"JUST THE OVEN": A LAW & ECONOMICS APPROACH TO GESTATIONAL SURROGACY CONTRACTS

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"They want me to be the surrogate.
It's her egg and his sperm.
I'm just the oven.
It's totally their bun."
Phoebe Buffay[1]

In late 1995, a 36-year-old woman who had had 24 consecutive unexplained miscarriages over eleven years presented herself to a University hospital in Tel-Aviv. After a series of tests, her doctors were unable to come up with a definitive diagnosis. She was referred for assisted reproduction. Four good-quality embryos were transferred to her uterus, but unfortunately pregnancy was not achieved.[2] At that stage, surrogacy became legally possible in Israel, and this option was offered to the couple. Two embryos were then transferred to a 28-year-old surrogate mother. Her pregnancy was uneventful until term, when a caesarean section was performed and a healthy male neonate was delivered (Raziel *et al.* 2000).

At about that time, in a teaching hospital in Montpellier, a 29-year-old woman was treated for bulky squamous cell carcinoma of the uterine cervix. She received primary chemotherapy and underwent total pelvic irradiation

* Earlier drafts of this paper were presented at the Erasmus Workshop on Law and Economics (Hamburg, February 14, 2003) and at the Workshop on Political Sociology at Panteion University (Athens, February 21, 2003). It is based on my related work in a major project that deals with the ethical, legal and economic ramifications of surrogacy and gestational agreements. I am particularly thankful for their comments, suggestions and help to Brian Bix, Olga Dyuzheva, Pierre Garello, Theresa Glennon, Denise Lascarides, Hugh McLachlan, Nigel Lowe, Rosa Martins, Yvette Tan, Epaminontas Triantafilou and Aspasia Tsaoussis. The usual disclaimer applies. Comments are welcome at: ahatzis@phs.uoa.gr.

1 PHOEBE BUFFAY (Lisa Kudrow) from the episode "The One with Phoebe's Uterus" of the hit American TV sitcom *Friends*. Original transmission date: January 8, 1998. Written by SETH KURLAND.

2 According to her doctors, "another pregnancy would have probably had the same outcome as all her previous pregnancies" (RAZIEL *et al.* 2000: 105).

before a total abdominal hysterectomy. Two years after surgery, the patient had no clinical or biological signs of ovarian failure. She and her partner still desired a pregnancy. So they decided to recruit a surrogate mother in San Francisco and were completely responsible for all the details of this arrangement. The woman's French doctors began ovarian stimulation in their IVF centre in December 1998 in cooperation with the United States fertility unit. Two embryos were obtained and transferred to the surrogate mother. After nine months, the surrogate mother underwent a caesarean section, which resulted in two live and normal infants (Giacalone *et al.* 2001).

I. Surrogacy is a form of assisted reproduction through artificial insemination. A woman, who is designated as a "surrogate", bears a baby on behalf of a couple with the intention of relinquishing her rights as the legal mother of the child after birth.

In this paper, I will concentrate on the so-called gestational (full) surrogacy, *i.e.* the form of artificial insemination that applies the method of *In Vitro Fertilization* (IVF),[3] whereby a doctor implants the fertilized (by her partner's sperm) eggs of a woman into the surrogate's uterus. The surrogate[4] is not the genetic mother of the child, since there is no genetic link. The reason that surrogacy is needed is that the female partner is unable to carry a pregnancy to term because of hysterectomy, congenital defects, vaginal agenesis,[5] unexplained habitual abortions, etc.[6] Surrogate gestational pregnancies after IVF have been reported since 1985 (Goldfarb *et al.* 2000).

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3 IVF has also been used as an assisted reproduction method in normal (not surrogacy) pregnancies, when there is a need to enhance fertilization in the laboratory, since 1978. The fertilized eggs are implanted into the female partner's uterus.

4 A more scientifically correct word would be "gestational carrier": A woman in whom a pregnancy resulted from fertilization with third-party sperm and oocytes and carries the pregnancy with the intention or agreement that the offspring will be parented by one or both of the persons that produced the gametes (Vayena *et al.* 2002: xx).

5 In vaginal agenesis, the cervix is either absent or hypoplastic. The most frequent form of vaginal agenesis is known as the Mayer-Rokitansky-Kustner-Hauser syndrome (the uterus is congenitally absent with normal fallopian tubes and ovaries). In this case, surrogacy is the only opportunity a woman has of becoming a mother (see *e.g.* VAN WAART & KRUGER 2000).

6 POSNER (1992: 420, n. 23) defines infertility in the broad sense, as the incapacity to produce a healthy child. According to this definition, the possession of recessive genes that would create a serious danger of producing a deformed child is a fertility problem (*id.*).

I am not going to discuss the oldest known form of surrogacy, i.e., the traditional/partial "Abraham-Sarah-Hagar"[7] type of surrogacy agreement, where the surrogate mother is also a genetic mother (who contributes both the ovum and the womb) and the male partner of the couple that is unable to procreate (intentional parents) offers his sperm.[8] I am also not going to examine the case of social surrogacy, when a woman decides to have another woman bear her child by choice (for cosmetic or career reasons), even though she is able to carry the child herself at no significant risk. I am also assuming that the couple entering a surrogacy contract is heterosexual and married. I am not going to defend (at least not in this paper) the right of unmarried women and homosexuals[9] to become parents using this technology.

There are two reasons why I am not going to discuss the above cases. Firstly, because the opposition to the enforcement of these controversial arrangements is more adamant that the one to the "traditional family-oriented" gestational form.[10] Secondly, because there are a number of ethical and legal issues associated with these marginal cases which justify separate treatment – the most important one being that the best interests of children should be taken into consideration.[11]

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7 *Genesis* 16: 2 ("*And Sarai said unto Abram, Behold now, the LORD hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her.*"). Traditional surrogacy was widely practised before gestational surrogacy became available. For the mid-1970s California, when surrogacy was a crime, see ERICKSON (1978) (despite the prohibitions, the practice was increasing). A more complicated (and rare) form can be egg donation: the intentional mother can carry a baby, but cannot ovulate. See COHEN (1996).

8 In the most extreme case of surrogacy, both intentional parents are not genetic parents (the eggs and the sperm are provided by donors). These parents, who are not biologically related to the child, become nurturing parents directly. This form is the most akin to adoption (Garrison 2000: 898). See *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 72 Cal. Rptr., 2d 280 (1998) (although the two women to the surrogacy contract could both prove their maternity, the legal mother is the woman who was intended to be the mother as expressed in the surrogacy or egg donation contract). Thus, it is possible that a child can have three mothers (social, surrogate, egg donor) and two fathers (social, sperm donor)!

9 Mostly gay men, for whom surrogacy is the only way of becoming the genetic parents of a child (GOLOMBOK & TASKER 1994).

10 See especially LASCARIDES (1997).

11 In the case of gestational surrogacy, the role of children is, as we will see below, less complicated. The main problem relating to the children in marginal cases is the emotional pain which the child would undergo upon the discovery that his/her social mother is not the genetic one (traditional surrogacy) or that his/her genetic mother opted to avoid the experience of carrying him/her (social surrogacy). In addition, traditional surrogacy is a rather peculiar method of adoption and it might be more appropriate for it to be treated as such. For a powerful defence of traditional surrogacy agreements, see POSNER (1989). The same goes for the unmarried woman who uses sperm from a bank or a friend and wishes to have a child destined to grow up in a single-parent family (for problems faced by single-

Gestational surrogacy (as well as any other type of surrogacy) can also be categorized into altruistic surrogacy (the surrogate receives no payment) and commercial surrogacy (where the surrogate receives a fee for her services). I am not going to consider altruistic surrogacy, since the arguments in defence of commercial surrogacy overlap those in support of the former.

Gestational surrogacy (via the IVF method) is a quite expensive operation; in case of failure it has a rebound time of months and it involves a complicated medical procedure:[12] The eggs of the intended mother (ova) are fertilized with the sperm of the intended father, they are allowed to grow and they are transferred into the surrogate's uterus. The appropriate preparation of the surrogate mother and the period after the insemination involves several injections of hormones, estrogen and progesterone, the taking of pills and a significant change in her way of life. Every new IVF attempt costs thousands of dollars, there is a significant miscarriage rate and the compensation to the surrogate mother in the United States where surrogacy is more widespread, begins at $15,000 for a novice surrogate mother and can go up to $25,000 for an experienced surrogate.[13] Therefore, the total cost to the intentional parents can be quite high (ranging from $20,000 to $120,000).

In most jurisdictions worldwide, gestational surrogacy is prohibited by law and even when it is permitted, in most cases the contracts between the genetic parents and the surrogate mother are not enforceable. In these cases, only altruistic surrogacy is permitted, but with many restrictions and requirements.[14] This situation is creating a major problem in federal

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parent households, see MCLANAHAN & SANDEFUR 1994). Surrogacy on behalf of a homosexual couple is an even more complicated issue, which is closely linked to the question of allowing adoption by homosexuals. However, see the recent survey by MOONEY-SOMERS & GOLOMBOK (2000) (a mother's sexual orientation matters less for children's psychological adjustment than the quality of relationships in the family home; parents have little influence on the gender development of their children).

12 On the other hand, traditional surrogacy is much less costly, it has a shorter rebound time in case of failure and it is a lot easier as a procedure (the surrogate can even perform a cervical insemination with sperm at her own home). However, the emotional cost to the surrogate can be intolerable. Of course, traditional surrogacy can also be achieved through intercourse (the most cost-saving method); this was actually the only available form of surrogacy before the introduction of artificial insemination techniques.

13 My basic source are the advertisements of American fertility clinics. According to SAINT-PAUL (2002: 26), the surrogate fee is about $20,000-$30,000 ("which is above median U.S. annual income"). In 1988, the common price was $10,000 (FIELD 1988: 25-26).

14 See MCEWEN (1999: 281-286). The most liberal regimes are those of the United Kingdom, Israel and recently Greece (see KOUNOUGERI-MANOLEDAKI 2002).

countries like the United States, where some states permit and some others restrict surrogacy contracts. The same holds true for the European Union, where most countries do not enforce surrogacy contracts.

II. In this paper, I will support the thesis that gestational surrogate contracts should be enforceable under the law. My approach is informed by the economic analysis of contract law, which is one of the most sophisticated areas of law & economics theory both in the United States and Europe. Some clarifications are necessary in order to prevent some common misconceptions. Economic analysis of law is not an attempt to monetarize human relationships and to establish economic efficiency as the law's primary goal. It is rather an approach which assumes that people are basically rational utility-maximizers who respond to incentives, and purports to use law as a system of social control, a weapon for more effective social action having as its most important goal the achievement of social welfare. According to this view, "legal policy should be evaluated using the framework of welfare economics, under which assessments of policies depend exclusively on their effects on individuals' well-being" (Kaplow & Shavell 2002: 465).[15] In the case of surrogacy, under the lens of law & economics, infertile married couples will try to maximize their utility by exploring all options in an effort to have a baby. If the law prohibits them from doing so, so much the worse for the law![16]

Economic analysis of contract law in particular has offered a theory on which promises should be enforced.[17] Under this approach, a contract should be enforced when it makes two people better off, without making anyone else worse off. Who should decide when and if the parties are better off? The parties themselves, who are the best judges of their own welfare. Their preferences and their desires should dominate any kind of paternalistic intervention by the legal system, except in some rare circumstances where the parties are demonstrably not acting rationally or when their actions have negative effects on third parties.[18]

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15 "[S]ocial welfare is postulated to be an increasing function of individuals' well-being and to depend on no other factors" (KAPLOW & SHAVELL 2002: 24).

16 See especially the research by VAN DEN AKKER (2000 and 2001) for the importance of the genetic link to prospective parents. See also CHLIAOUTAKIS *et al.* (2002).

17 For more on the economic theory of the enforcement of contracts, see the excellent treatment by COOTER & ULEN (2000: 184-189).

18 Only the interests of third parties which are already protected under the law. Thus, the negative externalities to children awaiting adoption (RADIN 1987: 1931; POSNER 1989: 24) should not be considered to be a valid argument for the prohibition of surrogacy. See BLOCK (1999: 47) and more generally EPSTEIN (1995: 2320-2325) and HATZIS (2000: 209-210).

When the parties to a surrogacy contract reach agreement on the terms of the contract, apparently all of them wish the contract to be enforceable; otherwise they would not have entered into it in the first place. The parents wish to have children and they view surrogacy as their only opportunity to do so[19] and the surrogate mother wishes to obtain a sum of money, which she apparently needs for herself or for her own family. After the deal, they all feel better off, since they have acquired what they needed more in exchange for money or services, which they valued less. For example, a surrogate mother can use the money to offer a better education to her children or a better standard of living to her family. At the same time, she can derive utility from her own altruism.

The interests of the child do not represent a significant factor in the case of gestational surrogacy, since there is no confusion as to the parental rights or the genetic link,[20] not forgetting that the child owes its very existence to this contract (Harris 2000).[21] In addition, according to a recent major study, "a gestational carrier would provide potential environmental benefits for the infant" (Serafini 2001).[22] However, I am not arguing that the child will remain unaffected by the way in which he/she was born. Even in the less complicated case of gestational surrogacy, there are dangers lurking for the children, which can only be avoided by strengthening the norms of parental responsibility (see especially Shiffrin 1999). The only way to ensure children's welfare (which is more important than contracting parties' welfare in the gestational surrogacy nexus) is to limit the power of contracting parties and especially to prohibit opportunistic attempts to modify or rescind the contract.

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19 According to a research study of a small group of infertile women by VAN DEN AKKER (2001), half of them were devastated by their inability to have a child, and nearly two-thirds could not foresee a future without a family.

20 See especially the discussion in the seminal California case *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (the woman who intended to bring about the birth of a child that she intended to raise as her own is the natural mother under California law). For this landmark decision, see Gordon (1993).

21 For the experiences of the child born under the second gestational surrogacy, which became publicized (in Australia), see KIRKMAN & KIRKMAN (2002). The article was written by MAGGIE KIRKMAN (the mother) and includes an appendix with answers to a set of questions by ALICE KIRKMAN (the 13-year-old daughter). According to Alice: "[S]ome people are born because a man and a woman get very drunk; or when a man and a woman love each other; or when a man and a woman hire a scientist. There are different ways of being conceived. Mine was just one of them." (*id.* 144).

22 See also DILL (2002: 259): "there is no evidence in the literature to suggest that in the vast majority of such arrangements there is any detrimental effect on the child or the other parties involved".

III. This is an idealized picture, which is increasingly being challenged by many. A major objection is that these contracts are immoral, and therefore should not be enforced on that basis alone. Most churches are against surrogacy for this reason. According to a survey for the U.S. Congress (1988), all religious groups represented in the United States were against surrogate motherhood.[23] The approach of the "Congregation for the Doctrine of the Faith" of the Catholic Church is typical:[24]

> [Surrogate motherhood] is contrary to the unity of marriage and to the dignity of the procreation of the human person. Surrogate motherhood represents an objective failure to meet the obligations of maternal love, of conjugal fidelity and of responsible motherhood; it offends the dignity and the right of the child to be conceived, carried in the womb, brought into the world and brought up by his own parents; it sets up, to the detriment of families, a division between the physical, psychological and moral elements which constitute those families.

The legislator should "prohibit, by virtue of the support which is due to the family […] surrogate motherhood" since "[i]t is part of the duty of the public authority to ensure that the civil law is regulated according to the fundamental norms of the moral law in matters concerning human rights, human life and the institution of the family."

Despite the plain advice of the Catholic Church to the legislator, the depiction of surrogacy as an immoral practice cannot justify its prohibition. The argument that law should punish immorality is ancient, but discredited. According to the widely accepted principle of liberal neutrality, the state must remain neutral towards competing moral standards (Kymlicka 1991: 95-96; Charlesworth 1993: 16). The view that law should regulate conduct having morality as its guide was successfully rebutted more than 150 years ago by John Stuart Mill, who introduced the harm principle, an invaluable guidepost for any liberal, pluralistic society:

> The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. […] Over himself, over his own body and mind, the individual is sovereign. (Mill 1859: 13).

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[23] With the exception of some marginal groups (Christian Scientists, Reform Jews and Mennonites). See U.S. Congress (1988: 364-368).

[24] See *Donum Vitae* (Respect for Human Life): "Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation (Replies to Certain Questions of the Day)", issued on February 22, 1987.

I believe that the "harm principle" is one of the cornerstones of our legal civilization, especially after the Hart/Devlin debate.[25] Thus, I am not going to elaborate more on why conventional morality should not limit the liberty of people to engage in consensual activities[26] when these cannot harm others.[27] In this case, it is also questionable whether conventional morality contrasts with surrogacy, since there is no indication of a popular opposition or generalized hostility to surrogacy.[28] It is also worth noting that traditional surrogacy has not been controversial since Biblical times.[29] The recent attack on surrogacy on moral grounds is rather a result of the distrust of certain groups for reproductive technologies in general (Kirkman & Kirkman 2002: 136) and of an image of "unnaturalness" attributed to the surrogate mother (Burr 2000).[30]

IV. The most important moral (deontological) argument against commercial surrogacy is the commodification argument.[31] According to this argument, such an economic agreement is unacceptable, since it commodifies a woman's body and permits the surrogate mother to exchange an inalienable right (i.e. her *quasi*-parental right)[32] for money. This is morally unacceptable, since it eliminates the human dignity of this woman by reducing her body to a commodity (Radin 1987: 1928-1936; Anderson

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25 For the debate, see DEVLIN (1965) and HART (1963).

26 See especially MCLACHLAN (1997).

27 Of course, one could say that an issue here is the enforcement of the surrogacy agreement against the surrogate mother who has second thoughts. In such a case, a surrogate can invoke the "harm principle" (I owe this point to Brian Bix). However, the surrogate has already relinquished her rights to the child by her promise. In contract law, any promise- or reliance-based theory would call for the enforcement of the contract. Economic theories would be even more emphatic, since the opposite conclusion would create disincentives for contracting and it would harm both future intentional parents and surrogate mothers. In the case of gestational surrogacy, the issue is less complicated than in traditional surrogacy.

28 A utilitarian-like approach, like the one I have espoused in this paper, does not preclude any effect of morality on law (as a pure libertarian approach would do). According to a leading proponent of law & economics, STEVEN SHAVELL (2002: 255), "the existence of moral beliefs should itself influence the design of the law, given that moral beliefs constitute tastes the satisfaction of which raises individuals' welfare".

29 See also Genesis 30, when Isaac's servant Bilbah bore his child because Rachel was barren.

30 For SILBAUGH (1997: 106), "it may have as much to do with notions of femininity and a desire to elevate a romantic essentialism about femininity as it does with a desire to protect women's integrity."

31 For a comprehensive treatment of commodification, see RADIN (1996, especially ch. 10) (commodification describes in monetary terms all things of value to the person including personal attributes and relationships; they are considered fungible and commensurable; their only value is their exchange value).

32 See especially n.10 of *Johnson v. Calvert*, *op. cit.*

1993: 168-189).[33] According to Anderson (1993: 189), "when market norms are applied to the ways we allocate and understand parental rights and responsibilities over children, children are reduced from subjects of love to objects of use. When market norms are applied to the ways we treat and understand women's reproductive labor, women are reduced from subjects of respect and consideration to objects of use". Women's personal attributes and reproductive capacity will be commodified and monetized, which is harmful to "the identity aspect of their personhood" (Radin 1987: 1932).

We should first determine what is being bought and sold here. Is it the child? In the context of the gestational agreement, the embryo belongs to its parents. We cannot speak of "baby selling" (as we might in traditional surrogacy), since the surrogate cannot sell something that she does not have: i.e., parental rights to the newborn.[34] The surrogate is essentially selling her labour, her gestational services. These services are similar to other services offered by women who transfer to another person a limited use of their bodies in employment contracts: nannies, wet-nurses, models, athletes, actresses, manual labourers, maids, career soldiers, etc. Furthermore, one cannot equate surrogacy with slavery, since there is no indication of the "alienation of the will" that is characteristic in slavery contracts (McElroy 2002: 276).[35] According to Wertheimer (1997: 1220), even if we consider surrogacy as commodification, "it does not follow that surrogacy should be prohibited or that surrogacy contracts should not be enforceable."

However, the commodification argument essentially says that a woman should not have the right to contract, i.e. to transfer even a limited use of her body, because in doing so she would be treating it as a commodity. The proponents of the commodification argument perhaps fail to see that the

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[33] Both Radin and Anderson argue against traditional surrogacy, which they equate with baby-selling and prostitution. Their attack on commodification covers gestational surrogacy ("a lesser level of commodification" according to RADIN 1987: 1929). However, there is an inconspicuous qualitative difference between Radin's and Anderson's approach (see *e.g.* RADIN 1987: 1934, 1936 and ANDERSON 2000). See also BRAZIER (1999).

[34] ANDERSON (1993: 174) agrees that the child does not belong to the surrogate mother, thus she cannot sell it. But even the forms of surrogacy that look like "sale of children" cannot necessarily lead people to think of children in monetary terms, since the desperate need for children will also create the incentive to think of children as persons (ALTMAN 1991: 333-334). See also EPSTEIN (1995: 2330-2334) and LASCARIDES (1997: 1240-1245).

[35] There is almost no reference in the literature to the role of the father in such arrangements, especially the phenomenon of the "increasing marginalization" of the modern father (MANDER 2001).

woman is not treating her body as a commodity for the simple fact that she is not selling a piece of herself. She is making a trade-off, offering a service by using a part of her body (her uterus; but she could use her hand or her brain as well) to obtain something that is more valuable to her. The emotional cost of the attachment to the child and the psychic and physical costs of labouring are valued less (by the surrogate) than the goals she is going to achieve with the compensation. The surrogate is not a saleswoman selling commodities in a market; she is rather someone who has ranked her priorities in life in such a way as to achieve her most important goal in the most efficient way. The fact that only a few women will seriously consider surrogacy as a way of achieving other goals in life is an indication that this is a matter of subjectively ranking values and goals. For many women, the cost of surrogacy can be enormous and simply not worthwhile. For other women, this cost can be minimal in comparison with choices they prefer to have and which they value more. Any government intervention in this ultra-subjective calculus will lead women to suboptimal decisions about themselves and will thus harm them.

Moreover, the commodification argument deprives women of the right to privacy and self-determination (Andrews 1986) and treats them unfairly, since it accepts payments to be made to adoption agencies and fertility clinics, but not to women who are prepared to change their lives for nine months and bring a child into the world. The issue here is not that the intentional parents will pay for their child, but that the surrogate mother will give up her parental rights in return for money.[36] It might be no coincidence that anti-commodification arguments arise "when women receive money for something, not when women are paying money for something" (Silbaugh 1997: 104).[37]

The indeterminacy of the commodification argument is not only illustrated by the differentiated treatment of sperm donors and surrogate mothers, but also by the problem of the compensation for pregnancy: even the staunchest opponents of commodification would accept that surrogates should be compensated for medical, hospital and travelling expenses.[38] But what about loss of wages, maternity clothes, nutritional food? At what point does commercialization begin? If we include opportunity cost (and we should if we do not want to punish a surrogate economically for being

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[36] BRIAN BIX's comments were instrumental in clarifying this point.

[37] For similar arguments, see EPSTEIN (1995: 2328) and MCLACHLAN & SWALES (2000: 17, n.3).

[38] In the U.K., surrogacy agreements are not enforceable, but as between individuals they are not illegal (Surrogacy Arrangements Act 1985, s 1A). Commercial surrogacy is illegal (s 2), as well as advertising for surrogates (s 3). However, the payment of expenses is allowed.

altruistic),[39] the actual difference with the market value of surrogacy could be minimal or zero.

According to Burr (2000: 112), the commodification argument has essentially reinforced the public/private divide: private is the feminine sphere, predicated upon nurturing and loving; public is the world of masculinity, characterized by commercialism and the sale of labour power (see also Shalev 1989: 17).[40] The differentiated treatment of sperm donors and surrogate mothers is more than characteristic.[41]

V. Let me now discuss the economic exploitation argument, which can be illuminated by adopting an economic perspective. As the argument goes, surrogate mothers, who are usually poor and unsophisticated, will have unequal bargaining power compared to the infertile couple who will be at least well-off, if not rich. This imbalance will lead to contracts that are unconscionable for poor women.[42] Not only will the exchange price be low, but the surrogate will have to make promises of undertaking responsibilities of such magnitude that she will turn into the couple's slave for nine months.[43]

In the most extreme case, some women are on the verge of destitution, and they choose to enter into such an agreement to ensure their bare necessities, i.e. food and shelter.[44] They engage in an activity that they deem as immoral, exploitive and inhuman, because it is their only option. They are so desperate that they will agree to do anything for money. According to this "degradation" argument (which applies to many kinds of contracts in

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39 For example, RADIN (1987: 1932) believes that only "reasonable out-of-pocket expenses" should be allowed without discussing the unfairness of the undercompensation (see also *id.* 1933). See also TREBILCOCK *et al.* (1994: 696-697) (the payment should not induce women to become surrogate mothers).

40 But see RADIN (1987: 1930-1931) (acting in ways that current gender ideology characterizes as empowering might actually be disempowering), as well as ANDERSON (1993: 182-185).

41 For a powerful attack on the commodification argument, see MCLACHLAN & SWALES (2000) (treating women as child incubators does not preclude treating them respectfully).

42 According to ANDREWS (1995: 2362-2363), there is no evidence of the exploitation of surrogate mothers. See also LASCARIDES (1997: 1235-1236).

43 A related argument has been voiced by many feminist writers, emphasizing that women will be converted into breeding stock against their will. But see ANDREWS (1988: 78) (the anti-surrogacy arguments can potentially turn all women into reproductive vessels without their consent by providing government oversight for women's decisions). This view of women is greatly derogatory for their capacity to enter into a contract (MCELROY 2002: 275-278). For a fair and useful discussion of all kinds of criticism based on the exploitation argument, see WERTHEIMER (1997).

44 It is rather unlikely that these women will be chosen for surrogacy in the first place. If they are so poor and desperate, their health will also be problematic. See ANDERSON (1993: 185).

both the commercial and the non-commercial sphere), some people, when finding themselves in extreme circumstances, are ready to fall into deep levels of degradation as long as they are paid (Radin 1987: 1930). Thus, says the argument, we should not let them do what they would not assent to do if they were not so desperate.[45]

First, I fail to see why we should not accept and enforce a "desperation" agreement. Perhaps the only conceivable solution for people in financial despair is for the government to provide a safety net. If there is a safety net, then prospective surrogate mothers will not fall into such desperate situations in the first place. If there is no government safety net and the law prohibits their "degradation", it is essentially depriving them of the "market safety net", which might appear to some as "dirty" and "repulsive", but is nevertheless the only one available to them. Besides, by what moral authority will the legislators deprive them of food and shelter just so that they can enforce their moral standards?

Second, any argument against the exploitation of women should take into consideration the problem of personal autonomy. If the state cannot offer an alternative to these women and the market for surrogate mothers is not monopolistic,[46] then any restriction on personal autonomy is paternalistic,[47] harmful to women and inconsistent. More specifically, it is logically incompatible with the right to reproductive autonomy, which is principally exemplified in the right to abortion (Charlesworth 1993: 8). This is more so in cases where women make informed, unrestrained decisions believing that they will be better off.

Third, such situations of economic deprivation are most likely marginal. In the majority of cases when the contract seems one-sided, this can be the result of one of two factors: either there is a considerable supply of surrogate mothers and the price of their services is thus devalued in the market for surrogacy or there is a contract failure which reflects a market failure. Let us rephrase this argument using economic terminology: The fact that the parties decide for themselves what will be the benefit and what

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45 See RADIN (1987: 1930, especially n. 278) for the rather indeterminate "potential double bind" argument.

46 This means that the woman who decides to offer her gestational services has many alternative contracting partners (fertility clinics, couples, etc.) so she can choose the best offer. In a monopolistic situation, a woman can appeal to the doctrine of "private necessity".

47 However, according to ANDERSON (1993: 170), "commercial surrogate contracts establish relations of domination over surrogate mothers that are inconsistent with their autonomy and with treating women with respect and consideration". But see WERTHEIMER (1997: 1225-1227).

will be the cost of their future actions does not imply that they will always and necessarily make the right decision. Even though it is widely accepted that the parties know better than anyone else where their interests lie, it is also true that the parties can make mistakes, due to imperfect information and/or uncertainty about the future. There is a chance that at least one of them will make a miscalculation of the cost or the benefit, based on inaccurate information. Another potential and more common problem is the likelihood of a change in circumstances that will overturn the previous calculation of costs and benefits and will create a new situation which is often completely different from the one the parties took as given when constructing their relationship.

All these problems are basically the result of the passage of time, that is a *sine qua non* element in any contract, and of the unavoidable lack of perfect information among market participants. The scarcity of time and money make it virtually impossible for the parties to allocate responsibility for every possible contingency due to uncertainty in a deferred exchange.

Yet another problem, added to those of imperfect information and "unforeseen contingencies", is the opportunistic behaviour of one of the parties, that is also a result of the sequential character of the performance and is pertinent to the problem of unforeseen contingencies due to asymmetric information. Even a contractual relationship that begins as a relation of parties with roughly equal bargaining power can turn into (after performance by one party) an extremely unequal relationship, a bilateral monopoly situation, with one party falling prey to the other. Even in a long-term relationship between two parties, one party's threat of a unilateral violation of the initial contract may induce a renegotiation of the contract.

What does all this mean for the surrogacy nexus? The surrogate mother might be ignorant as to what this procedure entails. It is also possible that she makes a frivolous decision enticed by the generous compensation. She might also change her mind while pregnant if she experiences emotional distress that she could not predict. Some have argued that a woman cannot really know what it is like to give up a child that she has carried for nine months.[48] Even a woman who has already had children is not able to even begin to imagine the pain of separation. According to this view, there is

[48] However, "the evidence simply does not support the assertion that women uniformly identify motherhood with pregnancy" (GARRISON 2000: 914).

no way for the surrogate to give her informed consent (Anderson 1993: 178).[49]

This rather stereotypical (one could even say derogatory against women) argument is repudiated by Posner (1989: 30) and McElroy (2002: 276-277) as sexist and aprioristic. It is also unsubstantiated, since the proponents of the view that women are overwhelmed by their feelings have failed to present supporting research.[50] However, it crudely presents a real issue, that of regretted decisions of contracting parties in general and of gestational carriers in particular.[51] On the other hand, this problem is of heightened importance in traditional surrogacy, where a right to contract rescission could be offered to the surrogate. In the case of gestational services, any such right can lead to an overprotection of the surrogate in comparison with the genetic mother. As Garrison (2000: 915) aptly puts it: "without her ovum, there would be no fetus to gestate".

The parents-to-be could also have second thoughts about the original contract. Since they are initially unaware of the effects that the whole endeavour will have on their personal relationship and their financial situation, it is possible that they might consider rescinding. They could also be experiencing problems in their marriage, which will ultimately lead to a divorce during the surrogate's pregnancy. Most importantly, there is a chance that they will change their mind after learning that their future child will have some kind of disability.

All these are problems that are not unknown to the contracts concluded in an economic market. The existence of market failures does not constitute a reason for abolishing freedom of contract. The same holds true for surrogacy contracts. Any problems in the surrogacy relationship do not justify the prohibition of these kinds of arrangements (McLachlan & Swales 2001).[52]

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49 "[The surrogate mother] never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment." (*In re Baby M*, 109 N.J. 396, 437).

50 See ANDREWS (1988: 79) citing testimony by Joan Einwohner, a psychologist who works with a surrogate mother programme.

51 See generally BRINIG (2000: 73-74) on imperfect information in surrogacy contracts.

52 See also LASCARIDES (1997: 1257-1258) (unconscionability must be determined on a case-by-case basis).

VI. Family law can simulate contract law, which has successfully regulated economic activity for thousands of years.[53] The main difference with family law is that the basic goal of contract law is to justify the wishes of the parties. This is also a legitimate goal for the law of surrogacy contracts. However, the primary goal of the regulation of surrogacy agreements should be the protection of the best interests of the child. For the above reasons, I believe that:

- gestational surrogacy contracts should be enforced by the courts with the exception of cases where the standard formation of contracts excuses apply (incompetence, coercion, duress, failure to disclose, etc.).
- the parents should not have the right to rescind the contract under any circumstances; regardless of the health of their baby or the status of their marital relationship, the child is theirs (see generally Shiffrin 1999: 145-148);[54] the only exception could be in the case where the gestational mother wishes to keep the child, either altruistically or because the intentional parents are willing to help her economically.[55]
- the surrogate should have the right to obtain an abortion and the duty to demonstrate reasonable care; of course, in the case of an abortion or of miscarriage due to irresponsible, reckless behaviour, she should be liable for restitution damages;
- after the successful delivery of a healthy baby, the surrogate who has had second thoughts about the contract, should not have the choice of damages; the contract should be "enforced" by specific performance. Even though compensation *in natura* is rather the exception in Common and Civil contract law, in the case of surrogacy any other form of compensation would be unrealistic.[56] There is no way for a

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53 For a similar argument, see BUSH (1999) (law & economics can be a useful tool to guide feminist policy so as to avoid outcomes that ultimately harm the people feminists are trying to empower). For a more critical approach to law & economics (from a feminist perspective), see BELCHER (2000) (identifying masculine traits but also feminizing developments).

54 But see also RADIN (1987: 1934-1935) (if the parents change their mind, they should not be forced to keep and raise a child they do not want; but they bear the responsibility of providing for its future).

55 This certainly looks ugly for the child. However, in this unfortunate situation when the intentional parents do not want the baby, it is better for it to stay with the gestational mother for as long as she is willing to keep it. But this is likely to be an extreme case. See BLOCK (1999: 48).

56 See especially SHALEV (1989: 139-140) and her sculptor simile in particular. Even RADIN (1987: 1934, n.292) believes that there is essentially a binary choice concerning commercial surrogacy: either banning it or granting specific performance. See also EPSTEIN (1995: 2336-2338) (damages are not an adequate remedy; specific performance is needed). LASCARIDES (1997: 1252-1253) believes that reliance damages are preferable since they can be easily calculated.

surrogate mother to be able to pay expectation damages to the intentional parents.[57] In this case, one should also take the interests of the child into consideration.[58] I fail to see why a child would prefer a (most probably) poor surrogate mother to his/her genetic parents who, in the great majority of cases, are well off!
- the parties can also be allowed to agree that the surrogate will follow a more healthy way of life than necessary in exchange for a premium.[59]
- since the surrogate is not the genetic mother, she quite clearly waives any and all rights to the newborn (Garrison 2000: 913-917) and of course should not be entitled to visitation with the child.[60]

These principles are not as harsh as they seem (Anderson 1993: 175-176), since they discourage frivolous decisions by women and ensure that parents will not be the victims of opportunism and extortion. Additionally, if there is no compensation in case of breach, the surrogate fee will be greatly discounted in order to incorporate the risk of opportunistic or irresponsible behaviour.[61] The surrogates will not be able to signal their credibility and the couples will resort to the services of women who have already successfully rendered their services. Thus, a barrier to entry will be created for younger first-timers.

Safeguarding the best interests of the child is the basic reason why a rescission of the contract or an opportunistic or altruistic attempt to modify the contract should be avoided. Starting from the moment of insemination, a new entity is created: a child with autonomous rights and interests. Any decision by the parties that has potential negative effects (externalities) on the child should not be tolerated by the law.

Finally, for a transitory period, one can allow some regulation in contract terms such as:

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57 The only case I can imagine is that of an altruistic surrogacy where a rich woman offers to carry her sister's baby and then has second thoughts. However, even in this highly unlikely situation, the specific performance rule will be superseded by the dynamics of the Coase theorem (Coase 1960) (when transaction costs are low, resources are allocated efficiently regardless of the legal assignment of property rights).

58 See *e.g.* SHIFFRIN (1999: 147) (gestational mothers are unlikely to be adequately prepared to assume primary custody or support obligations).

59 For the fine line between such extra-care agreement and a slave contract, see the useful distinction by MCELROY (2002: 276) (a slave contract transfers all moral and legal jurisdiction over one's own body). See also ARNESON (1992: 161-162) and TREBILCOCK (1995: 366).

60 See, however, TREBILCOCK *et al.* (1994: 692-697) (the birth mother should have an absolute right to opt-out), as well as FIELD (1988).

61 According to POSNER (1992: 423), in the long run surrogate mothers will lose from a rule which allows them to repudiate their contracts.

- setting a minimum age for the surrogate mother (to avoid frivolous decisions),
- requiring the surrogate to already have children (thus having the necessary information for an informed decision and at the same time minimizing the cost of losing the child she is carrying),
- monitoring of surrogacy agencies (to avoid unconscionable contracts due to asymmetric information and monopoly),
- establishing a speedy court procedure and requiring counselling (to validate the contract and help the contracting parties to fully realize the consequences of their decisions), etc.

All these regulations will of course drive the price of the surrogate fee up, since they will essentially lead to a drastic decrease in supply. After the transitory period, which should be no longer than five years, the accumulated experience (in which I include the institutional experience) will help the contracting parties to acquire all the necessary information before entering into such high-risk contracts.

In concluding, I should warn about the dangers of the prohibition of surrogacy or of the non-enforcement of surrogacy contracts in the European Union. In the case of non-enforcement of contracts, the law would arbitrarily discriminate in favour of couples whose friends or relatives are willing to undergo the procedure. The prohibition is essentially applicable only to middle-class couples who wish to have a child through surrogacy. Rich couples can always go to the United States or elsewhere and poor couples do not lose an option they have not had in the first place (even though one could argue that social insurance agencies should offer this option to poor couples). Middle-class couples will have two options: either to travel to one of the countries which offer these services at lower prices and most probably under sub-optimal conditions – or to turn to the black market (McEwen 1999).[62]

VII. I have attempted to make a case for the enforcement of gestational surrogacy agreements, using mainly arguments originating from the economic analysis of contract law, whose basic goal is to enforce the wishes

[62] It is absolutely certain that a black market will be created almost instantaneously and the parties (especially the surrogate mothers who are supposed to be protected) will fall prey to opportunism, mafias, etc. (BRINIG 2000: 76). According to ANDERSON (1993: 176-179), the state cannot regulate surrogacy efficiently since the surrogacy lobby will influence legislation. However, the absolute prohibition she advocates will, by definition, limit a surrogate's alternatives and lead to black markets where surrogates are even more underprotected!

of the parties. According to Jennifer Burr (2000: 116), "the fact that surrogacy practices continue irrespective of the social stigma and legal and ethical discourse that operates to further stigmatize and pathologize the surrogate mother, is in itself of political significance." There is no way and there is no legitimate reason to prohibit an exchange, which makes both parties better off. This is not only inefficient, but also authoritarian. The parties will find a way to circumvent the law which will be discredited as inapplicable, not to mention the fact that this inapplicability most of the time harms the parties with less bargaining power.

It is interesting to note that the economic approach can be fully compatible with a Rawlsian perspective (Rawls 1971). There is no doubt that a woman behind a veil of ignorance would decide that surrogacy should be available to her, either as a genetic mother (because there is always the possibility that she will be infertile) or as a gestational carrier (because there is always the case that she will be financially deprived or altruistic).

My approach was also informed by the primacy of the child's best interests. In surrogacy, it is obvious that if there is no contract, there is no child (Posner 1989: 29). The protection of a child's rights presupposes the child's existence[63] and this is only possible if we permit and enforce surrogacy contracts.

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[63] See, however, ANDERSON (1993: 174-175) advocating a rather hazy principle for the "respect of genetic ties". I find it very difficult to accommodate this principle with the statement that "[t]he most fundamental obligation of parents to their children is to love them" (*id.* 170).

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