

# WHEN SUPEREROGATION IS SUPEREROGATORY. A CASE OF MEDICAL ETHICS

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## ABSTRACT

In this paper I analyze critically real cases of actions, often deemed “supererogatory” in the context of bioethics and medical ethics, in order to assess whether it is appropriate to classify them in this way. More specifically, I try to discuss the moral legitimacy of a consequence of In Vitro Fertilization (IVF), i.e., the freezing of the so-called supernumerary embryos, and their “adoption”, focusing on the possibility of it being a supererogatory action. The hypothesis of this paper is that we often misuse “supererogation” to describe actions that do not have a clear moral connotation, since it is offered as a “shortcut” to resolve moral issues without clearly defining the issues at stake. In order to determine whether “embryo adoption” can be defined as “supererogatory”, indeed, we have first to assess its morality and then get back to the definition of supererogation given by Heyd. Once acknowledged that embryo adoption is not a supererogatory action, I conclude with some anthropological and ethical considerations about this bioethical solution. Furthermore, I suggest that the misuse of supererogation, far from helping the development of an ethical theory, should create a kind of moral dichotomy among ordinary and extraordinary (heroic) way of acting. In these regards, ethics does not need any heroism or sanctity. Too many times, thus, supererogation is supererogatory, especially in the field of bioethics.

## KEYWORDS

Supererogation, embryo adoption, in vitro fertilization, heroism, moral evaluation, human ecology

## 1. INTRODUCTION. SUPEREROGATION AND MORAL EVALUATION

The question of supererogation is often evoked in bioethics (in particular in the context of medical ethics<sup>1</sup>) in relation to all those cases in which it is difficult to make an accurate moral judgment in agreement with the given moral paradigm. I am talking about uncertain situations of clear uncertainty, which give the moral agent the possibility to “*pay or give more than what is rightly due, and thus to develop actions that are not strictly required*”<sup>2</sup>, i.e., to act in view of a good that does not closely coincide with one’s duty. It is even clear that, when talking about supererogatory acts, I am referring to actions pursuing an end that is considered good, and that can never be determined by the sole purpose of damaging to the moral actors. However, the relevant question, in the context of supererogatory acts, is whether the good involved in the action has sufficient normative force to “motivate” the agent to act in view of its fulfillment, or, to be more precise, whether there are some elements of the action itself that mitigate such mandatory dimension, being themselves good. The moral evaluation becomes thus complex, since the possibility to hierarchize these goods involved in this particular action is difficult, i.e., as the use of the past experiences seems to be hardly practicable, making the final decision particularly hard. Another issue to take into account within this process is the notion of sacrifice<sup>3</sup>: there cannot be supererogatory actions that do not involve, at the same time, the sacrifice of other “goods”<sup>4</sup>, that is, something which is considered valuable in itself.

Indeed, it is precisely when the practical reason – and thus the perception of the “duties” – ceases to provide its stringent criteria to direct “what must be done”, that the theme of moral supererogation comes into play, more specifically, a dimension that is not necessarily “mandatory” or “due”<sup>5</sup>. The moral agent may then decide to

<sup>1</sup> In consonance with the idea of bioethics (a very minority-idea, for the sake of truth) developed by Van Rensselaer Potter, its “father”, and, unlike to many international experts in this field (See: W. Reich, *The Word “Bioethics”: The Struggle Over Its Earliest Meanings*, “Kennedy Institute of Ethics Journal”, 5/1 (1995): 19-34), I believe that the two disciplines – i.e., bioethics and medical ethics – cannot overlap; but, if anything, that the former includes the latter, maintaining a broader vision that even includes philosophy of ecology. For further discussion on this topic, please see: L. Valera, *La bioetica di Potter: la ricerca della saggezza all’origine della bioetica e dell’etica ambientale*, “Medicina e morale”, 65/6 (2016): 719-732.

<sup>2</sup> E. Lecaldano, *Dizionario di bioetica*, Laterza, Roma-Bari 2012.

<sup>3</sup> See: J. Rawls, *A theory of justice*, Harvard University Press, Cambridge (MA) 2003, p. 100.

<sup>4</sup> See: A. Lambertino, *Valore e piacere. Itinerari teoretici*, Vita e Pensiero, Milano 2001, p. 90.

<sup>5</sup> I am not stating, here, that practical reason cannot inspire supererogatory acts. I am conscious that supererogation deals with secondary reasons (i.e., non-obligatory) and that such reasons can be

act in a certain way, but, *strictu sensu*, he/she is not required to act in that way; the context of non-compulsory actions leave a “moral” range (or perhaps it would be more appropriate to call it an “extra-moral” range) to the subject’s freedom. In this regard, the moral agent usually decides to sacrifice his/her own good for the sake of allowing other subjects to enjoy other goods.

To use a contemporary language more appropriate to the context of meta-ethics, we are dealing with actions that are neither mandatory nor prohibited, and hence fall within the rank of those actions that are formally permitted but not compulsory<sup>6</sup>. As pointed out by Chisholm,

“the status of supererogation can be summarized in this way. If I seek advice, concerning an act which would be supererogatory, and ask: ‘Shall I do this?’, I may well be told: ‘You ought to, but you don’t have to’ – it is advisable, but not obligatory. It is ever appropriate to say, similarly, ‘You ought not to, but you may?’”<sup>7</sup>.

Once the issue of supererogatory actions has summarily clarified, it seems interesting to analyze critically real cases of actions, often deemed “supererogatory” in the context of bioethics and medical ethics, in order to assess whether it is in fact appropriate to classify them in this way. The starting hypothesis is that this denomination is often “abused” to describe actions that do not have a clear moral connotation (are they good or bad?), since it is offered as a “shortcut” to resolve moral issues without clearly defining the issues at stake. This is precisely what it is happening with two distinct situations that find a common ground in the controversial topic of the “gift”<sup>8</sup> (repeatedly evoked not only in the field of bioethics), namely:

One of the “undesired” – though not unexpected, for the sake of truth – consequences of the practice of In Vitro Fertilization (IVF), i.e., the issue of “supernumerary non-implanted embryos” (or surplus embryos), and one of its

recognized by practical reason. Nevertheless, these secondary reasons do not have the same “normative force” of primary reasons (in the opposite case, indeed, I would have not called this act “supererogatory”).

<sup>6</sup> A classic reference to this issue is definitely: R.M. Chisholm, *Supererogation and Offence: A Conceptual Scheme for Ethics*, in: R.M. Chisholm, *Brentano and Meinong Studies*, Humanities Press, Atlantic Highlands (NJ) 1982, pp. 98-113.

<sup>7</sup> *Ibid.*, p. 102.

<sup>8</sup> For an interesting deepening of this theme, please see: M. Mifsud, *On Rhetoric as Gift/Giving*, in: G.A. Hauser (ed.), *Philosophy and Rhetoric in Dialogue. Redrawing Their Intellectual Landscape*, The Pennsylvania State University Press, University Park (PE) 2007, pp. 89-107.

possible solutions, the so-called “embryo adoption for the birth”<sup>9</sup>, or “prenatal adoption”<sup>10</sup>.

The so-called “Good Samaritan” donation of organs (in particular of kidneys), sometimes called “nondirected live-kidney donation”<sup>11</sup>.

In the next few sections, following a brief reconstruction of the facts and situation, I will attempt to outline the ethical issues involved in the first example given below, in order to determine whether we can correctly talk about “supererogatory actions”, in reference to the issue of embryo adoption.

## 2. IN VITRO FERTILIZATION (IVF), SUPERNUMERARY FROZEN EMBRYOS AND THE UNCERTAINTY OF MORAL EVALUATION

As it is now widely known, the first successful birth of a “test tube baby” was that of Louise Brown in 1978<sup>12</sup>. Certainly, this event was a major watershed in the history of reproductive medicine (as well as in bioethical and in philosophical reflections on human beings). However, the consequences, over thirty years later, are even more impressive: that event changed our idea of human birth, and along with it, the notion of parenting, sexuality, and, finally, of dependency. At the same time, the idea of

<sup>9</sup> With reference to the Italian context, please see: Comitato nazionale per la bioetica (CNB), *L'adozione per la nascita (APN) degli embrioni crioconservati e residuali derivanti da procreazione medicalmente assistita (PMA)*, 18/11/2005.

<sup>10</sup> See, for example: M.A. Carrasco, *Rescate y adopción de embriones criopreservados: solidaridad o encarnizamiento reproductivo*, “Teología y Vida”, 55/4 (2014): 680-719. Within the Catholic tradition, it is very famous the book: S.-V. Brackman, D. Fozard Weaver, *The Ethics of Embryo Adoption and the Catholic Tradition: Moral Arguments, Economic Reality and Social Analysis*, Springer, New York 2007. It is even important to know that most of the Catholic arguments in this field deal with the well-known “*Donum Vitae*”, i.e., the *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation. Replies to Certain Questions of the Day*, redacted by the “Congregation for the Doctrine of the Faith” in February, 22<sup>nd</sup>, 1987.

<sup>11</sup> See: P.E. Morrissey, C. Dube, R. Gohh, A. Yango, *et al.*, *Good Samaritan Kidney Donation*, “Transplantation”, 80/10 (2005): 1369-1373; P.L. Adams, D.J. Cohen, G.M. Danovitch, *et al.*, *The nondirected live-kidney donor: ethical considerations and practice guidelines: A National Conference Report*, “Transplantation”, 74/4 (2002): 582-589; E.K. Massey, L.W. Kranenburg, W.C. Zuidema, *et al.*, *Encouraging Psychological Outcomes After Altruistic Donation to a Stranger*, *American Journal of Transplantation*, 10/6 (2010): 1445-1452; C.L. Jacobs, D. Roman, C. Garvey, *Twenty-Two Nondirected Kidney Donors: An Update on a Single Center's Experience*, *American Journal of Transplantation*, 4/7 (2004): 1110-1116. For a first ethical evaluation of this practice, in relation with the “old” directed donation, please see: M.T. Hilhorst, *Directed altruistic living organ donation: partial but not unfair*, “Ethical Theory and Moral Practice”, 8 (2005): 197-215.

<sup>12</sup> See: P. Steptoe, R. Edwards R, *Birth after the implantation of a human embryo*, “Lancet”, 312/8085 (1978): 366.

motherhood has changed dramatically, so much so that the famous Latin motto “*mater semper certa est*” is no longer used as easily:

“The introduction of new reproductive technologies (mainly in vitro fertilisation [IVF] and pre-embryo transfer) has resulted not only in separation of sex and procreation, which occurred beforehand with the introduction of contraceptive techniques, but also in the need to re-define the term ‘mother’. [...] The following terminology relating to mothers will be used: 1. Genetic mother – she who donates the ovum. 2. Gestational mother – she who carries the pregnancy to term and delivers the child. 3. Social mother – she who rears the child. In the traditional nuclear family the genetic, gestational and social mothers are one and the same. Both the genetic and gestational mothers are biological mothers, therefore to avoid confusion this latter term will not be used”<sup>13</sup>.

The change is indeed radical at the anthropological level, and should perhaps deserve more philosophical considerations. For this essay, however, I would like to focus on another aspect of the IVF, i.e., a consequence of this “new” fertilization process. Unfortunately, I do not have the space here to explain in detail the steps in this process: it is enough to emphasize that

“the physician’s role is to obtain the woman’s ova and the man’s sperm and transfer them to the appropriate laboratory for the procedure of in vitro fertilization. The successfully fertilized egg(s) undergo(es) a small number of divisions in vitro, at which point the pre-embryo may be either immediately implanted for gestation in a uterus, or frozen in liquid nitrogen for implantation at a later date (or donated or used for research or destroyed or allowed to die)”<sup>14</sup>.

The important point discussed in this paper is not the moral legitimacy of the IVF itself, but its consequences: namely, the freezing of the so-called supernumerary embryos, and their “possible use”, focusing on the possibility of it being a supererogatory action. The reason why freezing “spare” embryos is customary is because it is

“attractive to patients and IVF clinicians for a number of reasons. It offers an opportunity to save embryos for subsequent transfer into the mother, should the first implantation attempt fail. This saves the mother the financial expense and the physical and emotional strain of a second laparoscopy procedure, and gives the IVF team a better chance of achieving a pregnancy”<sup>15</sup>.

<sup>13</sup> R. Bier, *Ethical Issues in Gestational Surrogacy*, “Theoretical Medicine and Bioethics”, 21 (2000): 154.

<sup>14</sup> *Ibid.*, pp. 156-157.

<sup>15</sup> M. Carrington Coutts, *Ethical Issues in In Vitro Fertilization*, “Bioethics Research Library”, 1988: 3.

The reason why embryos are frozen, as a consequence of an IVF process, is almost always an economic one. On the contrary, many authors sustain that

“embryo freezing as an adjunct to in vitro fertilization (IVF) is an important step forward in the treatment of infertility and control of human reproduction. Yet many questions concerning frozen embryos must be answered if the promise of this novel technology is to be realized”<sup>16</sup>.

Regardless of the reason that causes the freezing of supernumerary embryos, today we are faced with this situation; an appropriate moral consideration must deal with the current state of things, not only with the possible (or the best) one. Clearly, it would be more expeditious and easier to evaluate this situation as negative “*per se*”, only as a consequence of a negative action, but this is not what is required of moral philosopher today. Moral philosophy – and with it bioethics or medical ethics – has to consider the problem (and the situation) as such in order not to fall into that meta-ethical “sleep”, from it was awoken by medicine in the last century<sup>17</sup>.

In this regard and getting back to the subject of this chapter, we have three main alternatives to consider when deciding what to do with frozen embryos<sup>18</sup>:

1. “The embryos may be preserved through cryo-preservation”<sup>19</sup>.
2. “Embryos can also be donated for use in research”<sup>20</sup>.
3. “Finally, the embryos may be destroyed”<sup>21</sup>.

These three choices were the “traditional” alternatives to the problem of cryopreservation of embryos that were “abandoned”<sup>22</sup> by their parents<sup>23</sup>. To these, an

<sup>16</sup> J.A. Robertson, *Resolving Disputes over Frozen Embryos*, “The Hastings Center Report”, 19/6 (1989): 7. Other authors state: “*Embryo cryopreservation is a common tool in assisted reproduction techniques. This technique allows maximizing the chances of pregnancy per oocyte extraction by reserving the remaining embryos to be used in a subsequent cycle without requiring a new ovarian stimulation and culdocentesis. The efficiency and security in the application of assisted reproduction techniques is thus improved. The latest alternative egg cryopreservation is less efficient and is used rather for the postponement of fertility, so it still has not replaced the conservation of embryos*” – J.P. Beca, A. Lecaros, P. González, *et al.*, *Aspectos médicos, éticos y legales de la criopreservación de embriones humanos*, “Revista médica de Chile”, 142 (2014): 904.

<sup>17</sup> I am here referring to the very famous essay: S. Toulmin, *How Medicine Saved the Life of Ethics*, “Perspectives in Biology and Medicine”, 25/4 (1982): 736-750.

<sup>18</sup> Evidently, I am implicitly assuming that the biological parents (or those who started the IVF process) do not intend to redeem such embryos for different reasons that I cannot investigate in this paper.

<sup>19</sup> P.C. Redman II, L. Fielder Redman, *Seeking a Better Solution for the Disposition of Frozen Embryos: Is Embryo Adoption the Answer?*, “Tulsa Law Review”, 35/7 (1999): 586.

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

<sup>21</sup> *Ibid.*

<sup>22</sup> The word “abandoned”, here, does not have a connotative sense, but only a descriptive one.

<sup>23</sup> Only in 2007, it was estimated there were about “*400,000 human embryos cryogenically preserved around the United States, and the stockpile of embryos growing at a current rate of 18.8% annually*” – K.A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, “University of St. Tomas Journal of Law and Public Policy”, 1/1 (2007): 100.

added fourth option is what I would like to analyze and discuss in the next section, i.e., “the embryos may also be donated by the couple to another patient who is not able to produce usable oocytes. This is sometimes referred to as embryo adoption”<sup>24</sup>. What is, then, “embryo adoption”? “Embryo adoption is a process where frozen embryos are donated to infertile couples for implantation. The adopted frozen embryo is implanted in a genetically unrelated woman. Once the child is born, the donee couple raises the child as their own. Embryo adoption has a number of unique benefits for those participating in the process”<sup>25</sup>. This solution has been often considered supererogatory<sup>26</sup>, and it is interesting in this sense to delve into its moral character for the sake of this paper.

### *2.1 Assessing Embryo Adoption. Between Supererogation and “Human Ecology”*

In order to determine whether this particular action can be defined as “supererogatory”, we have to assess its morality: is it a morally good action? We know, indeed, that it is possible to characterize an action as “supererogatory” only if it is a good action, being it a necessary condition for these kinds of act. Once acknowledged that this is a good action (if this is the case), we then have to take into account, whether it should be considered a supererogatory action. In order to do this, it is necessary to recall Heyd’s definition of supererogatory actions (the adjective supererogatory characterizes, in fact, an “*attribute of acts, rather than persons or personalities*”<sup>27</sup>). In his analysis, an act is supererogatory if and only if:

“It is neither obligatory nor forbidden.

- Its omission is not wrong, and does not deserve sanction or criticism.
- It is morally good, both by virtue of its (intended) consequences and by virtue of its intrinsic value (being beyond duty).
- It is done voluntarily for the sake of someone’s good, and is thus meritorious”<sup>28</sup>.

In order to assess its “supererogatory character” we have to assume, without explaining any further, that the embryo is a person, or at least, that it has the same

<sup>24</sup> P.C. Redman II, L. Fielder Redman, *Seeking a Better Solution for the Disposition of Frozen Embryos*, p. 586.

<sup>25</sup> K.A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, p. 106.

<sup>26</sup> See, for example: J. Ozolins, *Is the Saving of Embryos by Altruistic Surrogacy Morally Wrong?*, “Australian eJournal of Theology”, 8 (2006).

<sup>27</sup> D. Heyd, *Supererogation: Its Status in Ethical Theory*, Cambridge University Press, Cambridge 1982, p.115.

<sup>28</sup> *Ibid.*

dignity of a person<sup>29</sup>, as well as the same rights: “*Embryonic human beings, no less than human beings at other developmental stages, should be treated as subjects of moral respect and human rights, not as objects that may be damaged or destroyed for the benefit of others*”<sup>30</sup>. It would be nonsense, in fact, to talk about the adoption of “mere biological material” or “a bunch of cells”<sup>31</sup>; in that case, it would be better to talk about its sale or donation<sup>32</sup>. For this reason, I will not take into account the other two of these three options, i.e., to use them in research and their destruction, since these two latest actions are by no means compatible with the idea of human dignity<sup>33</sup>, and, therefore, with the features of a supererogatory action. Hence, considering the respect of human dignity as the very source of any good action, I should address the problem of embryo adoption, keeping in mind that I am assessing an action (i.e., the adoption) which is the consequence of another action (i.e., IVF) that is at least problematic at the ethical level.

As I have already said, when we talk about “adoption”, we have already accepted that the “who” being adopted is always a person. That is, we are implicitly recognizing its dignity. On the contrary, it would be more adequate talking about donation, since we can donate an organ or a tissue, but we could never “donate” a person<sup>34</sup>. In a strict sense, the human person should never be considered a “gift”, since this term implies the presence of an owner who gives, and of another new owner who receives, the gift. But, in this sense, we are reducing a human being –

<sup>29</sup> I am only taking here the term person as “*nomen dignitatis*”. Deepening this theme, indeed, would require a more sophisticated argument. For this reason, please see: L. Valera, *Ecologia umana. Le sfide etiche del rapporto uomo/ambiente*, Aracne, Roma 2013, pp. 102-172 and pp. 191-196.

<sup>30</sup> R.P. George, A. Gómez-Lobo, *The Moral Status of the Human Embryo*, “*Perspectives in Biology and Medicine*”, 48/2 (2005): 209.

<sup>31</sup> This terminology has been widely used in political/media debates, since it seems to connote in a certain way a specific being; on the other hand, it is also possible to find such use in scientific publications. See, for example: M. Mohler-Kuo, U. Zellweger, A. Duran, *et al.*, *Attitudes of couples towards the destination of surplus embryos: results among couples with cryopreserved embryos in Switzerland*, “*Human Reproduction*”, 24/8 (2009): 1935.

<sup>32</sup> For the same reason, another expression is used to describe “supernumerary embryos”, which implicitly recalls their “human nature”, i.e. “orphan embryos” – J. Berkman, *Gestating the Embryos of Others. Surrogacy? Adoption? Rescue?*, “*The National Catholic Bioethics Quarterly*”, 3/2 (2003): 311; H. 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?*, in: L. Gormally (ed.), *Issues for a Catholic Bioethics*, The Linacre Centre, London 1999, pp. 347-352.

<sup>33</sup> In this regard, I cannot agree with the central thesis of the two following papers, strictly connected with the themes I am deepening here: M.J. Meyer, L.J. Nelson, *Respecting What We Destroy: Reflections on Human Embryo Research*, “*Hastings Center Report*”, 31/1 (2001): 16-23; and: K. Devolder, *Creating and sacrificing embryos for stem cells*, “*Journal of Medical Ethics*”, 31 (2005): 366-370.

<sup>34</sup> This term has a strong link with the other medical issue of this paper. In this sense, I suggest reading the following paper, where the term used with reference to embryos is “disposition”: S.C. Klock, S. Sheinin, R.R. Kazer, *The Disposition of Unused Frozen Embryos*, “*New England Journal of Medicine*”, 345 (2001): 69-70.



because it is always a member of the *Homo Sapiens* species<sup>35</sup>, even if we do not want to define it as a person – to a property, i.e., to something we can dispose of freely.

Once acknowledged that the “object” of the donation is always a “subject”, that is, a “who”, I will focus on Heyd’s four elements that characterize an act as supererogatory, referring back to this specific case.

### *1. It is neither obligatory nor forbidden*

Obviously, from the point of view of adoption (and, therefore, from the point of view of parents who adopt), there is no obligation, since it always appears to be a voluntary act and the result of a free choice. A point that might be appropriate to discuss, much more problematic than the previous one, is the issue of “the right to be born”<sup>36</sup>, often invoked by the supporters of this practice<sup>37</sup>. Be careful: I am not saying here that we should not recognize that “right to life” in general, but instead, that the right “to be born” is a complex subject to talk about, which is essentially distinct from the previous one. At the societal level, indeed, it is possible to guarantee a general principle of respect for human life – and, in fact, it is the very condition of possibility of the existence of the society itself: there cannot be a society that does not defend its members’ lives. Since such a right exists, a duty to respect this life should be conversely recognized: a right, in fact, always generates a corresponding duty. That is to say: rights and duties are always strictly connected. In this regard, the existence of the right to life also involves, at the same time, a duty to protect it<sup>38</sup>. Finally, this right even implies a duty to create structures and policies to support it.

If all of this is true, a practical problem arises in relation to the right to be born: who will assume the duty to respect/guarantee the embryo’s “right to be born”? By means of this right, indeed, we are implicitly saying that there should be a duty by any woman (and especially by women who may better guarantee the embryo’s

<sup>35</sup> In this regard, it is not necessary to take into account Singer’s famous distinction between “members of the *Homo Sapiens* species” and “rational and self-conscious being, a person” (P. Singer, *Practical Ethics. Third Edition*, Cambridge University Press, New York 2011, p. 138), since I am only stating – as Singer actually did – that the human embryo is a member of the *Homo Sapiens* species. An interesting refusal of Singer’s distinction (and separation, at anthropological level) may be found in: S.L. Krantz, *Refuting Peter Singer’s Ethical Theory. The Importance of Human Dignity*, Praeger Publishers, Westport 2002.

<sup>36</sup> See: R.F. Drinan, *The Inviolability of the Right to Be Born*, “Case Western Law Review”, 17/2 (1965): 465-479; J. Feinberg, *Is there a Right to Be Born?*, in: *Rights, Justice and the Bounds of Liberty*, Princeton University Press, Princeton 1980, pp. 207-220. D.A. Davey, *The right to be born*, “Medicine and Law”, 7/5 (1989): 475-482; S. Rodotà, *Tra diritto e società. Informazioni genetiche e tecniche di tutela*, “Rivista critica el diritto privato”, 4 (2000): 571-604, and particularly: p. 573.

<sup>37</sup> In this regard, please see: B.C. Heng, *Independent counselling on embryo donation for infertility patients*, “Human reproduction”, 31/10 (2016): 2347; and: B.C. Heng, *Should embryo donation be actively encouraged and advocated for couples with only one infertile partner?*, “Journal of Assisted Reproduction and Genetics”, 24 (2007): 57-58.

<sup>38</sup> See: L. Valera, *Ecologia umana. Le sfide etiche del rapporto uomo/ambiente*, pp. 82-83.

survival, that is, those who do not have reproductive problems) to offer themselves for the so-called “adoption”. But, can a society do this? Furthermore, could an action, which is not mandatory – but, at least, only supererogatory – be compatible with such a right to be born? Even more, if we sustain the solution of embryo adoption starting from the absolute value of every human life, how can it be a supererogatory act? The absolute value recalls, indeed, the necessity of a right. In this regards this action could not be considered supererogatory, but, in a strict sense, given the absoluteness of the value of life, it may be considered mandatory, if we keep in mind that “the distinction between ordinary and extraordinary may be instructive: ordinary is morally obligatory, extraordinary is optional”<sup>39</sup>.

Another issue, strictly connected with the previous one, may be the following: if we have the duty to guarantee the right to be born – and the duty is always mandatory – should we find the best ways to fulfill this duty or should we use whatever means available? I am thinking, in concrete, about the possibility of creating an artificial uterus<sup>40</sup>, or, paradoxically, at the remote possibility to “utilize” a “non-human animal womb”<sup>41</sup> to achieve our goal – the right to be born. Would it be morally acceptable? Would we respect the dignity of the human embryo by these means? Would the embryo implantation, as many authors suggest, be only an accidental event in a human being’s life? “As an objection to the idea that there is a moral distinction between implanted embryos and un-implanted embryos, one might argue that implantation is an arbitrary milestone because an implanted embryo is not physiologically different from an un-implanted one. Implantation only seems like an important event to us because we cannot grow embryos outside of a woman’s uterus. If scientists ever develop an artificial womb, implantation would lose its moral significance”<sup>42</sup>. As “Grisez, Surtees and Watt all argue embryo adoption is an entirely licit and moral act that cannot be compared to the acts of surrogacy, IVF, or other means of ART that are repudiated by the church. Adoption is an action that involves a child that is already conceived but rejected”<sup>43</sup>. And, furthermore, “any woman offering herself for the purpose of saving the baby’s life is participating in a moral good, and the means are not necessarily inherently evil”<sup>44</sup>.

In order to answer and deepen this point, I have to explain my philosophical view, which comes first from scientific evidence that may refute the previous hypothesis.

<sup>39</sup> M.J. Iozzio, *It Is Time to Support Embryo Adoption*, “The National Catholic Bioethics Quarterly”, 2 (2002): 592.

<sup>40</sup> See, for example: C. Bulletti, A. Palagiano, C. Pace, *et al.*, *The artificial womb*, “Annals of the New York Academy of Sciences”, 1221 (2011): 124-128.

<sup>41</sup> With regards to other species “interspecific pregnancy”, please see: G.B. Anderson, *Interspecific pregnancy: Barriers and prospects*, “Biology of Reproduction” 38/1 (1988): 1-15.

<sup>42</sup> D.B. Resnik, *Embryonic Stem Cell Patents and Human Dignity*, “Health Care Analysis”, 15/3 (2007): 218.

<sup>43</sup> K.A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, p. 120

<sup>44</sup> *Ibid.*

The dignity of the human being in many cases depends on its place. As effectively highlighted by Ramos et al., “it should be added that the capabilities of that life are deprived of a suitable habitat that would enable it to perform and express itself, depriving the conceived, at least temporarily, of maternal reception and gestation”<sup>45</sup>. And, furthermore, “the person (embryo) must be ‘caught’ from the unnatural habitat where it was placed (freezer), thawed and then deposited in the uterus of a woman who cannot be its mother only by reason that she is carrying this extraneous person. This is the aporetic situation that an abandoned cryopreserved embryo is exposed, because it only could save its life if its dignity is violated at once, i.e., if its person becomes once again ‘available’: being transferred or not, according to the deliberate will of a ‘third person’, from the freezer to the uterus of a woman who is not his mother”<sup>46</sup>.

Human life is, then, strictly connected with human place, and, as human ecology<sup>47</sup> points out, it is the very source of human dignity<sup>48</sup>. In this regard, no human being who does not live in an environment exists: the condition of possibility of a being is always its space and time. Every human being has its “natural place” and develops its capabilities in a well-established time: for this reason, not just any habitat is adequate to sustain its life. Moreover, we should consider that mother-child relations within the womb are essential for the development of the child’s capabilities (and also to mother’s own physical development, among others): “Both the child and the mother exchange cells and become biologically ‘related’ to each other, even if the ovum from which the child was formed was not that of the mother gestating the child”<sup>49</sup>.

In order to synthesize this first point: we deal with a problematic point when grounding supererogation on the “right to be born”, both at the moral and anthropological level.

<sup>45</sup> P. Ramos Vergara, A. Arenas Massa, M. Santos Alcántara, *La persona y su dignidad al inicio de la vida: el concebido por técnicas de fertilización in vitro en Chile*, “Acta Bioethica”, 20/2 (2014): 170.

<sup>46</sup> M.A. Carrasco, *Rescate y adopción de embriones criopreservados; solidaridad o encarnizamiento reproductivo*, p. 695. And she highlights: “These embryos were submerged in liquid nitrogen, in a state of ‘suspended animation’ that prevents them both to grow, develop and die naturally” – *ibid.*, p. 685. The unnatural habitat would be not only the freezer or the nitrogen liquid, as Carrasco suggests, but even more the adoptive mother’s “new womb”.

<sup>47</sup> See: L. Valera, *Ecología humana. Le sfide etiche del rapporto uomo/ambiente*.

<sup>48</sup> It is interesting that many authors (theologians, philosophers) often refer to an “ecology of marriage”, forgetting that a human ecology of the child exists in itself, in relation to its “natural” habitat, even if the former seems to be more difficult to demonstrate than the latter. For an evocative example, please see this passage by Tonti-Filippini: “*Within marriage, man and woman give themselves to each other and through each other to any children who result from that union. There is an ecology (so to speak) in the relationships thus formed, an orientation for the good of the communion and the communion itself oriented toward growing in the image and likeness and hence the love of God through the relationships*” – N. Tonti-Filippini, *The Embryo Rescue Debate Impregnating Women, Ectogenesis, and Restoration from Suspended Animation*, “The National Catholic Bioethics Quarterly”, 3/1 (2003): 131.

<sup>49</sup> P. Berkman, *Gestating the Embryos of Others. Surrogacy? Adoption? Rescue?*, p. 322.

2. *Its omission is not wrong, and does not deserve sanction or criticism*

There are not many doubts with regards to this point. Nevertheless, a matter that we should consider further is: What are the consequences of the omission of the embryos adoption? Furthermore, this is one of the points that the supporters of embryo adoption emphasize the most: “The consequences in this case are hundreds of thousands of cryopreserved embryos suspended in time. Embryo adoption is the pro-life community’s attempt to counteract a growing disrespect for life by infusing a sense of humanity into the human embryo”<sup>50</sup>. It is presented, then, as the only possible solution that would prevent the embryos’ abandonment, or, even worse, their use for scientific research or their death. But, even if it were the only possible solution, does this fact make it a good solution? Furthermore, in a pro-life perspective, making it the only possible solution, should be again considered as supererogatory, once its optionality has been lost?

3. *It is morally good, both by virtue of its (intended) consequences and by virtue of its intrinsic value (being beyond duty)*

To answer to the previous question, it is necessary to take into consideration the consequences of this action. Even though moral assessment cannot be exclusively focused on the consequences of the action<sup>51</sup>, it is a very important dimension to take into account. One of the most important consequences of this action is the possible opening to surrogate motherhood, or, more simply stated, to surrogacy. In this regard, it is not sufficient to state that “the question of gestating abandoned embryos is not the only kind of scenario involving women gestating the embryos of others. There are classic surrogacy arrangements, such as the kind made famous in the New Jersey Supreme Court case involving Mary Beth Whitehead. There are cases in which a woman’s sister or mother offers to gestate a child if the woman, for a variety of medical reasons, is unable to gestate a child to term. Also, a considerable number of women undergoing IVF use donor ova; this is most prevalent with women over forty, who have a much better chance of carrying a child to term if they use a donor egg”<sup>52</sup>. Here, a “majoritarian” argument cannot be used: it would be inadequate for a philosophical reflection on this problem.

On the contrary, it is important to rethink the possible (or intended) consequences of this action. In order to do this, I have to focus on the two “objects” of this particular action: “adoption” and cryopreserved embryos. Starting from the idea that

<sup>50</sup> K.A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, p. 121.

<sup>51</sup> See: L. Valera, C. Terranova, *An Ethical Dilemma in the Field of Gynecology*, “Persona y Bioética”, 20/1 (2016): 62-69.

<sup>52</sup> P. Berkman, *Gestating the Embryos of Others. Surrogacy? Adoption? Rescue?*, p. 311.

we have “at our disposal” a cryopreserved embryo and a possible mother, who does not have any “biological links” to the embryo, how can we distinguish prenatal adoption from surrogacy? Can a good intention (the one to save – or rescue – a life) change the biological links between the two, thus paving the way to the moral legitimation of surrogacy? Furthermore, this practice causes a theoretical problem, i.e., an argument in favor of the idea that motherhood is purely functional in character, and consequently, that we can effectively rethink motherhood in its three dimensions: the biological mother, the pregnant mother, and the social mother. Thus, the first consequence of this solution is the moral legitimation of surrogacy<sup>53</sup>, and, consequently, of a new idea of motherhood.

This leads us to rethink another possible consequence: if motherhood is not strictly connected to “biological links” (between mother and child), then what remains is only the mother’s will (even if it is clearly a good will)<sup>54</sup>. In this sense, Robertson suggests: “Until the law prescribes otherwise, disputes over frozen embryos should be resolved first by looking to the joint wishes of the couple, and if they are not available or are unable to agree, to prior instructions which they gave for disposition of those embryos. If no instructions exist, we must then compare the relative burdens on each party of using or not using the embryos in question to see which party should prevail. These principles are the best guide for assimilating IVF technology into social practice while respecting family and reproductive choice”<sup>55</sup>.

As I said, since this action cannot be considered mandatory for women with childbearing potential, but only optional (supererogatory), the primacy of the good will over “nature” (i.e., of desire over biology), paving the way for other actions supported by the same logic (abortion, IVF, etc.), is recalled here. In this regard, given the consequences I have shown in this paragraph, prenatal adoption cannot be

<sup>53</sup> To consider it a “good action”, it is not sufficient to state that the “object” of surrogacy is different from the one of the embryo adoption, as Collins does: “*It is further argued that embryo adoption represents a form of surrogacy, although simultaneously acknowledged that the surrogacy referred to in the document is the sort discussed earlier in this paper: a woman who bears a child on behalf of another adult, not on behalf of the child*” – T. Collins, *On Abandoned Embryos*, “The Linacre Quarterly”, 75/1 (2008): 9. Indeed, the objective fact is that the expectant mother is carrying in her womb a child who is not “biologically hers” (the expression is not happy, but effective). It may be possible to talk about “double heterologous” to better clarify this and to break the deadlock highlighted by Collins, but the objective fact remains. At the same time, not even a legislative restriction can change the characteristic of the act itself, as Kamein tries to demonstrate in her very famous book: “*Surrogacy is precluded by not permitting the transfer of an embryo to a woman who would be willing to carry to term a child for someone else*” – A.J. Kamein, *A Theory of Unborn Life. From Abortion to Genetic Manipulation*, Oxford University Press, New York 2012, p. 55.

<sup>54</sup> About the importance of parents’ will in embryos donation (or adoption), and its related factors, please see: C. Samorinha, M. Severo, E. Alves, *et al.*, *Factors associated with willingness to donate embryos for research among couples undergoing IVF*, “Reproductive BioMedicine Online”, 32/2 (2016): 247-256.

<sup>55</sup> J.A. Robertson, *Resolving Disputes over Frozen Embryos*, p. 12.

considered a supererogatory action. Embryo adoption, far from saving the lives of some human embryos, is more likely to open ways to lower the protection of many more human embryos, exponentially increasing the number of those who will be exposed to their death. As a consequence of a presumable merciful act (embryo adoption), the embryos become, from time to time, children to be expected, orphans to be adopted, biological materials to be selected, products to be cryopreserved, or perishable things to be studied; all depending on the adults' wishes.

*4. It is done voluntarily for the sake of someone's good, and is thus meritorious*

The problem that arises here has been previously pointed out. In summary: how can an action that is based on a right (the right to be born), which is in turn based on an absolute value (the value of human life), be considered voluntary? In fact, although we should consider the mother's motive as "voluntary", we cannot forget that by its nature a right obliges the subject (in this case, the mother), thereby eliminating the "voluntary nature" of the action itself.

In all these regards, we cannot affirm that prenatal adoption can be considered a supererogatory action. Even if we do not believe that this act should be characterized as supererogatory, this is not a good reason for considering it a "therapeutic obstinacy"<sup>56</sup> act, as many authors have suggested<sup>57</sup>. Indeed, this new terminology is equivocal since it implicitly suggests that motherhood can be considered as a therapy for the embryo, and this is clearly not the case.

Nonetheless, a possible doubt still remains: who is in charge of the corresponding duty (taking care of the surplus of embryos)? Given the arguments presented above, the answer would only be: the biological parents.

## 2. SAINTS, HEROES<sup>58</sup>, OR NONE?

The issue of moral supererogatory moves the center of the ethical debate from the universality of the prescription to the particularity of heroism, i.e., the level of the individuality and of the individual subject for which we know, echoing an Aristotle's

<sup>56</sup> L.M. Pastor, *Análisis y comentario ético del documento Dignitas Personae: Desde la continuidad a la novedad*, "Cuadernos de Bioética", XXII/1 (2011/1): 29.

<sup>57</sup> See: L.M. Pastor, *La nueva genética y la procreática*, "Persona y Bioética", Entrevista realizada el 29 de Mayo de 1998 por el director de la revista, Dr. Pablo Arango Restrepo; M.A. Carrasco, *Rescate y adopción de embriones criopreservados: ¿solidaridad o encarnizamiento reproductivo*.

<sup>58</sup> This title aims to echo the famous essay by Urmson: J.O. Urmson, *Saints and Heroes*, in A.I. Melden (ed.), *Essays in Moral Philosophy*, University of Washington Press, Seattle 1958, pp. 198-216.

principle, we cannot make science. Indeed, the question of supererogation, as pointed out in a recent paper by Heyd, is likely to threaten the universal character of ethics, since, “based on individual discretion, supererogatory action has an ad hoc nature and it is not universalizable”<sup>59</sup>. Here, on the other hand, we are not dealing with the well-known passage from an ethic of the third person to the one of the first person<sup>60</sup> (usually evoked in the contemporary context of neo-Thomist thinkers) but with the possibility of creating a moral framework with its own rules and purposes, often foreign to rules required by the “public” practical reason.

The emphasis on the subject’s existential peculiarities ends up discrediting the “ought”<sup>61</sup>, i.e., ordinary practices that are mandatory – because, ultimately, this kind of ethics focuses more on the particular subject’s “good disposition” than on its capability, which is shared with other subjects to obey a moral norm that responds to practical reason, as I noticed in the bioethical case taken into account. In this sense, we tend to forget the act itself, which is the very center of a moral evaluation, by focusing too much on the person committing such an act, and at the same time, by implicitly considering “moral strangers”<sup>62</sup> all those who do not have these heroic peculiarities, and are thus unable to perform such an act. For this reason, when talking about supererogatory actions, it is very common to refer to the figures of the saint and the hero, who do not actually need moral norms, because they act in an extra-moral way. Recalling a very famous passage by Trianosky: “Moral saints and moral heroes are typically people who are always willing to help those in need, even at great risk or inconvenience to themselves. They are responsive to moral considerations in general, and usually to altruistic considerations in particular, even when they don’t have to be. They are always willing to go the extra mile. We may think at such noble and selfless individuals as more or less faithful renditions of an ideal type, which I will call the fully virtuous person. The fully virtuous person is willing to do both what morality requires and what only recommends, and has whatever supporting traits are sufficient to maintain this commitment in human beings”<sup>63</sup>.

<sup>59</sup> D. Heyd, *Can Virtue Ethics Account for Supererogation?*, “Royal Institute of Philosophy Supplement”, 77 (2015): 34.

<sup>60</sup> See: G. Abbà, *Felicità, vita buona e virtù. Saggio di filosofia morale*, LAS, Roma 1995, p. 102; M.T. Russo, L. Valera, *Invito al ben-essere. Lineamenti di etica*, Aracne, Roma 2015, pp. 162-169.

<sup>61</sup> Even if supererogation *logically* relies on the very existence of regular duties, it *practically* discredits the ordinary moral practice. For example: it is not sufficient to state that an exception to a rule presupposes the existence of this same rule; we have also to consider how this exception changes the perception of the rule itself.

<sup>62</sup> I am here implicitly evoking the effective expression by Engelhardt in the field of bioethics: H. Tristram Engelhardt Jr., *Personhood, Moral Strangers, and the Evil of Abortion: The Painful Experience of Post-Modernity*, “The Journal of Medicine and Philosophy”, 18 (1993): 419-421.

<sup>63</sup> G.W. Trianosky, *Supererogation, Wrongdoing, and Vice: On the Autonomy of the Ethics of Virtue*, “The Journal of Philosophy”, 83/1 (1986): 31.

Far from helping the development of an ethical theory (and of a moral discourse, in general), this approach tends to create a kind of moral dichotomy, for which there would be an ordinary way (more widespread, mandatory, and, at the same time, less meritorious) and an extraordinary, heroic way (elitist and “private”, but more praiseworthy) of acting. This is well recalled by Kawall’s definition of supererogation: “An action is supererogatory iff it is what a virtuous agent would characteristically (i.e. acting in character) do in the circumstances. This account has certain attractive features. [...] It [...] captures our expectation that moral exemplars will not just do what is (merely) right, but will go beyond the call of duty, performing supererogatory actions”<sup>64</sup>.

Once explained some general guidelines for the interpretation of the theme of supererogation, we can go back, for a moment, to the medical field. The moral dichotomy recalled above, as shown by Kottow, particularly characterizes the physician’s figure and role, which usually deals with uncertain situations; however, we can state the same by taking into account the role and figure of the patient: “If supererogatory acts are defined as meta-deontological or duty-plus acts, they cannot be included in a catalogue of medical obligations without ceasing to be supererogatory and converting to role duties. The realm of role duties may be exceptionally ample if medical practice is considered to be more intensely obligation-laden than other activities, but this deontological language must steer clear from issues such as supererogation and altruism, lest it become inextricably contradictory”<sup>65</sup>. And continues: “Requiring physicians to be altruistic is both dangerous and unfair. It is dangerous because it introduces an, albeit positive, separatist morality by demanding doctors to be better than other people, and better than they actually are. But if positive separatism is fostered, one will have to tolerate some negative consequences, for an equally separatist position might justify some forms of moral laxness, trying to place physicians in a position immune to the scrutiny of rational ethics”<sup>66</sup>.

In my opinion, the greatest “harm” would be dealt to ethics as a whole, and not so much to the actors involved in that particular action (since, as I have already said, a supererogatory action is always directed to something good, “hard” to achieve). Creating an ethics “outside of morality” – a concept that would require deeper reflections – is likely to disqualify the importance of ethics itself, this ultimately understood as something ordinary, understandable, and reachable by any moral subject. This is precisely what is happening in the case I analyzed: when thinking in

<sup>64</sup> J. Kawall, *Virtue theory, ideal observers, and the supererogatory*, “Philosophical Studies”, 146 (2009): 181.

<sup>65</sup> M.K. Kottow, *Against the magnanimous in medical ethics*, “Journal of Medical Ethics”, 16/3 (1990): 126.

<sup>66</sup> *Ibid.*, p. 127.



terms of supererogatory solutions, the moral evaluation of motherhood, being child, birth, biological links between mother and child, and so forth, are likely to lose sense.

In these regards – and this is the very conclusion of my argument – ethics does not need any heroism or sanctity. Radicalizing this conclusion further, it is possible to say that we do not need to be “good” persons to act like “right” or “just” persons<sup>67</sup>. Moreover, in this regard I cannot agree with the thesis for which “bioethics needs heroes – to teach us, to fire the imagination, and to inspire us to greatness”<sup>68</sup>. It should not be a matter of heroism – it is a matter of justice and fairness. For this reason, I cannot subscribe to Heyd’s statement, when highlighting “that supererogation and duty are mutually dependent. They are correlative concepts. Supererogation cannot be conceptually articulated without reference to duty and duty cannot be normatively justified without reference to what lies beyond duty. In that respect, supererogation is essentially a deontic concept or a phenomenon which is naturally accounted for in deontological theory”<sup>69</sup>.

We cannot, as many authors argue, measure the goodness of an ethical theory starting from the concept of supererogation with regards to different moral theories: “Supererogation, despite its centrality in our moral experience, is not a fully blown theory of ethics and cannot in itself be considered as an ultimate test for the acceptability of virtue ethics”<sup>70</sup>.

Too many times, thus, supererogation is supererogatory<sup>71</sup>, especially in the field of bioethics.

<sup>67</sup> With this sentence, I am not trying to overcome the tradition of virtue ethics, which stresses the need to create good moral habits to achieve a fully happy life; the emphasis is on the fact that an ethical approach (as the one I am trying to outline here) should further emphasize the universality of the law – based on reason – rather than on good personal dispositions. It is clear, after all, that the two positions are complementary.

<sup>68</sup> F. Baylis, *Heroes in Bioethics*, “The Hastings Center Report”, 30/3 (2000): 39.

<sup>69</sup> D. Heyd, *Can Virtue Ethics Account for Supererogation?*, “Royal Institute of Philosophy Supplement”, 77 (2015): 31.

<sup>70</sup> *Ibid.*, p. 42.

<sup>71</sup> I am considering here the term “supererogatory” as equivalent to “not necessary”, even though I am well aware that the two terms are not equivalent.