

MY GENETIC CHILD MAY NOT BE MY LEGAL CHILD? A FUNCTIONALIST PERSPECTIVE ON THE NEED FOR SURROGACY EQUALITY IN THE UNITED STATES

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ABSTRACT

While assisted reproductive technology, and surrogacy in particular, may appear to be a straightforward solution to infertility, the legal field is extremely complex. The patchwork of laws across the United States leaves intended parents at risk for a court to deny legal rights to their biological child. This Note will examine the complexities of surrogacy agreements and the need for a federal, uniform surrogacy law under the sociological functionalist theory of society.

INTRODUCTION

A child born using assisted reproductive technology¹ can have up to five potential “parents.”² One or two intended parents³ can have a child using a

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1. Assisted Reproductive Technology treats infertility through in vitro fertilization (IVF) fertility treatments. In IVF, eggs are surgically removed from the ovary and mixed with sperm outside the body in a Petri dish (“in vitro” is Latin for “in glass”). After about 40 hours, the eggs are examined to see if they have become fertilized by the sperm and are dividing into cells. These fertilized eggs (embryos) are then placed in the women’s uterus, thus bypassing the fallopian tubes. *What is In Vitro Fertilization?*, SOCIETY FOR ASSISTED REPRODUCTIVE TECHNOLOGY, https://www.sart.org/SART_Frequent_Questions/ [https://perma.cc/78WE-HR9L] (last visited Jan. 19, 2019). An individual or a couple who utilizes IVF can carry a fetus using either their own genetic material or by using donor eggs, sperm, or embryos. The individual or couple may sometimes use a surrogate. *Assisted Reproductive Technology*, MEDLINE PLUS, NAT’L INST. OF HEALTH AND U.S. NAT’L LIBRARY OF MEDICINE (May 14, 2018), <https://medlineplus.gov/assistedreproductivetechnology.html> [https://perma.cc/5B4X-77NF].

2. The legal definition of a parent is the “lawful father or mother of someone.” BLACK’S LAW DICTIONARY, *Parent* (11th ed. 2019).

3. An intended parent is, “an individual or couple who commission and become the legal parent/s of a child birthed by a surrogate.” *Intended Parent(s)*, SURROGACY 360, <https://surrogacy360.org/considering-surrogacy/definitions/> [https://perma.cc/8H66-NQNN] (last visited Jan. 29, 2020).

surrogate⁴ and either an embryo donor or an egg or sperm donor. Under the Uniform Parentage Act, a woman who gives birth to a child is presumed to be the biological and legal mother, and if she is married, her husband is presumed to be the biological and legal father.⁵ This is often not the case in third-party reproduction,⁶ where the intended parents⁷ use a surrogate to carry the fetus. Because of this legal presumption, intended parents who use a surrogate must establish legal parentage. In most cases, a judge must order an acknowledgement of legal parentage,⁸ which in some states must occur after the birth.⁹ For individuals struggling with infertility, surrogacy provides a solution that enables them to raise a child of their own genes.¹⁰ However, the lack of uniform surrogacy legislation in our country frustrates people who seek to use third party reproduction. To avoid inconsistent results when adjudicating parental rights or, in the most extreme cases, to avoid facing criminal punishment,¹¹ these individuals have no choice but to explore adoption or to engage in reproductive tourism.¹²

This Note examines the necessity of uniform surrogacy legislation and, under functionalist theory, analyzes how societal equilibrium can be

4. A surrogate mother is “a woman who becomes pregnant usually by artificial insemination or by implantation of a fertilized egg created by in vitro fertilization for the purpose of carrying the fetus to term for another person or persons.” *Surrogate Mother*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/surrogate%20mother> [<https://perma.cc/XBY8-YLLX>] (last visited Jan. 29, 2020). A surrogate is also referred to as a gestational carrier and these terms are used interchangeably throughout this Note.

5. UNIF. PARENTAGE ACT (2017). The legal presumption of parentage is applicable to same-sex couples when children are born to couples who are married or where their state recognizes their civil union or domestic partnership at the time the child is born. *Legal Recognition of LGBT Families*, NATIONAL CENTER FOR LESBIAN RIGHTS (Sept. 2016), http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf [<https://perma.cc/U9SE-9KBH>].

6. Third party reproduction “refers to the use of eggs, sperm, or embryos that have been donated by a third person (donor) to enable an infertile individual or couple (intended recipient) to become parents.” *Third Party Reproduction*, AM. SOC’Y REPROD. MED., <https://www.asrm.org/topics/topics-index/third-party-reproduction> [<https://perma.cc/K8SN-APYR>] (last visited Dec. 26, 2018).

7. The use of “intended parents” throughout this Note also refers to a single intended parent, regardless of gender.

8. *Establishing Parentage in Surrogacy*, AMERICAN SURROGACY & SURROGATE.COM, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/establishing-parentage-in-surrogacy> [<https://perma.cc/Q4ZZ-7ND9>] (last visited Dec. 26, 2018).

9. *Id.*

10. “About 10 percent of women under the age of 44 (6.1 million) have difficulty getting pregnant or staying pregnant . . . Struggling with infertility causes many painful emotions, including grief, guilt, anxiety, and depression . . . For women, the stress of fertility treatment and the side effects of fertility medications can take a huge psychological toll.” *Depression and Infertility: How Infertility Affects Employees*, WINFERTILITY, <https://www.winfertility.com/depression-and-infertility> [<https://perma.cc/K7A7-CTKH>] (last visited Jan. 29, 2020).

11. See discussion *infra* Section IV.

12. Reproductive Tourism is the “willingness to travel for ART [Assisted Reproductive Technology] and the practices that facilitate fertility travel.” Lisa C. Ikemoto, Note, *Reproductive Tourism: Equality Concerns In The Global Market For Fertility Services*, 27 LAW & INEQ. 277 (2009).

achieved by allowing surrogacy to preserve the role of the family. Section I outlines the history of surrogacy and the legal distinctions between traditional and gestational surrogacy. Section II introduces the sociological functionalist theory and analyzes the interaction of functionalism and surrogacy. Section III introduces compensated surrogacy agreements and analyzes the morality of compensation against functionalism. Section IV outlines court-approved remedies for a breach of the surrogacy contract. This section additionally analyzes functionalist views of appropriate remedies. Section V groups states based on the degree of legislation presently enacted. This section additionally analyzes specific state policies against the functionalist theory. Section VI proposes Congress enact a uniform, comprehensive surrogacy statute under its Commerce Clause power. This Note concludes that under functionalist theory, uniform surrogacy legislation is necessary for our society to properly function.

I. HISTORY OF SURROGACY AND DISTINCTIONS BETWEEN TRADITIONAL VERSUS GESTATIONAL SURROGACY

Gestational surrogacy was first successful in 1985.¹³ But despite the longevity of the field, surrogacy law and the legal rights of the parties remain largely unclear. Since there is no federal surrogacy legislation,¹⁴ state legislatures have discretion to implement their own surrogacy laws. However, very few states have clear and comprehensive legislation. In fact, most states have not enacted any legislation, and judges issue parentage judgments on an inconsistent basis.¹⁵ As a result, intended parents may not have the rights they expected at the time of contracting.

There are two types of surrogacy: traditional surrogacy and gestational surrogacy. In traditional surrogacy, the surrogate carries a child conceived using her egg and the sperm of the intended father.¹⁶ In these cases, the child will be genetically related to the surrogate and the intended father, but not

13. Modern IVF Technology was established in 1978 when the first successful IVF embryo transfer occurred in the United Kingdom. Later, in 1982, the first baby conceived via egg donation was born. Doctors were then able to combine the two innovative procedures in 1985. *The History of Surrogacy, Abridged*, CONCEIVEABILITIES: ALL THINGS CONCEIVABLE BLOG (July 17, 2018), <https://www.conceiveabilities.com/about/blog/the-history-of-surrogacy-abridged> [https://perma.cc/3C3C-SPJY].

14. Samantha Lollo, Note, *Our Baby, Her Choices: The Need for Enforcement of Gestational Surrogate Contracts*, 56 FAM. CT. REV. 180 (2018).

15. See discussion *infra* Section IV.

16. Amanda Mechell Holliday, Comment, *Who's Your Daddy (And Mommy)? Creating Certainty for Texas Couples Entering into Surrogacy Contracts*, 34 TEX. TECH L. REV. 1101, 1102 (2003).

the intended mother.¹⁷ Since the surrogate is the genetic and biological mother of the child, it comes as no surprise that issues arise when determining the parental rights of the intended mother, regardless of the surrogate's intentions.¹⁸ Gestational surrogacies, on the other hand, are not as legally complex since the surrogate carries the child but has no genetic relationship to the child.¹⁹ In gestational surrogacy, an embryo is implanted in the surrogate through in-vitro fertilization.²⁰ The embryo is typically either genetically related to both of the intended parents or to at least one, with the help of an egg or sperm donor.²¹

II. INTRODUCTION TO THE FUNCTIONALIST THEORY

Traditional functionalist theory is based largely on the works of Herbert Spencer, Emile Durkheim, Talcott Parsons, and Robert Merton.²² Functionalism is a sociological theory that all aspects of a society serve a function and are necessary for the survival of that society.²³ This perspective emphasizes the interconnectedness of society by focusing on how each part

17. *Id.*

18. *See In re Baby*, 447 S.W.3d 807 (Tenn. 2014), a landmark Tennessee traditional surrogacy case where the Supreme Court refused to grant custody to the intended parents and terminate the parental rights of the surrogate. The court concluded that the surrogate retains parental rights unless and until such rights are terminated in a future proceeding. *Id.* at 812. The court declared that traditional surrogacy agreements are not prohibited against public policy of the state, but that certain restrictions apply. *Id.* at 833. To exhibit the utter lack of consistency among the states, *compare In re Baby*, 447 S.W.3d at 807 (holding that in a traditional surrogacy case the surrogate retains parental rights unless and until such rights are terminated in a future proceeding), with *In re F.T.R.*, 349 Wis.2d 84 (2013) (holding that traditional surrogacy agreements were enforceable to the extent enforcement was not contrary to the child's best interest, despite the traditional surrogate deciding that she no longer wanted to give up her parental rights). *See also*, Holliday, *supra* note 16, at 1102.

19. *Id.* However, complexities do still exist in gestational surrogacy. In *In re C.K.G.*, an unmarried couple in a long-term relationship decided to have children via In Vitro Fertilization using Charles's sperm and an egg donor. *In re C.K.G.*, 173 S.W.3d 714 (Tenn. 2005). Cindy, the intended mother and surrogate, signed an agreement formalizing her intent to be the mother of any child born. However, after the children were born, the parents' relationship deteriorated. *Id.* at 716. Charles objected to Cindy asserting her parental rights on the basis that she had no genetic relationship to the children so she could not be the legal mother. *Id.* The Supreme Court of Tennessee affirmed the Court of Appeals ruling that Cindy, the gestational mother, is the children's legal mother. *Id.* at 717. The court adopted an intent test, where the gestational mother is deemed the legal mother if her intent was to raise the children and if there is no dispute about parental status between the gestational mother and the genetic mother. *Id.*

20. *See What is In Vitro Fertilization?*, *supra* note 1.

21. *What is Gestational Surrogacy?*, AMERICAN SURROGACY & SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-gestational-surrogacy/> [<https://perma.cc/CZ36-YHCX>] (last visited Jan. 19, 2019).

22. Linda A. Mooney et al., *The Three Main Sociological Perspectives*, UNDERSTANDING SOCIAL PROBLEMS 1 (2007) (e-book).

23. Ashley Crossman, *Understanding Functionalist Theory*, THOUGHT CO. (Sept. 24, 2018), <https://www.thoughtco.com/functionalist-perspective-3026625> [<https://perma.cc/2YDE-QFQE>].

influences and is influenced by surrounding parts.²⁴ Functionalism emphasizes “the consensus and order that exist in society, focusing on social stability and shared public values.”²⁵ Functionalist theory focuses on uncovering *how* aspects of society function rather than *why* they function.²⁶ Functionalists view family, politics, and economics as the central elements in society.²⁷ Functionalists theorists attempt to uncover how these sectors function independently in our society and how they interact with others to achieve stability.²⁸ Family, politics, and economics must all depend on each other in order for society to function at its most productive capacity. A large portion of work on this theory focuses on the family element because of its importance in reproduction, among other functions.²⁹

Functionalists believe that the three sectors work in harmony to create stability. However, functionalists prefer static stability. They view societal change as undesirable because various parts of society will be required to compensate when problems arise.³⁰ When disorganization and dysfunction occur in one sector, it affects all other sectors and creates societal problems.³¹ A social change must occur to mitigate this disequilibrium and can be achieved by adjusting various societal components.³² Once the system changes, society stabilizes.³³

Although a social change may be imperative, opponents of functionalist theory argue that people are discouraged from changing their social environment, even when doing so benefits them.³⁴ For example, Emile Durkheim viewed crime as an element of society that embodies both functional and dysfunctional qualities. Crime is dysfunctional in that “it is

24. Mooney et al., *supra* note 22.

25. Crossman, *supra* note 23.

26. *Id.*

27. *Id.* Elements, sectors and components are used interchangeably throughout this Note.

28. *Id.*

29. *Reading: Theoretical Perspectives on Sex*, LUMEN LEARNING SOCIOLOGY, <https://courses.lumenlearning.com/alamo-sociology/chapter/reading-theoretical-perspectives-on-sex/> [https://perma.cc/J7N5-DDH4] (last visited Jan. 4, 2019). *See also* Linda A. Mooney et al., *supra* note 22 (discussing that politics and economics are also seen as important social elements because politics provides a mean of governing members of society, and economics provides the production, distribution, and consumption of goods and services).

30. Crossman, *supra* note 23.

31. *See* Mooney et al., *supra* note 22 (defining dysfunction as a disruption of social stability); *see also* Crossman, *supra* note 23 (defining disorganization as deviant behavior leading to change).

32. Crossman, *supra* note 23.

33. *Id.*

34. *Id.* Another critique of functionalist theory is that it justifies the status quo and the process of cultural hegemony – a tacit agreement with the way that things are. Nicki Lisa Cole, Ph.D., *What is Cultural Hegemony?*, THOUGHT CO. (July 2, 2018), <https://www.thoughtco.com/cultural-hegemony-3026121> [https://perma.cc/85JL-W4GU].

associated with physical violence, loss of property, and fear.”³⁵ However, a limited amount of crime is also functional “because it leads to heightened awareness of shared moral bonds and increased social cohesion.”³⁶ Durkheim believed clarification and reinforcement of moral boundaries through crime and punishment actually strengthen society and are vital to society’s proper functioning.³⁷ Functionalism’s discouragement of active social change additionally allows crime to continue to occur even when reducing crime would be substantially beneficial.³⁸ Encouraging society to actively disengage from generating social change is a critique of this theory since it conflicts with the theory’s main principle of societal interconnectedness.³⁹

A. Functionalism and Surrogacy

The family sector is an essential component of society, and while there is no universal definition of family,⁴⁰ many definitions include children. When individuals or couples receive news of infertility, the image of an idealistic family vanishes. Disruption of procreation leaves the family sector, which relies on reproducing, nurturing and educating children,⁴¹ unable to function at its highest capacity. However, third party reproduction, and specifically surrogacy, affords everyone—infertile couples, gay or lesbian couples, single men, or women who want a child without pregnancy – the opportunity to have a genetically related child. Unfortunately, traditional functionalist works, specifically the work of Talcott Parsons, are centered on outdated views regarding sex and procreation outside of marriage.⁴² Parsons argued that sexual activity, and thereafter procreation, should only occur within the sole confines of a stable, legally recognized relationship so that offspring had the best chance for appropriate socialization.⁴³ A traditional functionalist belief furthermore “stress[ed] the importance of regulating sexual behavior to ensure marital cohesion and

35. Mooney et al., *supra* note 22.

36. *Id.*

37. Scott A. Bonn, Ph.D. *Serial Murder and Functionalism*, PSYCHOLOGY TODAY (Oct. 20, 2019), <https://www.psychologytoday.com/us/blog/wicked-deeds/201910/serial-murder-and-functionalism> [https://perma.cc/75V4-ZUSG] (last visited Mar. 18, 2020).

38. *See* Crossman, *supra* note 23.

39. *See* Mooney et al., *supra* note 22.

40. “The word family may mean children, wife and children, blood relatives, or the members of the domestic circle, according to the connection in which the word is used.” *Spencer v. Spencer*, 11 Paige Ch. 159, 160 (N.Y. Ch. 1844).

41. Mooney et al., *supra* note 22.

42. *Theoretical Perspectives on Sex*, *supra* note 29.

43. *Id.*

family stability.”⁴⁴ In light of Parsons’s perspective, functionalist theory initially appears to reject surrogacy because surrogacy acts as an additional mechanism to enable procreation outside of marriage and weakens the idealistic image of marital cohesion.⁴⁵ However, with broader acceptance today of what a modern family looks like, modern-day views of functionalism accept surrogacy as a method to enhance family stability and contribute to society’s functioning.

Societal functionalism is enhanced by surrogacy in three important ways. First, surrogacy protects family stability. In fact, a recent study suggests that the parent-child relationship is stronger in families with only one genetic parent than in natural-conception families. This result is likely due to the extra burdens experienced by these parents in their efforts to procreate.⁴⁶ The strengthened relationship between children born through surrogacy and their parents could also be explained by the fact that, “couples [and individuals] who cannot reproduce without assistance would be unlikely to seek technologic help if they were not particularly enthusiastic about parenting.”⁴⁷ Moreover, as single-parent and same-sex couple parenting become increasingly common, surrogacy allows these individuals to genetically procreate, advancing the modern concept of a family. The advancement of a modern family as single individuals and same-sex couples adds to family stability since it provides broader acceptance of what a family looks like.⁴⁸

Second, since functionalism places importance on procreation within the family sector, surrogacy serves an important function in society because it allows this sector to return to equilibrium after an infertility crisis. Infertility can be equated to Emile Durkheim’s view on crime.⁴⁹ It causes a sense of loss and sadness; however, with the assistance of reproductive technology and surrogacy, infertility can also lead to shared moral bonds and societal cohesion between individuals and their surrogates. These

44. *Id.*

45. See *id.* for a discussion of Parson’s view on the importance of regulating sexual behavior within the marriage to ensure family stability.

46. Clinton Wang, *Health and Development of Children Conceived Through Assisted Reproduction*, 16 *AMA J. OF ETHICS* 34, (2014), <https://journalofethics.ama-assn.org/article/health-and-development-children-conceived-through-assisted-reproduction/2014-01> [<https://perma.cc/BX9U-HVCG>] (discussing Henry Bos & Frank Van Balen, *Children of the New Reproductive Technologies: Social and Genetic Parenthood*, 81 *PATIENT EDUC. AND COUNSELING* 429-35 (2010)).

47. Wang, *supra* note 46.

48. Being a single parent protects family stability since it gives that parent “increased bonding time with the children,” the “unique opportunity to role model strong, ethical behavior,” and creates a household without fighting between parents. *Pros and Cons in Single Parent Families*, UNIVERSAL CLASS, <https://www.universalclass.com/articles/self-help/pros-and-cons-in-single-parent-families.htm> [<https://perma.cc/K2XE-F6VR>] (last visited Jan. 5, 2019).

49. Mooney et al., *supra* note 22, at 35-36.

women make a decision to help others who are infertile, but would like to have a genetically related child.⁵⁰ Surrogacy can be considered a “social good,” and the act of carrying a child for another can strengthen the bonds between members of society in a deeply personal way.

Third, surrogacy is supported by the functionalist belief that when interconnected parts cannot work together, alternate means should be adopted to restore society’s balance.⁵¹ Each part of society contributes to the stability of society as a whole, so when one element is not functioning at its highest efficiency, the whole society suffers. Infertility precludes the family sector from functioning at its highest efficiency since functionalist theory places a high emphasis on procreation.⁵² Society began to utilize alternate means for reproduction as one remedy to ensure that procreation was still possible.⁵³ A contemporary perspective of functionalism indicates that surrogacy is accepted, despite Parsons’ underlying, and now dated, concerns of enabling procreation outside of marriage.⁵⁴

However, the law lags far behind society’s increasing use of surrogacy. Family law is one area of law that is traditionally reserved to the states.⁵⁵ This explains the lack of consistency in surrogacy laws throughout the United States.⁵⁶ Most states have chosen to stay silent on this topic, and in these states, judges have the legal discretion to deny parents of their legal rights based on their own moral or ethical biases. This silence can cause surrogacy cases to be inconsistently decided,⁵⁷ leaving the family sector disorganized and dysfunctional. Dysfunction typically occurs when a gestational surrogate asserts parental rights as the child’s mother.⁵⁸ Families may be left disheartened and without a predictable remedy of law (or legal rights to their child), especially in states where determining parentage in third-party reproduction is a matter of first impression.⁵⁹ Since surrogacy is accepted under functionalism, different sectors of society must work together to remedy the current disorganization and dysfunction in the family sector.

50. See *The History of Surrogacy, Abridged*, *supra* note 13.

51. Crossman, *supra* note 23.

52. See Crossman, *supra* note 23; Mooney et al., *supra* note 22.

53. See *The History of Surrogacy, Abridged*, *supra* note 13.

54. See *supra* text accompanying notes 42-45 detailing Parson’s perspective on the sanctity of marriage.

55. “Federalism in family law was intended to check the emergence of national tyranny over family life.” Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 *YALE J.L. & FEMINISM* 221, 226 (2005).

56. See discussion *infra* Section IV.

57. See discussion *infra* Section IV.

58. Unif. Parentage Act, *supra* note 5.

59. See discussion *infra* Section IV.

III. COMPENSATED GESTATIONAL SURROGACY AGREEMENTS

The Supreme Court has explicitly stated that its obligation is to define the liberty of all, not to mandate a moral code.⁶⁰ However, in the absence of a Supreme Court ruling on surrogacy legislation, critics like state legislatures⁶¹ and select feminist family-law scholars⁶² continue to condemn commercial surrogacy for its perceived immorality. These opponents focus on surrogacy agreements that compensate the surrogate.⁶³ Critics raise two major public policy arguments in opposition to compensated surrogacy. Both arguments are misguided.

First, critics fear that surrogacy will give men another way to exploit women because of their reproductive capability.⁶⁴ However, contract principles support compensated surrogacy. In defending freedom of contract principles, Professor Richard Epstein, a proponent of surrogacy, argued that “full control over their own bodies and labor is what autonomous individuals have before they contract. The process of contracting always requires a surrender of some portion of autonomy, but only in exchange for things that are thought to be more valuable.”⁶⁵ Surrogates freely consent to restrictions of their personal freedom as a statement of their strong desire to carry a child for the intended parents.⁶⁶ Therefore, compensated surrogacy is not exploitative.

60. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992).

61. See Michigan Surrogate Parenting Act, M.C.L. §§ 722. 851-863; N.Y. DOM. REL. LAW § 121 et seq. (McKinney 2020).

62. Andrea Dworkin, a radical feminist, argued that surrogacy is analogous to prostitution since it puts a price on women’s bodies—something that is not typical of the way society views men’s bodies. Jennifer S. White, Note, *Gestational Surrogacy Contracts in Tennessee: Freedom of Contract Concerns & Feminist Principles in the Balance*, 2 BELMONT L. REV. 269, 281 (2015), see ANDREA DWORKIN, RIGHT-WING WOMEN 182 (1983); see also White, at 290-91, citing Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 167, 172 (Lawrence O. Gostin ed., 1990), for an additional argument suggesting that other feminists who oppose surrogacy believe that the decision to relinquish custody of a child is never truly voluntary because of unpredictable hormonal changes. However, Andrews notes that a change of heart or unpredictable hormone changes would not allow a party to disregard his or her contractual obligations in any other contract. “Feminist proponents of surrogacy respond to anti-surrogacy feminists by arguing that failure to enforce surrogacy contracts based on this rationale suggests that by virtue of being born female, a woman cannot truly consent to certain contracts.” White, at 291.

63. See White, *supra* note 62, at 295, for a discussion on why payment may be necessary to a functioning surrogacy system.

64. Margaret Friedlander Brinig, Comment, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein’s Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377, 2380 (1995); see also White, *supra* note 62, at 290.

65. Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2335 (1995).

66. Interview with Tim Schlesinger, Assisted Reprod. Tech. Partner, Paule, Camazine, & Blumenthal, in St. Louis, Mo. (Aug. 31, 2018).

Second, critics believe that compensation is given in exchange for a human being and thus equates surrogacy to “baby selling.”⁶⁷ Contrary to the beliefs of surrogacy opponents, surrogacy should not be equated to “baby selling” because a surrogate is not being compensated for giving the intended parents a baby.⁶⁸ Surrogates still receive the full amount due based on the length of the pregnancy regardless of the child’s health, or even whether the pregnancy results in a stillbirth.⁶⁹ This is further evidence that surrogates are compensated for providing the service of carrying the baby, not “selling” the baby.

Another viewpoint, espoused in a student Note by Jennifer White, is that “paying a surrogate for her services should be viewed as similar to paying a reproductive center for artificial insemination or other fertility treatments that are commonly used to assist couples in conceiving a child.”⁷⁰ In terms of freedom to contract, the law treats sperm donation much differently than gestational surrogacy. Sperm donors contract to relinquish all legal rights to any *genetically related* child that may be conceived using their sperm.⁷¹ Unlike sperm donors, gestational surrogates have no genetic relationship to the child⁷² yet still contract to relinquish the same legal rights to any child conceived through surrogacy. However, because of the Uniform Parentage Act presumption,⁷³ in states without surrogacy laws, a gestational surrogate can petition the court for legal rights to a child that is not genetically theirs. Sperm donors presumably cannot go to court and do the same. If sperm donation is not equated to a sale, gestational surrogacy should not be either because the baby was never the surrogate’s child.⁷⁴ Logically, the fees should be considered a payment for services and not a payment for a child.

A. Functionalism and Compensated Surrogacy Agreements

67. White, *supra* note 62, at 288-89. The Oregon state legislature has carved out a surrogacy exception under trafficking law, implying that surrogacy is inherently different. OR. REV. STAT. ANN. § 163.537 (West).

68. The gestational carrier is entering into this agreement based on her free will and is being compensated for the services rendered, her risk, discomfort endured, time, effort, and relinquishment of certain behaviors, not for any genetic material. Compensated surrogacy agreements clearly state that no money is being exchanged in return for the “sale” of a child. Interview with Tim Schlesinger, Assisted Reprod. Tech. Partner, Paule, Camazine, & Blumenthal, in St. Louis, Mo. (Aug. 31, 2018).

69. Interview with Tim Schlesinger, Assisted Reprod. Tech. Partner, Paule, Camazine, & Blumenthal, in St. Louis, MO. (Feb. 25, 2020).

70. White, *supra* note 62, at 295.

71. *Id.* at 288-89.

72. Holliday, *supra* note 16, at 1102-03.

73. UNIF. PARENTAGE ACT, *supra* note 5.

74. See *supra* notes 19-21 and accompanying text (defining gestational surrogacy).

Since procreation is a function of the family sector, functionalists support and encourage the practice of compensated surrogacy agreements.⁷⁵ Compensation may encourage some women who have been considering becoming a surrogate to actively seek out an agency. Allowing compensated surrogacy agreements increases the pool of available potential surrogates—enabling the family sector to function more efficiently. Because surrogacy is becoming an increasingly prevalent method of procreation, a ban on compensated agreements would only push the family sector into further imbalance. Without compensation, women may be less likely to become surrogates, which would somewhat eliminate one available method of reproduction.

Additionally, because both the intended parents and the surrogate benefit from the agreement, compensated surrogacy maintains the balance in society between the parties. The surrogate performs a service for the intended parents, and the intended parents receive genetically related offspring. Legal scholar Richard Posner espouses that an economic efficiency argument⁷⁶ maintains the balance because “the parties would not make [an agreement] if they did not think it would make both of them better off.”⁷⁷ Posner argues that individuals should have the autonomy to contract efficiently for their personal benefit.⁷⁸ Therefore, by allowing individuals to contract for their personal benefit, compensated surrogacy agreements preserve the status quo.

IV. BREACH OF CONTRACT REMEDIES

Third-party reproduction is the only opportunity for individuals and same-sex couples to have equitable access to genetic family formation.⁷⁹ Intended parents who wish to form a family using a surrogate invest a

75. *Theoretical Perspectives on Sex*, *supra* note 29.

76. Posner defines “efficiency” as “exploiting economic resources in such a way that human satisfaction as measured by aggregated consumer willingness to pay for goods or services is maximized.” Donald H.J. Hermann, Comment, *Review of “Economic Analysis of Law,”* by Richard A. Posner, 1974 WASH. U. L. Q. 354, n.4 (1974).

77. Richard A. Posner, Comment, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 60 (1987).

78. White, *supra* note 62, at 293.

79. *Id.* at 271-72. A single male or female may prefer to raise a child alone, and many infertile couples see surrogacy as an alternative to adoption. This is unequivocally true for infertile heterosexual couples, but these couples typically turn to surrogacy after they have exhausted other reproductive options. *Id.*

significant amount of time,⁸⁰ money (even when uncompensated),⁸¹ and emotional labor into the process.⁸² Intended parents hope they can rely on their surrogate to fulfill her contractual promises, but there are always risks associated with these agreements. The intended parents and surrogate may disagree on whether to terminate the pregnancy or selectively abort a fetus.⁸³ Selection reduction lowers the number of fetuses through a surgery called multifetal reduction. The goal of selective reduction is to improve a woman's chances for a healthy pregnancy.⁸⁴ The main purpose of a surrogacy contract is “[t]o make sure that, should a decision about a termination arise, everyone is making the decision with full

80. For some couples, the decision to use a surrogate is one that takes time to process and accept. Once an individual or couple is ready to conceive using a surrogate, there is a standard procedure that can take upwards of two years. The intended parents must find a surrogate, the surrogate must be medically cleared, the parties must retain an attorney to draft a legal agreement, the embryos must be transferred and may not result in a successful pregnancy on the first attempt, and then the intended parents must wait out the nine month pregnancy period. However, then once the child is born, the attorney must obtain a judge's signature on the judgment of parentage to a judge and contact the state's Department of Health to obtain a new birth certificate. Kelly Enders-Tharp, *A Rough Timeline for Intended Parents*, GROWING GENERATIONS (Jan. 22, 2015), <https://www.growinggenerations.com/surrogacy-resources-for-intended-parents/a-rough-timeline-for-intended-parents/> [<https://perma.cc/PBZ9-F7ER>].

81. Even where the surrogate is not being compensated, the intended parents typically reimburse the surrogate for out-of-pocket expenses incurred as the result of her participation in the agreement, including (but not limited to) health insurance, medical expenses, and legal fees. Interview with Tim Schlesinger, Assisted Reprod. Tech. Partner, Paule, Camazine, & Blumenthal, in St. Louis, Mo. (Aug. 31, 2018).

82. Intended parents must take the leap of faith and entrust another person to take care of something extremely important to them. It is often an emotional task for the intended parents to let go their control of the pregnancy, yet stay closely involved. Dr. Carrie Eichberg Ph.D., *Frequently Asked Questions About the Emotional Aspects of Surrogacy*, PARENTS VIA EGG DONATION, <https://www.pved.org/surrogacy-faq-emotionalaspects.php> [<https://perma.cc/M9Y6-H8XV>].

83. See DEBORAH L. FORMAN, *Abortion and Selective Reduction Clauses in Surrogacy Contracts: What Every Intended Parent and Surrogate Needs to Know*, PATH 2 PARENTHOOD (Nov. 24, 2014), <http://www.path2parenthood.org/blog/abortion-and-selective-reduction-clauses-in-surrogacy-contracts-what-every-intended-parent-and-surrogate-needs-to-know> [<https://perma.cc/Y27R-6ZCE>] (discussing ways to minimize the risk of conflict between intended parents and surrogates given that courts will not order a surrogate to undergo selective reduction against her will). See also Cook v. Harding, 190 F. Supp. 3d 921, 928-29 (C.D. Cal. 2016) (illustrating the conflict between a gestational surrogate and intended father where the surrogate cited her anti-abortion beliefs and refused to selectively reduce, despite having signed the contract agreeing to abide by the agreement's selective reduction clause).

84. A fetus is “an unborn offspring from the embryo stage (the end of the eighth week after conception...) until birth.” *Medical Definition of Fetus*, MEDICINET (Dec. 12, 2018), <https://www.medicinenet.com/script/main/art.asp?articlekey=3424> [<https://perma.cc/T8W9-GUFN>]. The more fetuses in the womb, the more likely the woman is to have a miscarriage or a stillborn. *What is Multifetal Reduction?* WEBMD, <https://www.webmd.com/infertility-and-reproduction/fertility-multifetal-reduction#1> [<https://perma.cc/L7D6-STTD>]. Selective reduction also lowers the chance of the baby being born too early. Premature delivery can cause lifelong health issues of the lungs, heart, stomach, and brain. Finally, selective reduction lowers the chance that the surrogate experiences severe morning sickness, diabetes, preeclampsia, anemia, and placental abruption. *Id.*

understanding.”⁸⁵ Unsurprisingly, conflicts can, and do, arise when the surrogate makes medical decisions, such as having or refusing to have an abortion, contrary to the intended parents’ wishes. Since it is a clear constitutional violation of privacy and personal liberty for a court to mandate an abortion,⁸⁶ selection reduction⁸⁷ and termination of pregnancy clauses are two contractual clauses that, if breached, cannot be remedied with specific performance (court ordered performance of a contractual duty).⁸⁸ If specific performance is unavailable, intended parents are left with minimal available remedies.⁸⁹ Even if a court were to award the intended parents monetary value in damages, the remedies available do not provide the intended parents with what they are seeking: a baby.

Selective reduction and termination of pregnancy are already divisive, sensitive topics. Contract clauses on selective reduction and abortion exacerbate criticism that compensated surrogacy agreements are immoral.⁹⁰ Though, there are advocates who believe that a surrogate should be held to her earlier commitment at the time of contracting as it relates to these clauses. These individuals believe specific performance would apply even when the surrogate experiences intervening distress during pregnancy and

85. KATIE O'REILLY, *When Parents and Surrogates Disagree on Abortion*, THE ATLANTIC (Feb. 18, 2016), <https://www.theatlantic.com/health/archive/2016/02/surrogacy-contract-melissa-cook/463323> [https://perma.cc/SMS6-EPSV] (quoting Jes Stumpf, executive director of the Vermont Surrogacy Network).

86. *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a pregnant woman has a constitutional right to terminate a pregnancy prior to the point of viability under the Due Process Clause of the Fourteenth Amendment).

87. In 2016, a case arose in California after Melissa Cook, a gestational surrogate, refused to selectively reduce a high-risk triplet pregnancy after the intended father asked three times. *Cook v. Harding*, 190 F. Supp. 3d 921, 929 (C.D. Cal. 2016). The intended father was concerned about his finances and the three fetuses’ health. The three babies were born premature (at 28 weeks gestation) and remained in the Neonatal Intensive Care Unit for seven weeks. *Id.* The court was not involved until Melissa Cook filed an action in federal court seeking to overturn California’s surrogacy law and name her as the mother of the children. The court was obligated to dismiss the claim because it would interfere with ongoing state court proceedings. *Id.* at 938. Still, this case illustrates the limited recourse an intended parent has when a gestational surrogate refuses to undergo a selective reduction procedure.

88. LEGAL INFORMATION INSTITUTE, *Specific Performance*, https://www.law.cornell.edu/wex/specific_performance [https://perma.cc/VQ5E-Q5NM].

89. A court can order the surrogate to pay the intended parents “compensatory, expectancy, restitution, reliance, punitive, or mental pain and anguish damages.” Lollo, *supra* note 14, at 182. While the court has the authority to award these types of damages, because of the speculative nature of the injury, it is more likely that intended parents will be awarded restitution and reliance damages. *Id.* at 182-83.

90. In states where surrogacy contracts are considered void against public policy, no aspect of the contract would be enforceable. Forman, *supra* note 83; *see also* discussion *infra* section V on state enforceability of surrogacy agreements.

ultimately changes her mind.⁹¹ The tort law principle of voluntary undertaking could support their argument. Under a voluntary undertaking,

an actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has the duty of reasonable care to the other in conducting the undertaking if: ... (b) the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking.⁹²

Applied to surrogacy, once a surrogate intervenes and makes the decision to carry the child for the intended parents, she must exercise due care and cannot leave the intended parents in a worse position later than they previously enjoyed by terminating the pregnancy against their consent.⁹³

Further, while *Roe v. Wade* delineates that procreative rights are strictly confined to the individual,⁹⁴ surrogates knowingly, willingly, and intelligently consent to waive this constitutional right within the contract.⁹⁵ Proponents of court enforcement view a waiver of reproductive rights similarly to the common waiver of First Amendment rights.⁹⁶ Consequently, the surrogate's advanced agreement to a procreative decision should be upheld under a voluntary undertaking principle.

Those who oppose court enforcement of selective reduction and termination of pregnancy clauses predominantly raise concerns about forced

91. Julia Dalzell, Note, *The Enforcement of Selective Reduction Clauses in Surrogacy Contracts*, 27 WIDCLR 83, 104 (2018) (inferring that “[w]ith a clear legal rule that selective reduction clauses are enforceable, any woman with doubts about her psychological stability will steer away from contracting altogether, avoiding the problem of later regret”).

92. RESTATEMENT (THIRD) OF TORTS § 42 (AM. LAW. INST. 2010).

93. Some scholars additionally believe that under tort law, the contractual relationship between the surrogate and the intended parents and child creates a “special relationship.” *Dalzell, supra* note 91, at 113. “In essence, the carrier is the trustee, and the fetus, as a beneficiary of the fiduciary relationship between the intended parents and the carrier, depends upon the carrier to act in good faith by fulfilling her duties of loyalty and care.” *Id.* (quoting Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier's Right to Abortion*, 70 FORDHAM L. REV. 93 165 (2001)).

94. *Roe*, 410 U.S. 113 at 153-54 (1973); see, e.g., *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 71 (1976); *Forman, supra* note 83 (reinforcing the notion that the decision to terminate a pregnancy rests with the pregnant woman – consequently the surrogate, not the intended parents); cf. *Dalzell supra* note 91, at 103, arguing against the opposing position that women do not have “decisional maturity based on their supposed hormonally-induced unpredictability” because it “depict[s] a strong sense of paternalism” and “presumes that women are naïve, unable to evaluate information from their health care providers, and psychologically unfit to make rationale [sic] choices.”

95. Lollo, *supra* note 14, at 186 (stating that a surrogate reviews the contract with her attorney so she can adequately understand what she is signing).

96. Reproductive rights involve the same deeply personal issues unique to the individual as First Amendment rights. *Dalzell, supra* note 91, at 95.

consent.⁹⁷ Since a court cannot mandate an unwanted abortion,⁹⁸ and a surrogate's emotional response to pregnancy cannot be controlled or legislated,⁹⁹ this issue will persist. Federal surrogacy legislation would still serve a beneficial purpose despite not being able to address these controversial clauses. Legislation would mitigate other legal issues like establishing legal parentage,¹⁰⁰ making the surrogacy process slightly less speculative and stressful for both parties.

A surrogate could additionally breach the contract by engaging in risky behavior that harms the fetus. Prior to signing the contract, the surrogate is fully aware that she will have to relinquish certain liberties during the pregnancy.¹⁰¹ By engaging in behavior prohibited by a "behavioral terms" provision, the surrogate breaches the contract. In terms of enforcement, intended parents are limited in remedies since it is an invasion of privacy to micromanage the surrogate, and the parents may not even be aware of the damaging behavior until much later.¹⁰²

One remedy, monetary damages, is available if the surrogate substantially engages in prohibited behavior.¹⁰³ Theoretically, if the surrogate substantially deviated from the allowed behavior and the child is born with birth defects or ongoing detrimental health conditions, then contract law allows the intended parents to sue the surrogate for monetary damages.¹⁰⁴ Monetary damages act as partial compensation for tangible loss, but courts will rarely award money if the damages are too speculative.¹⁰⁵ For instance, some health or cognitive consequences may remain unrealized for months or years post-partum and, therefore, be

97. *Id.* at 102.

98. *Roe*, 410 U.S. at 153-54 (1973).

99. *See also* FORMAN, *supra* note 83 (discussing the implausibility of court enforcement of selective reduction and termination of pregnancy clauses).

100. *See supra* notes 5, 8 and accompanying text (explaining legal parentage).

101. Interview with Tim Schlesinger, Assisted Reprod. Tech. Partner, Paule, Camazine, & Blumenthal, in St. Louis, Mo. (Aug. 31, 2018) (discussing the relinquishment of certain liberties including: abstaining from consuming raw fish, avoiding contact with cat litter, using hair dye within the first trimester, drinking alcohol, using tobacco or illicit drugs, engaging in high risk sexual intercourse for an extended period of time, and traveling to jurisdictions with known cases of the Zika virus, among others).

102. Interview with Tim Schlesinger, Assisted Reprod. Tech. Partner, Paule, Camazine, & Blumenthal, in St. Louis, Mo. (Aug. 31, 2018) (discussing the unreasonableness in true enforcement of these behaviors, including ensuring that the surrogate refrains from feeding stray cats because of a fear of Toxoplasmosis).

103. *Cf. Lollo, supra* note 14, at 182 (stating that damages are typically the remedy courts award when an abortion or reduction provision is breached).

104. *Cf. Lollo, supra* note 14, at 182 ("[A]ssuming the surrogate contract is valid and enforceable, when the contract is breached...the court can order the surrogate to pay the intended parents damages . . .").

105. *Lollo, supra* note 14, at 182.

unaccounted for during the judicial process. For tangible loss, monetary damages may be recoverable under basic contract law even if the surrogate agreement is executed in a state that does not have surrogacy laws.¹⁰⁶ Though, in states where surrogacy agreements are void as against public policy, intended parents are left with absolutely no breach of contract remedy.¹⁰⁷

Judges should have the authority to enforce the contract in some capacity regardless of the perceived immorality of surrogacy. Both intended parents and gestational carriers benefit from knowing that their rights and remedies at the time of contracting would be upheld if a breach occurred. Otherwise, the risk of entering into an agreement of this nature may be too high to be justified.

A. Functionalism and Breach of Contract Remedies

Functionalism's main goal of achieving societal harmony is analogous to contract law's purpose of awarding monetary damages to make the injured party whole.¹⁰⁸ Because of these similar principles, functionalism supports a court award of compensatory and restitution monetary damages¹⁰⁹ for a breach of "behavioral terms." It is therefore plausible that functionalism would also support a specific performance remedy. The parties to a surrogate agreement have a special relationship due to the deeply personal purpose for the contract, and a breach by the surrogate causes a serious deterioration of trust. Specific performance returns the injured party to a state of equilibrium in a way that a monetary award cannot.¹¹⁰ Since forum shopping and reproductive tourism¹¹¹ allows intended parents and surrogates to be matched across the nation, a deterioration of trust in the aggregate can cause serious harm to the reproductive subset of the family sector.

In actuality, functionalist theory does not support specific performance for a breach of an abortion provision because the constitutional disharmony in doing so outweighs the perceived benefit. It is a fundamental

106. *Cf.* Lollo, *supra* note 14, at 182 ("assuming the surrogate contract is valid and enforceable, when the contract is breached...the court can order the surrogate to pay the intended parents damages . . ."); *contra* FORMAN, *supra* note 83 (stating that in states where surrogacy contracts are considered void against public policy, no aspect of the contract will be enforceable).

107. FORMAN, *supra* note 83.

108. Lollo, *supra* note 14, at 182.

109. *Id.* (defining compensatory damages as an award for the actual loss the intended parents suffered, based on proven harm, loss, or injury, and defining restitution damages as a return or reimbursement of the expenses paid to the surrogate as of the date of the breach).

110. *See Specific Performance*, *supra* note 88.

111. Ikemoto, *supra* note 12, at 281.

constitutional principle that a woman has an absolute right to make decisions regarding her medical care.¹¹² If society were able to supersede fundamental constitutional protections, tremendous social dysfunction would result. Therefore, it is extremely unlikely under the current state of the law that functionalism would support a judicial mandate of an unwanted abortion, or conversely, a refrain from terminating.

In addition, specific performance is not supported under functionalism as a practical remedy for a surrogate's breach of "behavioral terms." If surrogates believed they were under constant scrutiny by the intended parents (or the court), fewer women may offer to become a surrogate. Individuals and couples would have no other choice but to turn to foster care or adoption as a means to parent. Although adoption and foster care themselves do not lead to societal instability, the family sector would weaken as a result of the elimination of an entire means of reproduction.

However, if a surrogate were to significantly engage in prohibited behavior, functionalist theory would allow monetary damages as an adequate remedy. Damages protect social stability since surrogates would likely be discouraged from engaging in risk-adverse behavior—such as drinking alcohol or smoking cigarettes¹¹³—that would harm the fetus. While functionalism would support monetary damage, it is important to note that damages for risky behavior attempts to assign a monetary value to the life of an unborn fetus. Though, it is likely that this concern can be reconciled under the functionalist view that some aspects of society can serve as both functional and dysfunctional.¹¹⁴

A court awarding monetary damages to an injured party is analogous to Durkheim's view on crime since it acts as both necessary and damaging to societal stability.¹¹⁵ On one hand, monetary damages act as a mechanism to maintain equilibrium because they discourage breaches from occurring in the first place. If a breach does occur, monetary damages protect the injured party and safeguard the parties' contractual obligations.¹¹⁶ On the other hand, monetary damages attempt to quantify the value of future quality of

112. *See e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (holding that choices concerning contraception, family relationships, procreation, and childrearing are protected by the Constitution and constitute a separate sphere in which the federal government cannot enter).

113. "Drug researchers are discovering more and more about persistent learning and emotional disabilities, as well as physical defects and health problems, attributable to alcohol and other drug exposure during fetal development." PADDY S. COOK, ET. AL., U.S. DEP'T OF HEALTH AND HUMAN SERV., *Alcohol, Tobacco, and Other Drugs May Harm the Unborn* 1 (Tineke B. Haase ed., 1990).

114. *See supra* notes 35-37 and accompanying text for a discussion on Emile Durkheim's view on crime as both functional and dysfunctional.

115. Mooney et al., *supra* note 22, at 8.

116. *See Lollo, supra* note 14, at 182, for a discussion on the purpose of awarding damages.

life. Since each situation is unique, this leaves open the very real possibility for discrimination and abuse of power by judges. Nonetheless, monetary damages should continue to be an appropriate substitute remedy for specific performance just as crime continues to occur under functionalism.¹¹⁷

V. STATE ANALYSIS OF GESTATIONAL SURROGACY LAWS

Since surrogacy remains unregulated at the federal level,¹¹⁸ the state of the law is left to state legislatures.¹¹⁹ These legislators hold the decision making power over whether their particular state will be surrogacy-friendly, surrogacy-hostile, or somewhere in between.¹²⁰ States that are surrogacy-friendly have either enacted a clear statute permitting surrogacy, have a long history of judges upholding surrogacy contracts, or a combination of both.¹²¹ States that are surrogacy-hostile view all surrogate agreements (uncompensated and compensated) as void and unenforceable due to public policy concerns.¹²² In the most extreme of cases, individuals may be prosecuted for engaging in the surrogacy process in these states.¹²³ States that are “somewhere in between” do not have surrogacy laws that address and regulate the agreements, and have either have had no surrogacy cases, or cases where the court has only enforced select terms.¹²⁴ These states have resorted to a legal process that is both confusing and complicated, which allows judges to vary widely in their treatment of surrogacy contracts.¹²⁵ Surrogacy in these states is “largely a process that depends upon the integrity of intended parents and surrogates”¹²⁶ rather than the legislature or judicial system.

Illinois has taken a consistent position on the enforcement of surrogacy by enacting an elaborate and clear statute.¹²⁷ This statute governs the surrogate process from contract formation to the issuance of birth

117. Dalzell, *supra* note 91, at 106.

118. Lollo, *supra* note 14, at 180.

119. See *supra* note 55 and accompanying text.

120. *Surrogacy Laws by State*, AMERICAN SURROGACY & SURROGATE.COM, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/establishing-parentage-in-surrogacy> [<https://perma.cc/Q4E2-XGF2>].

121. *Id.*

122. MICH. COMP. LAWS ANN. §§ 722. 851-863 (West 2018); N.Y. DOM. REL. LAW § 121 et seq. (McKinney 2020) *infra* notes 152-56.

123. N.Y. DOM. REL. LAW § 121 et seq. (McKinney 2020) *infra* notes 152-53.

124. *Infra* text accompanying notes 149-56

125. *Infra* text accompanying notes 149-56.

126. *Nebraska Surrogacy Laws and Information*, AMERICAN SURROGACY & SURROGATE.COM <https://www.americansurrogacy.com/surrogacy/nebraska-surrogacy-laws> [<https://perma.cc/WG8K-WJXJ>].

127. 750 ILL. COMP. STAT. 47/1, 5, 10, 15, 20, 25, 30, 35 (West 2018).

certificates without requiring any appearance in court.¹²⁸ It applies to single parents who have furnished their own gametes or couples where at least one person has furnished his or her own gametes.¹²⁹ In addition, California courts have used the California Family Code,¹³⁰ California Uniform Parentage Act,¹³¹ and well-established case law¹³² to interpret a number of surrogate cases. California attracts a large number of reproductive tourists¹³³ because of the ability of courts to establish the legal parentage rights of the intended parents in a pre-birth parentage order.¹³⁴ In 2017, Washington D.C. became surrogacy-friendly, with the District removing the ban on compensated surrogacy that dated back to the 1980's.¹³⁵ More recently, in May 2018, the New Jersey Governor signed the New Jersey Gestational Carrier Agreement Act into law.¹³⁶ This Act declares that “gestational carrier agreements executed pursuant to this act are in accord with the public policy of the state,”¹³⁷ securing both the rights and responsibilities of intended parents and surrogates. This legislation is especially monumental since it effectively supersedes the famous New Jersey Supreme Court decision, *In Matter of Baby M*,¹³⁸ which prompted the enactment of the strict anti-surrogacy laws thirty years ago.

128. *Id.*

129. *Id.*

130. CAL. FAM. CODE §§ 7960-7962 (West 2019).

131. CAL. FAM. CODE §§ 7600-7606 (West 2019). California courts have additionally held that though the Uniform Parentage Act, two women can be deemed as the legal parents of a child born via surrogacy.

132. *See generally* Johnson v. Calvert, 851 P.2d 776, 777-78 (Cal. 1993) (holding that “[w]hen, pursuant to a surrogacy agreement, a zygote formed of the gametes of a husband and wife is implanted in the uterus of another woman... the husband and wife are the child’s natural parents”); *In re Marriage of Buzzanca*, 61 Cal.App.4th 1410 (1998) (holding that the intended parents’ agreement with a surrogate for her to carry an embryo genetically unrelated to either of them on their behalf, deemed them both the lawful parents of the child born from that embryo).

133. Ikemoto, *supra* note 12, at 281.

134. *What Are the State Laws in California for Surrogacy?*, MODERN FAMILY SURROGACY CENTER, <http://www.modernfamilysurrogacy.com/what-are-the-state-laws-in-california-for-surrogacy> [<https://perma.cc/A33C-C8F2>].

135. D.C. CODE ANN. §§ 16-401, 403-412 (West 2018).

136. N.J. STAT. ANN. §§ 9:17-60 to -68 (West 2018).

137. *Id.* § 9:17-61.

138. *In Matter of Baby M* was the first American court ruling on the validity of surrogacy. *In Matter of Baby M*, 109 N.J. 396 (1988), *invalidated by* N.J. STAT. ANN. §§ 9:17-60 to -68 (West 2018). In *In Matter of Baby M*, William and Mrs. Stern entered into a traditional surrogacy agreement with the surrogate, Mary Beth Whitehead. The contract stated that Mary Beth would be artificially inseminated with William’s sperm, carry the child to term, and that when the baby was born, she would do everything necessary to terminate her parental rights so that Mrs. Stern could adopt the child. *Id.* at 411-12. However, after the birth of the child, Mary Beth decided that she did not want to give the baby back and she challenged the enforcement of the agreement. *Id.* at 415-16. Mary Beth claimed the contract was invalid and that the trial court erred in terminating her parental rights. *Id.* at 417, 419. The Supreme Court of New Jersey ultimately reversed the trial court and declared that surrogacy contracts were invalid as against public policy. The court reinstated the surrogate’s parental rights. *Id.* at 459.

Although state legislation may favor surrogacy, it may still contain limitations or ambiguity on the parties' legal rights. For example, the North Dakota legislature has authorized that a child born to a gestational carrier is a child of the intended parents,¹³⁹ but sets the limitation that traditional surrogacy agreements are void—meaning the surrogate or her husband (if applicable) cannot be the genetic parents.¹⁴⁰ Moreover, Arkansas's favorable surrogacy law contains no language to indicate whether compensated surrogacy is permitted.¹⁴¹

Although Louisiana enacted the Louisiana Surrogacy Bill in 2016 permitting gestational surrogacy,¹⁴² it is arguably the most controversial and discriminatory surrogacy legislation to date. The Louisiana bill includes clauses that extend surrogacy only to those using their own egg and sperm by defining “intended parents” as “a married couple who each exclusively contribute their own gametes to create their embryo.”¹⁴³ This is a requirement same-sex couples simply cannot meet. The inclusion of this restrictive statutory language solely provides Louisiana's legislature a back-door entry at foreclosing surrogacy for gay couples without apparent discrimination. Louisiana's statute additionally excludes a large percentage of individuals, either single or with a partner, who wish to procreate using his or her genetic material and require a donor's contribution.¹⁴⁴ The punishments for entering into a surrogacy agreement that is not sanctioned by the new law include civil and criminal penalties.¹⁴⁵ This bill excludes classes of individuals, and thus it will be susceptible to challenges under the Equal Protection Clause.¹⁴⁶

A state can still be surrogacy-friendly even if it does not have an elaborate statute defining the enforceability of surrogacy contracts and the rights of the parties. By way of example, Iowa and Kansas are states relatively favorable to surrogacy even in the absence of a statute. The Iowa Code exempts a “surrogate mother arrangement” from criminal provisions regarding the sale or purchase of human beings.¹⁴⁷ In Kansas, pre-birth

139. N.D. CENT. CODE ANN. § 14-18-08 (West 2017).

140. N.D. CENT. CODE ANN. § 14-18-05; Holliday, *supra* note 16 (defining traditional surrogacy).

141. ARK. CODE ANN. § 9-10-201 (West 2018).

142. LA. STAT. ANN. §§ 9:2718 - 9:2720.15 (2018).

143. LA. STAT. ANN. § 2718.1(6).

144. LA. STAT. ANN. § 2718.1(6).

145. Amy Kern & Noel Vargas Jr., *Gestational Surrogacy in Louisiana*, CREATIVE FAMILY CONNECTIONS (2016), <https://www.creativefamilyconnections.com/us-surrogacy-law-map/louisiana/> [<https://perma.cc/FE34-KCXN>].

146. U.S. CONST. amend. XIV § 1.

147. *U.S. Surrogacy Law by State*, THE SURROGACY EXPERIENCE, <https://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html> [<https://perma.cc/3MSJ-ZR34>].

orders are regularly granted, even in the absence of a statute directive, if parent(s) are using their own egg and sperm.¹⁴⁸

However, there are states that remain strongly opposed to surrogacy, likely because of the beliefs that women are being exploited for their reproductive capabilities¹⁴⁹ and that surrogacy is “baby selling.”¹⁵⁰ New York and Michigan have particularly strict legislation to restrict who may procreate using third party reproduction.¹⁵¹ In New York, anyone who enters into a surrogacy agreement, regardless of whether it is compensated or uncompensated, may be fined up to \$10,000.¹⁵² The lawyers and agencies that facilitate these agreements will be fined and could be found guilty of a felony.¹⁵³ Michigan has gone so far as to enact the Michigan Surrogate Parenting Act.¹⁵⁴ This Act declares all surrogacy contracts “void and unenforceable as contrary to public policy.”¹⁵⁵ Anyone who enters into a compensated surrogacy agreement in Michigan is subject to criminal penalties of up to \$50,000.¹⁵⁶ In order to avoid facing criminal charges, individuals and couples living and seeking surrogacy in these states are burdened with travelling an unknown distance in search of a more hospitable jurisdiction.

Finally, many of the states in the country are “somewhere in between” – they have no laws addressing or regulating surrogacy and thus, have not taken a consistent position regarding enforceability of surrogacy

148. *Id.*

149. *See* discussion *supra* section III.

150. *See id.*

151. THE AM. SOC’Y REPROD. MED., *supra* note 6 (defining Third Party Reproduction). The Indiana legislature additionally has particularly strict legislation and has declared that it is against public policy to enforce any term of a surrogate agreement that requires a surrogate to provide a gamete, consent to undergo an abortion, and engage in activity only in accordance with the demands of another person, among others. IND. CODE 31-20-1-1 (2018).

152. N.Y. DOM. REL. LAW § 121 et seq. (McKinney 2020).

153. The harsh reality of this law is that it still promotes discrimination against same-sex couples that wish to procreate using one partner’s genetic material. The laws of New York do however recognize second parent adoptions by same-sex couples. In re Adoption of J.J., 984 N.Y.S.2d 841, 846 (Fam. Ct. Queens Co. 2014) (holding that, in a matter of first impression, adoption of twins conceived with birth father spouse’s sperm and an anonymous egg donor’s egg could be approved for finalization despite statutory ban against surrogacy contracts). The New York Legislature is currently discussing proposed legislation of the “Child-Parent Security Act of 2017” which would lift the ban on gestational surrogacy agreements in New York State. This discussion follows New Jersey’s recent legislation that lifted a nearly thirty-year ban on surrogacy. Harriet N. Cohen & Kristen E. Marinaccio, *Surrogacy in New York: Boon or Bane?* N.Y. L. J. (July 27, 2018), <https://www.law.com/newyorklawjournal/2018/07/27/0730sscohen-surrogacy-in-new-york-boon-or-bane> [<https://perma.cc/S9R2-9B37>].

154. Michigan Surrogate Parenting Act, M.C.L. §§ 722. 851-863.

155. *Id.*

156. *Id.*

contracts.¹⁵⁷ Intended parents in these states are not always granted their parental rights as they thought they would be at the time of contracting even though the state does not have legislation blocking the enforcement of the contract. The issuance of a parentage judgment requires the involvement of the court and the possibility that the intended parents may run into procedural and legal challenges in successfully securing their parental rights.

The Supreme Court of Idaho, for example, has refused to issue a declaratory judgment to the intended parents determining the parentage of a child even though Idaho has not enacted any surrogacy legislation.¹⁵⁸ The court refused despite the request from the gestational carrier who had no genetic relationship to the child.¹⁵⁹ But because the court declined to address whether the underlying surrogacy contract was in violation of public policy, the legality of surrogacy in Idaho still remains unclear.¹⁶⁰ Additionally, the Arizona Legislature has not yet addressed whether to allow compensated surrogacy despite striking a statute that prohibited surrogacy contracts in total—even when uncompensated.¹⁶¹ Arizona judges will typically allow heterosexual intended parents who have used their own egg and sperm to obtain a pre-birth order declaring them the legal parents of a child that is born through surrogacy.¹⁶² However, judges will not issue the same pre-birth order to same-sex couples and heterosexual couples using donated eggs or sperm.¹⁶³ These parents must wait until the child is born to undergo the lengthy adoption process of their genetic child.¹⁶⁴

157. Kentucky, for example, does not have law governing surrogacy, and pre-birth orders will vary by court venue. Judges tend to be more favorable to married couples. In Pennsylvania, court venue will dictate results in Pennsylvania, with more conservative judges refusing to grant pre-birth orders. *U.S. Surrogacy Law by State*, THE SURROGACY EXPERIENCE, <https://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html> [https://perma.cc/UW7Y-6R3C].

158. *In re Doe*, 160 Idaho 360 (2016).

159. In *Doe*, the intended parents contracted with the gestational carrier and her husband, to carry a child conceived from the intended father's sperm and a donor egg. *Id.* The district court cited Idaho Code §10-1201 as its authority and stated that "Idaho law already provides a statutory means by which parties can become parents when using a gestational surrogate—the termination of that gestational surrogate's parental rights and the adoption of the child." *Id.* at 361. The Supreme Court affirmed, stating that there was no legal basis on which it could have issued the judgment. *Id.* at 362.

160. *Id.* at 362.

161. *Soos v. Super. Ct. In & For County of Maricopa*, 897 P.2d 1356 (Ct. App. Ariz. 1994) (declaring that A.R.S. § 25-218, the surrogate statute, affects a fundamental liberty interest and, therefore, violates the Equal Protection clause of the Fourteenth Amendment to the United States and Arizona Constitutions).

162. *Learn About the Law Covering Surrogacy in Arizona*, NEW BEGINNINGS SURROGACY SERVICES, LLC, (Oct. 5, 2018), <https://www.nbsurrogacy.com/law-covering-surrogacy-in-arizona/> [https://perma.cc/ZGR9-HY4L].

163. *Id.*

164. *Id.*

A. Functionalism and State Surrogacy Legislation

According to the principles of functionalism, when disorganization occurs in one sector, various societal components must be adjusted in order for the system to change.¹⁶⁵ Since there is utter disorganization in the family sector caused by the confusing and inconsistent application of surrogacy laws, it is the duty of society to turn to another component, like politics, to create systemic change. Unfortunately, persuading Congress to enact a favorable, uniform, and comprehensive surrogacy law will be a challenge under the functionalist notion that members of society should not take an active role in societal change.¹⁶⁶ Functionalism's discouragement of activism is ironic because it is the absence of legislation by the political sector that is the root cause for the dysfunction in the family sector. However, the interconnection of each component in society is necessary for the survival of that society, and therefore, functionalism requires that society work together to achieve what is best as a whole.¹⁶⁷

Functionalism supports the legislation passed in states with favorable surrogacy laws under the notion that family is one of the most integral components of society.¹⁶⁸ Social arrangements that promote and ensure family protection are supported, whereas those that weaken family protection are disfavored.¹⁶⁹ States with strict legislation banning and criminalizing surrogacy exacerbate infertility chaos, and weaken the family sector. For the family sector to return to a balanced state, society must find a way to actively engage in passing favorable surrogacy legislation.

Louisiana has enacted the most alarming surrogacy legislation of all of the states.¹⁷⁰ Even though there is a clear law, its discriminatory effect moves the state towards an even deeper disequilibrium.¹⁷¹ Under functionalism, it is more beneficial to have no law than to have one that further pushes the family sector out of harmony. At first glance, Louisiana's discriminatory legislation does appear to align with traditional functionalist beliefs. This is mainly because same-sex marriage was far from being legally recognized when this theory emerged, and the leading theorists¹⁷²

165. Crossman, *supra* note 23.

166. *Id.*

167. *Id.*

168. *Id.*

169. *See supra* notes 42-45 and accompanying text for a discussion of Talcott Parson's views on ensuring family protection.

170. LA. STAT. ANN. §§ 9:2718 to :2720.15; *supra* notes 142- 44.

171. *See supra* text accompanying notes 31-33.

172. *See* Mooney et al., *supra* note 22, for a discussion on the three prominent functionalist theorists.

tended to display homophobic views while developing their work.¹⁷³ Since the landmark Supreme Court decision *Obergefell v. Hodges*,¹⁷⁴ functionalists have no choice but to legally recognize same-sex relationships as an acceptable substitute for heterosexuality. Functionalist theorist Parsons traditionally believed that in order to preserve procreation, it was essential for procreation to occur within a stable, legally recognized relationship.¹⁷⁵ Now that same-sex marriage is a legally recognized relationship and same-sex couples can have genetically related children through surrogacy, functionalist theorists could coherently support same-sex procreation instead of Louisiana's statute.

VI. PROPOSED LEGISLATION

Even though Congress has little direct authority to legislate family law matters,¹⁷⁶ there are various indirect approaches that “have resulted in significant federal impact on a myriad of family law questions.”¹⁷⁷ One viable approach to enacting a federal statute that mandates the enforcement of gestational surrogacy contracts is for Congress to apply its broad Commerce Clause power.¹⁷⁸ This would be a plausible application of

173. *Theoretical Perspectives on Sex*, *supra* note 29.

174. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (holding that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

175. *Theoretical Perspectives on Sex*, *supra* note 29.

176. *Family Law: Congress's Authority to Legislate on Domestic Relations Questions*, CONGRESSIONAL RESEARCH SERVICE, (Sept. 13, 2012), <https://crsreports.congress.gov/product/pdf/RL/RL31201> [<https://perma.cc/69HC-7G2V>].

177. *Id.* For example, Congress enacted the Defense of Marriage Act (DOMA) in 1996, which regulated marriage and barred same-sex married couples from being recognized as spouses for purposes of federal laws. Defense of Marriage Act (DOMA) of 1996, Pub. L. No. 104-199, 1 U.S.C.A. §7; 28 U.S.C.A. §1738C, *invalidated by* *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell*, 135 S.Ct. at 2584. In 2013, the Supreme Court struck down the definition of marriage as unconstitutional in violation of the 5th Amendment Due Process Clause. *Windsor*, 570 U.S. at 775. In 2015, the remaining provisions of the Defense of Marriage Act were struck down in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and states must recognize lawful same-sex marriages performed in other states. *Obergefell*, 135 S.Ct. at 2608. However, it is important to note that there is no direct indication that DOMA was struck down because Congress lacked the general authority to enact a family law regulation.

178. *See Gonzales v. Carhart*, 550 U.S. 124 (2007) (declining to comment on whether the Partial-Birth Abortion Act of 2013 constitutes a permissible exercise of Congress's power under the Commerce Clause). However, it can be intimated in light of this declination, that the Commerce Clause could feasibly extend to abortion and surrogacy since the necessary medical instruments may travel in interstate commerce, and women may travel to another jurisdiction in order to obtain abortion or surrogacy services; *see also* Makenzie B. Russo, Senior Thesis, *The Crazy Quilt of Laws: Bringing Uniformity to Surrogacy Laws in the United States*, TRINITY COLLEGE SENIOR THESES AND PROJECTS (2016) (discussing that an additional way to “establish uniformity for surrogacy laws in the United States

Congress's power since intended parents and surrogates are often matched interstate, these parties may have to travel to fertility clinics interstate, and the tools and equipment used in in-vitro fertilization procedures likely travel in interstate commerce. Moreover, this would be a wise use of the Commerce Clause because the use of federal power would compensate for the current inconsistent patchwork of laws among the states.

A uniform surrogacy statute allows the parties to rely only on one central authority. Individuals choosing to begin the surrogacy process would have the ability to enter into an agreement either interstate, or in their home state, with the knowledge that their parental rights were secure. Gestational surrogates could enter into these contracts without the ability to change their minds about parentage later on, or alternatively, would not risk being declared the legal mother against their intentions. If a breach of agreement did occur, the injured party would be guaranteed monetary remedies. Finally, judges would be mandated to issue parentage judgments and would not have the ability to deny parents of their legal rights based on moral or ethical biases.

CONCLUSION

It is in our nation's best interest for Congress to exercise its enumerated power and resolve the unpredictability encompassing the current surrogacy field. The sociological theory of functionalism requires that when a sector of society is dysfunctional, social change must occur to avoid forcing the entire system into disequilibrium.¹⁷⁹ State legislation (or lack thereof), as it currently stands, is unsustainable for the future of the family sector. This proposed legislation would allow one of the most important sectors in society¹⁸⁰ to function at its highest productivity. As a result, other sectors would be influenced to make beneficial changes, strengthening the overall stability of our nation. Functionalism supports and requires favorable federal surrogacy legislation.

would be for advocacy groups to formulate a reasonable, yet comprehensive law and take the issue to individual state legislators").

179. *Crossman*, *supra* note 23.

180. *Crossman*, *supra* note 23; *Mooney et al.*, *supra* note 22, at 29.