Surrogacy, Autonomy and Promising

Dr Lynn Gillam

Centre for Human Bioethics, Monash University
and
Centre for Applied Philosophy and Public Ethics

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Centre for Applied Philosophy and Public Ethics (CAPPE)

CAPPE Melbourne
Department of Philosophy
University of Melbourne
University
Parkville, Victoria, 3010
Phone: (03) 9344-5125
8467
Fax: (03) 9348-2130

CAPPE Canberra
GPO Box A260
Australian National

Canberra, 2601
Phone: (02) 6125-

Fax: (02) 6125-6579
Introduction
In the debate over surrogacy, reference is frequently made to the unpredictability of the surrogate mother's emotional response - she is unable to know beforehand how closely attached she will be to the child she has carried in her womb for nine months, and how she will feel about handing over the child to the commissioning couple. Although the degree and nature of this unpredictability of emotional response (which I will henceforth call the "unpredictability factor") has been questioned (eg by Justin Oakley, 1992, pp.274-276), in this paper, I will take it largely as fact. The purpose of this paper is to explore whether and how the unpredictability factor might have moral significance. I will briefly consider the claim that the unpredictability factor affects informed consent, and then discuss at greater length its implications for promising, since surrogacy is more accurately characterised as a promise rather than a consent.

It has been suggested that the unpredictability factor makes surrogacy arrangements morally wrong per se, but I shall argue that, at least with regard to informed consent and promising, there is not enough evidence to draw this conclusion. If surrogacy per se is wrong, it must be for other reasons.

Unpredictability and informed consent
One interpretation of the moral significance of the unpredictability factor is that it creates a barrier to informed consent. Dodds and Jones (1989) argue that if a woman cannot know how she will feel about handing over a child she has given birth to, then she cannot give a valid informed consent to a surrogacy arrangement:

- How a pregnancy will be experienced, in detail, is unpredictable, given the limitations of our knowledge of human psychology and physiology, so that even if a woman believes that she will have no emotional response to the child she has gestated, and tries to ensure this, she may not be able to guarantee that she will not come to have a deep emotional attachment to the child. Thus, how can a woman give a fully informed consent to part with a child that she will have felt growing and developing inside her, that she will have given form to through her body, before she knows the feelings these experiences will have produced? If bonding has occurred during a pregnancy, these feelings must be taken into account, but they can only be taken into account in retrospect. (p.9)

The thrust of Dodds and Jones' argument is this: If informed consent is not given, then surrogacy does not respect the occurrent autonomy of the surrogate, even if she freely enters into the arrangement, because the adequate knowledge requirement is not met. In the context of surrogacy, where the surrogate mother is risking her dispositional autonomy for the sake of a project which is not her own (but is rather the project of the commissioning couple), this constitutes an unjustified infringement of her autonomy on the part of those who ask her to take part in a surrogacy arrangement.

Dodds and Jones' argument is intended as an objection to surrogacy per se, and not just particular instances of it, since they regard all pregnancies as subject to the sort of unpredictable emotional responses which they describe. Thus on their view, the unpredictability factor has great moral significance - given that only a valid informed
consent can justify a major infringement of another’s autonomy, the unpredictability factor is sufficient in itself to make surrogacy wrong. (Note, however, that they concede on p.11 that not all will agree that pregnancy is so special, but they then have a strong paternalistic argument for overriding any occurringly autonomous choice in favour of surrogacy.)

Their argument depends on the assumption that informed consent requires knowledge of actual outcomes, rather than just the range of possible outcomes. It is not enough, on this view, for the surrogate to know that there is a chance that she will feel deeply bonded to the child and emotionally distraught about handing it over; she must know if this actually will happen. However, as Justin Oakley convincingly argues (1992, pp. 269-287), this is an incorrect understanding of what is required for informed consent. His argument is as follows: Informed consent only requires knowledge and a reasonable degree of comprehension of the foreseeable risks involved in a procedure. All of this is in principle attainable in the surrogacy situation. If more were required, we could never consent to anything.

Thus, contrary to Dodds and Jones, I would hold that the unpredictability factor is not morally significant in terms of informed consent, and does not constitute a sound argument against surrogacy. However, this does not exhaust the possibilities, as there is another way of analysing the moral nature of surrogacy, which refers not to consent but to promising.

**Surrogacy as promising**

To see surrogacy arrangements as an instance of informed consent seems to me to be inadequate. Although surrogacy generally requires some medical procedures to which the surrogate will need to give informed consent, a surrogacy arrangement as a whole is best characterised as an act of promising rather than of giving informed consent. This is true whether we are talking about altruistic or commercial surrogacy. In commercial surrogacy, where there is an explicit contract, the promises are obvious. The surrogate mother, in entering into the contract, undertakes to do certain things, and creates a legitimate expectation on the part of the commissioning couple that she will do them. That is, she puts herself under certain obligations. Likewise, the commissioning couple also make promises, notably to pay monies to the surrogate, and they thereby also put themselves under certain obligations. In altruistic surrogacy, the situation is, morally speaking, the same, even though the promises are not necessarily written down or clearly spelled out.

Promising can be clearly distinguished from consenting by the lack of obligation attached to consenting. Informed consent as normally understood implies the right to withdraw consent. If a person consents to being examined by a doctor, or to taking part in a research project, this is not taken to imply any obligation to continue. The right to withdraw consent, and thus cease to be examined or experimented upon, is uncontroversial. The patient is under no obligation to the doctor to go through with a decision to have surgery, and does not wrong the doctor if she changes her mind. But in surrogacy, the right to change one's mind is indeed controversial and is the source of many disputes. Clearly the parties to a surrogacy arrangement regard each other as having obligations - the commissioning couple regard the surrogate mother as having an obligation to hand over the child, and will feel wronged if she doesn't; and likewise the surrogate mother regards the commissioning couple as having an obligation to accept the child, and will feel wronged if they don't.

**The significance of unpredictability for promising**

If promising is the moral category most appropriate for an analysis of surrogacy, what bearing does the unpredictability factor have on promising? Because promising is a morally more complex notion than consenting, there are a number of different
ways of approaching this question. Both the act of promising itself, and the subsequent act of keeping the promise need to be examined. In this paper I will consider in particular three ways in which unpredictability might have a significant bearing on the promising involved in surrogacy. These are:

1. It may make the initial promise conceptually incoherent.
2. It may make the initial promise morally wrong.
3. It may provide a justified excuse for not keeping the promise.

Two interpretations of the unpredictability factor
First, however, it is necessary to say more about the unpredictability factor. Precisely what is unpredictable, and what effects does it have on the surrogate mother? In a broad sense, I take it that what is unpredictable is whether or not the surrogate mother will feel able to give up the child, when the time comes to hand it over. Many other things about the pregnancy may also be unpredictable, but this is what matters in terms of the surrogacy arrangement. But clearly this is still too vague: the word "unable" is doing a lot of work here and it needs to explicated. I see two different possible readings.

On the strong reading, "unable to hand over the child" refers to an uncontrollable and irresistible emotion, which prevents the woman from acting. She cannot stop herself feeling this emotion, and cannot voluntarily act against it. It could be seen as a psychological "compulsion", although not necessarily pathological. (To clarify by way of comparison, it has the same sense as a person's feeling that she would be "unable to kill her child".) On the weak reading, in contrast, "unable to hand over the child" refers only to a very strongly felt unwillingness to hand over the child. This is likewise uncontrollable in the sense that the woman is not able to stop herself feeling it, but, importantly, it is not irresistible. The woman can act against it, although it would cause her great distress to do so. The importance of the difference between the weak and the strong readings will become apparent in the following analysis of the three ways in which the unpredictability factor may have moral significance in regard to promising.

Possibility 1: It makes the promise conceptually incoherent
A speech act can only count as a promise if certain conditions are met. I can only promise to do X if it is within my power to do X, or at least it appears to be. (See, eg. Bronaugh, 1992, p.1020.) Archetypically, I cannot promise to win a lottery, since, under normal circumstances at least, my winning (once I have entered) does not depend on any action of mine - it is completely beyond my control. Put differently, it is impossible that any action of mine could bring about the winning - it depends solely on the actions of the other people or objects. (And a person to whom I made such a promise, provided that he had knowledge about lotteries in general, could not be deceived by this promise.) In short, it is conceptually incoherent to promise to win a lottery - it makes no sense.

The conceptually incoherent promise must be distinguished from the lying promise, typified in Kant's famous example of the man who borrows money and promises to repay it, when he knows he will not be able to repay it. (Kant, 1952, p.18.) It is not at all conceptually incoherent to promise to repay money, since the repaying is in one's power, and depends on one's own action. The problem for Kant's gentleman is not that it is impossible for any person in any circumstances to pay back money, but rather that he in particular, in his circumstances, won't have the money to do so. Since it is theoretically quite possible for him to repay money, the person to whom he makes the promise can indeed be deceived. The promise is conceptually coherent, but deceitful, and thus is prima facie morally wrong.

I shall say more about lying promises below, but the relevant question at this point is
this: does the promise to hand over a child in a surrogacy situation run into this conceptual problem? Is it conceptually incoherent? No, it is not, not even on the strong reading of the unpredictability factor. Under the strong interpretation, the surrogate mother in this particular instance may turn out to be unable to hand over the child, but no-one can know beforehand whether this will actually happen or not. It may also be that she is quite able to hand over the child. Thus, her promise to do so is not conceptually incoherent, since the action of handing over the child is, theoretically at least, within her power, and depends on her actions. It is not impossible for her to perform this action.

In fact, the surrogacy promise is no different from any other promise, in that certain circumstances may arise which prevent the promise being fulfilled. For example, if I promise to meet a friend at the station, my car might break down on the way and prevent me from getting there. But the mere possibility of this does not render my promise conceptually incoherent. Rather, built in to the concept of a promise is an "all things being equal" exception clause. If it weren't, and we could only promise things that we could absolutely guarantee to do, then we could not make any promises at all.

So the unpredictability factor does not affect the conceptual coherence of the surrogacy promise - it still makes sense to speak of a surrogate mother promising to hand over a child.

**Possibility 2: It makes the promise morally wrong**

The second possibility is that the unpredictability factor makes it morally wrong to make a surrogacy promise. Since the type of moral wrongness potentially involved depends on the precise meaning attached to the unpredictability, I will again consider the two different readings separately.

I will take the weak reading first, since it is more quickly dealt with, and is not particularly controversial. If a surrogate mother knows at the time of entering into a surrogacy arrangement that she may be very unwilling to fulfil her promise, and may suffer great distress in doing so, is it morally wrong for her to make the promise? I don't think so. It may be unwise, or imprudent, to voluntarily put oneself in a position where one may fail to fulfil an obligation because of weakness of will, but it is not morally wrong to do so. It may also be imprudent, but not wrong, to put oneself at risk of psychological distress for the sake of someone else. But of course altruism, which just is putting oneself at risk for the sake of others, is often the motivation for women to become surrogate mothers. It would be nonsensical to suggest that an act could be morally wrong simply because it was altruistic.

So on the weak reading, the unpredictability factor does not have much moral significance for surrogacy, although it does suggest some considerations with regard to prudence. The strong reading, however, has more interesting implications.

On the strong reading of the unpredictability factor, the surrogate mother might end up feeling psychologically compelled not to hand over the child. If she knows at the time of entering into the surrogacy arrangement that this might happen to her (that it is one of the possible outcomes), is it morally wrong for her to make the surrogacy promise? This seems to me a difficult question, because the situation lies in the grey area between the two paradigms of the lying promise and the standard promise with implied exception clause.

The surrogacy promise is not a straightforward example of Kant's lying promise, in which the promiser knows for sure (barring some miracle) that he cannot do what he
promised. Nor is it a lying promise in the sense that the promiser does not intend to keep the promise, although quite able to do so. (Note that Tooley (1983) sees these two as being equally wrong.) Instead, the promiser foresees, but does not know for sure, that she might be prevented from keeping the promise. However, this does not seem to me to be, in moral terms, exactly the same as the situation in which I promise to meet you, but am prevented by my car breaking down. There are two morally significant differences which suggest that making the surrogacy promise is at least morally suspect.

One difference is the degree of likelihood. The feeling of being unable to hand over the child is not uncommon in surrogacy, and, given that it is unpredictable, a woman presumably has no particular reason to think that it won't happen to her. On the other hand, car breakdowns are relatively rare, and not wholly unpredictable - knowing my car and the mechanical care lavished on it, I have quite good reason to think that it won't happen to me. That is, the extent to which the intervening event is foreseeable (and even foreseen) is much greater in surrogacy than in any standard promise. Whilst this does not make the surrogacy promise a lie as such, it seems to me to make it deceitful to some degree, if it is made without explicit mention of the foreseeable intervening event. It is deceitful in the sense that it leads the commissioning couple to believe that the likelihood of the promised action (handing over the child) being carried through is higher than it actually is.

The second difference in the two situations is the extent to which the promisee is relying on the promised action. The commissioning couple have a large emotional (and probably financial) investment in the surrogacy promise being fulfilled, and their whole life-plan from now on depends on it. The person whom I promised to meet at the station, on the other hand, depends very little on my promise. He knows his own way home, it is not far to walk, and if it's raining he can always catch a bus. At most, only his plans for the next few hours are affected - apart from that, his life will go on as usual. It has been suggested (see Bronaugh, 1992, p.1022) that a promise only creates an obligation if the promisee actually places reliance on the promise. This may be going too far, but clearly the degree of reliance that will be placed on the promise is an important factor to consider when making a promise in a situation of unpredictability. Due caution ought to be exercised when creating such reliance upon one's own actions, and especially so when one has reason to think that one may not be able to carry out the promise. This suggests that an unqualified surrogacy promise is a reckless, perhaps even negligent promise.

Thus, on the strong reading of the unpredictability factor, surrogacy promises are morally dubious. Whether or not it is actually morally wrong for a particular woman to promise to be a surrogate mother will depend on the individual circumstances, but in my view there are some circumstances in which it would be morally wrong to do so. In this respect, the unpredictability factor does have moral significance for surrogacy, but not in the way that might have been expected, for it suggests not that surrogacy constitutes a moral wrong to the surrogate mother, but rather that the surrogate mother herself is in danger of committing a moral wrong against the commissioning couple.

**Possibility 3: It may provide a justified excuse for not keeping the promise**

The third way in which the unpredictability factor may have a moral bearing on surrogacy is in relation to the carrying out of the promise. That is, it may provide a justifiable excuse for not fulfilling the promise. Again, this will work differently for the weak and strong readings of unpredictability.

On the strong reading, where the inability to hand over the child is experienced as a
psychological compulsion, the actions of the surrogate mother are, in essence, being restricted by forces beyond her control. It is just like the car breakdown. For this reason, she cannot be held to be blameworthy for failing to keep the promise, since she could not have acted otherwise. That is, the unpredictability factor does provide a justified excuse for not keeping a surrogacy promise. (Although my earlier conclusion that making the promise in the first place is morally dubious, when unpredictability is taken in the strong sense, must be borne in mind here - it is not necessarily a great comfort to have a good excuse for not keeping a promise that it would have been morally preferable not to make in the first place.)

The weak reading of unpredictability, however, does not suggest that it provides a justifiable excuse. Here we are dealing with unwillingness rather than actual inability, and mere unwillingness to keep a promise is not sufficient in other situations to justify not doing so. This is true even where the emotional response to doing what has been promised is unpredictable. The example used by Dodds and Jones, that of selling a house, is apposite, since people can become very emotionally attached to their homes, without realising until they actually have to move out and hand over the keys just how unhappy they are to be leaving. But however strong this unwillingness to leave, no-one would seriously suggest that this constitutes a valid excuse for breaching the contract of sale. So if it is to count in surrogacy, it must be shown that the situation is unique, and cannot be compared with selling one's house, or any other situation in which unwillingness is not an excuse.

One approach would be to claim that the surrogacy promise is unique because it is a promise regarding a living thing, which demands an emotional response in a way that an inanimate object like a house does not. This is then a qualitatively different sort of unwillingness. The trouble is, this doesn't work for other situations involving living things. Take puppy walking, for example. A person promises to look after and socialise a puppy for one year, and then to hand it back to the Guide Dogs for the Blind Association to be trained as a guide dog. There is no good reason to think that the promise can justifiably be broken just because the family have become very attached to the dog and can't bear to part with it. They knew that this would probably happen when they made the promise.

Dodds and Jones, however, would probably object that even this analogy does not hold. They suggest that the situation is unique because it pertains to children - "nevertheless, the emotions surrounding children do seem to be of an extra special kind and of a special intensity" (p.9). But even this is not enough, as the example of foster parenting shows. Undoubtedly foster parents sometimes form very deep emotional attachments to the children they care for, over many years, but this would not count as a valid reason for refusing to hand back the child to the natural parents when the time came. Even more clearly, the attachment of non-custodial parents to their children is not taken as a valid excuse for refusing to return them to their custodial parent after an access visit. In each case, the promise has created a moral obligation to hand over the child, which cannot be outweighed by a non-moral factor like very strongly felt unwillingness (I speak here as a non-utilitarian), but only by a stronger moral obligation.

If these situations are also to be ruled out as disanalogies, then it must be in pregnancy and birth that the unique quality lies, which makes unwillingness a valid excuse when it would not otherwise be. Dodds and Jones, in fact, make this precise argument: "No two women experience pregnancy in quite the same way, and the same woman can experience different pregnancies differently." (p.8). But even if this is true, it only shows that pregnancy is emotionally unique, not that it is morally unique. Probably every experience of puppy walking or foster parenting is emotionally unique - but promises made in these contexts ought still to be kept, even in the face of
unwillingness. Whilst I do not entirely dismiss the possibility that pregnancy and birth are morally unique, I am still waiting to hear a convincing argument for this, as opposed to simply an assertion.

Moreover, as some others have suggested, I think the line run by Dodds and Jones is a dangerous one, since it comes close to saying that, in regard to pregnancy, women are not moral agents and they should no more be held to their promises than a young child. Surely this implication in itself constitutes a significant threat to women's autonomy.

Before I leave the issue of excuses for not keeping a surrogacy promise, there is one more, somewhat different, interpretation of unwillingness to consider. That is, an unwillingness to hand over the child due to a belief that this act in itself would be morally wrong. If this is a belief that the surrogate mother held even at the time of making the promise, then the situation is relatively straightforward. According to some (eg Bronaugh, 1992, p.1022), one cannot, conceptually speaking, promise to do something which one regards as morally wrong. So there was in fact never any promise, and the handing over of the child is to be considered independently. If it is wrong to hand over the child, for example because it is wrong to deprive children of their birth-mothers, then the surrogate has not only an excuse but an obligation not to do it. Others would say that one can, conceptually speaking, promise to do something morally wrong, but this provides no moral justification for doing it (eg Sissela Bok, 1989, p.152). Again, if handing over the child is wrong, the surrogate would be obliged not to do it, irrespective of the earlier promise. It should be noted, however, that although this provides the surrogate mother with a valid excuse for not keeping her promise, it also implies that it was morally wrong for her to make the promise in the first place, since if it is wrong to do X, it is wrong to promise to do X.

However, it seems unlikely to me that surrogate mothers actually start out believing that it is morally wrong to hand over the child. More likely they develop this belief as the time to actually do it draws nearer. This could happen in one of two ways. The easier one is that the surrogate mother learns something which she had not previously known about the commissioning couple, which causes her to believe that, for example, it would not be in the best interests of this child to be handed over to this couple. This is simply an instance of the obligation to keep a promise being overridden by a stronger moral obligation, for example to protect someone from harm. It is not controversial to regard obligations to keep promises as prima facie, not absolute.

This situation seems straightforward because appeal is being made to a very widely accepted moral principle, which people other than the surrogate mother herself would recognise as non-controversial. If the surrogate mother's assessment of the situation is sound, one would expect an impartial observer also to come to the same assessment.

A more murky situation is that in which the surrogate mother comes to the view that surrogacy per se is wrong. Here, since there is no general agreement about the moral permissibility of surrogacy, she cannot be appealing to a widely held non-controversial moral principle, which would produce a moral assessment with which an impartial observer could be expected to agree. At best, an impartial observer could agree that she had a reasonable position, but not sufficiently strong to show the contrary position to be wrong.

In this situation, it seems that she must act in accord with her moral beliefs, and could not be blamed for doing so. But on the other hand, lurking in the background is the
issue of true (or soundly-based) moral beliefs, and the question of whether an appeal to newly acquired moral beliefs, no matter how grounded, is sufficient to justify not keeping a promise. I find this matter puzzling, and have not yet been able to find a satisfactory way of thinking about it.
Conclusion
The result of my analysis is, on the whole, negative. The unpredictability factor does have some moral bearing on surrogacy promises in some sets of circumstances. It is not wholly irrelevant, but neither is it sufficient to prove any general conclusion about the rightness or wrongness of surrogacy as such. Indeed, if anything it shows that the surrogate mother may in some circumstances be committing a moral wrong, rather than herself being wronged. This is probably not the conclusion which everyone wants to hear.

Finally, it should be noted that my analysis is not intended to have any direct bearing on public policy questions. I have suggested that in some instances a surrogate mother would be doing wrong to enter into a surrogacy contract, and in others she has an obligation to keep to the contract, even if she doesn't want to. This should not be taken to mean that the surrogate mother should in the first instance be punished in some way, or in the second instance, forced to keep the contract or be penalised in some way if she doesn't. Whether or not morality should, or can, be enforced by law in these situations is an entirely separate matter.

References


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