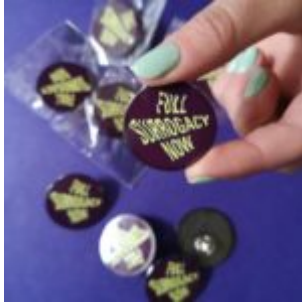


A Radical New Politics of Surrogacy?

January 11, 2020



Sophie Lewis' new book *Full Surrogacy Now*, published by Verso, has gotten a lot of attention in left media circles. Lewis was interviewed on Jacobin Radio's *The Dig* podcast, on *This Is Hell* radio show,



and in *The Nation* magazine. Lewis was featured on a panel at the Philadelphia Socialist Feminist Convergence. The book purports to outline a radical new politics around surrogacy, which she links to a call for "family abolition." In her second chapter, Lewis describes how white liberal feminists rallied around the 1988 case of Mary-Beth Whitehead, a working-class white woman in New Jersey who sought to keep "Baby M," her own biological (genetic) child whose conception was arranged through a surrogacy contract with a straight couple, the wife of whom had multiple sclerosis. Far fewer people mobilized around the 1993 California case of Anna Johnson, a working-class Black single mother who sought custody of the baby she gestated pursuant to a surrogacy contract with a married couple consisting of a white man and a Filipina woman, whose genetic material formed the embryo for the baby.

For Lewis, the unequal response by the nascent anti-surrogacy movement was indicative of its future, as today opposing commercial surrogacy galvanizes "neoimperialist humanitarian feminis[ts]," along with homophobes, transphobes, conservative Catholics, and other tendencies that Lewis identifies as "bioconservative." Asserting that "surrogacy bans uproot, isolate, and criminalize gestational workers," Lewis instead proposes that the left accept that surrogacy is simply *work*. Like all labor under capitalism, commercial surrogacy is exploited labor, but Lewis argues that it does not warrant singling out and should not occasion comparisons to slavery, which Lewis presents as a species of concern belonging to the type of white liberal feminists who believe that the Trump era means we are literally "living in *The Handmaid's Tale*." Where anti-surrogacy campaigners seek to preserve the cis-heteronormative nuclear family, the left should embrace "open-source, fully collaborative gestation" in the utopian "gestational commune."

At a packed panel at the Socialism in Our Time conference in New York City this past May, Lewis read from the book and four speakers provided favorable commentary on the text. During the discussion, I asked Lewis how she proposed to expand surrogates' right to parent the babies they

gestate, if they so desire. Lewis responded to the effect that her book is a theoretical exploration and does not purport to offer policy solutions to a deeply complex issue. Panelist Mackenzie Wark urged that we should empower the workers, not the police. Lewis and panelist Jules Joanne Gleeson also insisted that their call for “family abolition” did not in *any way* implicate state policies, such as Trump’s family separation policy, that take children away from working-class parents of color.

In this essay, I show that these are all at least partially untrue statements, although I am not sure the speakers realized this. First, while Lewis’ book may not lay out a policy “solution” to the ills of the commercial surrogacy industry, she clearly has a policy *preference*, which is to legalize commercial surrogacy and repeal so-called “surrogacy bans.” Second, legalizing commercial surrogacy empowers the state rather than workers because surrogacy contracts are enforced through the court system. They may even be enforced at the hands of police, as they were in the *Baby M* case. Third, court enforcement of surrogacy contracts against surrogates who seek to renege cannot be fully understood without invoking the manner in which courts *generally* treat working-class parents, especially mothers of color. This was the context in which the state of California decided that Anna Johnson was a temporary caretaker rather than a mother of the baby she carried to term, and cases like hers continue to arise wherever surrogacy contracts are enforced.

The source of these distortions appears to be Lewis’ misunderstanding of the law regarding surrogacy. In the book, Lewis entirely fails to mention the outcome of the *Baby M* case, in which the New Jersey Supreme Court declared surrogacy contracts void and unenforceable because they were against public policy and contrary to extant laws prohibiting adoption for pay. The court reinstated Mary-Beth Whitehead as the legal mother of Baby M, thus entitling her to visitation rights, although the court ultimately awarded custody to the father for reasons unrelated to the contract. Without this critically important piece of history, Lewis mistakenly equates a pro-worker desire for the decriminalization of labor with a pro-business demand for legalization of a for-profit industry.

Legalization entails active government participation in setting up a market, and as a business, commercial surrogacy is particularly reliant upon this government activity because the question of *who is a parent* is fundamentally a legal one in the modern bureaucratic state. Without the state’s backing, commissioning parties would not be the legal parents of the children produced through surrogacy agreements. This is even more important given the costs involved, as commissioning parties in the United States can spend between \$20,000 and \$200,000 on the process. The state’s backing—or lack thereof—is precisely why California and not New Jersey became a global destination for people seeking to produce children through commercial surrogacy.

In this way, Lewis manages to avoid a neoliberal feminist “empowerment” spin on the industry while still embracing the capitalist faith in the market’s inevitable growth, which becomes a dark fatalism when filtered through her anti-capitalist lens. Lewis writes, “I am sympathetic to the impulse, in that the advancing frontier of commodification elicits, in so many of us, a form of recoil that feels almost beyond words. I think I get it. We refuse the concept that the most precious things should be for sale, as though that will change the reality that—exploitatively, yet consensually—they are.” Because Lewis’ particular brand of leftism rejects the use of the law for reforming capitalism, the duty of solidarity requires accommodating our minds to this horror while supporting (from afar) the only real recourse she believes is available to workers: the strike, in this case, via abortions. The logistics of such a strike would surely confound most labor organizers, so Lewis conveniently does not investigate this.

More insidiously, Lewis’ ill-informed representation of the law forecloses tools that are actually protective of workers, renders all struggle against commodification impossible, and conceals the role of the state in creating markets that would not otherwise arise “naturally.” From land to intellectual

property to mortgage-backed securities, the state plays an essential role in constituting many things as commodities for sale and regulating the terms of their exchange. The fact that no state in the world today will officially recognize or enforce the sale of human beings as commodities is the result of centuries of struggle against the Atlantic slave trade and other abuses. This is precisely why states that have legalized commercial surrogacy are careful to insist that what is being sold are “services” rather than the babies themselves. In full contrarian mode, Lewis asserts that she *agrees* with critics that commercial surrogacy entails the buying and selling of children, but she does not find this a compelling reason to outlaw the trade.

This brings us to another serious problem, which is the way that Lewis misrepresents Black feminists’ position on surrogacy, failing to engage with the serious concerns they raised, while presenting their work as if it supports hers. Lewis cites Angela Davis and the legal philosopher Anita Allen to draw parallels between surrogacy and earlier forms of gendered and racialized care work such as wet nursing. For Lewis, surrogacy’s lack of novelty makes it unworthy of heightened concern. She neglects to mention, however, that Davis and Allen drew the *exact opposite* conclusion: They thought commercial surrogacy should be opposed. While Lewis often seems to struggle to understand why people find the commodification of reproductive labor and children so disturbing, Davis and Allen point directly to American chattel slavery (history providing far more horrific parallels than *The Handmaid’s Tale*).

Some Black feminist scholars also took Anna Johnson’s case as an indication that Black surrogates would be particularly disadvantaged in any disputes that arose between them and the commissioning parties, who are wealthy and usually white. In this way, the state’s backing of commercial surrogacy could be seen as an extension of other government policies, from the excessive adoptions-out of indigenous children that motivated the Indian Child Welfare Act to the modern child-welfare system, all of which have treated working-class families as not having full parental rights and in some cases have furthered the reproductive interests of upper-class white families at the expense of working-class mothers of color.

Lewis’ choice to ignore this entire context is indicative of a weakness throughout the book, in which she fails to see any tension between her call for “family abolition” and Black, indigenous, and other working-class feminisms (which Lewis claims to be inspired by), which have sought to establish and protect the *rights to family* that are constantly under attack in their communities. A more fruitful approach would be to seek a balance between these concerns and the also-important impulse to question the heteronormative family form and dream of new and different ways of raising children. Instead, Lewis’ discussion is simultaneously cavalier toward these issues and hopelessly vague with regards to what she proposes, so that even those who are interested in radical possibilities for childrearing will also likely be disappointed with what is presented.

Some of the most interesting parts of Lewis’ book are her investigations of the biology of pregnancy and the bloody and difficult business it has always been. She also discusses how pregnancy (in all contexts, not just surrogacy) does not always involve bonding with the fetus or the resulting child, and she invokes social reproduction theory to posit that all pregnancy can be theorized as labor. From these points, Lewis asserts that “all hitherto existing societies have probably only known alienated gestating.” The difficulty of generalizing about literally everyone’s pregnancy aside, it’s not clear what actually follows from this. Without disputing Lewis’ assertion that all pregnancy can be seen as labor, it would still be a mistake to miss the distinctiveness of labor that is alienated in the strictly Marxist sense. As applied to pregnancy, this only fits commercial surrogates, since they are the only gestators who produce babies *that do not belong to them* for a wage. Furthermore, any attempt to link the view of pregnancy-as-labor to labor militancy is immediately undercut by Lewis’ own research, which shows that the anti-abortion movement also promotes the idea of pregnancy-as-labor, one to be embraced as a form of submission to God.

Perhaps commercial gestational surrogates could be the most advanced sector of the reproductive labor force, destined to overthrow all systems of social reproduction and the family, but Lewis presents little to indicate that their own consciousness and organizing has generated new models of childrearing to be realized through labor militancy. Instead, Lewis documents the prevalence of heteronormative middle-class views of family among surrogate workers, from the Indian surrogates who hope that this labor will enable them to buy a house for their own genetic children to the American surrogates who insist that the baby belongs exclusively to the commissioning parties, rather than a “polymaternal” grouping. All of this suggests that today’s proletarian gestators may not be the revolutionary subjects that Lewis might envision and also that theorizing something as labor is not the only, or necessarily the most radical, way to fight for it. The frameworks that people use to articulate rights also depend on their goals: Perhaps Anna Johnson chose to frame her situation in terms of parental rights rather than labor rights because she wanted custody of a child, not a labor union. And finally, the left doesn’t advocate for cities to invite Uber to town just because we believe that Uber drivers are workers rather than independent contractors. This is the bizarre logic that Lewis applies to surrogacy.

To be sure, there are interesting interventions that queer Marxist-feminists have made and will continue to make with regards to the family and labor today. Unfortunately, Lewis’ blithe and poorly researched book is an unhelpful contribution to this literature, and the consideration it has garnered reveals the intellectual-academic left’s destructive obsession with hot takes. To put it simply, there is absolutely no Marxist-feminist, anti-racist argument for government enforcement of these contracts against surrogates who want to back out of them. While I do not know if Lewis actually thinks that governments should do this, she has not said otherwise and has meanwhile gone on every left-wing media outlet that she can talking about how *all* surrogacy “bans” hurt workers and how the left needs to “unlearn its gestation-exceptionalism.” These statements may have consequences, since they are not being made in a vacuum. New York’s legislature nearly passed a bill legalizing commercial surrogacy this year, and powerful Democratic forces are still mobilizing around it. If it passes, any future surrogates who, like Anna Johnson, feel a bond with the children they gestate will have no right to parent them, and Lewis and the rest of the libertarian left who support her will bear some of the blame for failing to uphold a decommodified vision of pregnancy. Readers who actually care about trying to make things better would do well to look elsewhere.

Notes

1. The author would like to extend her deep thanks to Nancy Holmstrom, Johanna Brenner, Elizabeth Rapaport, and other friends for their feedback on this piece. Any errors are her own.
2. *Johnson v. Calvert* (1993) 5 Cal. 4th 84.
3. *Matter of Baby M*, 109 N.J. 396, 412, 537 A.2d 1227, 1235 (1988).
4. See Angela Y. Davis, “Surrogates and Outcast Mothers: Racism and Reproductive Politics in the Nineties,” in Joy James, ed., *The Angela Y. Davis Reader* (Blackwell Publishing Ltd, 1998); Beverly Beyette, “Angela Davis Now: On a Quiet Street in Oakland, the Former Radical Activist Has Settled In but Not Settled Down,” *Los Angeles Times*, March 8, 1989, Anita L. Allen, *The Black Surrogate Mother*, 8 Harv. BlackLetter J. 17 (1991).
5. See Allen above; also Deborah R. Grayson, “Mediating Intimacy: Black Surrogate Mothers and the Law,” *Critical Inquiry* (Vol. 24, No. 2, Intimacy, Winter 1998), 525-546.