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Commercial Gestational Surrogacy on The Biopolitical Horizon

Molly Sir

Up until the last few decades, individuals and couples unable to conceive did not have access to the nuclear family structure that prioritizes having one's own biological children. However, the vast developments in assisted reproductive technologies (ARTs) have prompted a change. In-Vitro fertilization (IVF), where sperm can fertilize an egg outside of the body, broadens the possibilities for creating genetically related children for previously infertile couples and individuals. This paper focuses specifically on the growth of gestational surrogacy, a technology that "now permits a woman who is unable to sustain a pregnancy...to have her ova fertilized with her partner's sperm and then have the resulting embryos transferred to a gestational surrogate" (Ragoné 56). While research on the prevalence of gestational surrogacy is relatively sparse, statistics indicate an 89 percent growth from 2004 to 2008 in the number of babies born to gestational surrogates in the United States, greatly exceeding the growth of other IVF practices (Council For Responsible Genetics 3).

The introduction of IVF into surrogacy agreements has created a market for surrogates and egg donors, reflecting a shift away from the "baby selling" moral predicaments in the 1970s; however, a great deal of criticism around the practice of commercial gestational surrogacy remains (Spar 298, Ludden). Since the practice is unregulated in most states, legal controversies that place value on genetics, gestation, or "intent" to parent have sparked debates around what it means to be a parent (Ludden). By placing the role of a surrogate mother into Giorgio Agamben's theory of *homo sacer*, this paper aims to develop his theory further by engaging with scholars speaking from the marginalized positions about the ways that commercial gestational surrogacy upholds white supremacist hetero-patriarchy through its perpetuation of nuclear family structures.

States of Exception and The Biopolitical Horizon

Agamben explains the problem with our contemporary politics as the problem of states of exception that place some people both inside and outside of the law. This theory relies on his two figures: the *sovereign* and the *homo sacer*. The *sovereign* is both "inside and outside the judicial order" allowing him to suspend the rule, which "gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule" (Agamben 15, 18). The *sovereign* is within the law, in that he must follow it, but also outside of the law, in that he has the power to suspend that law. The *homo sacer*, who "may be killed and yet not sacrificed," is a figure that mirrors the *sovereign* power (8). When the *sovereign* gives rise to the exception, the *homo sacer* is placed outside of law; however, in excluding the *homo sacer* from the rule, he is included in the capacity that he can be killed without legal consequences. In order to analyze problems of commercial gestational surrogacy, this paper considers the surrogate mother as *homo sacer* who "may be killed and yet not sacrificed" in a system that introduces ARTs as a method of achieving the American Dream.

According to Agamben, *homo sacer* arises out of being excluded from a new set of norms that were created in response to a previous state of exception. Before the surrogate mother was *homo sacer*, another group of people had been excluded from the rule, giving rise to the new rule. Until the popularization of IVF in 1978, couples and individuals unable to reproduce were unable to participate in the nuclear family structure (Council for Responsible Genetics 3). This placed many people (i.e. infertile couples, homosexual couples, single individuals) on the margin in that they were excluded from achieving the traditional images of the American Dream. However, as Agamben predicts, processes – and consequentially laws – are created to work towards minimizing that

exception through biopower, which has replaced the historic assumption of sovereign power.

The surrogate mother as *homo sacer* must be considered through the sphere of *biopower*, “the power to ‘make’ live and ‘let’ die,” rather than sovereign power, which relies upon an individual making the decision to take someone’s life (Foucault 241). Biopower infiltrates all structures of society and appears through experiences of oppression. In the case of surrogacy, ARTs are a function of biopower that allows for white wealthy bodies to continue to live through their genetically related offspring. While giving life to those who can afford to use ARTs, our society ‘lets’ the gestational surrogate ‘die’ by not viewing that role as valuable or fitting into normative notions of family. By perpetuating the value of a nuclear family, the structures of the United States instill the narrative of the American Dream in its citizens and oppress those who cannot achieve that Dream. Commercial gestational surrogacy attempts to provide previously marginalized populations access to the American Dream; however, in minimizing the surrogate to her reproductive abilities, the privileging of genetics over gestation excludes the surrogate mother from the nuclear family, and consequentially, from participation in that Dream. Demonstrated through her exclusion from the nuclear family, society marks the surrogate mother *homo sacer*, implicating the inverse of the surrogate as what is *sovereign*. When looking at the surrogate mother as *homo sacer*, we can see that white supremacist hetero-patriarchal society acts as *sovereign*.

Agamben believes that the only way to move out of contemporary politics is through the continuation of law making, so that eventually, the exception becomes the rule. He sees this process occurring through a “biopolitical horizon,” an extreme form of biopower that makes “it possible to clear the way for the new politics, which remains largely to be invented” (4, 11). In applying this theory to the surrogate mother in the state of exception, the next logical step would be to center the experience of *homo sacer* in the creation of

the new rule. In the following sections, this paper will outline the key critiques of commercial gestational surrogacy made by women of color. By incorporating the theories of Anita L. Allen and Dorothy E. Roberts, two prominent Black female scholars in the field, this paper aims to take Agamben’s theory a step further and begin conceptualizing the “new politics.”

From Traditional to Gestational Surrogacy: the Importance of the ‘Genetic Tie’

The growth of surrogacy is often accepted as a method to help families that had previously been marginalized by society’s reliance on nuclear family structures; however, as Agamben expects, each new law creates a new state of exception. Who benefits from the growth of commercial gestational surrogacy and who is left on the margins? Prior to the introduction of IVF and gestational surrogacy, “surrogates were required to contribute their own ova toward the creation of the child... surrogate motherhood was utilized primarily by Euro-American couples who were most often matched with Euro-American surrogates” (Ragoné 57). This form of reproduction only serves to benefit the man and his desires for a genetic connection to his child. The biological mother is exploited for her reproductive functions, the intended mother does not automatically have custody of their child, and working-class women of color tend to be left out of participating in traditional surrogacies. By prioritizing the father’s genetic link to the child over anything else, traditional surrogacy continues to reenforce the white supremacist hetero-patriarchal ideologies.

In order to understand the ways commercial gestational surrogacy upholds white supremacist and hetero-patriarchal notions of family, one must look at the shift from traditional to gestational surrogacy with a critical race framework. While the majority of traditional surrogates were white, “30 percent of all gestational surrogacy arrangements at the largest program now involve surrogates and couples

matched from different racial, ethnic, and cultural backgrounds” (Ragoné 65). This statistic may be thrown around to demonstrate a post-racial relationship between customers and their surrogates; however, a deeper analysis provokes questioning of that transition. Why do women of color only serve as surrogates once their genes will not be involved in the reproduction? This question unveils the white Euro-American obsession with the “genetic tie” and maintaining their status as whites.

Dorothy Roberts explores the concept of the “genetic tie” extensively in her work. In order to understand why the “genetic tie” exists, it’s imperative to consider that “[th]e desire to have genetically related children is not entirely natural, but is determined by our political and cultural context” (Roberts 215). The dependence on using genetics to explain and privilege certain ideas over other ones is a relatively recent concept. “Policymakers and theorists increasingly enlist biology to explain social problems, thereby dismissing the need for social change” (220). The reliance on the genetic tie dates back to slavery, where “nature” was used to “systematically explain the anomaly of slavery existing in a republic founded on a radical commitment to liberty, equality, and natural rights” (224). White supremacy in the United States has depended on the link to the “genetic tie” and continues through the maintained prioritization of that tie.

Because traditional surrogacy relies on the donation of the surrogate’s ova, in a heterosexual relationship, only the man has the option to pass his DNA on to their child. This creates a dynamic that privileges male genetic connection to the child, arguably placing women on the margins, or as *homo sacer*. When IVF became popularized, gestational surrogacy may have taken some women off the margins; however, the women whose genetics are not valued remain marginalized by traditional notions of family. The dependence on a “genetic tie” further indicates white supremacist hetero-patriarchy acting as *sovereign* by placing the genes of the surrogate

mothers, who are often low-income women of color, outside of the desired genetic future.

Commodification of Black Women’s Bodies

In addition to understanding the relationship between commercial gestational surrogacy and “the genetic tie,” the commodification of Black women’s bodies is another central critique to commercial gestational surrogacy perpetuating white hetero-patriarchal society. This argument prompts many to consider a comparison to slavery:

[C]ontrolling Black women's reproduction was essential to the creation and perpetuation of capitalist class relations. Slave owners controlled Black women's labor and commodified Black women's bodies as units of capital. As mothers, Black women produced the children who increased their white owner's property and labor force. (Dillaway 317)

When considering this analogy, it becomes clear that upper-class whites still seek control over Black women’s fertility. Dillaway expresses the key difference as “under slavery Black slave women were producing a Black laboring class and receiving no payment whereas now, with advanced technology, Black women can produce the white capitalist class instead” (317). The connection between slavery and commercial gestational surrogacy points to a continued priority being placed on white motherhood and having more white babies. From eugenic practices¹ to the trope of the “Welfare Queen,”² the devaluation of Black

¹ Denise A. Pierson-Balik defines historic eugenic practices as, “blatant eugenic methods such as forced sterilization to today’s more subtle methods of family caps, subpoverty level public assistance, *encouraged* sexual abstinence... in the past eugenics was based on the belief that behavioral, physical, and intellectual traits were inherited, and was used to justify the argument for the elimination of targeted racial and ethnic groups,” (Pierson-Balik 12).

² “By deeming the behavior of poor fertile women to be morally questionable, politicians and public opinion have

motherhood has been a theme throughout history and commercial gestational surrogacy can be viewed as another manifestation of this.

White supremacist hetero-patriarchal society depends on the devaluation of Black women's bodies, which Anita Allen warns against in her consideration of surrogacy:

Minority women increasingly will be sought to serve as 'mother machines' for embryos of middle and upper-class clients. It's a new, virulent form of racial and class discrimination. Within a decade, thousands of poor and minority women will likely be used as a 'breeder class' for those who can afford \$30,000 to \$40,000 to avoid the inconvenience and danger of pregnancy. (Allen 1122)

While acknowledging the negative consequences of commercial gestational surrogacy, others consider the complexity of the 'double-bind' that many low-income women of color may find themselves in:

If we now permit commodification, we may exacerbate the oppression of women—the suppliers. If we now disallow commodification—without what I have called the welfare-rights corollary, or large-scale redistribution of social wealth and power—we force women to remain in circumstances that they themselves believe are worse than becoming sexual commodity-suppliers. (Radin 1136)

Options outside of commercial gestational surrogacy should exist for working-class women of color to make a living; however, participating in a surrogacy arrangement may seem like the best

turned the poverty debate to focus on the reproductive habits of welfare recipients and have legitimated the use of family caps, abstinence-only education, and even proposals for 'voluntary' temporary or permanent sterilization in return for life-sustaining benefits," (Peirson-Balik, 12).

option for a woman at the time, given the vast limitations on her freedom.

Commercial Gestational Surrogacy as Radical Technology

How can gestational surrogacy be utilized as a tool to undermine the white supremacist patriarchal society that we find ourselves in today? Scholars who discuss the significance of the "genetic tie" and the complexities of the commodification of working-class women of color's gestational services present various suggestions for how policy around gestational surrogacy should change. In order to conceptualize Agamben's theory of making laws along the margins, this paper will consider the suggestions by Allen and Roberts, and see how they fit into the Agamben's call for a "biopolitical horizon."

In her analysis of the oppression of the Black surrogate mother, Allen presents three goals for legislation surrounding gestational surrogacy:

- (1) refusing to legally enforce commercial surrogacy agreements;
- (2) ascribing to surrogates parental rights that they may voluntarily relinquish only after the birth of a child they are paid to carry; and by
- (3) making no distinction between genetic and gestational surrogates when it comes to the assignment of parental rights. (Allen 1122)

In these suggestions, Allen aims to equalize the power dynamic that she believes to exist between the surrogate and the intended parents. Providing more rights to the surrogate during the legal process, and equalizing the power of genetics with the gestation process, work to undo some of the stigma that is associated with marketing services of the body. Our current system does not value the services of gestation, compared to the importance of the "genetic tie;" however, in order to work towards gestational surrogacy as a tool that does not perpetuate the white supremacist hetero-patriarchy, we must change the

understanding of the worth and value of providing gestational services.

Roberts echoes many of Allen's suggestions, emphasizing the importance of considering race and class when making legal decisions.

We would not necessarily privilege claims based on genetic relatedness nor reject them altogether. Rather, we should be guided by a particular concern for the relational bond between less powerful parents and their children, remaining especially vigilant for policies that value the genetic tie on the basis of race. In surrogacy cases, for example, the law would cease to privilege a father's wish for a genetic inheritance and give more concern to the potential harm of commercializing childbirth, including its devaluation of Black genetic contributions. At the same time, however, the law would pay more respect than it has to the genetic bond between Black parents and their children... we would eliminate the promotion of adoption and new reproductive technologies as a means for white, middle-class couples to have the children they prefer. (Roberts 273)

Roberts argues that legislation needs to reflect a change in power so that policies do not continue to value only the white genetic tie, especially over the harm it may cause to low-income women of color. Roberts believes that more emphasis should be put on familial structures that diverge from the nuclear family structure that our white supremacist hetero-patriarchal society relies on. Her work focuses primarily on the familial bonds in Black families that transcend the normative dependence on a "genetic tie." This argument fits into Agamben's call for the exception to become the rule. A working-class woman of color as a commercial gestational surrogate, representing the figure of *homo sacer*, demonstrates what has

been excluded from nuclear family structures and what should become the new rule.

One of the most important parts of progressing out of the laws that continue to exclude and let certain bodies die, for Agamben, is the power of reflection. He explains that only a reflection that:

thematically interrogates the link between bare life and politics, a link that secretly governs the modern ideologies seemingly most distant from one another, will be able to bring the political out of its concealment and, at the same time, return thought to its practical calling (Agamben 4-5).

The suggestions from Roberts and Allen to fit into this framework, as they acknowledge the ways that commercial gestational surrogacy, as a form of biopower wrapped up in the exploitation of capitalism, sexism, and racism, works to make certain bodies live and let other bodies die. Agamben would consider this an interrogation of "the link between bare life and politics;" however, an important distinction between Agamben's words and the analyses that this paper focuses on is where those laws are coming from. This paper takes Agamben's theory a step further in suggesting a crucial component of the "new politics" would be that those laws and decisions are made by individuals whose voices and lives are not prioritized through legislation and policies in the United States. In her publication, *Looking At The Bottom*, Mari Matsuda emphasizes the need for United States legal doctrine not to consider the experiences of those who are marginalized from an abstract position, "but from the position of groups who have suffered through history," (Matsuda 63). By making laws in this fashion, "moral relativism recedes and identifiable normative priorities emerge," (Matsuda 63). The current attitudes and policies around commercial gestational surrogacy do nothing to undo the racism and sexism that exists in the structures of our society; however, if the voices of low-income

women of color and others oppressed by these policies can participate in changing them, perhaps we can begin to see commercial gestational

surrogacy as a form of radical technology to take us into a “new politics.”

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