hereafter, page numbers from these articles are given in the text.

3. On one occasion, an eminent Thomist suggested to me that it belongs to some heretofore unknown “bodily faculty of gestation.” I do not, however, think that there is any basis in Aquinas’s thought for the positing of such a faculty of the soul.

4. Christopher Tollefsen, “Could Human Embryo Adoption be Intrinsically Immoral?” in *The Ethics of Embryo Adoption and the Catholic Tradition: Moral Arguments, Economic Reality, and Social Analysis*, ed. Sarah-Vaughan Brakman and Darlene Fozard Weaver (New York: Springer, 2007), 91–93. In general, those who follow new natural law theory have a novel view of what the moral law requires with respect to our use of the generative organs, which is based on their understanding of marriage as a basic good and of the marriage act as a one-flesh union instantiating that good. On this view, pregnancy does not enter into the notion of what makes the spouses biologically one in the act of coitus, and so need not be willed as the fruit of the marriage act. I consider this view deeply problematic, but to do justice to the NNL view of marriage would require a separate treatment. For a recent critique of the NNL

is an organ of the generative faculty, one could argue nevertheless that this use of the uterus is not contrary to the order of reason governing the use of the generative faculty. The analogies between embryo adoption and wet-nursing, live organ donation, and the Incarnation of our Blessed Lord could also be employed on the basis of that supposition. This essay, however, is not concerned with these arguments. My primary objective is to respond to the serious criticisms of my work advanced by Rex while offering my own objections to her position. In this way, I hope to show what advocates of embryo adoption need to establish in order to convince those of us opposed to it that it can be morally licit.

Misplaced Criticisms

The first and most serious charge against my article is that I have distorted the meaning of an important statement from *Donum vitae*. The opening sentence of my essay, as published, reads, “The Congregation for the Doctrine of the Faith, in its instruction *Donum vitae*, made the judgment that heterologous artificial fertilization and embryo transfer ‘clearly contradict the unity of matrimony, the dignity of the spouses, the proper vocation of the parents as well as the right of the child with a view to which it should both be conceived and brought forth in marriage and through marriage’” (Robertson, 673). Rex devotes significant space to a discussion of this sentence, concluding that “Robertson has significantly altered *Donum vitae* II.A.2 in order to manufacture ‘magisterial’ support for his article’s conclusion that embryo transfer is ‘morally evil’” (Rex, 709). This is indeed a serious charge. The point at issue is the number of the verb in my citation: she asks why I mistranslate *contradicit* as “contradict” rather than “contradicts,” and why I added the term “embryo transfer” after “heterologous artificial fertilization.” The simple answer is that it was not I, but an editor, who quite understandably changed the English verb to agree with what he understood as a plural subject, whereas when I wrote the piece, I took “heterologous artificial fertilization and embryo transfer” as a single subject. The full passage, as I translate it, reads,

In the IVF-ET method and in heterologous artificial insemination, the human conceptus comes about by means of the joining of gametes which come, at least from one part, from a donor that is other than the spouse. *But heterologous artificial fecundation clearly contradicts the unity of matrimony, the dignity of the spouses, the proper vocation of the parents, and also the right of the child with a view to which it should both be conceived and brought forth in marriage and through marriage.*⁵

view of marriage, see Joshua Madden, “Marriage, ‘Bodily Union,’ and Natural Teleology,” *National Catholic Bioethics Quarterly* 16.1 (Spring 2016), 83–98. My own critique of this view relative to the embryo adoption debate will be published in the *2016 Proceedings of the American Catholic Philosophical Association*.

5. CDF, *Donum vitae* (February 22, 1987), II.A.2: “In methodo FIVET et in seminatione artificiali heterologa humanus conceptus fit per concursum gametum, qui saltem ex una parte e donante proveniant qui sit diversus a coniugibus. *At fecundatio artificialis heterologa tum unitati matrimonii, tum coniugum dignitati, tum vocationi parentum propriae aperte*

As I did not want an acronym (IVF-ET) to appear in my first sentence, I constructed what I thought was a fair elision, replacing “heterologous artificial fecundation” with “heterologous artificial fertilization and embryo transfer,” considering the latter to correspond to the meaning of IVF-ET. In hindsight, it would have been better to write “In vitro fertilization and embryo transfer . . . contradicts etc.”

That being said, I do not think I distorted the text. First, I was taking “IVF” and “artificial fertilization” as synonymous, which is not contrary to the text of *Donum vitae*, for, as Rex herself points out (706), the term “artificial procreation” or “artificial fertilization” includes both IVF-ET (*FIVET*) and artificial insemination (*seminatio artificialis*). Second, the first few paragraphs of my article show that I was sensitive to disagreements in the interpretation of the CDF documents, and, in response to the criticisms of a peer reviewer who, like Rex, thought that I was advancing a contentious interpretation, I tried to make clear by my rhetoric and footnotes that there are problems even with what I take as the more probable interpretation.

That reviewer had mentioned the reading of *Dignitas personae* n. 19 favored by Rex, in which the “various problems” with prenatal adoption “enumerated above” are not those that make artificial heterologous procreation and surrogacy wrong, but the “innumerable other problems of a medical, psychological, and juridical character” (Rex, 717–721). I admit that this is a possible reading. However, it is also possible that the various problems include the ones that make artificial procreation and surrogacy wrong because heterologous embryo transfer is the common element when using frozen embryos as a treatment for infertility, prenatal adoption, artificial procreation, or surrogacy.

According to this latter interpretation, prenatal adoption is intrinsically evil. By the former, it is not intrinsically evil, only inadvisable for other reasons. Neither reading, however, asserts that *Dignitas personae* n. 19 approves of prenatal adoption. Therefore, I do not think we gain much by rehearsing hermeneutical exercises on these documents, for there are certainly ambiguous statements right in the places where precision is wanted.⁶ To clarify my own view, I do not think that *Donum vitae* and *Dignitas personae* clearly condemn embryo transfer, embryo adoption, or embryo rescue as intrinsically evil, nor do I think that they clearly approve of embryo transfer in any circumstances. Consequently, moralists are free to advance reasons why they think embryo transfer is, in itself, morally problematic or morally neutral.

In both of her articles, Rex argues that embryo transfer is a morally legitimate therapeutic treatment that benefits the embryo. She bases this argument on her inter-

contradicit, itemque iuri filii ad quem spectat ut et concipiatur et enascatur in matrimonio et per matrimonium” (original emphasis).

6. For a defense of the reading that embryo adoption is illicit, see Luke Gormally’s contribution in E. Christian Brugger et al., “Symposium on *Dignitas personae*,” *National Catholic Bioethics Quarterly* 9.3 (Autumn 2009): 470–474, followed by the alternative interpretation given by John Finnis, *ibid.*, 474–477. For the view that the document is ambiguous, see John S. Grabowski and Christopher Gross, “*Dignitas personae* and the Adoption of Frozen Embryos: A New Chill Factor?,” *National Catholic Bioethics Quarterly* 10.2 (Summer 2010): 315.

pretation of *Donum vitae* I.3, which states, “Just like all interventions” of the medical art on the sick, “*So also those interventions on the human embryo are to be held licit on this condition, namely, that they preserve the embryos’ life and integrity such that they do not bear with them disproportionate dangers, but look to the healing of disease, to changing the state of health for the better, and to placing the surviving life of the singular fetus itself in safety*” (my translation).⁷ Since embryo transfer accomplishes these goals of the medical art, it should be held as licit.⁸ Consequently, Rex criticizes me for having failed to mention her discussion of this text and asks, “Did he avoid mentioning these magisterial teachings because they do not support his position on embryo transfer?” (Rex, 711).

I did not reference these teachings because they are wholly irrelevant to the liceity of embryo adoption, not because they do not support my position. Rex rightly points out that those texts approve of acts that are therapeutic for the embryo, that is, acts that benefit the embryo’s health. She then identifies embryo transfer as such an act. However, embryo transfer is not only directed toward the improvement of the embryo’s lot; it also impregnates the woman, or introduces in her an order to birth. Embryo transfer involves two patients, and any judgment on its morality must account for both of them.

No one opposed to embryo adoption has any problem with acts that benefit the embryo. Nor, I surmise, would they take exception to an embryo transfer in which, for therapeutic reasons, an embryo is removed from and then restored to the same woman’s body.⁹ They do, however, disagree with introducing a new order to birth in the woman who receives an embryo transfer. This does not constitute a therapeutic act for that woman, even if it benefits the embryo and is in accordance with the woman’s will.

Hence, it is a non sequitur to justify embryo transfer on the basis of *Donum vitae* I.3. For that conclusion to follow, it would have to be clear already, on the basis of distinct principles, that a woman is within her rights to put her body at the service of the embryo in this way. In my article, I argue, on the basis of distinct principles, that a woman does not have that right because the order of reason that governs the use of one’s generative potential restricts such use to the marriage act (Robertson, 682).

7. CDF, *Donum vitae* I.3: “Sicut quilibet artis medicae interventus in aegrotis, ita *interventus in humano embryone liciti habendi sunt hac condicione, ut embryones vitam integritatemque observent, ne secumferant pericula haud proportionata sed spectent ad morbi curationem, ad salutis statum in melius mutandum et ad ipsius singularis fetus superstitem vitam in tuto ponendam*” (original emphasis).

8. See Elizabeth B. Rex, “IVF, Embryo Transfer, and Embryo Adoption: A Response to Repenshek and Delaquil,” *National Catholic Bioethics Quarterly* 14.2 (Summer 2014): 227–234.

9. See Helen Watt, “Becoming Pregnant or Becoming a Mother?,” in *Human Embryo Adoption: Biotechnology, Marriage and the Right to Life*, ed. Thomas V. Berg and Edward James Furton (Philadelphia: National Catholic Bioethics Center, 2006), 55–67. Watt argues that only such embryo transfer is licit.

Relations: Maternity and Pregnancy

Rex also faults me for my title, which seems to promise an analysis of embryo adoption, when in fact the bulk of the paper is devoted to the liceity of embryo transfer.¹⁰ To me, it seemed then, and still seems now, that if the kind of embryo transfer involved in embryo adoption is illicit, then so is embryo adoption. She also criticizes me for focusing on the categories of paternity, maternity, and filiation, as if the analysis of those categories had nothing to do with embryo adoption. In that article, I came to the conclusion that the real relations of paternity, maternity, and filiation are established in the coming-to-be of the child by means of the activity of generation, whereas the relation of reason of adoptive parenthood is established by legal fiat (Robertson, 691). I was responding to the charge that those who distinguish between adoptive parenthood and biological parenthood “do so apart from any theology or definition of parenthood.”¹¹ In doing so, I believe that I demonstrated how both the defenders of embryo adoption and many of its opponents appeal to an irrelevant principle in their arguments.

In the first place, my analysis shows that those opponents of embryo adoption are wrong who argue that the principle that spouses have the right to become parents only through each other, enunciated in *Donum vitae* II.A.2, is violated by embryo transfer. This process does not make the woman a mother at all. On the other hand, defending embryo adoption by asserting that, in adoption, spouses do indeed become parents through each other is also founded on an equivocation. Becoming a parent through adoption differs in kind from becoming a parent through the use of marriage as enunciated in *Donum vitae* II.A.2.

In this connection, I agree with Rex that the real relation of paternity, maternity, and filiation is established at the moment of the fertilization of the ovum. Unfortunately, Rex fails to note the difference between our positions and misinterprets them to be identical (Rex, 702, 708, 710). Whereas she sees impregnation and fertilization

10. Rex gives a further criticism of my title on page 709: “The title of Robertson’s article gives hope that he will present a deep and insightful Thomistic analysis of the morality of embryo adoption; unfortunately, that is not the case. The animating principle of Thomistic philosophy is charity, and the abandonment of a fellow human being violates that principle.” Sed contra, charity is first owed to God, then to self, then to neighbor. We do not have the obligation, in charity, to lay down our bodily life for anyone in particular, and we certainly do not have the obligation, or the right, to do something out of fraternal charity that violates a rightly ordered love of God. If embryo transfer is, as I claim, contrary to the order of reason that governs the use of our generative faculties, it is primarily God who is offended by such a disordered use of our body, as God has instituted that order and made it knowable through his creation. Sometimes circumstances are such that we may not be able to give any concrete assistance to some person in need, and the only thing that we can do out of fraternal charity is to suffer with the suffering and commend them to the Lord. We are not held to do the morally or physically impossible, and if the only means to come to the aid of someone is itself immoral, that act is morally impossible.

11. Grabowski and Gross, “*Dignitatis personae* and the Adoption of Frozen Embryos,” 317.

as identical, such that the biological mother of a child conceived in vitro is thereby impregnated, I do not, and clearly distanced myself from that position in my article:

Rex's suggestion that pregnancy is simply the result of fertilization is untenable, for it does not take into account the fact that only some animals that reproduce sexually are said to "be pregnant." For instance, we do not say that female fish "get pregnant," for they do not gestate their young in a uterus. Likewise, we do not say that a hens "get pregnant," for they do not incubate their laid eggs in a special interior organ. Pregnancy is a term that we generally apply to animals that gestate their young within their bodies, such as placental mammals and marsupials. Rex is unfortunately misled by a too rigid adherence to a textbook definition of the term, which emphasizes the efficient cause of pregnancy. In this restrictive definition, "impregnation" is rightly defined as fertilization of the ovum, only if we assume that we are dealing with an animal that consequently gestates that conceptus interiorly. (Robertson, 694–695)

This disagreement does have practical consequences. I hold that a woman is impregnated by means of embryo transfer but does not thereby become the mother of that child. I also hold that a woman should only be impregnated, or ordered to birth, by means of the marriage act. Consequently, embryo transfer as initiating a pregnancy is intrinsically disordered.

In Rex's view, since impregnation and the generation of the parent–child relationship are simultaneous and inseparable, only the woman whose ovum is fertilized is properly impregnated and becomes a mother. Consequently, the woman who receives a heterologous embryo transfer neither is impregnated nor becomes a mother, and no violation of the generative order or disruption of the parent–child relationship occurs. However, this leads to some faulty conclusions. For instance, Rex advances the following supposed clarification of the semantic confusion caused by IVF-ET:

A mother whose IVF children are being kept as cryopreserved embryos in frozen storage is still, technically speaking, "pregnant." She is "with child," even though her "frozen" child is not physically within her. ... In the case of embryo adoption and embryo transfer, the child's conception has already taken place in vitro and the pregnancy has already begun. Once the frozen embryo has been legally adopted and is medically transferred into the adoptive mother's uterus, *the immorally interrupted pregnancy is restored*, and the adopted child can proceed to naturally implant itself in the womb of its adoptive mother. (Rex, 710 note 8, emphasis added)

If pregnancy begins when conception occurs in vitro and if it is accurate to say the biological mother is, in fact, pregnant, when is this pregnancy interrupted such that it may be restored, and who is pregnant once it is restored? Rex's clarification simply begets more ambiguity. My approach clarifies this semantic confusion: a woman is pregnant when she has the child "conceived"—in the Latin sense of "to be taken in" or "to be received," not in the sense that is synonymous with the fertilization of the ovum—within her. This does not require implantation, and can occur any time between fertilization and birth. In embryo transfer, impregnation occurs when the embryo is "conceived" or taken into the womb, which is also prior to implantation. At any rate, whether one wishes to call it impregnation or not, there is no doubt that embryo transfer introduces an *order to birth* in the woman's body.

Further, insensitive to my analysis of legal and natural parenthood, she seems to conflate the two, treating them as univocal notions: “Robertson is rightly concerned about protecting ‘the categories of paternity, maternity, and filiation.’ However, once again, it is simply undeniable that it is the biological parents who are directly responsible for violating ‘the categories of paternity, maternity, and filiation’ when they immorally use IVF to conceive, freeze, abandon, and destroy their own children. . . . Adoption is the only way to *restore* the categories of maternity, paternity, and filiation for any abandoned child regardless of its biological stage of development” (Rex, 704–705). I am not sure what it means to violate a category, but I am certainly sympathetic to the thesis that parental responsibilities, which follow from those relations, have been grievously neglected or offended by the use of IVF. Moral responsibilities following those relations can be violated, but the relations themselves simply are what they are as long as their terms continue to exist. As real relations existing between real subjects, the only way those categories can be corrupted is by the death of one of the subjects of the relation. Consequently, legal adoption does not restore the natural, biological, real relations of maternity, paternity, and filiation, which only cease to exist with the death of the child or the parents. Rather, it creates new, non-real relations of reason, modeled on those real relations which establish specific legal and moral responsibilities ordered to the good of the child.¹²

None of this, however, has any effect on the liceity of embryo transfer. If embryo transfer is licit, the question of whether the woman who undergoes it intends to adopt the child or not is immaterial.¹³ If embryo transfer is illicit, it is not because it violates the categories of maternity, paternity, and filiation, which exist in virtue of the coming-to-be of the child, but because it violates the order of reason governing the use of the uterus, which was the main thesis of my previous article. Either way, the morally determinative factor by which the liceity of embryo transfer is to be judged is, in my view, whether a woman has the right to order herself to birth, or submit herself to being ordered to birth, apart from the marital act.

A Dead End in the Debate

Ultimately, the kind of argumentation advanced by Rex and others who emphasize the rights of the child conceived in vitro will not convince their opponents that embryo transfer is morally licit.¹⁴ No one who argues against embryo adoption disputes the human nature of the embryo and the rights that follow from that nature. The

12. In considering the order of love, there could exist, prior to adoption, specific responsibilities to a particular orphaned or abandoned child. Apart from that case, however, there exists only a general responsibility to do good to these children, which may or may not oblige one to some specific act of assistance.

13. Were I to be convinced of the liceity of embryo transfer, then, I would consider both adoption and rescue morally licit means to save the lives of these persons.

14. Other recent articles employing this same general approach are Francis Etheredge, “Frozen and Untouchable: A Double Injustice to the Embryo,” *National Catholic Bioethics Quarterly* 16.1 (Spring 2016): 49–52; and Glen Breed, “The Only Moral Option is Embryo Adoption,” *National Catholic Bioethics Quarterly* 14.3 (Autumn 2014): 441–447.

question is whether we have the right to introduce an order to birth into a woman by any means other than the marriage act. It does little good to argue that embryo transfer is licit because it is the only way to rescue an embryo from its “absurd fate”;¹⁵ this presupposes what is to be proved, namely, that a woman can rightly subject herself to being ordered to birth by means of embryo transfer. If we can rightly order ourselves to the end of begetting offspring by means other than the marriage act, we must also show, without resorting to situational ethics, why embryo transfer is a licit means of doing this while artificial insemination is not. By all appearances, maintaining the liceity of embryo transfer only in the case of rescue or adoption creates an ad hoc exception to a rule that is everywhere else admitted, namely, that it is illicit to effect pregnancy through technical intervention in lieu of coitus.

Finally, we will need to be convinced that ordering a woman to birth apart from marital coitus respects her personal nature and does not reduce her to a mere incubator. The continued technical dominion over the processes of reproduction reduces all involved to the status of things to be manipulated and moved by planners; the illusion of autonomy is effected both by the desire of those willing to submit themselves to this artificial order and by the conceit that our control over nature has freed us from the need to respect certain limits, set for our own good, on the extent of that dominion. The desire to save a life is a good and noble one indeed, but far from being immune to such illusion and conceit, it is particularly vulnerable to them.

15. CDF, *Donum vitae* I.5.