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The Need for Psychological Evaluations in the New York's Child-Parent Security Act

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INTRODUCTION

In many cultures, having a child is considered one of the most rewarding and spectacular parts of a person's life. But for many families, giving birth naturally can be difficult, expensive, deadly, or impossible. Many suffer from infertility, which makes it difficult or impossible to get pregnant or carry a pregnancy to term.[1] According to the Key Statistics from the National Survey of Family Growth which surveyed women from 2015-2017, 13.1% of women aged 15-49 years have impaired fertility.[2] Those families are forced to either give up or explore alternate, complex options to have children, with 12.7% of all women aged 15-49 seeking out infertility services.[3] Surrogacy is an option for parents when they are physically unable to carry a child themselves.

Surrogacy is defined as the process by which another becomes pregnant and carries the child to term for another person or persons who will become the child's parent(s) after birth.[4] The person carrying the baby to term is called the "surrogate."[5] The person or people that hire the surrogate to carry a baby are called the "intended parents."[6] Surrogacy may either be traditional or gestational, which depends on the source of the egg.[7] Traditional surrogacy uses the egg of the surrogate mother and the sperm of the one of the intended parents.[8] In contrast, gestational surrogacy uses the egg and sperm from the intended parents, which is then transferred

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[1] *See* Andjani Chandra et al., *Infertility and Impaired Fecundity in the United States, 1982–2010: Data From the National Survey of Family Growth*, 67 CDC NAT'L HEALTH STAT. REPS. 1 (2013).
[2] *Key Statistics from the National Survey of Family Growth – I Listing*, CTRS. FOR DISEASE CONTROL & PREVENTION https://www.cdc.gov/nchs/nsfg/key_statistics/i_2015-2017.htm#infertility (last reviewed Nov. 8, 2019).
[3] *Id.*
[4] *About Surrogacy, The Surrogacy Definitions and Important Terms You Need To Know*, SURROGATE.COM, https://surrogate.com/about-surrogacy/surrogacy-101/surrogacy-definition/ (last visited Nov. 5, 2020).
[5] *Id.*
[6] *Id.*
[7] Kalsang Bhatia et al., *Surrogate pregnancy: an essential guide for clinicians*, 11 THE OBSTETRICIAN & GYNAECOLOGIST 49, 50 (2009).
[8] *Id.*

through to the surrogate mother using in vitro fertilization (IVF), the medical process in which the egg is fertilized outside of the embryo and then implanted into the surrogate mother.[9]

Though surrogacy has helped many families achieve their dream of raising children, New York is one of three states (with Michigan and Indiana)[10] that voids compensated surrogacy agreements as a matter of public policy.[11] The original purpose of this mandate was to protect against the complex legal and ethical problems of surrogacy posed by the infamous *Baby M* case.[12] After considering the impartial effect that this ban has on LGBTQ individuals and those struggling with fertility, Governor Andrew Cuomo launched the "Love Makes a Family" campaign to legalize gestational surrogacy.[13]

On April 2, 2020, New York passed the Child Parent Security Act (CPSA), legalizing gestational surrogacy in New York State, effective February 15, 2021.[14] The CPSA will bestow what the Governor emphasizes "the strongest protections in the nations for parents and surrogates."[15] The bill contains objective criteria for surrogacy contracts, a Surrogate's Bill of Rights, and the requirement that surrogates have access to comprehensive health insurance with behavioral health coverage, independent legal counsel of their choosing, and a life insurance policy: all of which will be paid for by the intended parents.[16] The CPSA is a great first step to

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[9] *Id*.
[10] ALEX FINKELSTEIN ET AL., COLUM. L. SCH. SEXUALITY & GENDER L. CLINIC, SURROGACY LAW AND POLICY IN THE U.S. 63 (2016). Note New Jersey's inclusion on this list: it legalized compensated surrogacy two years after the publication of this report. See New Jersey Gestational Carrier Agreement Act, N.J.S.A. §§ 9:17-60, et seq. (2020) (effective May 30, 2018).
[11] 8 N.Y. DOM. REL. LAW § 122.
[12] *See infra* text accompanying note 34.
[13] Andrew M. Cuomo, *Governor Cuomo Launches 'Love Makes A Family' Campaign to Legalize Gestational Surrogacy*, N.Y. ST. GOVERNOR ANDREW M. CUOMO (Feb. 11, 2020), https://www.governor.ny.gov/news/governor-cuomo-launches-love-makes-family-campaign-legalize-gestational-surrogacy.
[14] Child Parent Security Act [hereinafter CPSA], S.B. 7506, 2020 Leg., 243d Sess. § 1, part L (N.Y. 2020) (effective Feb. 21, 2021). This article will focus primarily on sections one and twelve of the CPSA, as they contain the new surrogacy regulations.
[15] Cuomo, *supra* note 13.
[16] Andrew M. Cuomo, *FY 2021 Budget Highlights*, N.Y. ST. GOVERNOR ANDREW M. CUOMO, (Apr. 2, 2021), https://www.governor.ny.gov/fy-2021-new-york-state-budget/fy-2021-budget-highlights#surrogacy.

assure that those struggling with fertility and LGBTQ individuals will have access to an additional option of procreation. However, the bill is lacking a basic safeguards present in the laws of other states: specifically, psychological evaluations for the surrogate mother and the intended parents before the execution of the surrogacy agreement. As will be discussed, this requirement will further the interests of the surrogate mother, intended parents, and the surrogate child by (1) fully informing the consent of the parties through discussion of the psychosocial and psychological risks of surrogacy and (2) evaluate the parties individually to screen surrogates may not comply with the surrogacy agreement and screen intended parents who may not properly care for the surrogate child.

This argument will be divided into five parts. Part I will explain New York's original stance on surrogacy and the controversial *Baby M* case. Part II will describe New York's comprehensive response to *Baby M* in the form of 8 N.Y. Dom. Rel. Law §§ 121-124, which prohibited surrogacy as a matter of public policy.[17] Part III will describe New York's new stance on surrogacy with the CPSA and explore the additional protections that would be afforded in comparison to the old law. Part IV will compare the protections granted in surrogacy-friendly states and compare them to those granted in the CPSA. Part V will argue the issues within the new Act, suggesting a requirement that surrogates and intended parents undergo a psychological evaluation, discussing ways to implement that requirement, and other considerations of the requirement, like prior legislation, cost, and potential for discrimination against infertile and LGBTQ people.

I

NEW YORK'S ORIGINAL STANCE ON SURROGACY & *BABY M*

[17] 8 N.Y. DOM. REL. LAW § 122

To understand the impact of *Baby M* on New York lawmaking, it would be helpful to consider New York's stance immediately preceding the case. Before the *Baby M*, New York's stance on surrogacy was relatively neutral, yet cautious.[18] Prior to the enactment of any surrogacy regulations and the only case in New York's history to address surrogacy before *Baby M*, the Nassau County Surrogate's Court decided in the *Matter of Adoption of Baby Girl L.J.* that surrogate agreements were enforceable.[19] In that case, the couple in that case contracted with a surrogate to bear a child for them through artificial insemination using the husband's sperm.[20] Because surrogacy contracts were a novel idea uncontemplated by the New York State Law, the court reviewed the contract's validity under New York's adoption laws and common law contract standards, finding that adoption was in the child's best interests and the fee paid to the surrogate mother was valid.[21] The court mentioned that there are moral and ethical implications with surrogacy contracts that may bring it into the realm of "baby-selling," but because current law does not expressly ban the use of surrogacy contracts, it determined that it would be improper for the judiciary to decide the issue.[22] The court decided it was "for the legislature to determine if such payments should be disallowed so as to prevent such practices in the future."[23]

However, this stance drastically shifted after the highly-publicized and influential *Baby M* case.[24] In 1988, the New Jersey Supreme Court in *In re Baby M* ruled that commercial

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[18] *See generally* Matter of Adoption of Baby Girl L.J. [hereinafter *Baby Girl L.J.]*, 505 N.Y.S.2d 813 (N.Y. Sur. Ct., Nassau Co. 1986). For discussions on New York's stance on surrogacy before *Baby M*, see Charles Gili, *Time to Rethink Surrogacy: An Overhaul of New York's Outdated Surrogacy Contract Laws is Long Overdue*, 93 ST. JOHN'S L. REV. 487, 489-90 (2019) (citing *Baby Girl L.J. and* discussing New York's neutral stance before *Baby M*); Brittnay M. McMahon, *The Science Behind Surrogacy*, 21.2 ALB. L.J. SCI. & TECH. 359, 363 (2013) (noting New York's lack of legislature on the issue and how the *Baby Girl L.J.* court enforced the surrogacy contract based on the law at the time, but left the legislature to decide whether these contracts should be disallowed in the future); Anita L. Allen, *Privacy, Surrogacy, and the Baby M Case*, 76 GEO. L.J. 1759, 1765-66 (1988) (article soon after *Baby M* citing *Baby Girl L.J.* and discussing the court's ambivalent holding that surrogacy contracts are not per se void, but can be voided by state adoption statutes and the best interests of the child).

[19] 505 N.Y.S.2d 813, 817-818 (N.Y. Sur. Ct., Nassau Co. 1986)

[20] *Id.* at 814

[21] *Id.* at 817-18.

[22] *Id.*

[23] *Id.* at 818.

[24] See *infra* text accompanying notes 33-35.

surrogacy contracts were void and against public policy.[25] *Baby M* involved a traditional surrogacy contract between William Stern and Mary Beth Whitehead.[26] The surrogacy contract provided that the surrogate mother, Mrs. Whitehead, would be inseminated with the sperm of the intended father, Mr. Stern, and after birth, Mrs. Whitehead would relinquish her parental rights and grant full custody to Mr. Stern and his wife. The child, Baby M, was successfully born.[27] However, Mrs. Whitehead became attached to her baby and refused to give up Baby M.[28] The Stern and Whitehead families engaged in a legal battle over custody of Baby M.[29] In a critical opinion condemning compensated surrogacy, the New Jersey Supreme Court held that the surrogacy contract was void and unenforceable as a matter of law because it contravened public policy.[30] The court concluded that the contract was based on:

> principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.[31]

For those reasons and the harmful potential consequences of allowing the wealthy to manipulate indigent women into paid surrogacy without any concern for the best interests of the surrogate mother or child, the court deemed the contract void as a matter of public policy.[32]

The dramatic events of the *Baby M* case caught the public eye and sparked debate on the ethical implications of surrogacy.[33] *Baby M* became a catalyst for legislators to push several

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[25] 109 N.J. 396, 443-44 (1988) [hereinafter *Baby M*].
[26] *Id.* at 411-12.
[27] *Id.* at 412.
[28] *Id.* at 414-15.
[29] *Id.* at 416-17.
[30] *Id.* at 421-22.
[31] *Id.* at 441-442.
[32] *Id.* at 440-41, 443-44.
[33] *See generally* Robert Hanley, *Father of Baby M Granted Custody; Contract Upheld; Surrogacy is Legal*, N.Y. TIMES, Apr. 1, 1987, at A1; Iver Peterson, *Baby M's Future*, N.Y. TIMES, Apr. 5, 1987, at A1; Robert Hanley, *Surrogate Mother Battle Goes to Trial*, N.Y. TIMES, Jan. 1, 1987, at 3; Elizabeth Kolbert, *In Struggle For Baby M., Fierce Emotion and Key Legal Issues*, N.Y. TIMES, Aug. 23, 1986, at 25.

regulatory regimes concerning the legality of surrogacy agreements, ranging from strict criminalization to legalization with regulation.[34] In 1988, and two years after *Baby M*, the New York State Task Force on Life and the Law was ordered to "develop recommendations for public policy" and address issues posed by artificial insemination and in vitro fertilization in the wake of *Baby M*.[35] The Task Force concluded that New York should discourage surrogate parenting and make surrogacy contracts void as a matter of public policy.[36] In justifying this conclusion, they argued that surrogacy "places children at risk and is not in their best interests or those of society at large," "has the potential to undermine the dignity of women, children, and human reproduction by commercializing childbearining," and "represents a significant departure from existing values and standards about parental rights and responsibilities emobided in New York State Law."[37]

II

CURRENT NEW YORK SURROGACY LAW: 8 N.Y. DOM. REL. LAW § 122-125

As a result of the Task Force's recommendations in the wake of *Baby M*, New York accepted their opinion and enacted 8 N.Y. Dom. Rel. Law §§ 121–124.[38] § 121(4) defines a surrogacy agreement as an agreement in which: "(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

[34] For a discussion on varied state responses to Baby M, see Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 101 (2010) (dividing state responses into four types: prohibition, inaction, status regulation, and contractural ordering).
[35] *See* NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY, at i (1988), https://www.health.ny.gov/regulations/task_force/reports_publications/docs/surrogate_parenting.pdf (last visited November, 5, 2020). *Baby M* is cited as the driving reason why Governor created the Task Force.
[36] *Id.* at v.
[37] *Id.* at 138.
[38] *Compare id.* at A-1, A-2 *with* 8 N.Y. DOM. REL. LAW §§ 121–24 (effective until Feb. 15, 2021). Note how the enacted law is extremely similar to the Task Force's "Proposed Surrogate Parenting Act" within their recommendations.

product of an ovum fertilized with the sperm of a man who is not her husband; and (b) a woman agrees to, or intends to, surrender or consent to the adoption of the child born as a result of such insemination or impregnation."[39] §122 renders all surrogacy contracts void and unenforceable as a matter of public policy.[40] Consequently, neither party will gain legal protection by signing a surrogacy agreement.[41] Furthermore, §124, in conjunction with New York Public Health Law §4130, further assures that the birth mother retains parental rights of the child, even against the terms of the surrogacy agreement.[42]

§123 also imposes civil and criminal penalties on parties who enter a surrogacy contract.[43] If found knowingly requesting, accepting, or paying for a surrogacy contract, the surrogate mother and intended parents will be subject to a civil penalty not to exceed five hundred dollars.[44] Individuals and entities who induce, arrange, or facilitate the formation of a surrogate contract for a fee, like doctors, lawyers, and surrogate agencies, are faced with severe penalties.[45] For the first offense, those who assist must forfeit their fee and face a civil penalty not to exceed $10,000.[46] For the second offense, the individual or entity assisting or facilitating the surrogacy will be guilty of a felony.[47]

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[39] *Id.* § 121(4).
[40] *Id.* § 122.
[41] *Id.* See also, Matter of J., 72 N.Y.S.3d 811, 812 (Fam. Ct.) ("a party to a surrogacy contract may not seek a court's assistance to enforce the agreement, nor will such contract be deemed viable for any other claims arising under its arrangement.") As a result, consequently, because these contracts cannot be enforced by law, a surrogate cannot sue to recover any payments due to her after delivering the child, an intended parent cannot sue a surrogate for keeping the surrogate child against the terms of the agreement, and other parties who assisted under the terms of the surrogacy contract, like doctors or attorneys, cannot sue for unpaid fees.
[42] *Compare* 41 N.Y. PUB. HEALTH LAW § 4130 (2020), which states that birth, in the context of creating a birth certificate, is "the complete expulsion or extraction from its mother of a product of conception. It follows that the mother who gives birth would be the mother of the child; *and* 8 N.Y. DOM. REL. LAW §124, which states that a "court shall not consider the birth mother's participation in a surrogate parenting contract as adverse to her parental rights, status, or obligation" during a dispute over parental rights with the intended parents. The product of these two statutes together all but assures that the court considers the birth mother as the mother of the child, even though she signed an agreement granting away her parental rights.
[43] *Id.* § 123(1).
[44] *Id.*
[45] *Id.* § 123(2).
[46] *Id.* § 123(2)(b).
[47] *Id.*

8 N.Y. Dom. Rel. Law §§ 121–124 has the effect of removing protections of compensated surrogacy contracts, and even uncompensated surrogacy agreements cannot pay for the assistance of an agency, lawyer, or doctor.[48] As recently as 2018, New York courts have refused to enforce any surrogacy agreement as a matter of public policy.[49]

III

NEW YORK'S NEW SURROGACY REGIME: THE NEW YORK CHILD-PARENT SECURITY ACT

On April 2, 2020, the Child-Parent Security Act (CPSA) was passed in the New York.[50] The CPSA, effective February 15, 2021, is boasted to have the strongest protections for surrogates and intended parents in the entire country, assuring that each party will have informed consent throughout the entire process and containing a "Surrogate's Bill of Rights" that will grant surrogates special privileges.[51] This section will explain the general criteria for both surrogates and intended parents, and the privileges granted by the Surrogate's Bill of Rights.

A

Requirements for Surrogates

To become a surrogate, the gestational carrier must satisfy particular criteria. First, the surrogate must be 21 years old.[52] Second, the surrogate must be a United States citizen or a lawful permanent resident.[53] Third, the surrogate cannot provide their own egg.[54] Fourth, the

[48] *See* 8 N.Y. DOM. REL. LAW § 123(2). The law does not specifically proscribe payment to assistors in conjunction with a compensated surrogacy agreement: instead, it bans any fee in conjunction with the assistance of any surrogate parenting contract.
[49] *See* Matter of J., 72 N.Y.S.3d 811, 811 (Fam. Ct.) ("The state of the law remains the same as it did in 1988 when surrogacy contracts were found to be against public policy.")
[50] Child Parent Security Act [hereinafter CPSA], S.B. 7506, 2020 Leg., 243d Sess. § 1, part L (N.Y. 2020) (effective Feb. 21, 2021).
[51] Andrew M. Cuomo, *Governor Cuomo Announces Highlights of FY 2021 Budget*, N.Y. ST. GOVERNOR ANDREW M. CUOMO (Apr. 2, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-highlights-fy-2021-budget (last visited Dec. 17, 2020).
[52] CPSA, *supra* note 50, § 1, § 581-402(a)(1).
[53] *Id.* § 581-402(a)(2).
[54] *Id.* § 581-402(a)(3).

surrogate must complete a medical evaluation related to their surrogacy, screening for known health conditions that may pose risks to the surrogate and explaining to the surrogate the possible psychological and social risks associated with surrogacy.[55] Lastly, the surrogate must also meet other requirements deemed appropriate by the New York Commissioner of Health regarding the health of the prospective surrogate.[56] There are other requirements in this section, but because those primarily touch upon the rights granted in the Surrogate's Bill of Rights, they will be discussed later.[57]

B

Requirements for Intended Parents

The intended parents have comparatively less stringent requirements. First, at least one intended parent must be a U.S. citizen or lawful permanent resident and was a resident of New York for a least six months.[58]. Second, the intended parent must be represented throughout the formation, execution, and duration of the surrogacy contract.[59] Lastly, the intended parent(s) must be adults.[60] Furthermore, the CPSA does not mandate that the intended parents follow any additional rules promulgated by the New York Commissioner of Health.[61] The CPSA is also

[55] *Id.* § 581-402(a)(4).
[56] *Id.* § 581-402(a)(9). *See* also CPSA, *supra* note 50, §12, Article 25-B, §2599-cc(1)(d) (enabling the commissioner to promulgate guidelines, procedures, or protocols to assist physicians in screening potential surrogates).
[57] Compare §§ 581-402(a)(5)-(8) with §§ 581-601 (Surrogate's Bill of Rights). §§ 581-402(a)(5)-(8) requires that the surrogacy agreement provides a comprehensive health insurance policy, independent counsel for the surrogate, and a life insurance policy, which are also provided by the Surrogate's Bill of Rights.
[58] *Id.* at § 581-402(b)(1).
[59] *Id.* at § 581-402(b)(2).
[60] *Id.* at § 581-402(b)(3).
[61] *Compare* CPSA, *supra* note 50, § 581-402(a)(9) ("the person acting as surrogate meets all other requirements deemed appropriate by the commissioner of health regarding the health of the prospective surrogate") *with* § 581-402(b) (lacking the same requirement for intended parents).

silent on enabling Commissioner to promulgate additional requirements for screening intended parents, as compared to enabling the Commissioner to promulgate requirements for surrogates.[62]

C

Surrogate's Bill of Rights

The Surrogate's Bill of Rights grants six individual privileges upon the surrogate mother.[63] First, the surrogate is free to make their own health and welfare decisions, including choosing whether to undergo specific procedures, choosing their health care provider, and terminating their pregnancy at will.[64] Second, the intended parents must provide the surrogate with independent legal counsel that will inform their consent throughout the execution and duration of the surrogacy contract.[65] Third, the intended parents must provide the surrogate, at no cost to herself, with a comprehensive health insurance plan that covers "preconception care, prenatal care, major medical treatments, hospitalization, and behavioral health care" and lasts throughout the pregnancy and twelve months after birth, termination, stillbirth, or miscarriage.[66] Fourth, the surrogate must be provided with a healthcare policy covers the surrogate's behavioral health care, which will extend past the surrogate's comprehensive health insurance.[67] Fifth, the surrogate must be provided with a life insurance policy with minimum $750,000 or the maximum for which they would qualify, paid for by the intended parents.[68] Lastly, the surrogate is free to terminate their surrogacy contract at will before getting pregnant.[69]

D

[62] *See* CPSA, *supra* note 50, §12, Article 25-B, §2599-cc(1)(d) (enabling the commissioner to promulgate guidelines, procedures, or protocols to assist physicians in screening potential surrogates). Note the lack of a similar enabling statute concerning intended parents.
[63] *Id.* at § 581-601.
[64] *Id.* at § 581-602.
[65] *Id.* at § 581-603.
[66] *Id.* at § 581-604.
[67] *Id.* at § 581-605.
[68] *Id.* at § 581-606.
[69] *Id.* at § 581-607.

CPSA Compared to 8 N.Y. Dom. Rel. Law §§ 121–124

Compared to New York's old law, the CPSA will grant surrogates novel protections and place many of the legal and medical costs onto the intended parents. Under New York's old law, there was no requirement for the surrogate to be under a comprehensive health insurance plan; rather, the only payments allowed to be made to the surrogate for medical costs were for "reasonable and actual medical fees and hospital expenses for artificial insemination or in vitro fertilization services."[70] Furthermore, the surrogate was expected to furnish her own legal counsel and pay for her own healthcare and behavioral health costs throughout the surrogacy.[71]

Now, New York's approach to surrogacy is financially-friendly for the surrogate. It could potentially expand the market of surrogates, as less-wealthy surrogates will be more willing to participate since there will be less financial burden imposed onto them arising from legal fees, healthcare costs, psychological care, and life insurance.,[72] the cost of which can easily reach into the tens of thousands of dollars for the surrogate.[73] Furthermore, a comprehensive healthcare policy that will cover all care during a pregnancy and twelve months will reduce the surrogate mother's financial and health concerns throughout the surrogacy. The CPSA will also give surrogates day-to-day control over their health and welfare, since it would be illegal for the intended parents to force the surrogate to receive a specific treatment or procedure, to use a specific healthcare provider, or to terminate the pregnancy.[74] It has a high-enough age requirement to assure that younger, less developed women will not become surrogates.[75] It also heavily prioritizes obtaining completely informed consent, legally and medically, from the

[70] N.Y. DOM. REL. LAW § 123(1)(b)
[71] N.Y. DOM. REL. LAW § 123(1)(b)
[72] §§ 581-601 to 581-607 have the primary effect of shifting costs from the surrogate to the intended parents.
[73] *See, e.g.*, *Anticipated Costs*, AGENCY FOR SURROGACY SOLUTIONS, https://www.surrogacysolutionsinc.com/intended-parents/anticipated-costs/ (last visited Nov. 6, 2020) (approximately up to $56,500 for medical fees and insurance, not including additional IVF cycles; up to $3500 for psychological services; up to $2500 for legal fees; up to $1,200 for life insurance).
[74] CPSA, *supra* note 50, § 581-602.
[75] *Id.* § 581-402(a)(1)

surrogate mother, assuring that the surrogate will understand the impacts, risks, and implications of the surrogacy process.[76]

The CPSA assures that surrogates will be financially stable, legally and medically informed about the surrogacy process, and in control of their medical care. However, the CPSA still lacks a protection for surrogate mothers and intended parents: a psychological evaluation for both parties.[77]

IV

COMPARING THE CPSA TO SURROGACY PROTECTIONS IN OTHER STATES

In the United States, fourteen states and the District of Columbia have legalized gestational surrogacy.[78] Three of those states, New Jersey,[79] Delaware,[80] and the District of Columbia[81] require the surrogate to have completed a separate mental health evaluation before executing the contract. The District of Columbia has the strictest approach for surrogate mothers, requiring them to (1) complete a psychological evaluation must be with a medical professional that "has specialized training in collaborative reproduction" and (2) participate with the intended parents in a joint counsultation with a mental health professional.[82] The CPSA, in comparison,

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[76] *Id.* §§ 581-402(a)(5)-(6)
[77] *Id.* § 581-606
[78] For a general survey of the legality of surrogacy in all fifty states, see ALEX FINKELSTEIN ET AL., COLUM. L. SCH. SEXUALITY & GENDER L. CLINIC, SURROGACY LAW AND POLICY IN THE U.S. 55-63 (2016) (states in which full or partial surrogacy is regulated by statute are: Alabama, California, Colorado, Delaware, Florida, Illionis, Maine, Nevada, New Hampshire, North Dakota, Texas, Utah, Virginia, Washington, and the District of Columbia).
[79] N.J. Stat. § 9:17-65(a)(2) (2020) (requiring surrogates to be psychologically screened before executing the surrogacy agreement).
[80] 13 Del. C. § 8-806(a)(4) (2020) (requiring that the surrogate has completed a mental health evaluation before executing the surrogacy agreement).
[81] D.C. Code § 16-405 (2020) (surrogate must complete mental health evaluation by mental health professional that has specialized training in collaborative reproduction).
[82] D.C. Code §§ 16-405(a)(4)-(5).

only requires the surrogate to obtain a medical evaluation that includes the healthcare provider explaining the general psychological and social risks and impacts of being a surrogate: this explanation needs not to be personalized to the surrogate's existing psychological, emotional, or social conditions and will likely not involve any psychological evaluation at all.[83]

The same three states also require a mental health evaluation for the intended parents.[84] New Jersey and Delaware requires intended parents to be psychologically screened before execution of the contract.[85] Less stringent than the others, the District of Columbia requires the parents to obtain a joint consultation with the surrogate that describes what issues may arise during the surrogacy process.[86] This consultation may not involve psychological evaluation, but it deserves a mention for bringing together both parties to participate in a discussion of the psychological risks inherent to surrogacy.[87] In contrast, the CPSA has no mention of psychological evaluations or even consultations for the intended parents.[88]

V

REQUIRING PSYCHOLOGICAL SCREENINGS FOR SURROGATES AND INTENDED PARENTS

In its current form, the CPSA fails to address specific psychological and emotional concerns for the surrogate and the intended parents. Currently, the CPSA only makes it necessary for the surrogate mother to receive psychological advice, and even then, the advice only need be

[83] *See* CPSA, *supra* note 50, §581-402(a)(4). The language used here suggests that no psychological evaluation is required. All that is required is that the health care practicioner discuss psychological risks, rather than field the surrogate's questions or psychologically evaluate the surrogate.
[84] N.J. Stat. § 9:17-65(a)(2) (2020) (requiring intended parents to be psychologically screened before executing the surrogacy agreement); D.C. Code § 16-405(b)(1)(B) (requiring intended parents to have completed with the surrogate a joint consultation with a mental health professional regarding issues that could arise during the surrogacy); 13 Del. C. § 8-806(b)(1) (requiring intended parents to complete a mental health evaluation).
[85] N.J. Stat. § 9:17-65(a)(2); 13 Del. C. § 8-806(b)(1) .
[86] D.C. Code § 16-405(b)(1)(B).
[87] *See id*. As the term "consultation" and "evaluation" are used in entirely different contexts, it is likely that the consultation would not include a true psychological screening at the same level as those required in New Jersey and Delaware.
[88] *See* CPSA, *supra* note 50, § 581-402(b). Note the lack of any evaluation or consultation requirement for the intended parents.

an explanation of the psychological and psychosocial impacts of surrogacy on their personal lives.[89] More specifically, it fails to require a psychological evaluation for both parties, which (1) leaves them unaware of psychological risks that may inform their consent and (2) does not screen them psychologically to ensure they are prepared for the lengthy and difficult process of surrogacy. These failures would be corrected if the CPSA would adopt a requirement for psychological evaluations for both surrogates and intended parents.

A

Psychological evaluations for surrogates

Psychological screening of the surrogate will assist in assuring the safety and well-being of the surrogate, the intended parents, and the child. First, during the psychological evaluation, the mental health professional will discuss with the surrogate the psychological risks that she personally may face throughout the process, and she will have the opportunity to posit any emotional concerns she may have about the surrogacy process to a neutral third party.[90] This will have the effect of further advising the surrogate about her role, which serves to inform her consent to the surrogacy agreement. Surrogacy is a complex process that can cause physical and emotional changes to a person: the surrogate must fully understand if they are making the right decision, and an opportunity to discuss the challenges and risks associated would serve both

[89] *Id.*

[90] *See* American Society for Reproductive Medicine (ASRM) & Society for Assisted Reproductive Technology, *Recommendations for practices utilizing gestational carriers: an ASRM Practice Committee guideline* [hereinafter *ASRM Recommendations*], 107 FERTILITY & STERILITY no. 2, at e3, e9 (2017), https://www.fertstert.org/article/S0015-0282(16)63005-4/pdf (last visited Dec. 17, 2020) (discussing how psychological evaluations of surrogates will present psychosocial risks to surrogate to inform her consent and allow her to voice her concerns). *See also What to Expect from your Psych Evaluation*, ALL THINGS SURROGACY (2015), https://allthingssurrogacy.org/expect-psych-evaluation (last visited Dec. 17, 2020) (discussing common practices for psychological evaluations of surrogates, including a chance for the surrogate to voice her questions and concerns about the process).

parties' interests. Therefore, the psychological evaluation of the surrogate can extremely informative to the consent the surrogate gives throughout the surrogacy arrangement and will assist the surrogate mother in deciding whether she is mentally capable for this demanding role.

Second, the psychological testing will also be an additional screening opportunity for the intended parents. Here, the assessment can reveal deeper information about the surrogate's psychological condition, determining if they are ready to handle the pregnancy.[91] This has the consequence of protecting the parties and the public from potential disputes that could arise, such as the surrogate becoming overly attached and refusing to give up the child.[92] Therefore, the psychological evaluation plays an important role in screening out unfit surrogates, which would protect the both the health of the child and the peace of mind of the intended parents.

B

Psychological evaluations for intended parents

For similar reasons, psychological screening for the intended parents would also be extremely beneficial for all parties involved. Having a child can be extremely stressful, and that stress is only compounded by the fact that the intended parent(s) are entrusting another person, usually a stranger, to carry that child.[93] Discussing concerns and asking questions about the psychological toll of being an intended parent is therefore necessary for them to obtain fully

[91] *See ASRM Recommendations*, *supra* note 90, at e9-10 (describing criteria for rejecting a surrogate, including untreated addiction, a history of major psychiatric illness, or evidence of emotional inability to surrender child at birth). Note how each criteria reveals deeper information about the mother and her propensity to become a surrogate. Each risk factor could endanger the life of surrogate mother and child and would be highly relevant in deciding whether to allow the surrogate mother to continue with the surrogacy agreement.

[92] *See, e.g.*, Matter of Baby M, 109 N.J. 396, 415-17 (1988) (exemplifying a situation where the surrogate mother becomes overly attached and kidnaps the child). In fact, Mrs. Whitehead was psychologically evaluated by the agency, and even though she passed the evaluation, the psychologist warned that "she demonstrated certain traits that might make surrender of the child difficult and that there should be further inquiry into this issue in connection with her surrogacy." *Id.* at 436-37. However, neither the Whiteheads nor the Sterns were ever informed of this fact. *Id.* at 437.

[93] *See Do Intended Parents Undergo Psychological Screening*, CONCEIVEABILITIES (Nov. 21, 2019), https://www.conceiveabilities.com/about/blog/do-intended-parents-undergo-psychological-screening for an example of a surrogacy agency explaining their psychological evaluation of intended parents and concerns those parents may have during the process.

informed consent. In order to fully understand one's responsibilities and risks throughout the surrogacy process, a detailed psychological consultation is absolutely necessary for the intended parent(s).

Furthermore, it would be in the best interests of the mother and child for the intended parents to have a full psychological evaluation. Ever present in surrogacy is the risk that the intended parents may have a violent disorder, be interested in child trafficking, or show signs of being neglectful or uncaring of the child.[94] Without screening, a surrogate child may enter a dangerous home, which would likely be distressing for the surrogate mother to know that the child she gave birth to was being abused.[95] To avoid these complications, a psychological screening would add another barrier of defense to avoid bad actors, protect the child, and protect the surrogate mother.

C

Implementing Psychological Evaluations in the Current Legistative Scheme

Implementing requirements for psychological evaluations of surrogates is fairly easy in the CPSA. For the substance and criteria of these psychological screenings, the CPSA enabled the New York Commissioner of Health to promulgate reulgations on the practice of gestational surrogacy and develop guidelines for screening surrogates as required under § 581-402.[96] These guidelines for screening surrogates must be developed in consultation with both the American College of Obstetricians and Gynecologists (ACOG) and the American Society of Reproductive Medicine (ASRM).[97] In its 2017 guidelines, the ASRM recommended that the psychological

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[94] *See* discussion *infra* note 119 for examples of abuse of children and women within surrogacy agreements.
[95] *See* David Whiting, *Surrogate mom fears for triplets after allegations of abuse by father*, ORANGE CTY. REG. (Sept. 20, 2017), https://www.ocregister.com/2017/09/20/surrogate-mom-fears-for-triplets-after-allegations-of-abuse-by-father/ (surrogate mother files suit against intended father after alleged abuse against surrogate triplets).
[96] *See* CPSA, *supra* note 50, §12, Article 25-B, §2599-cc(1)(d) and CPSA, *supra* note 50, § 581-402(a)(9), noting how 402(a)(9) requires surrogates to follow any additional requirements "deemed appropriate by the commissioner of health regarding the health of the prospective surrogate" and §2599-cc(1)(d) enables the commissioner to promulgate those requirements.
[97] CPSA, *supra* note 50, §12, Article 25-B, §2599-cc(1)(d).

evaluation include a number of counseling topics, such as information about potential psychological risks about the process; a discussion about management of the relationship between intended parents; ways to cope emotionally with the pregnancy; the potential impact of the pregnancy on employment and family life; the risk of attachment to the child; and the balance between the gestational carrier's right to privacy and the intended parent(s)' right to information.[98] Each of these topics would bring the surrogate greater insight in her role of the agreement, physically, psychologically, and legally. To therefore obtain fully informed consent, it is necessary for the surrogate to partake in this information consultation and know all the risks of surrogacy and whether they truly want to undergo this challenging procedure and agreement,. These counseling topics would effectuate those goals and could be edited based on state-specific needs and public policy. The ASRM Recommendations also detail absolute and relative criteria for rejecting a gestational carrier that the Commissioner can model and edit based on the New York's public policy and the need for intervention into the process.[99]

In contrast, it may prove more difficult to require psychological screenings for intended parents. The CPSA does not explicitly require intended parents to follow additional regulations promulgated by the Commisioner of Health,[100] nor does it explicitly enable the Commissioner to

[98] *ASRM Recommendations*, *supra* note 90, at e9.
[99] *Id.* at e9-10. Absolute criteria for rejection include: (1) cognitive or emotional inability to comply or consent; (2) evidence of financial or emotional coercion; (3) abnormal psychological evaluation/testing as determined by the qualified mental health professional; (4) unresolved or untreated addiction, child abuse, sexual abuse, physical abuse, depression, eating disorders, or traumatic pregnancy, labor and/or delivery; (5) history of major depression, bipolar disorder, psychosis, or a significant anxiety disorder; (6) current marital or relationship instability; (7) chaotic lifestyle, current major life stressor(s); (8) inability to maintain respectful and caring relationship with intended parent(s); (9) evidence of emotional inability to separate from/surrender the child at birth. Relative criteria include: (1) failure to exhibit altruistic commitment to become a gestational carrier; (2) problematic personality disorder; (3) insufficient emotional support from partner/ spouse or support system; (4) excessively stressful family demands; (5) history of conflict with authority; (6) inability to perceive and understand the perspective of others; (7) motivation to use compensation to solve own infertility; and (8) unresolved issues with a negative reproductive event.
[100] *Compare* CPSA, *supra* note 50, § 581-402(a)(9) ("the person acting as surrogate meets all other requirements deemed appropriate by the commissioner of health regarding the health of the prospective surrogate") *with* § 581-402(b) (lacking the same requirement for intended parents).

promulgate rules concerning screening of intended parents.[101] As it stands, the law is unclear whether the Commissioner actually has the power to promulgate new screening requirements on intended parents.[102] However, the ASRM Recommendations still address both counseling topics and rejection criteria for psychological evaluations of intended parents, which could assist practitioners and agencies if they decide to perform this type of evaluation.[103]

D

Additional Considerations of a Psychological Evaluation Requirement

1. Previous Versions of the CPSA Required Psychological Evaluations for Both Parties

New York lawmakers previously considered requiring psychological evaluations for both intended parents and surrogates. In its 2017 report, the New York State Task Force on Life and the Law revisited public policy concerns surrounding compensated surrogacy agreements, rejecting the previous stance against surrogacy agreements that it made in their original report.[104] The Task Force recommended that gestational surrogacy should be legalized, and listed recommendations for general requirements of surrogacy agreements to assure the safety of all parties.[105] These recommendations included psychological screenings for both surrogate mothers

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[101] *See* CPSA, *supra* note 50, §12, Article 25-B, §2599-cc(1)(d) (enabling the commissioner to promulgate guidelines, procedures, or protocols to assist physicians in screening potential surrogates). Note the lack of a similar enabling statute concerning screening requirements for intended parents.

[102] *Id*. The explicit omission of this enabling power may potentially preempt the Commissioner's power to enter this field, but this requires further research into New York preemption rules and procedures.

[103] For eighteen recommended counseling topics, including meeting the emotional and physical needs of the surrogate, management of relationship with the surrogate, and discussing the surrogate child with current children, see *ASRM Recommendations*, *supra* note 90, at e8. For recommended absolute and relative criteria for rejection of intended parents, see *id*. at e9. Absolute criteria include: (1) inability to maintain respectful and caring relationship with gestational carrier; (2) abnormal psychological evaluation as determined by the qualified mental health professional; (3) unresolved or untreated addiction, child abuse, sexual or physical abuse, depression, eating disorder; (4) unresolved or untreated major depression, bipolar disorder, psychosis, or significant anxiety disorder or personality disorder; (5) Current marital or relationship instability; (6) intended parent(s)' failure to agree with gestational carrier's decision on number of embryos transferred. Relative criteria include: (1) ongoing legal disputes; (2) significant and ongoing problematic interpersonal relationships; (3) history of noncompliance or ongoing problematic interactions with program or medical staff.

[104] NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *Revisiting Surrogate Parenting: Analysis and Recommendations for Public Policy on Gestational Surrogacy*, at 1-2 (2017), https://www.health.ny.gov/regulations/task_force/reports_publications/docs/surrogacy_report.pdf (last visited Dec. 5, 2020).

[105] *Id*. at 54-71.

and intended parents performed by a licensed mental health professional.[106] Moreover, as recently as Februrary 20, 2020, previous versions of the CPSA required both surrogate mothers and intended parents to obtain psychological screenings before they executed their surrogacy agreement.[107] The medical provider performing said evaluation must discuss (1) potential psychological and emotional impacts on the surrogate or intended parents, their spouse or partner, current children, and any children born; and (2) evidence-based test practices for how to talk to current children and children born about surrogacy.[108] This language was removed without explanation in the final version of the CPSA.[109] If this language were re-added, it would place New York's surrogacy protections at about the same level as those of other states.[110]

2. Added Cost from Additional Psychological Evaluations

Though an added measure that would require some extra payment, this measure would not significantly increase costs in comparison to surrogacy's other major costs. As it currently stands, the CPSA has the intended effect of driving up the costs of surrogacy and placing those costs onto the intended parents by mandating the intended parents to obtain for the surrogate mother a comprehensive healthcare plan with behavior health included, independent counsel, and a minimum life insurance policy of $750,000.[111] The increased cost brought upon by two psychological screenings would be entirely negligible in comparison to the total cost. This is evidenced by breaking down of the total cost of surrogacy. According to one surrogacy agency,

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[106] *Id.* at 60, 62.
[107] Assemb. B. A9847, 2020 N.Y. St. Gen. Assemb., Reg. Sess. § 581-402(a)(4) (2020) (the person acting as surrogate has completed medical and psychological ealuations with health care practicitioners); § 581-402(b)(6) (the intended parent or parents must have had medical and psychological evaluations).
[108] *Id.* §§ 581-603 to 581-604.
[109] *See* CPSA, *supra* note 50, §§ 581-402(a)-(b), which does not include the additional language in the previous version. I personally reached out to the CPSA's sponsor to get an answer, and I am waiting on a response.
[110] *See supra* text accompanying notes 77-89.
[111] *See* CPSA, *supra* note 50, §§ 581-601 to 581-607. Note how many of the rights will grant the surrogate a benefit at the intended parent(s)' expense.

the average surrogacy can cost the intended parents approximately $90,000 to $130,000.[112] Broken down, fifteen percent of that cost is dedicated to the cost of insurance payments ($13,500 to $19,500), and twenty-two percent of the cost is from other medical fees ($19,800 to $28,600).[113] In comparison, psychological fees make up two percent of the total cost, adding up to approximately $1,800 to $2,600.[114] According to another agency, the predicted cost of the surrogacy is $95,000 to $175,000, but the cost of a psychological screening for both the surrogate would only be $1,050 to $1,350: 0.8 to 1.2% of the total cost.[115]

Surrogacy is an extremely expensive process, but additional screenings only negligibly increase costs in comparison to the other costs. The minor increase is miniscule in comparison to the assurance that both the surrogate and intended parents are in sound psychological condition to carry and care for a child. Therefore, in the best interests of the surrogate, intended parents, and the child, there should be such a requirement, even if that requirement tends to increase price by a small amount comparative to the entire cost of surrogacy.

3. Potential for Discrimination against Infertile Couples and LGBTQ People

Psychological screenings would place another barrier that infertile couples and LGBTQ people must navigate to have a child: a hurdle that would not exist if they were fertile or could otherwise conceive children. Psychological screenings must address two discrimination-based concerns: (1) infertile parents will face an additional requirement compared to natural parents; and (2) infertile couples and LGBTQ people commonly suffer from psychiatric disorders, and may be further discriminated by overly broad rejection criteria in psychological screenings.

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[112] Natalia Alvarez & Sandra F., *Surrogacy Cost Breakdown*, BABYGEST https://babygest.com/en/cost/#:~:text=The%20total%20cost%20of%20a,clinic%2C%20and%20the%20legal%20fees (last updated Oct. 11, 2019).
[113] *Id.*
[114] *Managing the Costs of Surrogacy*, SURROGATE SOLUTIONS, https://www.surrogatesolutions.net/find-surrogate-mother/surrogacy-costs/ (last visited Nov. 5, 2020).
[115] *Id.*

First, a psychological screening will naturally have a discriminatory effect against intended parents compared to natural parents, since natural parents do not have to go through any scrutinization as a part of having a child. However, analogizing the psychological evaluation to the "homestudy" within the adoption context exemplifies a way in which the State scrutinizes potential parents to assure that the child is being placed in the proper home. One study found that adopted children are at double risk to be diagnosed with a psychological or behavioral disorder.[116] There have also been specific incidents of children being abused in their adopted home.[117] To ensure a safe home for an already-fragile adoptee, New York can authorize adoption agencies to inspect the potential adoptive parents in an in-depth investigation called a "homestudy."[118] This investigation is detailed, as it tends to investigate parental fitness and capacity to care for an adopted child and requires extensive background, financial, psychological, emotional, and physical evaluations of a home.[119] Similarly, there are reports of

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[116] Margaret A. Keyes et al., *The Mental Health of U.S. Adolescents Adopted in Infancy*, 162(5) ARCHIVES OF PEDIATRIC ADOLESCENT MED., at *6-7 (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4475346/pdf/nihms-698605.pdf (last visited Dec. 17, 2020). According to the study, being adopted approximately doubled the odds of having a disruptive disorder. *Id.* Furthermore, domestic adoptees had a higher chance of developing an externalizing disorder. *Id.*

[117] For a state responding to severe abuse of adopted children, see WASH. OFFICE OF THE FAMILY & CHILDREN'S OMBUDSMAN, REPORT ON SEVERE ABUSE OF ADOPTED CHILDREN 28-34 (2012) (identifying thirteen incidences of severe abuse or neglect in adoptive placements between 2009 to 2011; abuse ranged from severe beatings, withholding food, removing access to bathrooms, and many other examples). For a New York-specific example, see Benjamin Weiser, *New Look at City Lapses in Adoption Abuse Case*, N.Y. TIMES (Aug. 5, 2011), https://www.nytimes.com/2011/08/26/nyregion/new-look-at-city-lapses-in-adoption-abuse-case.html. In this specific instance, a woman adopted eleven disabled New York foster children and subjected them to years of severe abuse while also collecting nearly $1.7 million in subsidies from New York City until 2007. The articles discusses multiple forms of abuse, included beatings, starving the children, , The New York adoption center explicitly failed to scrutinize easily confirmable self-reported information, including the address used (which was the same for each adoption) and false reports that the children were attending school.

[118] N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16.

[119] *See id.* § 421.16(a). The criteria of an adoption study is more stringent than a psychological evaluation, as it focuses less of the psychological fitness of the parent and more on the physical, emotional, and financial ability ability of the parent to care for the child. Listed in the statute, the adoption study explores the following characteristics of applicants: (1) capacity to give and receive affection; (2) ability to provide for a child's physical and emotional needs; (3) ability to accept the intrinsic worth of a child, to respect and share his past, to understand the meaning of separation he has experienced, and to have realistic expectations and goals; (4) flexibility and ability to change; (5) ability to cope with problems, stress and frustration; (6) feelings about parenting an adopted child and the ability to make a commitment to a child placed in the home; and (7) ability to use community resources to strengthen and enrich family functioning. *Id.* § 421.16(a)(1)-(7).

comparative abuses existing in the context of surrogacy.[120] Therefore, a psychological evaluation of the intended parents, like a homestudy, would allow the State to ensure that the surrogacy process will go more smoothly, as it may screen parents who are not prepared for the child, who may abuse the surrogate, or who may abuse the child.

The standards for the psychological evaluation can also be less stringent than the homestudy, which is necessarily more investigatory based on the vulnerability of the child and the role of the State to protect that child. In adoption, the State is placing a living and already-fragile child being placed into a home and out of the protection of the State, and therefore, the protections are consequently more stringent to ensure that the child will face no further abuse or abandonment. In surrogacy, the State acts more as a facilitator of the surrogacy agreement, rather than the protector of the child, but still working in the child's best interest. As such, the ASRM recommends less stringent criteria for psychological evaluation of intended parents and surrogates, focusing less on individual parental fitness and instead screening candidates and alerting to "significant psychological issues that could compromise successful collaboration."[121] Further in support of a less-intensive evaluative procedure, New York State Task Force on Life and the Law in their 2017 report explicitly stated that a homestudy in the surrogacy context is not recommended or required, as it is not required in other cases forms of assisted-reproductive

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[120] For specific examples of abuses in surrogacy, see generally David Whiting, *Surrogate mom fears for triplets after allegations of abuse by father*, ORANGE CTY. REG. (Sept. 20, 2017), https://www.ocregister.com/2017/09/20/surrogate-mom-fears-for-triplets-after-allegations-of-abuse-by-father/ (California case exemplifying physical abuse and neglect of surrogate children; alleged abuse of triplets conceived through surrogacy; intended father was deaf man who cannot properly communicate; allegations include beating, starving, and general neglect of children); Nino Bucci, *Man pleads guilty to sexually abusing his twin surrogate babies*, SYDNEY MORNING HERALD (Apr. 22, 2016), https://www.smh.com.au/national/man-pleads-guilty-to-sexually-abusing-his-twin-surrogate-babies-20160421-goc83m.html (Australia case exemplifying sexual abuse of surrogate children; intended father sexually abused twin surrogate babies; conceived children with clear intention to abuse them based on internet conversations within child abuse forums); Alan Zarembo, *Scam Targeted Surrogates as Well as Couples*, L.A. TIMES, (Aug. 13, 2011), http://articles.latimes.com/2011/aug/13/local/la-me-baby-ring-20110814 (California case that exemplifies commodification of women; attorney and past surrogate formulated scheme in which they recruited women from California to be surrogates and told them to go to Ukraine to be inseminated; unbeknownst to the surrogates, there were no intended parents at the time of the insemination, and the perpetrators of the scheme shopped the surrogate babies to prospective parents).

[121] *ASRM Recommendations*, *supra* note 90, at e8.

therapies where a child is being created, as opposed to a child already in existence in the adoption context.[122] Therefore, psychological evaluations could screen parents unprepared or unable to raise the child, and are analogous to homestudies in the adoption context, though much less stringent and more accepting.

Second, infertile couples and LGBTQ people suffer from a higher incidence of mental illness, and therefore may be unfairly screened in psychological evaluations based on their identity, if the criteria for rejection are overly broad. In a 2007 study researching the co-morbidity of infertility and psychiatric disorders, 69.6% of patients who visited a fertility clinic had a psychiatric disorder as well as fertility issues.[123] For LGBTQ people, one study found that one in three LGBTQ adults suffered from a mental illness in 2015, compared to one in five heterosexual adults.[124] And even among those adults with mental illness, thirteen percent of LGBQ adults reported that they had a mental illness that seriously impaired with their daily life, compared to a four percent of heterosexual adults with mental illness.[125]

Hence, it is necessary to either (1) develop explicit criteria that would only require rejection in the best interest of the child, like violent disorders or severe attachment issues, or (2) use a trained mental health professional that specializes in surrogacy. The first method would narrow the scope of the evaluation enough so that it would not overly discriminate a population already prone to mental illness, but keep it large enough so that the interests and safety of the surrogate mother and child will still be protected. The second method would also work well,

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[122] *See* NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *Revisiting Surrogate Parenting: Analysis and Recommendations for Public Policy on Gestational Surrogacy*, n. 421 (2017), https://www.health.ny.gov/regulations/task_force/reports_publications/docs/surrogacy_report.pdf

[123] Diana Guerra et al., *Psychiatric morbidity in couples attending a fertility services*, 13 HUMAN REPRODUCTION 6, at 1733, 1734 (2007), https://doi.org/10.1016/j.psc.2007.08.001.

[124] HUMAN RIGHTS CAMPAIGN FOUNDATION, MENTAL HEALTH AND THE LGBTQ COMMUNITY, at 2 (2017), https://suicidepreventionlifeline.org/wp-content/uploads/2017/07/LGBTQ_MentalHealth_OnePager.pdf.

[125] *Id*.

since that mental health professional should be already trained to deal with these vulnerable populations.

VI

CONCLUSION

New York has struggled immensely with catching up to the rest of country and lifting its ban on gestational surrogacy, taking nearly twenty-eight years since it initially imposed the ban. The Child-Parent Security Act will be an excellent first step opening a new avenue of procreation to people struggling with infertility and LGBTQ peoples. However, this increased parental freedom should not jeopardize the safety and stability of the surrogacy agreement for the intended parents, surrogate mothers, and surrogate children. Other states have shown the bare minimum that is required to assure the basic physical, psychological, and emotional safety of their surrogates. New York should follow and require psychological evaluations for surrogates and intended parents. Without those protections, surrogate mothers can never receive the full protections they truly deserve, and this bill cannot possibly have the strongest protections in the country.