Surrogacy, Exploitation, and Commodification

written by Sara Lee, Alexandra Holmstrom-Smith | July 13, 2020

***Sara Lee writes**:*

In her review of Sophie Lewis' much-debated book *Full Surrogacy Now* (*New Politics*, Winter 2020), Alex Holmstrom-Smith suggests that while commercial surrogacy should be decriminalised, contracts for commercial surrogacy should not be enforced. Many make a similar suggestion with regard to sex work—that sex workers should "be allowed to sell sex, but customers should not be allowed to buy sex." But by framing the issue in terms of whether or not commercial surrogacy contracts should be enforced, one ends up viewing commercial surrogacy through the lens of the legislator rather than through the eyes of the would-be commercial surrogate. If we consider the commercial surrogate to be the protagonist—and as socialists, we do consider the worker to be the protagonist of struggle—then there is no clear-cut answer to the question of whether commercial surrogacy arrangements should be enforced. The answer is simply "it depends."

Should a commercial surrogate wish to back out of an arrangement and keep the child they have gestated, then commercial surrogates and socialists should fight for the surrogate's right to keep the child and to not be forcibly separated from them. But in the reverse situation, if it is the commissioning parents who renege on the agreement, then we should defend the right of the commercial surrogate to be compensated, to not be forced to raise a child that they did not intend to have, and to be paid child support if they choose to do so. These rights are sites of struggle for commercial surrogates as workers—sites of struggle that are obscured when the issue is circumscribed to merely be about whether or not commercial surrogacy should be enforced.

Socialist-feminists bring three important ideas to the debate on commercial surrogacy. First, that one should not "exceptionalize" surrogacy just because it involves the biological process of gestation, just as one should not treat the exploitation of sex workers as morally any different from the exploitation of other workers. Often, such moral distinctions stem from the imposition of exceptional standards on women's bodies or the generalization of what women "feel" when they sell their labor in a particular way.

Second, pregnancy and childbirth is indeed work that reproduces capitalist relations of production, primarily by producing new workers. The fact that commercial surrogates are paid should not detract from the fact that having and raising children in general is work. It is work that is primarily performed by women, usually without any remuneration. It is because women shoulder the burden of performing such labour that their pregnancy or motherhood often results in their discrimination in the workplace.

Third, and most importantly, while some surrogates—like some sex workers—enjoy their work and perhaps see it as a means of sexual expression, other commercial surrogates are forced into this line

of work by material circumstances. What socialists bring to the debate is the acknowledgement that this problem is a result of capitalism and cannot be resolved under current relations of production. The material circumstances that compel someone to become a surrogate against their will cannot be resolved by banning or not enforcing commercial surrogacy arrangements. This is a problem resolved only under socialism, and we can only get to socialism through the collective struggle of workers, including commercial surrogates.

Holmstrom-Smith rightly points out that "the left doesn't advocate for cities to invite Uber to town just because we believe that Uber drivers are workers." The strongest argument she makes for not enforcing commercial surrogacy contracts is that, in contrast to sex work, there is no existent black market for commercial surrogacy. So why should socialists campaign for the setting up of a new legal market for commercial surrogates? While it is true that a lack of a legal market does not necessarily drive commercial surrogacy underground, it does drive commercial surrogacy abroad. Impoverished women of color in the developing world often serve as commercial surrogates for wealthy foreign couples. The most well-known example of this is Baby Gammy, a child born to a commercial surrogate in Thailand. The commercial surrogate was left to raise him when the commissioning couple from Australia discovered that he had Down syndrome.

In order for there not to be a legal or black market for commercial surrogates in one part of the world, there needs to be commercial surrogates in another part of the world—commercial surrogates who, by virtue of their race and gender, bear the brunt of reproductive labor under capitalism. The point is not that the left should campaign for the establishment of a new market for commercial surrogates. Rather, the point is that one cannot oppose the establishment of such a market on the mere basis that these markets exist elsewhere. Socialists, being concerned with the international working class as a whole, must have recourse to a wider view.

In her review, Holmstrom-Smith argues that when the state forcibly takes away a child from a commercial surrogate, it is reflective of a broader policy to take children away from working-class people of color in the United States. She highlights in particular the taking away of indigenous children from their families and of black children from their mothers by Child Protective Services. But while the left must fight for the commercial surrogate who wishes to keep their child, it must equally defend the commercial surrogate who has no such intention.

***Alexandra Holmstrom-Smith replies**:*

I appreciate Sara Lee's rejoinder to my review of Sophie Lewis' *Full Surrogacy Now* because it helps to clarify several points about how the left should think about commercial surrogacy. While I appreciate Lee's concern for the complexity of commercial surrogates' needs, I think her perspective echoes what I would call a narrow form of "feminist workerism" that is also present in Lewis' book. In the era of climate change, robots, and "post-work" politics, socialists cannot focus exclusively on the shop floor but also must engage with questions about what kinds of jobs are important and necessary for creating the kind of world we want. Furthermore, I think the defense of the commercial surrogate's right to be a commercial surrogate leads inevitably toward a libertarian politics that undermines workers' rights. Finally, I think Lee's perspective misses important opportunities for practical reforms within capitalism that fall short of revolution.

Lee suggests that the left can take a case-by-case approach toward whether surrogacy contracts should be enforced, depending on what the surrogate wants. This might be a plausible politics for rallying behind individual cases, but it doesn't provide any guidance for what our position is on what the law should be. And despite our focus on worker struggles, I think most on the left believe we

should also take positions on state policies. For example, from 1992 up until this year, New York had a statute that directed courts not to enforce surrogacy contracts. As socialists, are we happy that this statute was repealed or not?

In my review of Lewis' book, I focused on defending surrogates from contract enforcement when the surrogate seeks to renege by keeping the baby. Lawyers refer to what's called an "illusory contract," in which only one party is actually required to satisfy contractual arrangements. It is an arrangement in which one party has the right to back out and the other does not. In the case of surrogacy, this means the surrogate has the right to keep the baby, but the "client" doesn't have the right to not pay her. Illusory contracts are unenforceable, because they violate the market idea of a bargained-for exchange. If the only legal possibilities are for surrogacy contracts to be enforced always or never, the left should choose never. As seriously as we take the harm of a worker getting stiffed on her wages, the prospect of losing a child that one loves seems infinitely worse. Furthermore, I think there are ways that we might frame worker demands for things like child support that wouldn't depend on contract enforcement.

Earlier this year, New York State Senator Liz Krueger introduced a bill that attempted to have it both ways: legalize commercial surrogacy but give the surrogates a way to back out of the contract and keep the baby.[1] (The surrogate would still have had to return any money received above medical expenses.) Governor Cuomo managed to push through his much less worker-friendly bill, so we will never know how this would have worked in practice. Surrogates might still lose custody simply because the courts are so biased against working-class mothers, especially working-class mothers of color. But I think this prospect does raise very interesting questions for socialist feminists. If the awful prospect of the state taking away someone's child is off the table, are there still socialist-feminist reasons to oppose commercial surrogacy? This gets us into a more abstract discussion about labor, commodification, and economic policy.

Lee suggests that socialist feminists have taken the position that "one should not 'exceptionalize' surrogacy just because it involves the biological process of gestation, just as one should not treat the exploitation of sex workers as morally any different from the exploitation of other workers." First, I think it's important to note that many socialist feminists do not take the position that there is nothing exceptional about the labor of surrogacy or sex work. Theorists including Angela Davis, Carole Pateman, Nancy Holmstrom, and many others have suggested that some forms of bodily labor are different, either in kind or degree, from other forms of labor under capitalism. (This claim of course does not support criminalizing such workers.) As a particularly relevant example, the Marxist-feminist philosopher Kelly Oliver has argued that commercial surrogates face a double estrangement of their labor as compared to other workers under capitalism. She writes, "Unlike other workers, she is not an appendage of a machine. She is the machine. Her body becomes the machinery of production over which the contractor has ultimate control."[2]

I think it is often useful to draw out the similarities between different types of labor as this can expand solidarities and break down stereotypes and stigma. But I don't think it's useful to flatten all distinctions. Work in different contexts is simply different in many ways, which in turn can lead to different subjectivities and different strengths and weaknesses for organizing. Much of the field of left-wing labor sociology is dedicated to analyzing such differences—how is service work, or digital work, different from working in factories, and what does this mean for workers and the labor movement?

Even further, a narrow focus on the shop floor does not allow us to think about the broader social issue of commodification. Climate change has most clearly demonstrated the need to think beyond the demands of the factory floor. Even though we care about displaced workers in extractive industries, we still think the fossil fuel industry must be shut down and those workers given new

“green” jobs. Because of the bigger issues at stake, we must think about how economic policy can meet societal needs. Our society needs more teachers and more nurses, so we should demand that jobs be created in those fields. From this perspective, what is a leftist argument for commercial surrogacy? The surrogacy industry has always relied upon and promoted a culturally white, heteronormative, patriarchal, Neo-Eugenicist, genetically defined concept of family that is inimical to the inclusive, caring society that socialist feminism seeks to create.

Lee also suggests that “The material circumstances that compel someone to become a surrogate against their will cannot be resolved by banning or not enforcing commercial surrogacy arrangements. This is a problem resolved only under socialism, and we can only get to socialism through the collective struggle of workers, including commercial surrogates.” Here I think Lee’s argument veers toward a kind of libertarianism. Short of overthrowing capitalism, social-welfare and economic policies can go a long way to increase people’s substantive options to either not work at all, or to work in meaningful, interesting, safe, and healthy jobs. In some cases, this does in fact mean foreclosing people’s options to self-exploit. For socialists this should be seen as an expansion of freedom rather than a denial of freedom, as libertarians see it. For example, having a legal minimum for wages means limiting freedom of contract—you can’t decide to work for less than minimum wage, and we are all better off for it.

However, it’s certainly true that under the current conditions of global capitalism, some workers are inevitably going to end up doing work that falls very far short of the goal of meaningful, interesting, safe, and healthy work. The question then becomes how to relate that present reality with our imagined future goal of eliminating such labor. Margaret Jane Radin calls this the “double bind,” in which a short-term anti-commodification policy like prohibiting sex work has the effect of harming working-class people who are trying to survive, since they now have fewer options to make money.[3] As Lee emphasizes, I think the major distinction between surrogacy and sex work in this regard is that surrogacy does not seem to thrive in a black market, at least not in the Global North context. Thus instead of facing criminalization, as with sex work, the harm that would-be surrogates in places like the United States would face if surrogacy were banned is simply the foreclosing of that particular avenue for making needed money under capitalism.

I think the way to address this question is through a multifaceted platform of demands that encompasses improving conditions for workers, expanding the social safety net outside of work, and limiting new forms of commodification. Demands for universal basic income and/or direct support for parents would allow the social reproductive labor of pregnancy and childrearing to be compensated without being commodified. Where workers are already doing a certain kind of commodified work—including commercial surrogacy—socialists should support their organizing for better wages and working conditions. Where something is not commodified, we should oppose it becoming commodified. And where there is a serious possibility of eliminating a certain industry that we agree is not good for the world, we shouldn’t oppose eliminating that industry per se but rather should fight for better terms for the workers whose jobs would be lost. If we don’t, we will end up supporting the libertarian, not socialist, conception of a worker’s individual economic rights overriding what is best for society. These individualist framings of worker rights lend themselves to anti-union politics such as right to work.

In practice, the multifaceted platform that I have sketched has already been embraced by socialist groups such as the Democratic Socialists of America. We support better wages and working conditions for workers, while also expanding the social safety net outside of work and pushing to decommodify certain sectors of the economy, like health insurance and utilities. In the same way that New York City activists opposed the construction of Amazon’s new headquarters despite its promise of (bad) jobs, and in the same way that activists oppose Airbnb despite its offering some working-class people an extra source of income, we can oppose any expansion of commercial

surrogacy. It's a new form of commodification that won't offer good jobs and instead exacerbates existing inequalities. Lee suggests that taking such a position in a Global North state depends upon surrogacy being available abroad. However, capitalists' intent to evade regulations is a reason that they go abroad to do all kinds of unethical, exploitative things. This fact has never prompted the left to call for an end to protective regulations in the Global North. Instead, solidarity requires working with workers in the Global South to improve their working conditions until similar regulations can be effectively implemented there (or until the revolution). Rather than considering the demand for children produced through surrogacy as an insatiable, unstoppable global impulse, forced on workers in other countries too, we should regard it as something that must be contested wherever it raises its head. It is also worth noting that for many rich would-be parents around the world, the United States is the place "abroad" to seek commercial surrogates.

In some instances, an incomplete decommodification may be the best that we can achieve short of a revolution. Lee seems to suggest that my anti-commodification view somehow lends itself toward the Nordic model of criminalizing the buying, but not selling, of sex. However, as I emphasized in my review, the options are not simply to criminalize or to fully commodify. Instead, I think we should look mainly to civil laws that can constrain capitalist industry. With regards to sex work, my perspective is that socialists should be concerned about the ways that a highly commodified model of sex-work legalization in places like Germany has created a new capitalist class of brothel owners who have expanded power vis-a-vis workers and the state. Socialists should be trying to develop models of regulation that expand worker power while limiting commodification and employer power. It's inexplicable to me why Sophie Lewis specifically denies any such possibility. In *Full Surrogacy Now*, she writes that freedom "cannot simply be legislated … by decreeing, for instance, that all trade in a particular sector must be cooperatively run."[4] For highly intimate forms of labor that we cannot or choose not to eliminate, that certainly sounds like a great socialist demand to me!

Surrogacy is not a simple issue, but I hope this discussion has helped illustrate some of the principles at stake and how they may be addressed. Any discussion about commercial surrogacy that doesn't deal squarely with commodification will always fall short.

Notes

1. Senate Bill 7717.
2. Kelly Oliver, "Marxism and Surrogacy," *Hypatia,* Vol. 4 No. 3 (Autumn 1989), 105.
3. Margaret Jane Radin, "Market-Inalienability," 100 Harv. L. Rev. (1987), 1849, 1915; *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts and Other Things* (Harvard University Press, 1996).
4. Sophie Lewis, *Full Surrogacy Now* (Verso 2019), Chapter 2.