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ORIGINAL ARTICLE

From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece

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Abstract This paper is a critical analysis of the regulation of surrogate motherhood in Greece; I will discuss the way that a consensus reached in the legislative committee among liberal and conservative jurists on the matter of compensation of surrogate mothers was undermined by intra-party populism in the Greek parliament which banned it to avoid commodification; inevitably the law fell into disuse leading to a new law which allowed government-defined compensation, not the one agreed by the parties; the regulation of surrogate motherhood in Greece is a typical example of the deleterious effects of the combination of legal formalism and legal moralism in contemporary Greece.

Keywords Surrogate motherhood · Commodification · Legal formalism · Legal moralism · Legal paternalism · Economics of contracts · Exploitation · Consent · Compensation

JEL Classification I11 · J13 · K12 · K32

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1 Introduction

This is a story of law-making in Greece. It is the story of the regulation of surrogate motherhood in Greece in 2002. This regulation was part of a major reform of the Family law book of the Greek Civil Code, which was first put into effect in 1946. This was the second most important reform in Greek family law after the one which took place in 1983, enforcing equality of the sexes. In this paper I will be focusing more particularly on the regulation of surrogate motherhood contracts.

This story is interesting because it is illustrative of three, rather dreadful tendencies in Greek lawmaking and legal interpretation: Legal Paternalism, Legal Moralism and Legal Formalism. These tendencies are also representative of the mode of lawmaking in Civil Law Countries in general and in the countries of Southern Europe in particular.

I am going to narrate the story from a law and economics perspective to illustrate how more reasonable (and of course efficient) the regulation could have been if the Greek legislator took into consideration some fundamental economic concepts, such as opportunity cost or the Marshall/Posner efficiency criterion.

2 Gestational surrogacy

In this paper, with "surrogacy" I mean "gestational (full) surrogacy", i.e. the form of artificial insemination which applies the method of *In Vitro Fertilization* (IVF),[1] whereby a doctor implants the fertilized (by her partner's sperm) eggs of a woman into the surrogate's uterus. The surrogate 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, unexplained habitual abortions, etc.[2] Surrogate gestational pregnancies after IVF have been reported since 1985.

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).

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: The eggs of the intended mother (ova) are fertilized

[1] 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.

[2] Posner (1992: 420, n.23) defines infertility in the broad sense, as the incapacity for producing 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.*).

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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 of the offspring 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 tens of thousands of dollars or euros since there is a significant miscarriage rate.

3 The enforcement of surrogacy contracts

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.[3] This situation is creating a major problem in federal 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.

It is obvious that to be a surrogate mother is not an easy thing (Field 1988). The surrogate mother has to spend more than nine months of her life dealing with the consequences of helping a couple have a child that they could not otherwise have.[4] Even in cases of a genuine altruistic surrogacy, a number of issues will definitely arise that are related to compensation of costs incurred by the surrogate mother.

In an earlier paper on surrogate motherhood contracts (Hatzis 2003)[5] we defended the right of the couples to have a child with the help of a surrogate mother (which is a part of a right to procreative liberty) and the right of a woman to offer her services (her body if you wish) to a couple as a surrogate mother. In addition we offered an economic justification for the enforcement of surrogate motherhood contracts.

Some clarifications are necessary in order to prevent some common misconceptions. Economic analysis of law is not an attempt to monetize 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

[3]See McEwen (1999: 281–286). The most liberal regimes are those of the United Kingdom, Israel and Greece (see Kounougeri-Manoledaki 2002).

[4]See e.g. Goldfarb et al. (2000), Raziel et al. (2000), Giacalone et al. (2001), etc.

[5]The arguments in this section are substantially based on this earlier paper.

effects on individuals' well-being" (Kaplow and Shavell 2002: 465).[6] 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.[7]

Economic analysis of contract law in particular has offered a theory on which promises should be enforced. 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 demonstrably are not acting rationally or when their actions have negative effects on third parties.[8]

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 chance to do so[9] and the surrogate mother wishes to obtain a sum of money, which she apparently needs for herself or for her own family.

The interests of the child do not represent such a significant factor in the case of gestational surrogacy, since there is no confusion as to the parental rights or the genetic link,[10] not forgetting that the child owes its very existence to this contract (Harris 2000). In addition, according to a recent major study, "a gestational carrier would provide potential environmental benefits for the infant" (Serafini 2001).[11] 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 esp. Shiffrin 1999). The only way to ensure children's welfare (which is more important than contract 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.

[6] "[S]ocial welfare is postulated to be an increasing function of individuals' well-being and to depend on no other factors" (Kaplow and Shavell 2002: 24). See also Epstein (1995).

[7] See esp. the research by van den Akker (2000, 2001) for the importance of the genetic link to prospective parents.

[8] Only the interests of third parties which are already protected under law. Thus, the negative externalities to children awaiting adoption (Radin 1987: 1931; Posner 1989: 24) should not be considered a valid argument for the prohibition of surrogacy.

[9] 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.

[10] See esp. 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).

[11] 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".

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. 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). 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 (Mill 1859: 13).[12] Thus, I am not going to elaborate more on why conventional morality should not limit the liberty of people to engage in consensual activities[13] when these cannot harm others. In this case, it is also questionable whether conventional morality comes in contrast with surrogacy, since there is no indication of a popular opposition or generalized hostility to surrogacy.

The most important moral argument against commercial surrogacy is the commodification argument.[14] 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 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 1993: 168–189). According to Anderson (1993: 189), "[w]hen 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 (see generally Brazier 1999). 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".

In the context of the gestational agreement, the embryo belongs to its parents. We cannot speak of baby-selling, since the surrogate cannot sell something she does not have: i.e., parental rights to the newborn. The surrogate is essentially selling her labor, 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 laborers, maids, career army members, etc (Silbaugh 1997). Furthermore, one cannot equalize surrogacy with slavery, since there is no indication of the "alienation of the will" that is characteristic in slavery contracts (McElroy 2002: 276). 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

[12] For the debate, see Devlin (1965) and Hart (1963).

[13] See esp. McLachlan and Swales (2001).

[14] For a comprehensive treatment of commodification, see Radin (1996, esp. 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).

enforceable." 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 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 traveling expenses. 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 altruistic),[15] the actual difference with the market value of surrogacy could be minimal or zero.

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.[16] 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.

In the most extreme case, some women are supposedly on the verge of destitution, and they choose to enter into such an agreement to ensure their bare necessities, i.e. food and shelter.[17] 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 both the commercial and the noncommercial 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.

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

[15]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).

[16]According to Andrews (1995: 2362–2363), there is no evidence of exploitation of surrogate mothers. See also Lascarides (1997: 1235–1236).

[17]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).

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 they can enforce their moral standards?

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: 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 carried for nine months. 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 no way for the surrogate to give her informed consent (Anderson 1993: 178).[18]

In the case of non-enforcement of contracts, the law would arbitrarily discriminate in favor 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 didn't have 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).

I made 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 of the parties. 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 times harms the parties with less bargaining power.

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 and this is only possible if we permit and enforce surrogacy contracts.

[18] "[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).

Table 1 Differences between LM and LP

Legal paternalism	Legal moralism
Sometimes it does not hurt moral autonomy (soft paternalism)	It always hurts moral autonomy
Its motive is often altruistic	The motive is the disdain towards some acts
Major goal is the avoidance of harm (protecting the object of LP)	The harm or the benefit to the object of LM is irrelevant
"I want to prohibit surrogacy because the surrogate mother will change her mind after the birth"	"I want to prohibit surrogacy because it is immoral/against the conventional morality"

4 Some definitions

Before we proceed some definitions of three terms that I am going to use are necessary.

The first is legal paternalism.[19] Legal paternalism is the view that it is permissible for the state to legislate against self-regarding actions when necessary to prevent individuals from inflicting physical or severe emotional harm on themselves. Soft paternalism is the view that the state should prohibit what an individual would not have done herself if she knew the consequences beforehand. Hard paternalism is the view that the state should prohibit what is bad for an individual even if she would not change her mind after the act.

The second term is legal moralism.[20] Legal moralism is the view that the law can legitimately be used to prohibit behaviors that conflict with society's collective moral judgments even when those behaviors do not result in physical or psychological harm to others. According to this view, a person's freedom can legitimately be restricted simply because it conflicts with society's collective morality; thus, legal moralism implies that it is permissible for the state to use its coercive power to enforce society's collective morality.

We see the differences between LM and LP in Table 1.

The third term is legal formalism. Formalism has different meanings in different contexts and disciplines. Legal formalism is the idea that the law has an answer to every question. That law is a closed system where there is a solution to every legal problem, even to problems that are not regulated by law. Legal formalism in the US is often affiliated with Christopher Columbus Langdell, the first Dean of Harvard Law School. And there are some leading proponents of legal formalism today like Ronald Dworkin. However, the typical example should be Greek legal science which constitutes, as we will see, a prime example of legal formalism. Legal formalism should not be confused with legal positivism which is something not necessarily bad. It is the view that law should not be influenced by metaphysics, conventional morality or politics (Bix 2006).

[19] From the rich literature on Paternalism, see Sartorius (1983).

[20] For the problem of legal moralism see the famous Hart–Devlin debate: Devlin (1965) and Hart (1963). See also Mill (1859).

5 The regulation of surrogacy contracts in Greece

Greece is the typical country where legal formalism is prevalent in legal theory and practice. When legal formalism meets legal moralism, as it often is the case, this is a deadly combination. The best recent example of that would be the regulation of surrogacy.

On November 22, 2000 the Greek minister of Justice Mihail Stathopoulos appointed a Committee (working group) to study the effects of biotechnology and genetics to civil and particularly family law. The committee had to deal with issues like therapeutic and reproductive cloning, surrogate motherhood, *post mortem* insemination, etc.

Mihail Stathopoulos was not a politician; he was a professor at the University of Athens Law School, former Rector of the University, the leading expert on Greek civil law and a man with progressive ideas. In Greek politics he is more well-known as the minister who dared to remove the information on religious beliefs from Greek ID cards.

The committee appointed by Stathopoulos had nine members, all professors of civil law.[21] Even the two appointed assistants were also lawyers and civil law scholars. Not a single member of the committee was a biologist, a geneticist, a physician, a philosopher, an economist, a sociologist, or even a constitutional law scholar!

Of course some of these scholars were leading scholars in Greek legal theory, especially the appointed President of the Committee, the late George Koumantos, a major figure in post-war Greek legal theory and a prominent liberal intellectual. George Koumantos was also the President of the National Bioethics Commission.[22]

However, the appointment of the committee itself was a clear manifestation of legal formalism: To regulate social life the legal conceptual system is more than enough, we can accommodate life in it, we don't have to study life itself to find out what kind of regulation is appropriate for our goals. This practically means that despite the fact that the discussion among the members of the committee dealt extensively with all the problems related to the legal doctrines and the legal concepts involved, the discussion of the social and economic impact of the various proposals were minimal and was not supported by any data or references to social science literature.[23] Despite the fact that most of the members of the committee did their research and tried their best to reconcile any differences, most of their arguments had to do with how these issues had been regulated by other European legal systems (Agallopoulou and Koutsouradis 2004).

[21] Almost all the members of the committee had a special interest in Family Law. Most of them teach regularly and they have published extensively on Family Law. The committee included all the major figures working on the area.

[22] Under Koumantos leadership the Greek "National Bioethics Commission" reached some very progressive, liberal and reproductive technology-friendly decisions.

[23] See e.g. Chliaoutakis et al. (2002) and Vayena et al. (2002).

The committee convened 17 times during a period of 14 months and the discussion that took place was quite interesting. In the second meeting, some of the members suggested that a good idea could be to had a biologist or geneticist attend their sessions, but the president George Koumantos dismissed it as redundant and unnecessary. They then decided to invite as special counsels in some special sessions:

- George Maniatis, a university professor of genetics and associate president of the National Bioethics Commission for two sessions, and
- Vassilis Tarlatzis, a university professor of Gynecology for only one session

During these sessions, the members of the committee asked them to clarify some technical issues. However, most of their suggestions were rejected, even the ones concerning the appropriate terms that should be used by the law!

A characteristic example of the discussion that took place was the second session which was occupied with the analysis of the legal nature of the genetic material (sperm, egg, fertilized egg). The question was if it should be considered a thing, a normal good, an element of personhood or whether a new legal category should be devised. However there was no reference to any philosophical theory, not even to the more than extensive bioethics literature.

Nevertheless the draft law prepared by the particular committee was quite progressive if we compare it with similar legislation in Europe and North America. Surrogacy was not permitted in Germany, Austria and Switzerland and it was permitted but with many restrictions in France, Denmark and Sweden. The more liberal regimes were UK, Canada, Israel, Spain, Belgium and Netherlands, where surrogacy contracts are permitted but again with many limitations. In the USA surrogacy is legal in most states, and there are laws protecting the contractual relationships. The most liberal states are California and Illinois. There are two famous US cases, one in New Jersey (1988) where the court annulled a traditional surrogacy contract (the Baby M case) and the other in California (*Johnson v. Calvert*, 1993) where the court enforced a contract of gestational surrogacy.

The problem of how the law should treat surrogacy contracts came up in the third session. The members were immediately divided. Five of them believed that the law should not prohibit the financial benefit of the surrogate mother and four that it should clearly prohibit it.

The stance of the individual members on the issue was quite shaky. One of the members wrote the first draft of the article prohibiting financial benefit and punishing the women and the couple (in case of financial benefit) for 6 months in prison and a fine of up to $3,000. However, the same member voted against the prohibition in the final vote. This was not the result of confusion or uncertainty but of a great emphasis on the importance of doctrinal integrity and consistency.

In the ninth session the members decided that a prohibition of the financial benefit should not be included in the article. This was a wise decision since it satisfied both camps. According to their decision, the courts will most probably nullify contracts with financial benefit in them based on the bastion of legal

moralism in the Greek Civil Code, Article 178: A legal act that is against conventional morality is null.

They also decided to include (in the introductory report of the law) the statement that these contracts are of course immoral. But they didn't. The rationale was obvious... they passed the ball to the courts: The courts would have the discretionary power to decide if these contracts are immoral or not. Apparently the first decisions would cancel the financial benefit clauses but then, if social norms changed, the courts could interpret the law in an opposite way, allowing financial benefit or setting some limits but not absolutely prohibiting it.

This was actually a very good deal. The committee managed, despite the moralistic tendencies of some of its members, to prepare a quite progressive law and especially a very progressive article on surrogacy where even traditional surrogacy[24] could be accommodated if there were no second thoughts by the surrogate mother.

The committee submitted the draft law to the Ministry of Justice and it was introduced to Parliament in early November of 2002. It then became a law at the end of 2002, right before Christmas, 2 years after the initiative of Prof. Stathopoulos. This was enacted as Law 3089/2002.

Unfortunately Stathopoulos was no longer minister of justice. He was succeeded by Philipos Petsalnikos who tried to defend the most progressive aspects of the law but most of the times unsuccessfully since he didn't have the authority as a legal scholar or the courage to defend unpopular decisions (as Stathopoulos had).

When the law was introduced to the Parliamentary Committee on "Public Administration, Public Order and Justice" the first thing the members of the committee did was to change article 1458:

Article 1458. The transfer of fertilized ova to another woman (the ova should not be hers) and pregnancy by her is allowed by a court authorization issued before the transfer, given that there is a written and, without any financial benefit, agreement between the involved parties, meaning the persons wishing to have a child and the surrogate mother and in case that the latter is married of her spouse, as well. The court authorization is issued following an application of the woman who wants to have a child, provided that evidence is adduced not only in regard with the fact that she is medically unable to conceive but also with the fact that the surrogate mother is in good health and is able to conceive.

The members of the Parliament made the underlined additions to the article prepared by the committee.

[24] Where not only the womb but also the egg was offered by the surrogate mother who in that case she is not only a surrogate but also the biological mother.

As we can see, they manifestly prohibited traditional surrogacy, they prohibited financial benefit and they also added a clause concerning the health of the surrogate mother.

The members of all parties from ultra-right wingers to the communist party agreed on that. Many members of the parliament from different parties supported the thesis that surrogacy should be prohibited altogether. E.g. Alexandros Lykourezos, a famous Greek trial litigator and the member of the conservative party responsible for presenting the conservative party's thesis on the issue stated:

> *I think it would be a major mistake if we accepted and legalized gestational surrogacy. We will have many serious problems. If someone wants to apply this method they can always go to the UK, Denmark or the United States. But we should not create the legal framework and say to them "you're welcome to create this baby-making machine" and to commercialize the wombs of many women.*

Compare this with a statement of the then vice-president of Parliament and member of the socialist party Konstantinos Geitonas:

> *Can't we see that we deviate from the constitutionally protected human dignity when, in this case, we make the surrogate mother a baby-making machine, a womb that gives birth?? [. . .] There is no doubt that in practice the woman's body will be commercialized.*[25]

He even asked for the courts to request "a certificate of social research" as he called it, a certificate signed by social workers and psychologists certifying her suitability to become a surrogate mother.

The law passed with the prohibition of financial benefit and the result was that the interested parties had to break a law that clearly was inefficient, unreasonable and unjust.[26]

6 Law in books and law in action

I found all the decisions published by the district court of Athens from the promulgation of the law in early 2003 to the summer of 2007 (with the exception of 2006 because the decisions were unavailable due to book-binding procedures). The results are quite impressive but not unexpected.

From the 32 decisions in only five the surrogate mother was a close relative (one mother, three sisters, one sister in law). In all other cases the surrogate mother was "the best friend", often from Eastern Europe (21 out of 26) and only in five cases a Greek woman (with an age difference from her "best friend" extending from 10 to 20 years). In one case the request by the couple

[25] For similar views in American legal theory see Radin (1987, 1996).

[26] See Hatzis (2006) for arguments.

was rejected because the court decided that the partners did not try hard enough to have their child "the normal way" (Hatzis 2008).

According to the estimates, there are many more cases of surrogacy in Greece. Apparently many procedures take place illegally to avoid all the hassles and the expenses of the court procedure. But even from these cases it is more than obvious that surrogacy is not an altruistic deed and that there is financial benefit in the form of payments under the table.

7 The problem of compensation

During the discussion at the working group some of the members stated that the woman should be compensated for any expenses incurred for the pregnancy. In this we should include not only the cost of the doctors, the procedure and the hospital (which will be paid by the couple), but also all other related expenses (e.g. exams, drugs, vitamins, etc.) as well as expenses for pregnancy clothing, special diet and travel arrangements (if necessary).

What about a reimbursement for her visits to doctors (gynecologists, psychiatrists) or other specialists after the birth?

What about compensation for the risk of death which is approximately one in 10,000 in most western societies? Harvard Law Professor Kip Viscusi found that in the U.S., society pays people an additional $700 a year, on average, to take the same amount of risk in hazardous occupations.[27] Should these $700 (or their equivalent in Euros) be considered compensation? Most pregnancies are uneventful; however, serious complications may occur such as pre-eclampsia, high blood pressure, ectopic pregnancy, diabetes, thrombosis, miscarriage and hemorrhage. It should also be noted that it is possible to compromise your own fertility as a result of a pregnancy complication such as ectopic pregnancy or miscarriage. Should this risk be compensated?

What about the cost of the pregnant woman's restricted way of life during and after pregnancy, the problems in her sex life (if any), the social consequences (including her problematic position in the marriage market), the transformation of her body and the other negative effects in her personal life? One could say that these costs are difficult or immoral to monetize (Anderson 1993, 2000). If we accept this view, then what we are essentially saying is that these costs should not be compensated.

And finally, what about the lost (foregone) income because of pregnancy and the post-partum period and the lost income from any related deterioration of her health or the change of her appearance?

Even if you took for granted that commercialization is a bad thing but compensation of costs incurred is not, from which Euro exactly does commercialization begin?

[27] The cost to society adds up to $7 million for each life lost, according to Prof. Viscusi's calculation. See in general Viscusi (2008).

An economic approach to the compensation of surrogate mothers could be most useful in these circumstances. For a surrogate mother the compensation should at least equal her opportunity cost. Otherwise it would be unfair for her and she probably won't offer herself in the first place.

In less than two years the problem of compensation had become more than obvious so with the new law (Law 3305/2005) the Greek legislator emphasized again that financial benefit is prohibited but it does not consider as financial benefit (a) the compensation for the costs of artificial insemination, pregnancy, and the post partum period as well as (b) the compensation for her lost salaries because of the surrogacy.

Since this could essentially lead to financial benefit the law instituted an independent authority to define the amount of compensation. At the same time, it criminalized financial benefit setting a sentence of at least 2 years in prison and at least a €2,000 fine for everyone involved.

8 Concluding remarks

The regulation of surrogate motherhood in Greece is an illustrative case of legal paternalism where the legislator prohibits the parties to conclude a contract that they think would be beneficial to everyone involved. It supposed to be a case of soft paternalism because at least the Greek legislator allows the parties to proceed with the surrogacy but with many restrictions—the most important of them being the prohibition of financial benefit which results in discrimination against couples with no altruistic relatives or friends available and unfairness against surrogate mothers because it doesn't allow them to decide for themselves about the cost of their decision.

But this paternalism hides the legal moralism that lurks behind. Almost all legal commentators agree that financial benefit is immoral, it is against conventional morality and this is why it should be prohibited. With the exception of a young constitutional law scholar (Vidalis 2007), there isn't a single legal scholar in Greece criticizing this prohibition.

Even the scholars of the working group who thought that financial benefit should not be prohibited did not criticize the change of the article by the parliament. Most scholars discuss the new law without any reference to the related literature in bioethics, sociology, economics or even legal philosophy.

In one private conversation I had with one of them, she expressed her disappointment over the parliament's decision. I then informed her that I am going to write a newspaper article criticizing it. She was surprised: "But it's the law now!" That's legal formalism.

Stathopoulos accepted this result, as we can see in this statement found in a preface to the proceedings of the Working Group (Agallopoulou and Koutsouradis 2004: 8):

> *concerning the issue of permitting contracts on assisted reproduction (e.g. surrogate motherhood), contracts* ***that cannot in practice be intercepted****,*

the new law takes ***a realistic stance****: it recognizes them but does not allow commercialization since financial benefit is not allowed. [emphasis is mine]*

This statement is characteristic of the paradox that the combination of legal paternalism with legal formalism creates in Greek legal science. In that sense a law and economics analysis could offer not only more efficiency but it can also be liberating.[28]

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[28] See Kaplow and Shavell (2002), Trebilcock (1993) and particularly Bush (1999).

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