
Surrogate Motherhood: An Argument for Regulation and a Blueprint for Legislation in Kansas

Elizabeth Seale Cateforis

[G]iven the current and continuing uncertainty and non-uniformity of the legal aspects of surrogate motherhood, states . . . should consider regulation as a preferred alternative to prohibition.

I. Introduction

There are several methods of non-coital reproduction available to infertile couples. Each method raises its own unique moral, legal, and ethical questions and requires separate evaluation. This article focuses on surrogate motherhood: an arrangement involving the intended parents,¹ a couple including an infertile woman, and the "surrogate mother,"² who is artificially inseminated with sperm from the male of the intended parents.³

In spite of the substantial amount of academic and legislative debate concerning the use of non-coital reproductive technologies⁴ in general, and of surrogate motherhood specifically, the discussion has reached neither a consensus nor a satisfactory resolution to the complex moral, legal, and social issues raised by these technologies. While debate continues, the number of infertile couples in some age groups is increasing, resulting in wider use of non-coital reproduction.⁵ This article contends that given the current and continuing uncertainty and non-uniformity of the legal aspects of surrogate motherhood, states such as Kansas which have not legislated or produced case law in this area should consider regulation as a preferred alternative to prohibition.

Because surrogacy can be a viable alternative to adoption and other reproductive alternatives, states should adopt legislation permitting surrogacy. Overall the arrangement can be less costly, both in monetary and temporal terms.⁶ Unlike adoption, surrogacy also allows the infertile couple to have a child who is genetically linked to the husband. To some couples, this link is very important.

No single legislative position can possibly accommodate all the competing views or solve the moral dilemmas. However, prohibition does not make the problem of surrogacy disappear. In the absence of clear guidelines and in the face of prohibition, surrogacy could go "underground." If surrogacy did flourish as a criminal activity, money could become the focal point of the transaction. The risk for abuse and exploitation of women and the commodification of babies, the two greatest risks of surrogate motherhood, could become realities.

As with most moral choices, there is not one right choice. It is the state's obligation to provide guidance and protection, both before the arrangement is finalized and afterwards; however, the state should not make the choice for individuals. Ultimately, there are persons with different ideals and concepts of morality who must be allowed to make a fully informed choice and take responsibility for their actions.⁷

Elizabeth Seale Cateforis is a 1994 graduate of the University of Kansas School of Law in Lawrence, Kansas.

II. Surrogate Motherhood in Kansas Today

No case law exists in Kansas, nor has there been any legislative activity with respect to surrogate motherhood. The Attorney General issued an opinion on the establishment of a corporation which would operate a surrogate motherhood clinic,⁸ but the opinion is over ten years old. The Attorney General took the position that these arrangements constitute baby-selling and would be void as a matter of public policy.⁹ The Attorney General stated, "The major legal impediment to the commercial practice outlined above is the long-standing legal principal and public policy that children are not chattel . . ." ¹⁰ Because no further action has been taken on surrogate motherhood, the status of the opinion is not entirely clear. Presumably, if a surrogate contract were challenged in the Kansas courts, the judge could use this opinion to justify a refusal to enforce the terms of the contract.

Kansas does, however, have an operating surrogacy clinic.¹¹ The activity there should spur the legislature to act on this issue. Apparently none of the births arranged by the clinic have resulted in litigation in Kansas. Perhaps, as a result, the Kansas Legislature will be able to consider the problem out of the lime light.

Kansas should adopt legislation that attempts to balance concern for the surrogate mother with concern for the infertile couple. The purpose of the legislation should be to ensure that, to the extent possible, problems are solved on the front end. The legislation should establish a pre-contractual procedure in which couples seeking a surrogate and potential surrogate mothers are psychologically and physically evaluated. A home study of both couples and potential surrogate mothers might be appropriate. The contract that is eventually used should provide for all medical expenses and life insurance to be paid by the couple and should have terms covering termination of the pregnancy. The contract should provide a "grace period" after the child's birth during which time the surrogate mother could decide to keep the child but share custody with the biological father. Once the surrogate surrenders the child and relinquishes her parental rights, the law should establish a presumption that the wife of the intended couple is the mother of the child. The law should establish a fee cap, but not prohibit compensation altogether.

III. The Surrogate Motherhood Arrangement

Of all the current means of non-coital reproduction, surrogacy involves the least technologically complex process. The husband of the infertile couple provides his sperm for the artificial insemination of a surrogate mother. This uncomplicated procedure is perhaps the simplest part of the surrogacy arrangement. This section describes a "basic" surrogate arrangement¹² and sets the stage for subsequent discussion of judicial and legislative action.

Currently, most surrogacies are arranged through intermediaries, either attorneys or professionals in one of the numerous clinics around the country.¹³ Some surrogate arrangements have

been privately made using classified advertisements to seek the surrogate mother.¹⁴ Typically, an infertile couple seeks a surrogate mother,¹⁵ and the potential surrogate mother seeks to be matched with an infertile couple.¹⁶ Some infertile women actively recruit potential surrogate mothers, but given the amount of publicity the procedure receives, many women have come forward as volunteers after learning about surrogacy.

Most clinics require prospective surrogate mothers to undergo a psychological screening to determine their mental fitness for the undertaking.¹⁷ The thoroughness and strenuousness of the examination vary depending on who is performing the screening.¹⁸ Depending on who arranges the surrogacy, the intended parents and the surrogate mother may meet or remain anonymous.¹⁹

The contract generally provides a fee for the surrogate mother, usually \$10,000,²⁰ insurance coverage, payment of legal fees for independent counsel, and payment of medical expenses.²¹ Some contracts contain behavioral restrictions on the surrogate mother. The surrogate mother generally does not receive the payment until after the completion of the adoption by the wife of the couple, with the funds held in escrow or trust until that time.²² If the surrogate mother decides to abort the fetus, if the child is stillborn, or the surrogate mother miscarries, the intended parents will either reduce or withhold the fee.

Surrogate arrangements do not always involve a fee. Noel Keane, one of the first attorneys to arrange surrogacies, specifically informed all parties involved that the contract might be unenforceable.²³ To provide a measure of security, Keane's first surrogacy arrangements were made without provision of a fee.²⁴

To opponents, and even some who support surrogacy, the fee payment over and above the expenses of pregnancy and birth is one of the most troublesome aspects of surrogate motherhood. Even if one believes that the basic process is not morally untenable, that belief does not automatically give rise to acceptance of the propriety of a fee. For many persons in the judiciary, legislatures, and academic circles, the link between large sums of money and a baby is very close to, if not the same as, baby-selling, a practice that is universally condemned, both legally and morally.²⁵ However, for surrogacy to remain a viable reproductive alternative, some fee must be paid, although lawmakers could set a payment cap.

As of the late 1980s, the number of surrogate arrangements was not overwhelmingly large, only about 1,000.²⁶ Surprisingly few have resulted in litigation,²⁷ although those that have wound up in court have captured the media's attention. Certainly, lack of litigation does not mean that those uncontested contracts were successful or without incident, but it does mean that the parties reached some non-judicial resolution.

IV. National Attention

Many commentators begin their discussions of surrogate

motherhood with reference to the Biblical stories of Sarah, Rachel, and Leah, who had their handmaids bear their husbands' children.²⁸ These stories are used in part to illustrate socio-economic disparities between surrogate mothers and intended parents and in part to show that surrogacy is not a "new" idea, but that its commercialization is. Biblical stories are false analogies when considering surrogate motherhood in the late twentieth century. It almost goes without saying that we do not live in a society that resembles the Old Testament era. The proper starting point is in late 1970s America. The history of modern surrogacy may be short, but it has been emotionally and intellectually charged since the beginning. As noted above, the number of infertile couples continues to increase. In over half of these couples, it is the woman who is infertile.²⁹ Add to the equation the medical community's research and the social norm of having children, and the potential power of new reproductive technologies is unleashed.

This section contains a discussion of two surrogate mothers and an attorney who brought surrogacy to the nation's attention. Their stories are fully illustrative of the problems of surrogate motherhood and provide the basis for many of the criticisms that have been leveled at the practice. Lawmakers will have to consider these criticisms in any legislation drafted.

Whether or not she was indeed the "first" surrogate mother, Elizabeth Kane considers herself the "first legal surrogate mother."³⁰ When Kane became interested in being a surrogate mother, she was married with children of her own.³¹ However, she was acutely aware of and sympathized with several relatives and a close friend who were infertile.³² According to Kane, in December of 1979, she read a newspaper article about an attorney in Kentucky, Katie Brophy, who was attempting to arrange a surrogate mother contract for an infertile couple.³³ Kane wrote to Brophy and received a response from Richard Levin, a Kentucky physician and founder of Surrogate Parenting Associates, Inc.³⁴ Eventually, Kane became a surrogate mother, over the initial objections of her husband.³⁵ She became intensely involved with publicizing the arrangement and heralding the value of surrogate motherhood. She appeared on numerous talk shows and was profiled in *People* magazine.³⁶ By the end of her experience as a surrogate mother, Kane had reversed her position, turning from surrogacy's champion into an advocate for prohibition of the arrangement.³⁷

***Prohibiting
surrogacy based on
the conclusion that
women cannot
make an
independent,
intelligent decision
in matters of
childbearing
suggests that
women are
governed by their
hormones, rather
than their minds.***

Kane experienced a range of conflicting internal and external responses to her surrogate pregnancy. Her neighbors and family reacted in a variety of ways; some were supportive, some were manipulative, some were shocked and drew away from Kane. Her husband experienced job difficulties which may have been related to Kane's notoriety.³⁸ Even though she had felt close to and positively involved with her pregnancy, after the birth, she felt neglected and used.³⁹

Kane's experience was intense and traumatic; however, not all the trauma arose from the sheer fact of being a surrogate mother. She assumed responsibilities beyond bearing a child for an infertile couple. At Dr. Levin's request, but with her consent and participation, she became the "symbol" of surrogate motherhood.⁴⁰ The transition from wife, mother, and part-time worker to media "star" must have been as stressful as bearing a child for another couple. Additionally, the media attention added to the perception of surrogacy as the commodification of children and as exploitation of women. Ironically, Kane may have helped create the very problems she condemned in surrogacy. Kane's experience does not have to be the norm for future surrogate mothers.

Elizabeth Kane may have been the "first legal surrogate mother," but Mary Beth Whitehead is by far the most famous. She gave birth to the little girl known as "Baby M" in 1986.⁴¹ Whitehead responded to an advertisement in a New Jersey newspaper soliciting women willing to help infertile couples.⁴² Noel Keane's Infertility Center in New York arranged for Whitehead to be a surrogate mother for Bill and Elizabeth Stern,⁴³ a professional couple living in New Jersey.⁴⁴ After the girl was born, Whitehead was unable to give the child up, and thus began the very contentious, very public battle between Whitehead and the Sterns.

The struggle culminated in a custody trial. The trial judge issued a lengthy and scathing opinion, upholding the contract, awarding custody to the Sterns, and stripping Whitehead of all parental rights.⁴⁵ Judge Sorklow found Whitehead extremely wanting as a mother.⁴⁶ Judge Sorklow's opinion was overruled by the New Jersey Supreme Court, which held that the contract violated public policy and was void.⁴⁷ The supreme court remanded to the lower court, and to a different judge, for determination of Whitehead's rights under the child custody standard of "best interests of the child."⁴⁸ Whitehead was awarded liberal

visitation rights.⁴⁹ The court also entered an order “enjoining and restraining each of the parties from publicly discussing their relationship with Melissa or her personal activities without prior approval of the court.”⁵⁰ The judge clearly wanted the parties to resume private lives, in order to protect Melissa from public exposure. Baby M was over two years old by the time the case was resolved.

Noel Keane, the Michigan attorney who arranged Whitehead’s surrogacy, considered to be among the founders of surrogacy, wrote his book well before the Baby M case, but not before he had met other complications and successes.⁵¹ His first clients were blue collar workers. Because of the uncertainty of the arrangements and an opinion Keane sought from a Michigan judge, the first surrogacies that Keane arranged did not include a fee.⁵² These arrangements were intensely personal. The couple was involved in selecting the woman with whom they would work. In several instances the couples and the surrogate mothers became close friends.

All of these stories brought to public attention the usually private event of starting a family. Even though these stories are very personal, they are obviously meant to promote the authors’ personal beliefs, and they are immensely valuable for the insight they provide. These stories, even in their brief tellings, illustrate that biology and many personal and social conflicts coalesce in the surrogate motherhood arrangement. Any method of non-coital reproduction challenges our traditional notions of “family.” The forces motivating all parties are as complex as each individual involved.⁵³

V. Surrogate Motherhood in Theory: Arguments For and Against Surrogate Motherhood

Because the debate surrounding surrogacy involves a web of complex philosophical, moral, and social issues, legislatures must be engaged in and informed by the debate surrounding surrogacy if the legislation adopted is to be effective and complete. If lawmakers are cognizant of the parameters of the debate, they will be more successful in drafting legislation that will anticipate and counter opposing arguments and will enhance the positive aspects of surrogacy.

The academic debate over surrogate motherhood generally proceeds on two levels. There is a highly abstract and theoretical level, but underlying that level is a narrative, personal level. Discussion of surrogacy almost always begins at the narrative level because the personal stories of surrogate mothers and intended parents are very powerful, affecting, and illustrative of arguments being advanced.

Those opposed to surrogacy discuss the Baby M case,⁵⁴ the case of a Mexican woman who was essentially tricked into coming to the United States to bear a baby for an infertile cousin,⁵⁵ the case in which the woman of the infertile couple was a transsexual,⁵⁶ and the case in which the baby was born with birth defects and neither party wanted him.⁵⁷

Those who do not wish to ban the practice tell the story of Noel Keane’s first couples, blue collar couples who contracted with women of similar socio-economic means, the Texas mid-wife who wanted to have “the perfect pregnancy,”⁵⁸ and countless other surrogacy arrangements that have not been litigated or highly publicized.

Opposition to surrogate motherhood is rooted primarily in a triad of concerns: (1) the fear of economic exploitation of women’s reproductive capacity; (2) the belief that the arrangement is nothing but baby-selling in disguise; and (3) a concern that surrogacy is an unacceptable affront to traditional notions of family. Opponents of surrogacy focus primarily on the surrogate mother without addressing the concerns and experiences of the infertile couple or the child.

Surrogate arrangements, according to surrogacy’s opponents, exploit the inevitable socio-economic disparity between the infertile couple and the surrogate mother.⁵⁹ The infertile couples are generally better educated and more affluent than the surrogate mother.⁶⁰ In the worst case scenario, opponents suggest that an underclass of breeder women could evolve.⁶¹ Gena Corea, Associate Director of the Institute of Women and Technology, testified before the California Judiciary Committee in 1988, and spoke harshly about surrogate motherhood as “junk liberty.”⁶² Surrogacy results, according to Corea, in the complete commodification of women and in a complete stripping of their human dignity.⁶³ She drew broad conclusions about women who become surrogates, applauding those who fight and pitying and denigrating those who comply with their agreements. She stated:

It is the “happy surrogates,” the “Stepford surrogates,” I worry about. The ones who don’t cause anyone any trouble. The ones who hear, “You are a thing,” and who think, “I am a thing.”

Selling women as breeders, setting up a class of breeder women, violates human dignity. When the mechanisms of violating human dignity are so firmly established that no one objects to them or even finds them remarkable, which is the case in the “successful” surrogacy cases, then we are living in a society in which a woman’s life is held in utter contempt.⁶⁴

Corea’s arguments completely dismiss the possibility that a woman could enter into a surrogacy agreement genuinely believing that she is doing something good. If any woman did believe that her action was positive and that her decision was rational, her belief, according to Corea, would be unenlightened and misguided. Corea fails to consider that women, as the feminist movement has discovered, do not all share the same values, needs, or outlook on life. Opinions such as Corea’s accomplish exactly

what they abhor: they reinforce the idea that surrogates are things and that the infertile couples have participated in reproductive prostitution and created a child-commodity.

This strident opposition to surrogacy is harmful to those considering surrogacy, to those women and couples who have already participated in a surrogacy arrangement, and to the children born out of the agreements. Infertile couples hope to have children. An overwhelming majority of American couples want to have a child.⁶⁵ Additionally, other artificial reproductive technologies can be prohibitively expensive and do not yet offer sure results.⁶⁶ Surrogacy as a technology is simpler and less expensive.⁶⁷ To vilify couples simply for wanting to fit into the social fabric of life is extreme.

The surrogate mother may have entered into the arrangement for a variety of reasons, perhaps even an economic reason, but that does not mean that she did not make an independent decision. Being a surrogate mother should not strip her of her self-respect. The child born of surrogacy arrangements needs a stable, caring environment, both at home and in society. If children are told in any manner that they are a commodity or should not have been born, the children could be unnecessarily harmed psychologically.

One commentator has argued that surrogacy is just the continued male domination of women's bodies and their "reproductive experiences";⁶⁸ she observes that the attorneys and physicians are mostly men and the father gets custody of the child.⁶⁹ The men therefore reap all the rewards from the use of women. Additionally, she points out, the biological father often exercises control over the surrogate mother's pregnancy.⁷⁰ Then, when the woman gives up her child, "the profound gestational relationship between the mother and fetus [does not] count for a whit."⁷¹ This argument against surrogacy is another extreme position, categorizing and analyzing all women's experiences within a patriarchal framework.

A corollary to the above argument is the assertion that a woman cannot truly give informed and voluntary consent to relinquish her parental rights before experiencing the pregnancy and birth.⁷² Another branch of feminist theory rejects this argument against surrogacy. These proponents consider surrogacy liberating rather than demeaning. A woman may choose to be a surrogate mother and to surrender her parental rights intelligently and independently. Prohibiting surrogacy based on the conclusion that women cannot make an independent, intelligent decision in matters of childbearing suggests that women are governed by their hormones, rather than their minds. Feminists have fought against the image of woman as an emotional irrational being who needs to

***The government
does not need to
actively encourage
surrogacy, but it
must protect an
essentially private
decision.***

be looked after by a father figure (father, husband, government). Prohibiting surrogacy can be viewed as an extension of that image. In response to this argument, the author of a recent article⁷³ made an acute observation. She stated:

If it is recognized that a woman has the capacity to make difficult decisions, and it is understood that the possibility for regret exists both within the surrogacy context and outside of it, it is difficult to accept the argument against knowing and voluntary waivers.⁷⁴

Perhaps it seems simplistic and harsh to say that the pain a surrogate mother might feel is merely another hard life experience with which she must cope, yet it also seems accurate and honest. Surrogate mothers do choose to become surrogates. The lure of the fee may seem coercive, but if a woman chose not to become a surrogate mother, she would be no worse off than she was before she considered the option. All human beings face regret and trauma in their lives: the childless couple, no less than the surrogate mother.

Additionally, if surrogacy were prohibited, then surrogate arrangements might become more exploitative of women than if regulated because those in control of the arrangement may single out and pressure economically disadvantaged women. Surrogacy would operate without any safeguards, psychological or physical, for the surrogate or the intended parents. This is the more disturbing and exploitative scenario.⁷⁵

A possible legislative response to concerns about consent given before the birth of the child would be a provision, as with adoption, for a period of time after the birth during which the surrogate mother could change her mind and keep the baby. The possibility of the surrogate mother keeping the child does create an additional complication, as the biological father will most likely seek a court determination of his paternity and seek visitation. In the end, the child could end up with two sets of parents, not an unusual or necessarily detrimental situation in the era of rampant divorce.

Opponents of surrogacy argue that the practice is the commodification of babies. Margaret Radin, in a powerful article, *Market Inalienabilities*, argues that there are some things in life that cannot be bought and sold. Children should be "inalienable."⁷⁶ Surrogate motherhood arrangements in Radin's view make babies into just another commodity on the market.⁷⁷ Commodification arguments hinge on the revolting scenario of a mother and father selling their baby in order to buy a new car.

While it is not completely a matter of semantics, a surrogacy agreement can be viewed in a more favorable light. Three people are coming together to make a decision to bring a child into the world. In society, parenthood is a generally favored norm. Granted the relationship is reduced to a written contract, but that does not diminish the importance of the decision being made. The contract is a document that serves to protect the surrogate mother, the intended parents, and the unborn child. Before signing the contract, the surrogate mother must make an informed and voluntary decision to become pregnant.

The fee can be properly characterized as compensation, not for the baby, but for the surrogate mother's time and energy. Although a survey of surrogate mothers indicated that most become a surrogate mother primarily because of the fee, economic reasons are not the only reasons.⁷⁸ Many surrogate mothers enjoy pregnancy or are in a position in which they cannot raise another child, but would like to bear another child.⁷⁹ Other surrogate mothers express great sympathy for infertile couples and are glad to be able to help the couple.⁸⁰

The stories of infertile couples provide powerful counterpoints to arguments against surrogacy. For some couples, infertility virtually destroys their marriage, or becomes the focal point of their lives.⁸¹ Many couples spend large sums of money over many years on infertility treatment; in comparison, the fees paid for surrogacy seem very small. Viewed in the larger context of all reproductive technologies, surrogacy seems simple and in some ways more human, requiring only willing people, not rooms of sterile equipment and specialized doctors and scientists.

Opponents of surrogacy argue that children's self-esteem will be affected when they are told about the agreement, because they will view themselves as a commodity.⁸² Opponents also express concern about other children the surrogate mother might have: they may come to believe that their mother will give them away or sell them as well.⁸³

Ideally, the intended parents will love the child and provide a stable and secure home. The child born out of a surrogacy arrangement is wanted, planned for, and eagerly anticipated. Often the intended parents have been hoping for a child for years and have finally been able to realize their dream. The child must be told about the surrogacy, and that discussion may be difficult for the parents. Hopefully, the safety and security will partially offset the difficulty of explaining the child's birth. How the child reacts when told will depend on how the situation is presented to the child. No matter how much the parents love the child, if the parents believe that society holds them in moral contempt, then it may be difficult for them to present a truly positive explanation to the child.

As more children are born as a result of surrogate arrangements and other means of non-coital reproduction, governmental prohibition and criminalization send a very clear signal of disapproval to these families. This message will be hard to counter. What can you tell a child when the very existence of that child could

be considered illegal? Is it in the "best interest" for the child not to have been born? Instead of stigmatizing families, both the infertile couple and the family of the surrogate mother, who have already participated in a surrogate agreement, surrogacy should be permitted as an alternative reproductive method for infertile couples. Even though notions of "family" are changing, "family" and children continue to be a central and essential part of the lives of many people. For some couples, surrogacy could provide a viable alternative to other technological methods of reproduction and to adoption. The government does not need to actively encourage surrogacy, but it must protect an essentially private decision.

VI. Surrogate Motherhood Contracts in State Court

Although the most famous surrogate mother case is that of Baby M,⁸⁴ the case of a young Mexican woman is more powerful.⁸⁵ Alejandra Munoz was brought to the United States by cousins, supposedly to carry her cousin's fertilized egg until it could be implanted in her cousin's womb.⁸⁶ However, Alejandra had been tricked. After she was pregnant, her cousins told her that the embryo would not be transferred.⁸⁷ Instead, she carried the child to term.⁸⁸ The trial over custody resulted in a settlement that provided Alejandra with visitation rights.⁸⁹

While Baby M and Alejandra Munoz received much attention in the media and in the literature on surrogacy, other cases reveal a spectrum of problems for which various state courts have fashioned solutions. These cases illuminate both the strengths and the weaknesses of the law when confronted with new and highly charged personal conflicts. The judges who have made decisions regarding surrogacy have carefully analyzed the issues, but have obviously been uncomfortable deciding such complex issues. Their discomfort arises both because of the moral and ethical dilemmas and because of the lack of legislative guidance.

Courts that have acted in a legislative vacuum when deciding surrogacy cases have, of course, turned to existing legal doctrines. Contract, constitutional, and family law can all come into play in a case involving a surrogacy arrangement.⁹⁰ Most of the judicial opinions have their roots in contract, family, or adoption law, often relying on the custody standard of "best interest of the child."⁹¹ Constitutional challenges are more likely to be raised when there is state legislation in place banning surrogacy.⁹² Even though the courts have not explicitly approved, and have often disapproved, of surrogate arrangements, they are hesitant to completely undo the contractual relationship and generally try to balance the competing claims.⁹³

Although judges might have very similar underlying objectives, two New York cases illustrate how courts can reach different results. In 1986, the Surrogate's Court of Nassau County in *In re the Adoption of Baby Girl L.J.* granted the adoption of a child born of a surrogacy arrangement to the intended parents using the "best interest of the child" as the guiding principle.⁹⁴ The court also approved, over strong reservations, the payment of the \$10,000 fee

to the surrogate mother, finding that current legislation did not prohibit the payment.⁹⁵ In spite of its reservations, the court was reluctant to essentially reform a contract term not explicitly prohibited by law.

In contrast, the Family Court in Kings County, in 1990, found that the payment of the fee violated legislation that prohibited compensation for the surrender of a child for adoption.⁹⁶ The Family Court was willing to remake the contract into a form it found acceptable. The court approved the adoption by the intended parents, conditioned on the surrogate mother swearing under oath that she had not and would not receive the money.⁹⁷ The Kings County court was willing to act on its disapproval of the contract. However, the outcome of litigation should not depend on what judge hears the case.

The California Appellate Court decided its first case involving a surrogacy contract in *In re Adoption of Matthew B.-M.*⁹⁸ The contract at issue was fully executed: the surrogate mother consented to stepparent adoption and acknowledged the paternity of the husband/sperm donor.⁹⁹ Because the contract had been

fully performed, the court refused to consider whether the contract was illegal or whether the contract should be invalidated as a deterrence measure.¹⁰⁰ As in New York, the court's overriding concern was the "best interest of the child."¹⁰¹ According to the court, the child had been with the couple for eight months and the bond that had formed between the three should not be disrupted.¹⁰² The court upheld the adoption by the wife of the intended parents.¹⁰³

The court, in *Matthew*, looked to contract law, as well as custody standards and remarked insightfully on the part contract law plays in interpersonal relationships:

Contract law has long played a role in the ordering of familial relationships, including the rights of child custody and visitation. Perhaps the oldest example of this involvement is found in the legal principles that govern the solemn and sacred contract of marriage. A more recent but no less important example is found in the legal principles governing adoptions. By using these well-settled principles to resolve the dispute in this case, we do not mean to suggest that children are commodities. The child's best interests remain the most important consideration.¹⁰⁴

[A] majority of state legislatures that have adopted laws concerning surrogate arrangements discourage the practice by making the arrangements void and unenforceable.

Faced with a fully performed contract, the court refused to make a policy judgment, although it certainly did not approve of the surrogate arrangement. The court ultimately held the surrogate mother responsible for her own actions,¹⁰⁵ even if she was not happy with the results. The surrogate mother's signature on the adoption consent was an acknowledgment that she understood her rights.¹⁰⁶ The court refused to reverse the lower court's decision in order to put deterrence over the best interest of the child. Although it had rendered a decision in the case before it, the court believed that surrogate motherhood was a matter more properly addressed by the legislature.¹⁰⁷

A 1993 Arkansas case stands out from other cases, because of its implicit approval of surrogacy, its lack of sympathy for the surrogate mother, and its illustration of the possible choice of law problems involved in a surrogate arrangement. The surrogate arrangement at issue in *In re Adoption of K.F.H.*,¹⁰⁸ had initially been litigated in the Michigan court system.¹⁰⁹ The surrogate mother retained parental rights, but custody of the twins to which

she gave birth was awarded to the father.¹¹⁰ However, the intended parents later brought an action in Arkansas to have the surrogate mother's parental rights terminated and to have the adoption by the intended mother approved.¹¹¹ The intended parents were successful in both instances. The Supreme Court of Arkansas first determined that Arkansas courts did have jurisdiction over the matter, then terminated the parental rights and upheld the adoption.¹¹²

The court based its decision on a factual finding that the biological mother had failed to communicate with the children for over one year.¹¹³ An Arkansas law provided for adoption without consent and termination of parental rights if the biological mother had unjustifiably failed to communicate with the children for a year or more.¹¹⁴ The biological mother argued that she had been in contact, and further that her contact had been hindered by the adversarial relationship between her and the couple.¹¹⁵ She claimed that she did not have the money to visit the children.¹¹⁶ Her arguments were contradicted by the testimony of the caseworker assigned to the children.¹¹⁷

While the Arkansas Supreme Court may have been engaged in the judicial function of statutory construction, it was nevertheless singularly unsympathetic to the surrogate mother, especially given the fact that a Michigan court had previously granted her visitation rights and declared the surrogacy contract void. In a case

such as this, one can see the position of opponents who claim surrogacy to be an exploitation of women of lower socio-economic classes. On the other hand, the court held the woman completely responsible for her actions, and cases such as these will arise if surrogacy is permitted.

The commercial aspect of surrogate arrangements was challenged in Kentucky in 1986, when the Kentucky Attorney General sued Surrogate Parenting Associates to revoke its corporation charter for violation of baby-selling laws.¹¹⁸ The Kentucky Supreme Court refused to revoke the charter, rejecting the Attorney General's argument that the activities of Surrogate Parenting Associates violated baby-selling laws.¹¹⁹ The court found that Kentucky's law at the time did not speak to the issue of surrogate parenting contracts. Nevertheless, the court found that surrogate mother contracts are void and unenforceable, meaning that they would not be enforced judicially. However, they were not illegal,¹²⁰ so the contracting parties would face no civil or criminal penalties. The Kentucky court recommended that the legislature take up the matter.¹²¹

As mentioned above, enacted surrogacy legislation has been challenged on constitutional grounds. A Michigan case illustrates the constitutional arguments which have been advanced to challenge enacted legislation.¹²² After the Michigan Legislature enacted the Surrogate Parenting Act in 1988, which made surrogate contracts void and unenforceable and made surrogate contracts involving compensation criminal,¹²³ potential surrogate mothers and infertile couples challenged the Act on constitutional grounds.¹²⁴ They charged that the Act was a violation of the Fourteenth Amendment Due Process Clause.¹²⁵ Because the Michigan Supreme Court found that the Constitution and the "penumbral rights" emanating from the Bill of Rights "protect 'individual decisions in matters of childbearing from unjustified intrusion by the State,'" it subjected the Act to strict scrutiny.¹²⁶ It found that the state had three compelling reasons for enacting the legislation: (1) the prevention of the commodification of children; (2) the best interest of the child; and (3) the prevention of exploitation of women.¹²⁷

VII. Surrogate Motherhood in State Legislatures

Some state legislatures have responded to judicial and academic calls for action. Currently, a majority of state legislatures that have adopted laws concerning surrogate arrangements discourage the practice by making the arrangements void and unenforceable.¹²⁸ A few states permit surrogate parentage agreements (SPA) without compensation and within well defined, restrictive parameters.¹²⁹ Arkansas is currently the only state which permits the intended parents and the surrogate mother to enter into an SPA for compensation beyond the surrogate mother's expenses.

The legislatures that have declared SPAs to be void and unenforceable have concluded that SPAs violate "public policy."¹³⁰

The states that permit SPAs obviously reached a different ultimate conclusion; nevertheless, the legislation adopted reflects lawmakers' concern about the same issues that led to prohibition in other states. Even state legislatures that permit surrogacy do not permit third party brokers to arrange and profit from a surrogate contract.¹³¹ Also, all state legislatures that have acted, with the exception of Arkansas, have distinguished between SPAs for compensation and those agreements without compensation.¹³² The philosophy behind the distinction is the belief that compensation of the surrogate mother and potentially a third party broker increases the possibility of exploitation and brings the transaction perilously close to baby-selling and prostitution. The Practice Commentaries to the New York Act state, "commercial surrogacy arrangements involve a form of procreation for profit, if not prostitution."¹³³

Legislation that prohibits surrogacy arrangements generally takes two forms. One model is a broad prohibition of the arrangements that generally contains four basic provisions: a statutory definition of a surrogate parenting contract (or agreement); a provision declaring such contracts to be void and unenforceable; a provision for civil and criminal penalties for parties that arrange for a contract for compensation; and a provision for penalties for persons who enter into an agreement for compensation.¹³⁴ The second model is less restrictive and declares void only "commercial" arrangements entered into for compensation.¹³⁵

The statutory definition of "surrogate parentage agreement" is essentially uniform in the states that have declared the agreements void. The agreement must have two distinct provisions to fall within the statute:

- (a) a woman agrees either to be inseminated with the sperm of a man who is not her husband or to be impregnated with an embryo that is the product of an ovum fertilized with the sperm of a man who is not her husband; and
- (b) the woman agrees to, or intends to, surrender or consent to the adoption of the child born as a result of such insemination or impregnation.¹³⁶

The definition does not include compensation. Nebraska's law does include compensation as part of its definition of the contract, although it has a clause that will allow the court to define the term differently if the context requires a modified definition.¹³⁷

The second model, which targets only "commercial" arrangements, obviously disfavors surrogate arrangements and operates under the assumption that prohibiting compensation will inhibit the use of surrogacy. However, the legislation does not regulate the terms of surrogate arrangements that do not provide

for compensation. Having no legislative guidance for forming a surrogate arrangement creates a vacuum that most likely will create difficulties for contracting parties.

Two states have enacted legislation that essentially fills this vacuum. New Hampshire and Virginia permit surrogacy, but have enacted detailed legislation setting out many requirements for the surrogate parentage contracts.¹³⁸ Both states establish procedures for judicial pre-approval of surrogate contracts. In New Hampshire, the contract must be pre-approved;¹³⁹ in Virginia, if the contract is not pre-approved, it can be reformed to meet the statutory provisions.¹⁴⁰

Both states forbid compensation of the surrogate mother beyond specified expenses.¹⁴¹ The fee is limited to medical expenses, wages actually lost, life insurance during the pregnancy and six weeks after, counseling fees, and the cost of any home study.¹⁴² By eliminating the possibility of a fee that does not cover a specific expense, the statutes eliminate the economic incentive for surrogate motherhood. Many proponents of surrogacy believe that because most women interviewed enter into the contract for monetary reasons, eliminating the fee is the same as banning surrogacy.

Virginia's law requires the court to make extensive findings before approving the contract. The statute requires a home study, similar to that required in adoptions, before approval of the contract.¹⁴³ Additionally, the court must find that: (1) the surrogate mother, her husband, and the couple meet the fitness standards used in adoptions; (2) the wife of the couple is either infertile or pregnancy poses an unreasonable risk to her or to the child; (3) there is adequate provision for medical and other costs; (4) the surrogate mother is married and has had one live birth; (5) all parties have submitted to physical and psychological examinations; and (6) all understand the terms of the contract.¹⁴⁴ The statute also provides that the surrogate mother is completely responsible for the medical aspects of the pregnancy.¹⁴⁵ New Hampshire requires similar judicial findings.¹⁴⁶ Through such detailed legislation, which subjects the couple and the surrogate mother to intensive screening before the contract is finalized, these states attempt to ensure that all parties are aware of their rights and obligations, and thus, to eliminate litigation after the birth.

Both Virginia's and New Hampshire's legislation have provisions for the surrogate mother to retain custody of the child. In Virginia, if the contract is judicially approved, the surrogate mother may terminate the contract within 180 days after the last insemination.¹⁴⁷ If the contract was not approved, then the surrogate mother may terminate up to twenty-five days after the birth.¹⁴⁸ The Virginia statute clearly indicates that if the contract is judicially approved it is considered binding at a much earlier point in time. In New Hampshire, the surrogate mother may terminate the contract up to seventy-two hours after birth.¹⁴⁹

The success of these two statutory schemes will depend on whether intended parents and surrogate mothers choose to work within the statutory scheme as well as on how thorough and thoughtful the courts are in carrying out the extensive task assigned to them. Until the statutes have been in operation for several years, their efficacy cannot be determined. If they are successful, surrogacy may become a limited, but viable option for infertile couples.

Arkansas has by far the most liberal law with respect to surrogate arrangements. In 1989, the legislature enacted a law that creates a presumption that the child born of the surrogate arrangement is the child of the intended parents.¹⁵⁰ Arkansas does not prohibit compensation of the surrogate mother. Arkansas has taken a "hands off" position, allowing individuals to control the arrangement themselves.

VIII. Outline for Surrogate Motherhood Legislation for Kansas

The central purposes of legislation regulating surrogate motherhood are to provide protection for the parties and certainty as to the performance of the contract. To fulfill these purposes, legislation must provide both up front and back end protection for all parties, but should emphasize up front procedures. To meet this purpose, Kansas should adopt a judicial pre-approval scheme similar to Virginia's. This legislation should also include a provision for reformation of contracts not approved.

Requiring the parties to seek judicial pre-approval will impress upon them the seriousness of the surrogate arrangement and will provide a forum in which the contract can be discussed in detail. For any surrogate contract to be successful, the intended parents and the surrogate mother must make well-informed and well-considered decisions. Physical and psychological testing would hopefully reveal any physical problems that would harm the child or the surrogate mother and should ensure that all the parties understand the arrangement and are able to undertake and perform their obligations, without psychological ramifications. The surrogate mother and the intended parents should each have independent legal counsel to guide them through the contract language and terms. Until the court is assured that the parties are all willing and able, no contract is formed.

The surrogate mother should have had a successful pregnancy prior to becoming a surrogate mother. Unlike Virginia, Kansas need not require that she be married. Requiring a successful birth would provide the counselor a basis for evaluating and discussing the surrogate mother's feelings about pregnancy and giving up the child she will bear. Marriage might provide a more stable environment for the surrogate mother and relieve social stigma attached to being pregnant out of wedlock, but it is not essential for the success of surrogate contracts.

Although the intended parents must take great care in selecting a surrogate mother and may certainly choose a woman who does not smoke, drink, or abuse drugs; once the contract is approved, the surrogate should be responsible for her pregnancy. The intended parents should have enough confidence in the surrogate mother to allow her independence. Ultimately, it is her body, and she is taking the risks of having the child.

After the child is born, the surrogate mother should have a period of time, perhaps five days, in which to decide whether to keep the child. The child is genetically related to the surrogate mother, and even though a waiting period reduces the absolute certainty of the contract, it does accommodate the very human element of this arrangement. If she does opt to keep the child, the biological father should be able to obtain visitation rights, although the surrogate mother would retain custody.

The intended parents should provide counseling to the surrogate mother after the birth, whether or not the surrogate mother decides to keep the child. The intended parents should also be evaluated after the birth. The intended parents and the surrogate mother will have just participated in an unusual contract, and mixed feelings should be expected. Counseling does not solve all problems, but simply having a third party to talk with might be helpful to all involved.

Once the surrogate mother has relinquished her parental rights, the law should presume that the intended mother is the mother of the child. This presumption would minimize the complications often attendant to adoption proceedings and will bring the contract to a close more quickly. This would allow the intended parents to begin their lives with the child as quickly as possible. It is essential that the family stabilize and bond, without the turmoil of litigation.

In order to reduce the "commercialization" of the process, Virginia and New Hampshire forbid the use of third party brokers and payment of a fee that exceeds the surrogate mother's actual costs.¹⁵¹ Kansas should forbid the use of third party brokers, in order to keep this as "intimate" a decision as childbearing usually is. Without the third party, the possibility of anonymity is virtually eliminated, but the intended parents and the surrogate mother should meet each other. By removing the anonymity of the process, the intended parents and the surrogate mothers can mutually evaluate each other on a first hand basis. They are not embarking on an impersonal arm's length transaction, and they should not act as though they are.

***Legislation
permitting surrogacy
will help shape a
positive future for
infertile couples and
the children born
out of surrogacy
arrangements.***

However, Kansas should not forbid the payment of compensation beyond actual expenses. Surrogacy without compensation could be the preferred model, but allowing payment of the surrogate recognizes the time and effort that she has spent on behalf of the intended parents. Many women become surrogate mothers partly for economic reasons. Prohibiting a fee will unnecessarily restrict the practice and will perpetuate the cycle of non-payment for "women's work." Kansas would be wise to place a cap on the permissible payment. For example, Kansas could severely restrict attorneys' fees, a move that would perhaps speak against commercialization even more than forbidding payment of the surrogate mother.

The legislation could also require that the whole fee be tendered even if the child is stillborn or if the surrogate mother miscarries after a certain month. A surrogate mother has tendered her services even if she does not give birth to a perfect baby. Requiring payment irrespective of the outcome would make compensation arrangements more closely resemble payment for an attempt at *in vitro* fertilization, for example. Surrogate mothers are providing an invaluable service for infertile couples, and it is not unwarranted for surrogate mothers to be paid.

In the interest of finality, challenges by surrogate mothers to surrogate parentage contracts after the birth of the child and relinquishment of parental rights generally should not be cognizable, unless there are equitable grounds, such as duress, on which to provide relief. In these instances, if the surrogate mother seeks custody of the child, the standard used by the court to evaluate the claim must be "the best interests of the child." The court's analysis should be the same as in other custody disputes.

Kansas cannot regulate human emotions. Because surrogate contracts involve people in an intensely personal and emotional relationship, there will be unexpected problems. However, if there is a legislative scheme in place, which has definite terms and clear policy goals, then the courts deciding the conflicts will be able to turn to the legislation for answers and guidance.

IX. Conclusion

There is no doubt that the legal, moral, and ethical issues raised by surrogate motherhood are complex and perhaps insolvable, but they will not disappear after legislative prohibition. Currently, although surrogacy has been in the news for over a decade, little is known about surrogacy's long-term effect on any of the parties. Much of the opposition is based on speculation about future events. Legislation permitting surrogacy will help shape a positive future

for infertile couples and the children born out of surrogacy arrangements. Prohibition of surrogacy is an extreme position and does not eliminate the dilemmas faced by persons who will choose to enter into a surrogate agreement anyway. Surrogacy should be permitted in order to create a system that protects the contracting parties, but gives individuals freedom to make hard choices for themselves.

Notes

1. Virginia and New Hampshire legislation use "intended parents." I adopt its use here for consistency and as a means of conveniently distinguishing among the parties involved.
2. I am using the conventional term "surrogate mother" for ease of discussion, in full recognition of the argument that the woman who provides the egg and carries the baby to term is the natural mother and not a "surrogate."
3. This type of surrogacy is to be distinguished from "gestational" surrogacy. Gestational surrogacy involves the implanting of a fertilized egg (generally the egg and the sperm are from the husband and wife) in another woman, who will carry the baby to term. See WASH. REV. CODE § 26.26.210(2) (West 1994). While the genetic and, therefore, perhaps the legal issues are much clearer in gestational surrogacy, it poses more complex moral and ethical issues than nongestational surrogacy, in that it is more apt to lead to the exploitation of women through surrogacy feared by some.
4. The amount of documentary and secondary material available on the subject is overwhelming. It comes from a variety of sources: books, law review articles, position papers by the American Bar Association, the American Medical Association, the ACLU. This article does not purport to be completely comprehensive, but will discuss the issue broadly, with reference to the major works.
5. According to a 1991 *Time* magazine article, "America today is in the midst of an infertility epidemic. . . . Taken together, more than 1 in 12 U.S. couples has difficulty conceiving — a number that is as high as 1 in 7 for couples in the thirtysomething years." Philip Elmer-Dewitt, *Making Babies*, *TIME*, Sept. 30, 1991, at 56, 56. However, in 1993, an article in *American Demographics* noted that "the overall infertility rate has fallen since 1976, although the number of affected women has increased in some age groups. . . . Among childless couples, 36 percent with a wife aged 35 to 44 had an impairment, . . . and 20 percent with a wife aged 25 to 34." Paula Mergenbagen DeWitt, *In Pursuit of Pregnancy*, *AMERICAN DEMOGRAPHICS*, May 1993, at 48, 48-49. Both articles agree that reproductive technology is a growing industry.
6. Other reproductive technologies, such as *in vitro* fertilization can be extraordinarily expensive and time consuming. See Annette

Miller, *Baby Makers Inc.*, *NEWSWEEK*, June 29, 1992, at 38. The waiting list for adoption of healthy newborns is up to seven years. See AMY ZUCKERMAN OVERVOLD, *SURROGATE PARENTING* 48 (1988) ("[B]y 1987 it was possible for a couple to wait as much as eight years to adopt an American-born child in some parts of the country.").

7. I do not believe that regulation will end the litigation, nor will it end abusive situations. Clearly abusive or exploitative situations should not be condoned or ratified in the court system. However, clear guidelines will enable those couples and those women who are contemplating a "legitimate" arrangement to be fully aware of the possible consequences of the agreement they are exploring.
8. Op. Att'y Gen. No. 82-150 (1982).
9. *Id.*
10. *Id.*
11. *Bill Would Restrict Surrogate Motherhood*, UPI, March 19, 1990, available in LEXIS, News Library, UPI File.
12. There are many forms of surrogacy arrangements, but when a contract is involved, most contain all or some of the provisions I discuss.
13. See NOEL P. KEANE with DENNIS L. BREO, *THE SURROGATE MOTHER* (1981) (Noel Keane is an attorney who works primarily out of Michigan and New York.). See OVERVOLD, *supra* note 6, at 205-16, for a then current listing of surrogacy clinics.
14. See, e.g., KEANE, *supra* note 13, at 33.
15. Keane tells the story of an unmarried man who completed a surrogacy arrangement with which there were no legal problems because he had no wife who wanted to adopt the child. Somehow this seems counter intuitive, if one holds to a traditional notion of family. See *id.* at 169-74.
16. There are various ways that women become involved in surrogacy. There was much publicity during the Baby M saga, and Noel Keane actively publicized his activities. See OVERVOLD, *supra* note 6, at 120, 177. Keane and many others made appearances on the Donahue show. See KEANE, *supra* note 13, at 173.
17. See, e.g., LORI ANDREWS, *BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, & BRAVE NEW BABIES* 80 (1989).
18. For example, in California one screener tries to match people who have similar interests and backgrounds. *Id.* at 82. Noel Keane wanted the couples actually to meet and select their surrogate mother. KEANE, *supra* note 13, at 72.
19. Noel Keane generally wanted the surrogate mother and the intended parents to meet or at least become acquainted through the mail. See, e.g., KEANE, *supra* note 13, at 142 (an example of the parties meeting).
20. See *id.* at 16-17. Current legislation that permits surrogacy most frequently prohibits the payment of a fee. See, e.g., VA. CODE ANN. § 20-160(B)(4) (Michie Supp. 1994).
21. See VA. CODE ANN. § 20-160(A)(5), (C).

22. It should be noted that because the technology is so basic, no intermediary, legal or medical, is actually required to complete the basic scheme of surrogate motherhood. Noel Keane tells the story of a threesome who apparently thought of the idea and completed the process themselves. KEANE, *supra* note 13, at 57-74.
23. See KEANE, *supra* note 13, at 47-48.
24. Surveys have recently shown that the interest in serving as a surrogate mother is greatly reduced when there is no fee other than payment of expenses. See, e.g., Philip J. Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117 (1983).
25. But see Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978) (the infamous baby-selling article).
26. Mimi Yoon, Note, *The Uniform Status of Children of Assisted Conception Act: Does it Protect the Best Interests of the Child in a Surrogate Arrangement?*, 16 AM. J.L. & MED. 525, 527 n.17 (1990) (citing NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 25 (1988)).
27. See *id.* at 538.
28. See MARTHA A. FIELD, SURROGATE MOTHERHOOD 5, 131 (1988).
29. Barbara Cohen, *Surrogate Mothers: Whose Baby Is It?*, 10 AM. J.L. & MED. 243, 244 (1984) (citation omitted).
30. See generally ELIZABETH KANE, BIRTH MOTHER: THE STORY OF AMERICA'S FIRST LEGAL SURROGATE MOTHER (1988).
31. See *id.* at 12-13.
32. *Id.*
33. *Id.* at 13-14.
34. *Id.* at 14. Levin and Brophy (who run a clinic) along with Noel Keane are the three major figures in the beginning of surrogate arrangements.
35. *Id.* at 95-97.
36. *Id.* at 40.
37. See *id.* at 274-90 for Kane's statement on her opposition to surrogacy.
38. *Id.* at 163-65.
39. See *id.* at 265-68.
40. See *id.* at 39-59.
41. See MARY BETH WHITEHEAD, A MOTHER'S STORY: THE TRUTH ABOUT THE BABY M CASE 1 (1989).
42. *Id.* at 7.
43. See *In re Baby "M,"* 525 A.2d 1128, 1138 (N.J. Super. 1987).
44. See generally *id.*
45. *Id.* at 1128.
46. See *id.* at 1140-41 (the court's findings of fact clearly disfavor Whitehead).
47. *In re Baby M*, 537 A.2d 1227, 1264 (N.J. 1988).
48. *Id.*
49. *In re Baby M*, 542 A.2d 52, 55 (N.J. Super. 1988).
50. *Id.* at 54.
51. See generally KEANE, *supra* note 13.
52. *Id.* at 47-48.
53. See Lita Linzer Schwartz, *Surrogate Motherhood and Family Psychology/Therapy*, 18 AM. J. FAM. THERAPY 385, 388 (1990); see also Parker, *supra* note 24.
54. *In re Baby M*, 537 A.2d at 1227 (N.J. 1988).
55. ANDREWS, *supra* note 17, at 113 (discussing *Munoz v. Haro* (1986)).
56. See KEANE, *supra* note 13, at 162-69, 197-209. The case was settled before litigation, due to the couple's fear of possible repercussions if it became known she was a transsexual.
57. See ANDREWS, *supra* note 17, at 40-45 (discussing *Stiver v. Malahoff*, 975 F.2d 261 (6th Cir. 1992)).
58. See KEANE, *supra* note 13, at 223-24.
59. Ironically for the two-career couple, the woman may have put off childbearing for so long that it might have contributed in some manner to her infertility, or to high medical risk from pregnancy. See Philip Elmer-Dewitt, *supra* note 5, at 56, 56.
60. But see *supra* notes 47-49 and accompanying text, for examples of couples who do not fit this description. They are mostly the couples who Noel Keane worked with at the start of his involvement with surrogacy.
61. See FIELD, *supra* note 28, at 30. This is less of a problem for the specific type of surrogate motherhood I am discussing, than for gestational surrogacy, where the genetic materials are totally from the couple. In that arrangement, all that is needed is a "vessel"; the possibility for a coercive relationship seems much greater when all that matters is that the woman have a womb. In the surrogacy arrangements I am discussing, the personal attributes of the woman involved will be much more important. Of course, there is the "Saks Fifth Avenue" and "K-Mart" problem. *Id.* at 28-29.
62. Gena Corea, Associate Director of the Institute on Women and Technology, testimony before California Assembly Judiciary Committee (April 5, 1988), in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 325 (Larry Gostin, ed., 1990).
63. See *id.* at 332.
64. *Id.*
65. See, e.g., Paula Mergenbagen DeWitt, *supra* note 5, at 48 ("According to a 1990 Gallup poll, 84 percent of childless adults under the age of 40 would like to have children.").
66. *Id.* at 50 ("High-tech infertility treatments are quite costly — the average procedure costs \$7,000, and prices range from \$4,000 to \$11,000 per try.").
67. See *infra* text of note 22.
68. ANDREWS, *supra* note 17, at 8-10. Andrews is describing the position of Barbara Katz Rothman, a sociologist and feminist who studies "the extent to which women actually control their own

- reproductive choices.” *Id.* at 9.
69. *Id.*
 70. *Id.*
 71. *Id.*
 72. See Mimi Yoon, *supra* note 26, at 534-35.
 73. *Id.*
 74. *Id.* at 534-35.
 75. See, e.g., *Munoz v. Haro*, 611 N.E.2d 454 (Ohio App. 1992) (portraying the worst problems with surrogacy).
 76. See generally Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (discussing the significance of market inalienability).
 77. *Id.*
 78. See Schwartz, *supra* note 53.
 79. ANDREWS, *supra* note 17, at 68-73.
 80. See *id.*
 81. See generally OVERVOLD, *supra* note 6, *Part One: The Couples*, 21-98.
 82. See, e.g., ANDREWS, *supra* note 17, at 261.
 83. See *id.* at 260-61 (discussion of testimony by a member of National Coalition Against Surrogacy).
 84. I am not going to discuss the Baby M case in detail in this section, as I have included enough of the story earlier for illustrative purposes. See *supra* notes 41-50 and accompanying text.
 85. See ANDREWS, *supra* note 17, at 114-26 for a complete account of the *Munoz v. Haro* case.
 86. *Id.* at 115.
 87. *Id.*
 88. *Id.* at 117.
 89. *Id.* at 123.
 90. See, e.g., *In re Adoption of Matthew B.-M.*, 284 Cal. Rptr. 18 (Ct. App. 1991); *In re Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813 (Surr. Ct. 1986); and *In re Adoption of Paul*, 550 N.Y.S.2d 815 (Fam. Ct. 1990).
 91. *Baby Girl L.J.*, 505 N.Y.S.2d at 817.
 92. See, e.g., *Doe v. Attorney Gen.*, 487 N.W.2d 484 (Mich. Ct. App. 1992).
 93. See, e.g., *Matthew B.-M.*, 284 Cal. Rptr. 18; *Baby Girl L.J.*, 505 N.Y.S.2d 813; and *Paul*, 550 N.Y.S.2d 815.
 94. *Baby Girl L.J.*, 505 N.Y.S.2d at 817.
 95. *Id.* at 818.
 96. *Paul*, 550 N.Y.S.2d at 817.
 97. *Id.* at 818-19.
 98. *In re Adoption of Matthew B.-M.*, 284 Cal. Rptr. 18 (Ct. App. 1991).
 99. *Id.* at 37.
 100. See *id.* at 25.
 101. *Id.* at 21.
 102. See *id.* at 36-37.
 103. See generally *id.*
 104. *Id.* at 37.
 105. See *id.* at 28.
 106. *Id.* at 28.
 107. *Id.* at 37.
 108. *In re Adoption of K.F.H.*, 844 S.W.2d 343 (Ark. 1993).
 109. *Id.* at 344.
 110. See *id.*
 111. See *id.* at 345.
 112. *Id.* at 343.
 113. *Id.* at 346-47.
 114. ARK. CODE ANN. § 9-9-207(a)(2) (Michie 1987).
 115. See *In re Adoption of K.F.H.*, 844 S.W.2d 343, 346 (Ark. 1993).
 116. *Id.*
 117. *Id.*
 118. See generally *Surrogate Parenting Assoc. v. Commonwealth*, 704 S.W.2d 209 (Ky. 1986).
 119. *Id.* at 211.
 120. *Id.* at 213.
 121. *Id.*
 122. *Doe v. Attorney Gen.*, 487 N.W.2d 484 (Mich. Ct. App. 1992).
 123. MICH. COMP. LAWS ANN. §§ 722.855, 722.857, and 722.859 (West 1990).
 124. *Doe*, 487 N.W.2d at 485.
 125. See *id.*
 126. *Id.* at 486 (citation omitted).
 127. *Id.* at 486-87.
 128. See, e.g., ARIZ. REV. STAT. ANN. § 25-218 (1991); IND. CODE ANN. § 31-8-2-1 (West Supp. 1991); N.D. CENT. CODE § 14-18-05 (1991).
 129. In general the definition of surrogate parentage contract includes gestational surrogacy arrangements as well. As I have noted, I would treat these seemingly similar arrangements differently, based on the danger for exploitation more inherent in gestational arrangements. I will therefore be considering the legislation solely as it relates to surrogate parentage arrangements in which the surrogate mother is also the biological mother.
 130. See, e.g., N.Y. DOM. REL. LAW § 121 (McKinney 1992) (Practice Commentaries) (“After years of debate and study, the Legislature has declared that surrogate parenting contracts are contrary to policy, void, and unenforceable.”).
 131. See, e.g., VA. CODE ANN. § 20-165 (Michie Supp. 1994).
 132. States that have legislated also include provisions making it illegal for a minor female, or a woman who is mentally retarded or has a mental illness to enter into an SPA. This is a reasonable provision, to protect the woman who truly cannot make an independent decision from possible exploitation. E.g., MICH. COMP. LAWS

ANN. § 722.857.

133. N.Y. DOM. REL. LAW § 122 (Practice Commentaries).

134. *See, e.g.*, N.Y. DOM. REL. LAW §§ 122, 123; MICH. COMP. LAWS ANN. §§ 722.855, .859.

135. *See, e.g.*, KY. REV. STAT. ANN. § 199.590(3) (Michie/Bobbs-Merrill 1991); WASH. REV. CODE ANN. § 26.26.240 (West Supp. 1994).

136. N.Y. DOM. REL. LAW § 121.

137. NEB. REV. STAT. § 25-21,200 (1989). The definitional section of the statute reads as follows: "(2) For purposes of this section, unless the context otherwise requires, a surrogate parenthood contract shall mean a contract by which a woman is to be compensated for bearing a child of a man who is not her husband."

138. *See* N.H. REV. STAT. ANN. §§ 168-B:1, -B:25 and -B:28 (1991); VA. CODE ANN. §§ 20-156, -158, -160 to -163, -165 (Michie Supp. 1993).

139. N.H. REV. STAT. ANN. § 168-B:16(I)(b) (Supp. 1994).

140. VA. CODE ANN. § 20-162.

141. N.H. REV. STAT. ANN. § 168-B:25(V); VA. CODE ANN. § 20-160(B)(4).

142. N.H. REV. STAT. ANN. § 168-B:25(V).

143. VA. CODE ANN. § 20-160(A).

144. *Id.* § 20-160(B)(3-8).

145. *See id.* § 20-163(A).

146. *See* N.H. REV. STAT. ANN. § 168-B:17.

147. VA. CODE ANN. § 20-161(B).

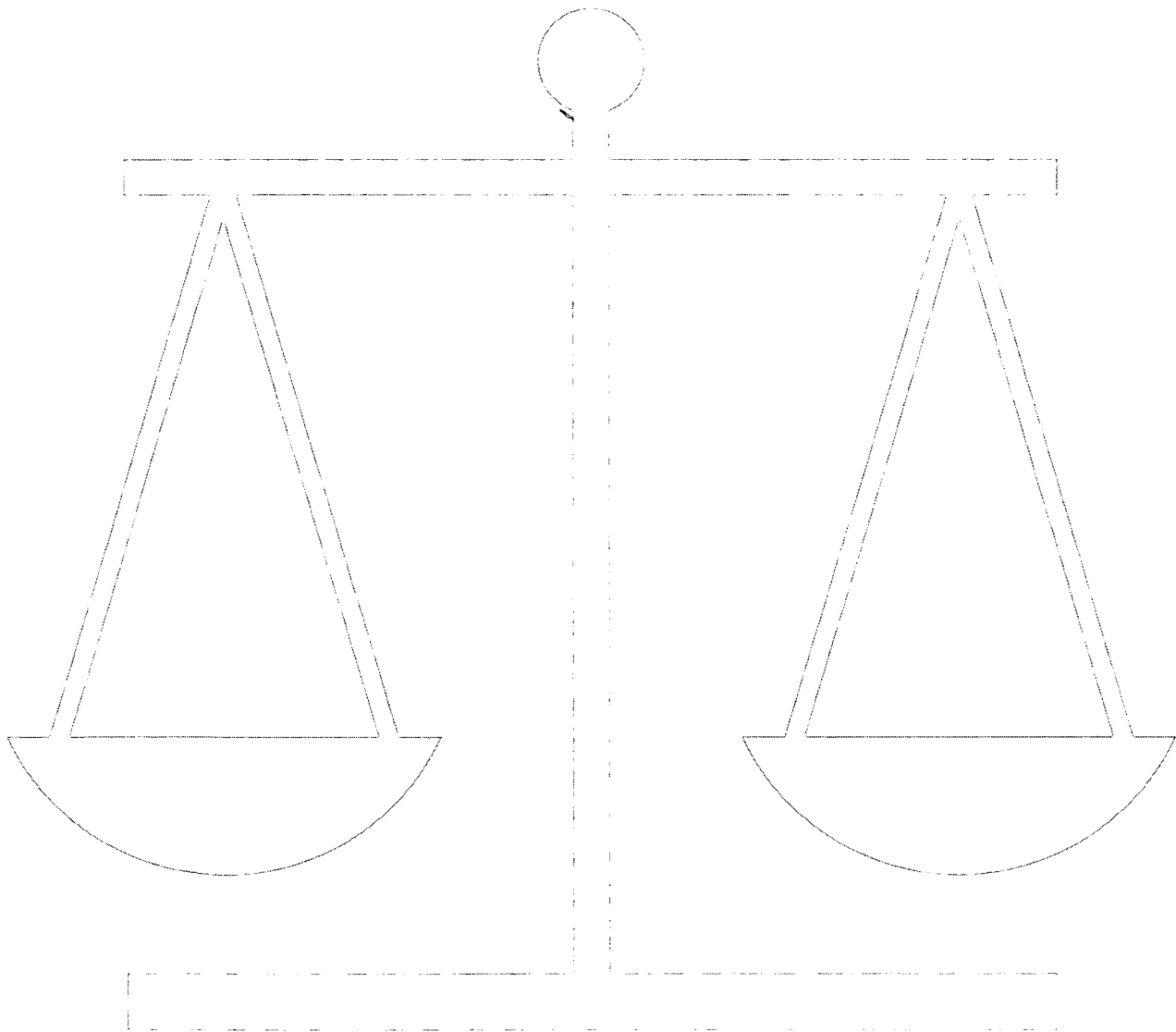
148. *See id.* § 20-162(A)(3).

149. N.H. REV. STAT. ANN. § 168-B:25(IV).

150. ARK. CODE ANN. § 9-10-201(b)(1) (Michie Supp. 1993). This presumption is analogous to the presumption created under the Uniform Parentage Act, that the child born as a result of artificial insemination by an anonymous donor is the child of the couple. *Id.* § 9-10-201(a).

151. *See* VA. CODE ANN. §§ 20-162(A), 20-165; N.H. REV. STAT. ANN. §§ 168-B:16(IV), 168-B:25(V).

The Kansas
**Journal of Law
Public Policy**



About the *Journal*

In March of 1990, five visionary University of Kansas law students held the first organizational meeting of the *Kansas Journal of Law & Public Policy*. These five students saw needs in society that could be satisfied by a new legal publication at the University of Kansas. These needs spurred two goals. The fulfillment of these two goals remains the *Journal's* ongoing mission.

The first goal stemmed from a recognition that a large number of important public policy issues are often neglected by policymakers, scholars, and traditional publications. Present and future members of the legal profession have the ability and the obligation to play an integral role in addressing these crucial issues. By defining "public policy" as the impact of legal rules on society, the *Journal* creates a unique and much needed forum for the discussion of these issues.

The second goal of the *Journal's* founders was to further diversity. Diversity within the law school, diversity within the legal community, and diversity throughout all society — diversity, not limited exclusively to race and sex, but diversity in the fullest sense of the word. In the course of providing important information to those who make public policy decisions, a public policy legal periodical offers an excellent opportunity to present diverse viewpoints on tough issues. The *Journal's* founders aspired to create a forum open to *all* those offering viewpoints on and solutions to public policy problems and issues. To this end, the *Journal's* Editorial Board is neither conservative nor liberal. Rather, the editors are interested in presenting a variety of viewpoints on any given issue in a manner that is thought-provoking, informative, and interesting.

The *Journal* was conceived as a tool for exploring how the law shapes public policy choices and how public policy choices shape the law. Consequently, the founding editors of the *Journal* adopted a style and format that they hoped would reach a broad audience. It is the mission of the *Journal* to reach decision-makers at all levels — legislators who create the laws, judges who interpret the laws, educators who influence the way we think about the laws, and voters who ultimately determine the laws.

Founding Members:

Rita Bigras, Louis Cohn, Scott Long,
Paulette Manville, and David Summers