

# Chapter 3

## Reproductive Autonomy as Self-Making

*Over himself, over his own body and mind, the individual is sovereign.<sup>1</sup>*

### 3.1 Introduction

I mentioned in the previous chapter that liberal eugenics relies on two principles to distinguish itself from previous historical manifestations of eugenics, the first of which is value pluralism and the second of which is individual liberty. These two principles are fundamentally interrelated: value pluralism presupposes and relies on the political liberty of individuals. It requires that individuals have the liberty to live in accordance with their own values and conceptions of the good. The protection of individual liberty also requires value pluralism; the principle of value pluralism helps to ensure a wide domain in which individuals can act without unjustified constraint on their liberty. In John Stuart Mill's words, 'the only freedom which deserves the name, is that of pursuing our own good in our own way'.<sup>2</sup> Further, in his classic formulation of the limits of freedom thus conceived he argues that the only justification for limiting freedom is in order to prevent harm to others. Thus, the principle of harm plays a key role in the negotiations of liberty and value pluralism. This also ensures a central role for the principle of harm in debates on reproduction. As I mentioned in the previous chapter, it may be that the principle of harm is the primary limitation on value pluralism in relation to individual parental decisions. It is to these negotiations of individual liberty and harm that I turn in this and the following chapters.

Arguments for the moral legitimacy of liberal eugenics rely centrally on the claim that this project is morally distinct from its totalitarian predecessor because it protects or enhances, rather than restricts, reproductive freedom. While earlier eugenic

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<sup>1</sup>Mill, John Stuart. 1989. *On liberty and other writings*. Cambridge: Cambridge University Press, 13.

<sup>2</sup>Ibid., 16.

programs emphasised state intervention in and control of reproduction within a population, the new, flexible eugenics places emphasis on the unrestricted decision-making of individual parents as the best defence against coercive reproductive policies and practices. As John Harris argues:

‘the best way both to avoid totalitarianism, and to escape the possibility of . . . prejudice, either individual or social, dictating what sort of children people have, is to permit free parental choice in these matters . . . For such choices are for the most part likely to be as diverse as the people making them’.<sup>3</sup>

This strong emphasis on reproductive freedom means that two particular issues immediately present themselves for further reflection. First, what is reproductive freedom, or in other words, what kind of freedom is it? Second, what are the limits of reproductive freedom? Interestingly, while there has been much discussion of the second of these questions, particularly in terms of the principle of harm derived from Mill, there has been significantly less articulation of what ‘reproductive freedom’ actually amounts to. The conjecture upon which this chapter is based is that a fuller response to the first of these questions will help to address the second of them, though it will not wholly resolve it.

As the above quote from Harris suggests, much of the discussion around reproductive liberty emphasises the importance of defending the free choice of parents against state coercion. This emphasis construes reproductive liberty as a negative freedom, in that what is at issue is the non-impedance of parental choice. Of course, this approach has a strong heritage in liberal normative philosophy and I do not wish to entirely reject it here. However, I want to argue in this chapter that reproductive freedom can also be understood as a form of positive freedom – that is, as the freedom to make oneself according to various ethical and aesthetic principles or values. To make this argument, I draw on the work of Michel Foucault, and particularly his later conceptions of ethics as a practice of the self. Foucault’s later work focuses on the ways in which ethical subjectivity emerges in practices that enact moral principles or codes, which he sees as being closely related to a ‘practice of liberty’. Both adopting and adapting Foucault’s notion of the practice of liberty, I argue that reproductive autonomy requires enactment to gain meaning within the life contexts of prospective parents. That is, it is not merely a principle of right but a practice that produces ethical subjects in its enactment. In short, human reproduction should be understood as a deeply personal project that integrates both negative and positive freedom and, moreover, produces ethical subjects.

### 3.2 The Presumptive Priority of Reproductive Liberty

In general terms, the principle of procreative or reproductive liberty has at its core Mill’s conception of the extent and limits of freedom, and determines that a more or less broad domain of freedom should be protected from state intervention for

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<sup>3</sup>Harris, John. 1998. Rights and reproductive choice. In *The future of human reproduction: Ethics, choice and regulation*, eds. John Harris, and Soren Holm, 22. Oxford: Clarendon Press.

procreative decision-making. While elaborated in different ways, the principle of procreative liberty is often supposed to take presumptive priority, such that attempts to limit such liberty must meet a high standard in order to override the importance of liberty rights. A majority opinion regarding any particular reproductive technology, such as genetic enhancement or cloning, would not in itself be sufficient to meet that standard. Instead, it is argued that attempts to place limitations on procreative liberty have to establish that reproductive technologies would cause a sufficiently high degree of harm to warrant impinging on the rights of parents to choose according to their own interests and values. While I take up questions of harm in more detail in the following chapter, here I focus specifically on the conception of liberty in regards to reproduction to which this liberal tradition has given rise.

In this tradition, one of the staunchest advocates of new reproductive and genetic technologies, John Harris, argues in his recent book that the ‘democratic presumption’ in favour of individual liberty protects a wide freedom to access reproductive technologies, including those used for enhancement purposes. Further, the presumption in favour of the freedom of citizens to make their own choices without interference places the burden of proof on attempts to limit freedom. Specifically, Harris argues that such attempts at limitation must show that serious harms to individuals and society would result from the exercise of reproductive freedom, where that harm must also be ‘real and present, not future and speculative’.<sup>4</sup> In this view, the right to reproductive liberty has a trumping power in debates on the restriction or extension of reproductive choice.

Importantly, Harris asserts that the right to reproductive liberty should be solely understood as a negative right of non-interference, such that it does not oblige others to participate in projects to exercise that freedom. For him, ‘it should go without saying’ that a right to reproductive liberty does not obligate others to cooperate in the realisation of procreative interests. Reproductive liberty only means that, ‘neither the state nor professional organizations, nor advisory or regulatory bodies’,<sup>5</sup> may legitimately prevent such cooperation. However, the requirement that reproductive liberty is a negative freedom that only requires the non-curtailement of reproductive choice may not be as easy to sustain as Harris supposes. This is because any effective capacity to exercise the right to access such technologies that reproductive liberty is supposed to protect will require the cooperation of medical experts and others to ensure the success of that reproductive project. This suggests that there may be a weak positive right which requires that reproductive liberty is not simply *honoured*, but *promoted*.<sup>6</sup> What is at stake in this distinction is whether the right course of action in a given situation simply respects important values or contributes to the

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<sup>4</sup>Harris, John. 2007. *Enhancing evolution: The ethical case for making better people*. Princeton and Oxford: Princeton University Press, 74.

<sup>5</sup>Harris. *Enhancing evolution*, 74.

<sup>6</sup>See Sparrow, Robert. 2008. Is it ‘every man’s right to have babies if he wants them’? Male pregnancy and the limits of reproductive liberty. *Kennedy Institute of Ethics Journal* 18(3):280–282. On the distinction between honouring and promoting, see Baron, Marcia, Phillip Pettit, and Michael Slote. 1997. *Three methods of ethics: A debate*. Malden: Blackwell; Pettit, Phillip. 1989. Consequentialism and respect for persons. *Ethics* 100(1):116–126.

overall realisation of them. Consequentialists, of which Harris is one, generally take the second view that actions should promote the overall realisation of important values. This would entail that others are obliged to assist in the overall realisation of the important value of reproductive liberty. To be clear, I am not arguing that there is such an obligation, but at the very least, it is not obvious that there is no such obligation.

Adding further weight to the claim that he is ultimately unable to maintain a strict distinction between negative and positive liberty rights in reproduction, Harris is not satisfied with the idea that reproductive liberty is simply a matter of the satisfaction of bare preferences ‘like drinking coffee or playing tennis’. Instead, he argues that it is more fundamental, and in fact can be considered to be a ‘basic human right’ akin to rights for freedom of expression and freedom of religion. This means that claims against the presumption of freedom in reproductive choices must be ‘proportionally stronger, and the harms that are claimed to result from its exercise must be proportionally greater’.<sup>7</sup> This view of reproductive liberty as a basic right gives it a trumping power in moral debates on reproduction. The uncontroversial interpretation of this would be that it establishes that the right to reproductive freedom overrides other non-rights claims. But it might also be argued that as a *basic* right, reproductive liberty also overrides other kinds of rights claims, such as, say, the right of a medical practitioner to not provide treatments that they personally find morally offensive. Whether Harris wants to make this stronger claim for reproductive liberty is unclear, as are a number of other possible implications of the view of reproductive liberty as a basic right. To draw out this claim further, then, I want to focus on two issues – first, the argument that reproductive liberty is a basic moral right, and second, the kind of freedom that Harris takes it to be.

In establishing the claim that reproductive liberty is a ‘dimension of a fundamental human right’, Harris draws extensively on the work of Ronald Dworkin. This is interesting since the text that Harris quotes in *Enhancing Evolution* to establish the claim is Dworkin’s *Taking Rights Seriously*,<sup>8</sup> in which he develops what is perhaps one of the strongest rejections of the idea that there is an abstract right to liberty. Dworkin argues, ‘there exists no general right to liberty at all’,<sup>9</sup> and further, the claim to a right to liberty cannot be resuscitated through a distinction between liberty as licence and liberty as a basic right. Instead, he claims that if constraints on basic liberties harm us, it is not because of the constraint on liberty itself, but because of its impacts on something beyond liberty. Specifically, this means that ‘what we have a right to is not liberty at all, but to the values or interests or standing that this particular constraint defeats’.<sup>10</sup> Ultimately, Dworkin argues that equality is more fundamental than liberty, and proposes a liberal conception of equality as centrally requiring a ‘right to equal concern and respect’.<sup>11</sup>

<sup>7</sup>Harris. *Enhancing evolution*, 76.

<sup>8</sup>Dworkin, Ronald. 1977. *Taking rights seriously*. 1st edn. London: Duckworth.

<sup>9</sup>*Ibid.*, 269.

<sup>10</sup>*Ibid.*, 271.

<sup>11</sup>*Ibid.*, 273.

While this suggests some tension in Harris' claim for liberty as a democratic presumption, it does not show his construal of reproductive liberty to be inaccurate or misleading. Rather, it directs attention to the ways in which the *specific* right to procreative liberty might be defended. While Dworkin rejects the idea of an abstract right to liberty, he nevertheless maintains the possibility of rights to specific liberties, especially those that protect values of particular importance or moral and political significance. Such rights include those of freedom of religion and freedom of speech or expression. For Dworkin, the principle of procreative autonomy is guaranteed by the First Amendment of the United States of America's Constitution, which protects freedom of religion and expression.<sup>12</sup> While Dworkin's argument is more complicated than is discussed here, Harris' argument for reproductive freedom as a basic right similarly relies on the moral comparability between it and the right to freedom of expression, which is often considered fundamental in liberal democratic states. The comparability or analogy derives, he argues, from the fact that both have at their core the 'freedom to choose one's own way of life and live according to one's most deeply held beliefs'.<sup>13</sup> Compelling as this might initially sound, the analogy between reproductive liberty and freedom of expression is not convincing.

As Onora O'Neill argues, while reproduction matters to people and allows them to express or enact their deeply held beliefs, it does not follow that it should be seen as a matter of self-expression, or that a right to self-expression can establish a right to procreative liberty. Reproduction, she points out, 'aims to bring a third party – a child – into existence'; reproduction 'aims to produce a dependent being', such that the requirements of care often curtail rather than enhance individual autonomy.<sup>14</sup> While O'Neill's point suffers from presupposing an opposition between autonomy and dependency that may prove unsustainable, I want to push her point about the falseness of the analogy between reproductive liberty and freedom of expression further. For, in my view the fundamental problem with this analogy lies in the fact that the former aims to produce another rights-bearing individual while the latter does not. To neglect that point of difference or to subsume it under the claim to self-expression leads to a form of moral narcissism, understood as a failure to recognise the other as other and their consequent incorporation into one's own self-regard. I return to this point later in the book, but for now, let me say more about reproductive liberty.

We have seen that what is at issue in the defence of procreative liberty rights is not an abstract right to liberty per se; instead, the importance of such rights derives from the significance in people's lives of the values and beliefs of which liberty allows expression. Harris indicates that the importance of procreative liberty derives from respect for the values that underlie procreation, such that what this right protects

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<sup>12</sup>Dworkin, Ronald. 1993. *Life's dominion: An argument about abortion and euthanasia*. London: HarperCollins Publishers, 160–168.

<sup>13</sup>Harris. Rights and reproductive choice, 35; Harris. *Enhancing evolution*, 78.

<sup>14</sup>O'Neill, Onora. 2002. *Autonomy and trust in bioethics*. Cambridge: Cambridge University Press, 61–62, 66.

is the ‘freedom to choose one’s own lifestyle and express, through actions as well as through words, the deeply held beliefs and the morality which families share and seek to pass on to future generations’.<sup>15</sup> In formulating reproductive liberty in this way, Harris again draws substantially on Dworkin, specifically his construal of autonomy and its role in relation to procreation.

For Dworkin, the key point of reference for autonomy is not rationality; instead, autonomy centrally relates to conceptions of integrity and dignity. He argues that the right to autonomy, understood as the right to make important decisions for oneself, derives from the capacity that the right protects to shape our own lives according to the values, commitments, convictions and interests that are important to us. He writes, ‘[r]ecognizing an individual right to autonomy makes self-creation possible. It allows each of us to be responsible for shaping our lives according to our own coherent or incoherent – but in any case, distinctive – personality’.<sup>16</sup> Further, ‘freedom is the cardinal, absolute requirement of self-respect’, since ‘no-one treats his life as having any intrinsic, objective importance unless he insists on leading that life himself, not being ushered along it by others’.<sup>17</sup> Regardless of the merits or otherwise of Dworkin’s account of autonomy, the important point here is that in drawing on this account, Harris’ conception of reproductive liberty runs into considerable tensions.

For on the one hand, he insists that what is at issue in reproductive liberty is a right to a negative liberty that protects parents against the imposition of external constraint on reproductive choices. But on the other hand, he grounds this claim to negative liberty on a stronger conception of autonomous self-creation through living in accordance with one’s deeply held values and beliefs. That is, the claim to a negative liberty rests on a more positive freedom, which Isaiah Berlin classically characterised as the wish to be one’s own master, in the sense that one’s decisions depend on oneself rather than on external forces.<sup>18</sup> While Harris may be loath to admit to a positive dimension to reproductive liberty, it nevertheless appears here as the foundation for his strong emphasis on unrestricted parental choice. While this might identify tensions in Harris’ account of reproductive liberty, suggesting that he is unable to maintain a strong distinction between negative and positive liberty, I am not suggesting that this dependence is a problem in itself.

Rather, this close connection between negative freedom and the capacity to live a life in accordance with one’s own values offers a potentially rich path for understanding the importance of autonomous decision-making in relation to technologies such as genetic enhancement. In particular, it allows for greater attention to the ways in which reproductive liberty is enacted and negotiated in everyday practice, not simply as a right to unimpeded action, but as a process of ethical self-formation.

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<sup>15</sup>Harris. *Enhancing evolution*, 76.

<sup>16</sup>Dworkin. *Life’s dominion*, 224.

<sup>17</sup>*Ibid.*, 238–239.

<sup>18</sup>Berlin, Isaiah. 2002. Two concepts of liberty. In *Liberty*, ed. Henry Harris. Oxford: Oxford University Press.

I take this up in the following section, but before turning to that, it is worth considering another formulation of reproductive or procreative liberty that does not rely on the problematic association between freedom of expression and reproductive liberty, and is more explicit about the role that values traditionally associated with procreation play in both grounding a right to reproductive liberty and placing limits on it.

John Robertson offers one of the more fully elaborated arguments for the presumptive priority of procreative liberty in his strong rights based approach to reproduction and the limits of freedom. In order to establish the presumptive priority of procreative liberty, Robertson similarly relies upon the intuition that reproduction is a core human activity and decisions about reproduction have a deep significance for personal identity and the meaning of one's life. He argues:

Procreative liberty should enjoy presumptive primacy when conflicts about its exercise arise because control over whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one's life . . . Decisions to have or avoid having children are thus personal decisions of great import that determine the shape and meaning of one's life.<sup>19</sup>

In Robertson's terms, the 'existential' significance of procreation relates closely to a biological drive to reproduce that connects us with nature and future generations.<sup>20</sup> As such, reproduction can provide solace in the face of death, but its significance may also encompass the expression of love between couples, as well as a religious dimension for many persons. Whether or not one agrees with these formulations of why it is so, the intuition that reproductive decision-making is of deep significance for personal identity and the shape of one's life appears relatively uncontroversial. However, what is interesting is the kind of work that Robertson expects this intuition to do in terms of establishing both the presumptive priority and the limits of reproductive liberty.

At the most basic level, Robertson defines procreative liberty as the 'freedom to reproduce or not to reproduce in the genetic sense'.<sup>21</sup> In this, reproduction is restricted such that the act of reproducing may or may not entail subsequently engaging in the process of childrearing. Reproductive liberty, however, only protects activities directly related to the question of whether to reproduce or not to reproduce – it does not extend to practices of parenting. Further, Robertson's construal of reproduction also centrally entails a genetic relatedness between parent and offspring. This may seem overly restrictive in light of *in vitro* fertilisation processes that separate genetic and gestational reproduction, and to incorporate this, Robertson also extends procreative liberty to female gestation, with or without a genetic connection to the child that results. Thus, surrogacy may still be considered

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<sup>19</sup>Robertson, John A. 1994. *Children of choice: Freedom and the new reproductive technologies*. Princeton, NJ: Princeton University Press, 24.

<sup>20</sup>Also see his more elaborate discussion of the importance of biological connection in his defence of 'modern traditionalism' in Robertson, John A. 2003. Procreative liberty in the era of genomics. *American Journal of Law and Medicine* 29(4):450–452.

<sup>21</sup>Robertson. *Children of choice*, 22–23.

a form of reproduction. While the moral or ethical significance of genetic relatedness is controversial, this is not my focus here. Instead, what is more interesting for my argument is the way in which the perceived existential value of reproduction is used to place limits on some reproductive practices.

Robertson's definition entails that procreative liberty has two strands in that it covers both the freedom *to not reproduce* and the freedom *to reproduce*, each of which involves different interests. In general terms, the first involves interests in access to the means of preventing pregnancy, in the forms of refraining from sexual intercourse, the use of contraception or access to abortion. The second primarily entails 'the freedom to engage in a series of actions that result in reproduction'.<sup>22</sup> However, it is more complex since it also involves potentially differing interests relating to coital and non-coital reproduction. While the interests associated with coital reproduction (such as freely choosing a partner, engaging in sexual intercourse and gaining access to medical assistance to ensure birth) are relatively uncontroversial in advanced liberal democratic societies, the technological advances that make non-coital reproduction increasingly available raise substantial questions about the limits of reproductive liberty.

For Robertson, it is self-evident that coital reproduction is protected by the principle of procreative liberty. As he points out, parents do not require licences to have children, nor are they required to provide justification for doing so. However, technologies for non-coital reproduction test the limits of procreative liberty, and Robertson proposes that the means for establishing whether such technologies fall within its scope is the test of proximity. That is, whether new reproductive technologies and practices such as non-therapeutic genetic enhancement, reproductive cloning and the intentional diminishment of offspring are protected rests on their proximity to the core interests of reproduction, core interests that are exemplified in the practice of old-fashioned coital reproduction. Applying this test, he concludes that such practices 'would not fall within procreative liberty because they deviate too far from the experiences that make reproduction a valued experience'.<sup>23</sup> This somewhat infelicitous formulation is supposed to indicate that such practices do not accord with the 'core interests' protected by procreative liberty.

Unfortunately, within the context of Robertson's argument in *Children of Choice*, these 'core interests' remain somewhat obscure. It does, however, appear that one of the, if not *the*, core interest of reproduction is the desire to bear 'normal healthy' offspring.<sup>24</sup> In this view, it is the desire to have a normal healthy child that is genetically related to at least one of his or her parents that ensures the significance of reproduction as an activity that gives meaning to human lives. Further, the centrality of this desire and its realisation establishes the presumptive priority of procreative liberty while also setting out its limits. While this clarification seems essential to establishing the limits of reproductive liberty, Robertson's attribution of substantive

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<sup>22</sup>Ibid., 30.

<sup>23</sup>Ibid., 167.

<sup>24</sup>Ibid., 149.



content to the core interests involved in reproduction also introduces complexities into his argument that are not fully acknowledged.<sup>25</sup>

For one, without explicit discussion, Robertson here takes recourse to notions of normality and health to distinguish between reproductive activities that fall within the scope of procreative liberty and those that do not. Given this, his argument should be subject to the analysis of the concept of normalcy that I proposed in the previous chapter. Moreover, Robertson goes on to restate the principle of procreative liberty in the claim that, ‘procreative liberty would protect only actions designed to enable a couple to have normal, healthy offspring whom they intend to rear’.<sup>26</sup> He defends this approach as a form of ‘modern traditionalism’, by which he means an approach that, ‘is modern in its acceptance of new technologies, but traditional in demanding that those techniques ordinarily serve traditional reproductive goals of having biologically related offspring to rear’.<sup>27</sup> This approach strives for a happy medium between the radical libertarian view that allows free access to all reproductive technologies and the traditionalist view that emphasises the perceived sacredness of human reproduction, and which tends to disallow technological interventions.

With this formulation of the principle of procreative liberty, though, we have moved some distance from the initially stringent formulation Robertson offered, whereby what was at issue was simply the liberty to decide for oneself whether to have children or to not have children. In this, reproduction was distinct from rearing, and the latter was not protected by procreative liberty. Now, modern traditionalism requires both *genetic connectedness* and the *intent to rear* offspring. This reformulation suggests that Robertson is unable to maintain the strict distinction between reproducing and rearing that he initially desired. But what, then, is the significance of this? As I have said, the presumptive priority of procreative liberty rests on the perceived existential value of reproduction in personal identity and in leading a meaningful life. But is it really credible that this existential significance rests on (biological) reproduction alone, or does it rather rely on the integration of reproduction and rearing? Contrary to Robertson, I suggest that reproduction *strictly defined* is neither necessary nor sufficient to establish the presumptive priority of procreative liberty. Instead, practices of childrearing and their ethical significance are built into Robertson’s understanding of procreative liberty from the start. That is, it is not simply genetic inheritance that establishes the importance of reproduction in people’s lives; rather, it is the bonds of familial attachments, and the vulnerability and responsibility that they entail, in the variety of forms they take, that ensure the existential and ethical significance of reproduction.

If this is right, then it suggests that the nature of procreative liberty is unlikely to be adequately understood if it is simply taken to be a negative liberty or a matter of unimpeded choice. Nevertheless, as with Harris, Robertson is explicit

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<sup>25</sup>Ibid., 150–172, passim.

<sup>26</sup>Ibid., 167.

<sup>27</sup>Robertson. Procreative liberty in the era of genomics, 446.

that procreative liberty must be understood as a negative right or right of non-interference. He states that reproductive liberty:

means that a person violates no moral duty in making a procreative choice, and that other persons have a duty not to interfere with that choice . . . [it] does not imply the duty of others to provide the resources or services necessary to exercise one's procreative liberty.<sup>28</sup>

At a constitutional level, procreative liberty protects against the interference of the state in procreative choices, but it does not entail a positive right to assistance from the state or any other person in the realisation of one's procreative choice. This understanding of procreative liberty as a negative right delimits a sphere of non-interference and understands the freedom involved in procreative liberty as a negative freedom, that is, a freedom from external constraints on the realisation of one's interests. However, given the significance of reproductive decision-making and the ongoing project of childrearing in the lives of parents, the construal of procreative liberty as negative freedom does not do full justice to the nature of the freedom entailed in such choices and the life plans of which they form a part.

In this sense, Robertson is subject to the same critique as I made of Harris, that the delineation of procreative liberty as solely negative is unsustainable. Instead, procreative liberty can also be seen as a form of positive freedom, here understood as freedom based on a capacity to shape one's own goals and values and to adopt and practice subjective ways of being that accord with those. We have seen that the approaches of Harris and Robertson stress the moment of choice rather than the implications of self-making that the conceptions of autonomy and reproduction that they draw on suggest. However, their reliance on these ideas introduces a complexity into procreative liberty that they leave unaddressed. In particular, they underestimate the ethical implications of construing reproductive autonomy as an activity in which one gives shape to one's own life – and in doing so, also shapes the lives of others. Neither Robertson's nor Harris' understanding of reproductive liberty goes nearly far enough in elaborating the conditions of possibility for the enactment of reproductive freedom, or considering the implications of the self-creative dimension of such enactment.

In order to elucidate this self-creative dimension of reproductive liberty, I turn in the following section to the later work of Michel Foucault. In this work, Foucault examines the practices of the Ancient Greeks in relation to sexuality to highlight the way that freedom is itself a positive practice of self-formation, realised through the enactment of significant values in everyday life. In doing so, he initiates an approach to ethics that emphasises the constitutive relation of one's self to self in relation to norms and values. I draw on this work to argue that reproductive liberty is a form of positive freedom that consists in the capacity for self-formation. Further, I will argue that reproductive autonomy can be seen as both a practice and problematisation of freedom, for what current debates and disagreements on new reproductive technologies show is that the very limits of freedom are being negotiated in its enactment.

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<sup>28</sup>Robertson. *Children of choice*, 23.

### 3.3 Enacting Freedom: The Ethical Practice of Reproductive Autonomy

Throughout his work, Foucault was concerned with the historical and social production of forms of subjectivity, ranging from the madman, through the infamous characterisation of ‘docile bodies’ in *Discipline and Punish* to the ‘confessing’ and ‘desiring subject’ in the *History of Sexuality* series. But while his work up until the first volume of *History of Sexuality* focused on the production of subjects through technologies of power, Foucault claims that in the research he undertook for *The Use of Pleasure*, he became increasingly aware of a different aspect of the production of subjectivity. Of this, he comments that the task of providing a ‘history of desiring man’ required that he focus not only on the ways in which subjectivity is produced through the operations of regimes of power and knowledge, but also on ‘the forms and modalities of the relation to self by which the individual constitutes and recognizes himself *qua* subject’.<sup>29</sup> On the basis of various discussions of different historical modes of acting upon oneself and techniques for doing so, he identifies this dimension of the production of subjectivity under the broad term of ‘technologies of the self’.<sup>30</sup> By this, he indicates the practices and means by which individuals act upon themselves as *ethical* subjects, that is, the way in which individuals make themselves up as subjects by enacting particular moral codes, modes of being, or aesthetic or ethical criteria.<sup>31</sup>

In sketching the parameters of the way in which individuals make themselves up as ethical subjects, Foucault outlines four practically interrelated but analytically distinct aspects of this activity, which are worth repeating here for heuristic purposes. The first of these entails the identification of one or another part of oneself or of one’s life as the object of moral conduct. The second, which he calls the ‘mode of subjection’ isolates ‘the way in which an individual establishes his relation to the [moral] rule and recognizes himself as obliged to put it into practice’.<sup>32</sup> In other words, it isolates the way in which a rule comes to be seen as having a bearing on one’s life and conduct. Third, ethical self-formation entails a more explicitly active and reflexive dimension in the ‘ethical work’ that one undertakes upon oneself, the kinds of practices, behaviours and techniques that one adopts in order to bring oneself into accord with a rule or value. And finally, it entails a ‘*telos*’. For an action is not simply moral in isolation but also ‘by virtue of the place it occupies in a pattern of conduct’, which commits an individual to a certain ‘mode of being characteristic

<sup>29</sup>Foucault, Michel. 1987. *The use of pleasure: The history of sexuality*. Vol. 2. (trans: Hurley, Robert). London: Penguin, 6.

<sup>30</sup>Foucault, Michel. 1993. About the beginnings of the hermeneutics of the self. *Political Theory* 21(2):203.

<sup>31</sup>It should be noted that Foucault distinguishes between ethics and morals, where the latter refers more directly to codes and rules, and the former refers to a way of being or *ethos*. See Foucault. *Use of pleasure*, 25.

<sup>32</sup>*Ibid.*, 27.

of the ethical subject'.<sup>33</sup> By identifying an aspect of oneself for moral transformation, bringing that aspect into relation with a moral rule, enacting certain practices that allow for or bring about the desired transformation, and having a vision of the end or purpose of that transformation, one creates oneself as an ethical subject.

Summarising these four dimensions, Foucault writes that, 'self-formation as an "ethical subject"' involves, 'a process in which the individual delimits that part of himself that will form the object of his moral practice, defines his position relative to the precept he will follow, and decides on a certain mode of being that will serve as his moral goal'.<sup>34</sup> This means that ethical self-formation involves much more than simply 'self-awareness'. The crucial dimension of technologies of the self is the relation that individuals establish with themselves, the nature of which is determined in relation to sets of values, principles and codes for living. This subsequently shapes the way in which individuals constitute themselves as subjects of their own actions through certain practices and associated matrices of knowledge. It is a matter of developing a reflexive relation to oneself that constitutes oneself as an ethical subject of one's own actions, through the selection of a certain action or form of being as the object of ethical concern and transformation according to more or less voluntarily applied criteria. Or in other words, it entails a transitive relation of auto-affection, whereby who one is comes into being through one's own relation to oneself and associated practices of self-formation.<sup>35</sup>

One centrally important aspect of Foucault's approach to ethical subjectivity is his opposition to the Cartesian and phenomenological conception of a psychologically substantive being that exists prior to the operations of power and technologies of the self. Instead, he emphasises the way in which subjectivity emerges from and is shaped by historical and culturally located experiences. Subjectivity is understood as an artefact of practices of self-formation, where that self-formation encompasses both the operations of power/knowledge and techniques of the self. This means that the ethics of the self does not presuppose a more or less voluntaristic subject that exists prior to its formation through acting upon itself.<sup>36</sup> Practices of self-formation are not simply expressions of choice, whether enacted in words or actions, of a pre-existing individual; rather, the individual subject only emerges as an artefact of the enactment of those choices. Even so, the ethical subject that Foucault describes is not a heroic figure that creates itself *ex nihilo*. Foucault explains:

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<sup>33</sup>Ibid., 28.

<sup>34</sup>Ibid.

<sup>35</sup>See Han, Béatrice. 2002. *Foucault's critical project: Between the transcendental and the historical* (trans: Pile, Edward). Stanford: Stanford University Press, esp. 149–187; for further discussion of the conception of the relation of self to self that Foucault relies upon and the tensions that it introduces into his work.

<sup>36</sup>See, Macherey, Pierre. 1998. Foucault: Ethics and subjectivity. In *In a materialist way: Selected essays*, ed. Warren Montag, 96–107. London: Verso.

[while] the subject constitutes itself in an active fashion through practices of the self, these practices are nevertheless not something invented by the individual himself. They are models that he finds in his culture and are proposed, suggested, imposed upon him by his culture, his society, his social group.<sup>37</sup>

Practices of the self are to a large extent given by the culture in which an individual lives, and in taking up such practices and putting them into effect in his or her own life, each individual actively constitutes his or her own identity and ethical capacity within the context of their own sociocultural location. Thus, it is through the adoption, enactment and alteration of norms and models that may already be found in a culture or society that the self emerges.

In light of this, it is a source of much confusion in secondary literature that Foucault goes on to associate the practice of ethical self-formation with what he calls a 'practice of liberty'. Much of the secondary literature emphasises the transgressive aspect of such a notion, whereby a practice of liberty is understood as roughly congruent with forms of political resistance. However, another inflection is also possible. In his characterisation of Ancient Greek practices, Foucault emphasises that the practice of ethical self-formation he describes delimits 'an ethics for men: an ethics thought, written and taught by men and addressed to men – *to free men* obviously'.<sup>38</sup> It may well be possible to criticise the theoretical extension of such a gender-specific model of ethical practice beyond its initial social and historical location. However, it is important that the ethical practices described by Foucault were not directed at men by virtue simply of their being male. They are, rather, directed at free men by virtue of their being *free*. The point of emphasising this is that those engaged in such a practice of liberty were not simply striving to become free, but were in fact already considered to *be free*. On the basis of this, Foucault argues that for the Ancient Greeks, an ethics of the self involved a self-reflexive relation to one's own freedom that made of that freedom an object of both ethical concern and a practical exercise. The *ethos* or aesthetics of existence that one develops is predicated on and directed toward the elaboration of one's liberty in relation to a particular domain of behaviour. A 'practice of liberty' entails that freedom is not given once and for all, but requires a practical exercise upon oneself to be delimited, maintained and elaborated.

Let me now return to the issue of reproductive liberty. Given his focus on a privileged political elite in Ancient Greece, it is pertinent to ask what validity Foucault's understanding of a practice of the self could possibly have to contemporary life, and particularly to the prospects of new reproductive practices such as genetic enhancement. It is altogether too obvious to point out that the general political development of the West has seen the extension of rights and the freedom they can entail to a much wider population than was the case in Ancient Athens. But in light of this,

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<sup>37</sup>Foucault, Michel. 1984. The ethics of concern for the self as a practice of freedom. In *Ethics: Subjectivity and truth, essential works of Michel Foucault, 1954–1984*, ed. Paul Rabinow, 291. London: Penguin.

<sup>38</sup>Foucault. *Use of pleasure*, 22; my emphasis.

by extrapolating the analytic principles that Foucault outlines from the model of an Ancient Greek practice of freedom to the context of advanced capitalist liberal democracies, it can be argued that liberty rights similarly entail the enactment and practice of freedom today. By this, I mean that it is precisely by virtue of being free – in the sense of being subjects of liberal democratic governance that presupposes the political value of liberty and extends liberty rights to all citizens – that we can engage in practices of freedom. Conversely, it is to the extent that citizens engage in practices of freedom that the liberal democratic principle of liberty rights for all citizens is enlivened and given a reality within the context of everyday life. In this sense, it is by virtue of engaging in practices of freedom that the free subject of liberalism has a reality.

It is not hard to subject the democratic presumption of reproductive liberty to the typology of an ethics of self-formation that Foucault suggests. In this light, the democratic presumption appears as a norm of individual freedom that is given in the culture of Western liberal democracies, a norm which may be contested in various ways, but which is also deeply embedded in the institutions, values and practices of such cultures. Through its enactment in quotidian practices, that norm produces free subjects as artefacts of its enactment. In terms of the four dimensions of self-formation as an ethical subject that Foucault picks out, it is possible to see that the *telos* of such a practice, whether explicitly or consciously recognised or not, is to become a free (reproductive) subject. The part of oneself that is isolated for transformation is the desire and capacity for reproduction and associated activities of childrearing, and the ‘mode of subjection’ is that of engaging a form of liberal democratic subjectivity predicated on principles of freedom, rationality and autonomous self-realisation. Finally, the practices of subjection entail taking responsibilities for decisional choices, along with the myriad practices that engage subjects as reproductive agents, from the use of contraception to prevent pregnancies, to the negotiations of medical procedures and technical expertise in more interventionist procedures to achieve conception, and the maintenance of a successful pregnancy that ideally gives rise to a ‘normal healthy child’. Thus the free (reproductive) subject is born.

To be clear, this brief account of the birth of the free reproductive subject does not mean that reproductive liberty is simply illusory, that it is simply a matter of ‘false consciousness’ where deeper analysis reveals the thorough determination of subjectivity. That individual freedom is a cultural norm that relies on enactment for its reality does not mean it does not have a distinctive force as a moral idea or principle. It clearly does have such a force in Western liberal democracies and elsewhere, even if it is contested. The point is not that this is undermined by its being a norm of subjection, but that the force of individual freedom as a moral norm is inseparable from it being a norm of subjection. As Nikolas Rose has analysed, freedom, and especially freedom of choice, is increasingly the matrix through which individuals are expected to and do interpret themselves and their actions. He argues that individuals are expected to ‘interpret their past and dream their future as outcomes of choices made or choices still to be made’. This ultimately means that ‘modern

individuals are not merely “free to choose”, but *obliged to be free*.<sup>39</sup> In this light, the presumptive priority of reproductive liberty can be seen as one discursive mechanism by which the liberal obligation to be free is taken up and enacted in ethical self-formation.

It is worth noting here too, that the freedom of individuals that liberalism makes central is primarily seen as the mechanism by which the relationship between the governed and governing is negotiated. Or, more specifically, what is at stake in liberal formulations of negative freedom such as those discussed in the previous section is what can be called the ‘independence of the governed with regard to government’.<sup>40</sup> But rather than being simply or strictly opposed to government, that freedom is itself produced by and through a liberal rationality of government, insofar as the central problematic of liberalism is the proper limitation of the scope of governance. In this sense, individual freedom is itself an artefact of liberal governance. But, if this is correct, then substantial questions arise about the interrelation of negative and positive freedom. We saw in the previous section that conceptions of reproductive liberty characterise it as a negative freedom that determines the proper scope of constraints by government on individual liberty, understood more specifically as a matter of choices about whether to reproduce or not reproduce. I have argued that reproductive liberty can alternatively be seen as a form of ethical self-formation, whereby the free reproductive subject comes into being through the enactment of the principle of individual freedom in everyday practices. This second formulation shifts focus from the absence or otherwise of external constraints on individual action to the capacities of individuals to adopt ways of life that accord with the reproductive choices and significant values that give meaning to their lives. This can be characterised as a form of positive freedom.

However, this may give the impression that I am urging a contrast – if not conflict – between two types of freedom, such as that outlined by Berlin. In his classic formulation, Berlin saw negative and positive freedom as opposed. He characterised positive freedom as a desire to be master of oneself, which involves an idea of the self split from itself, where one part is the ‘transcendent, dominant controller’, and the other the ‘empirical bundle of desires and passions to be disciplined’.<sup>41</sup> Two major forms, namely, self-abnegation and self-realisation, historically typify positive freedom and Berlin suggests that both conflict with negative liberty. However, an account of positive freedom that draws on Foucault’s conception of ethical self-formation, with the attendant theorisation of subjectivity as an artefact of relations of power and technologies of the self, does not necessarily lead to this opposition. Revising Berlin’s distinction, Paul Patton has argued that the account of freedom

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<sup>39</sup>Rose, Nikolas. 1999. *Powers of freedom: Reframing political thought*. Cambridge: Cambridge University Press, 87.

<sup>40</sup>Foucault, Michel. 2008. *The birth of biopolitics: Lectures at the Collège de France 1978–1979* (trans: Burchell, Graham). Basingstoke: Palgrave MacMillan, 42.

<sup>41</sup>Berlin. Two concepts of liberty, 181.

that Foucault develops emphasises ‘the importance of individual capacities as pre-conditions for the exercise of freedom’,<sup>42</sup> and identifies two forms of constraint on those capacities. The first are external constraints and the second are internal, such as ‘the psychological effects of insecurity, dependence or trauma’.<sup>43</sup> The first set of constraints follows a standard idea of negative freedom. The latter, however, allows for a revised notion of positive freedom: this is less a matter of a desire or will for self-government than it is of internal limitations on an individual’s capacity to formulate and enact a course of action.

This characterisation of the freedom involved in self-formation helps to bring out that there are not different kinds of freedom per se, but that the realisation of capacities through either the absence of internal and external constraints is fundamentally interrelated. Making use of one’s negative freedom depends on the exercise of positive freedom in the sense that it requires the absence or overcoming of certain internal limitations. Correlatively, the realisation or exercise of positive freedom also depends upon the existence of a degree of negative liberty. In other words, the freedom entailed in self-formation and the development of a subjective *ethos* necessarily requires the prior existence of an arena or area in which a person can act without interference and coercive limitation of the paths of action or modes of being available to them. The interrelation of negative and positive liberty might then be taken to inflect Foucault’s suggestion that, ‘freedom is an ontological condition of ethics. But ethics is the considered form that freedom takes when it is informed by reflection’.<sup>44</sup> The freedom that provides the ontological condition of ethics can be understood as negative liberty and the considered form that it takes as positive freedom, as self-formation or ethics understood as *ethos*, such that negative liberty appears as a precondition of positive liberty within Foucault’s formulation of an ethics of the self. This means that negative liberty is dependent on its enactment in positive practices of freedom to gain reality and import in everyday life. In this way, negative and positive concepts of freedom do not necessarily conflict; instead, they appear as mutually reinforcing and constitute two necessary dimensions of ethical self-formation. If this is right, then attempts to limit reproductive liberty to a negative right of non-interference seem doomed to fail.

One significant caveat must be added at this point, which refers to the question of the obligations of others in promoting the exercise of freedom, or the extent to which reproductive liberty entails positive rights. The complexity of this issue exceeds the limits of this chapter, so suffice here to say that in arguing for recognition of a positive dimension to the freedom entailed in reproductive liberty, I am not making a claim for a corresponding positive right. Harris and Robertson both emphasise that reproductive freedom only entails a right of non-interference, and does not oblige anyone to assist in the realisation of another’s reproductive project. Foucault’s approach is less determinate. The conception of ethics and freedom that

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<sup>42</sup>Patton, Paul. 1989. Taylor and Foucault on power and freedom. *Political Studies* 37:262.

<sup>43</sup>Ibid.

<sup>44</sup>Foucault. The ethics of concern for the self as a practice of freedom, 285.



he offers does not posit an in principle connection between freedom and rights at all, least not legal rights, and Foucault was notoriously suspicious of rights discourse. At the same time, this approach does not reject all claims to rights. Indeed, rather than reject rights claims *tout court*, on more than one occasion Foucault identifies a need for a new conception of rights, one that is not tied to either sovereignty or disciplinary power. Building on this, Duncan Ivison has argued that Foucault allows for a naturalistic approach to rights that sees them as conduits within the operations of power and practices of freedom.<sup>45</sup> Rights are not simply bulwarks against power, but are historically contingent, mobile elements drawn upon in its exercise and its agonism. One implication of this is that this approach would not preclude claims to a positive right in reproductive autonomy, one that requires that reproductive projects are promoted rather than simply honoured for instance. But it does not require such a right as a necessary correlate of freedom. Construing the exercise of reproductive liberty as a practice of freedom allows consideration of the roles and responsibilities of others in the realisation of reproductive projects, but it does not stipulate in advance what those obligations might be.

Finally, if freedom is understood as enacted in self-formation, it is important to note that the entanglement of reproduction, technology, and moral choice leads not only to an extension of freedom, but to a *problematization* of it. While central to Foucault's work, the notion of problematization is much misunderstood and much abused. Viewed as the fulcrum of Foucault's approach to ethics in the second volume of *History of Sexuality*, the point of problematization as a methodology and as a practice lies in the strategic identification of the 'local' contingencies of the present rather than the elaboration of moral universals. Problematization, Foucault suggests, is a way to bring to the surface both the historical generality of a problem or set of problems within the conditions of our existence, as well as the historically specific mode of their expression. It is a mode of analysis that takes as its object the ways in which 'being offers itself to be, necessarily, thought'.<sup>46</sup> This means paying close attention to the ways in which generalised conditions of human existence such as sex and sexual behaviour have entered into a set of practices and discourses that gives them a historically specific form.

Recent changes in reproductive technologies and practices give rise to such a problematization of liberty: as individuals strive to enact self-formative ethical practices by shaping their lives in accordance with closely held values and principles, they illuminate the ways in which this dimension of being has presented itself to be thought. Following Foucault, one might then seek to 'locate the areas of experience and the forms in which . . . [reproductive] behaviour . . . [has been] problematized, becoming an object of concern, an element for reflection, and a material for stylisation'.<sup>47</sup> Or more succinctly, we could ask 'how did reproductive behaviour come to be conceived as a domain of moral experience?' While my

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<sup>45</sup>Ivison, Duncan. 2007. *Rights*. Durham: Acumen, 186–196.

<sup>46</sup>Foucault. *Use of pleasure*, 11.

<sup>47</sup>Foucault. *Use of pleasure*, 23–24.

aim is not to respond to these philosophical-historical questions in detail here, this approach is nevertheless instructive. For what becomes apparent in the problematisation of human reproduction is that contemporary moral debates are themselves part of the ongoing negotiation and contestation of the nature and limits of reproductive freedom. Indeed, this contestation or agonism can be seen as an essential aspect of the realisation of reproductive liberty, as new practices such as the deliberate selection of deafness and disability in children test the limits of parental freedom and responsibility.

The deliberate selection by parents of traits for their children that are widely considered as disabilities provides one contemporary example of this negotiation and tests in a profound way traditional intuitions about reproductive ethics and parenting. Bioethical argumentation around these issues frequently relies on the related tropes that parents want the best possible lives for their children, and that the desire for healthy, normal children is overwhelmingly strong and natural. Consequently, any deviation from the standards of health and normality constitute a breach of the underlying compact of reproduction, soliciting responses such as that of Harris, otherwise a libertarian, who suggests that the deliberate selection of disability is something that no 'decent person' would do.<sup>48</sup> Harris' response is related to his commitment to Mill's principle of harm as the only acceptable moral and political limit on individual freedom. At a rhetorical level, Harris' recourse to the principle amounts to an attempt to legislate the limits of freedom. But as such, it is simply another element within the problematisation of reproductive liberty. Despite its legislative rhetorical mode, it is another element within the ongoing agonism of reproductive freedom, even while it disclaims that very agonism.

### 3.4 Conclusion

I have argued that despite their political differences, both Robertson and Harris rest a case for reproductive freedom as negative liberty on a foundation of positive freedom. This is not problematic in itself – indeed, I suggest that an understanding of reproductive autonomy as positive freedom is vital to grasping in any real way the nature and significance of reproductive decisions and projects within our lives. What I have argued for, then, is a particular way of understanding that freedom, one that draws on Foucault's construal of ethics as a practice of self-formation. This emphasises the insight that historically contingent values and social norms are constitutive of ethical subjectivity, not in the sense that these factors *determine* subjectivity, but in the sense that ethical subjectivity is attained in practical relation to them. This means that reproductive freedom only gains meaning and reality through its enactment in everyday practices of ethical self-formation. The approach I propose allows for a richer account of the significance of reproduction in human life and

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<sup>48</sup>See Harris. *Enhancing evolution*, 89, 145, 189.

responds to intuitions about the deeply personal nature of reproductive decision-making. In addition, it highlights the transformative potential of the experience of reproduction, at both an individual and social level, through the problematisation of the limits of reproductive freedom in contested practices and technologies. Reproductive freedom thus appears as an ongoing, agonistic negotiation of the limits of the possible.

The point that new reproductive practices entail a problematisation of freedom and contestation of its limits implies that any more or less a priori formulation of the limits of individual freedom will necessarily also be part of that contestation. That said, some indication of how the moral and ethical limits of the practice of freedom could be established in Foucault's terms may still be warranted. Unfortunately, Foucault himself did not enter into a discussion of this, leading some interpreters to reject his account as a kind of narcissistic 'anything goes' philosophy. This impression is perhaps encouraged by Foucault's claims that a practice of freedom takes the relation that one maintains with oneself as ontologically and ethically primary. In countering this perceived tendency, a number of scholars have introduced a concern with alterity (which at a minimum requires that ethical practice respects the other *as other*) into projects of self-formation such as those involved in human reproduction.<sup>49</sup> This concern and potential limit on reproductive practices may prove important to prevent a Foucauldian reproductive ethics of self-formation from sliding into the moral narcissism that I suggested was a danger of seeing reproduction as analogous to self-expression. I take up this concern with alterity in a later chapter through a discussion of the concept of singularity formulated by French philosopher Jean-Luc Nancy and others. Prior to that, in the following chapter I explore in more detail the recourse that is made to the principle of harm as the limit on freedom, especially in response to the selection of traits that are typically considered to be disabilities.

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<sup>49</sup>See especially Oksala, Johanna. 2005. *Foucault on freedom*. Cambridge: Cambridge University Press; Ziarek, Ewa Plonowska. 2001. *An ethics of dissensus: Postmodernity, feminism and the politics of radical democracy*. Stanford: Stanford University Press.

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