

# Giving birth but refusing motherhood: inauthentic choice or self-determining identity?

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## Abstract

*Issues of what personal autonomy and identity means are investigated in the context of the European Court of Human Rights' development of Article 8's right to respect one's private life into a right to personal autonomy, identity and integrity with particular reference to French anonymous birthing as explored by that court in *Odièvre v France* and feminist literature on mothering and autonomy. Although much critiqued by feminists, personal autonomy has been reconceptualised to mean something of worth to women. Yet, this version of autonomy can diverge into two directions in terms of individual identity as evidenced in *Odièvre* and in feminist literature: self-determination or self-realisation/authenticity. Conclusions are reached that making autonomy dependent on claims to 'authenticity' restricts personal freedom and thus ultimately identity.*

## 1 Introduction

One's identity as a person is enshrined as a legal public act in the United Kingdom as every new born person's identity must be documented in a birth certificate, showing the name of the woman who gave birth, who is the legal mother, regardless of whether she is the genetic parent.<sup>1</sup> If adopted, a child will have access to his or her original birth certificate at the age of eighteen.<sup>2</sup> The only recourse for a birthgiver who does not want to be identified is to give birth in secret and to abandon the child, committing at least one crime.<sup>3</sup> Such an abandoned child whose birthgiver disappears will not have the mother's name on the birth certificate. It has been noted that most of the debate on abandonment has taken place around the question of the child's identity rights,<sup>4</sup> with little focus on the birthgiver, for the obvious reason that her identity is unknown. However, there remain a small number of European countries where anonymous birthing is permitted, as shown in a recent case before the European Court of Human Rights (ECtHR), *Odièvre v France*.<sup>5</sup> In this case, the issue of permitting anonymous birthing was considered in the context of a claim brought by a, now adult, child born anonymously in a system which legally permits this in France. That applicant unsuccessfully claimed that her right to a private and family life had been violated in contravention of Article 8

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1 Registration of Births Act, 1953, s 2. Human Fertilisation and Embryology Act 1990, s 27.

2 Adoption and Children Act 2002, s 79.

3 Offences Against the Person Act 1861, s. 27. Estimates of the frequency of such actions in England and Wales vary. It is thought this could be about one hundred a year; Panter-Brick and Smith, 2000; see O'Donovan, 2002.

4 O'Donovan, 2000, pp. 73–86.

5 *Odièvre v France* Application no. 42326/98, Judgment 13 February 2003.

of the European Convention on Human Rights (ECHR).<sup>6</sup> As shall be shown, the French system is said to be based on ‘an adult-centred individualistic philosophy of freedom of choice’<sup>7</sup> for the birthgiver. Although much critiqued by feminists, a concept of freedom of choice or personal autonomy or agency has been reconceptualised to mean something of worth to women. It will be explained that, although a right to personal identity is now clearly protected by Article 8 of the ECHR, it remains to be seen whether this will develop in line with a reconceived version of autonomy as self-determination, by which I mean becoming something you are not yet, or self-realisation, authenticity and self-discovery, by which I mean realising or putting into practice, the person you already are. This article analyses these two different directions in the context of decisions to remain pregnant but to refuse motherhood as illustrated in *Odièvre*, and generally by reference to feminist debates on autonomy and motherhood. I begin my analysis with a summary of the *Odièvre* case and the ECtHR’s other related case-law on personal identity rights. I then explore the concepts of self-determination and self-realisation through analysis of feminist literature on mothering. This analysis illustrates how some feminists view a decision to continue a pregnancy, but not to take up mothering after giving birth, as an illustration of a woman’s lack of autonomy, because it fails to accord with versions of personal freedom as authenticity, while others think it would best be seen as an illustration of the individual woman concerned making her own choice because it accords with personal freedom as self-determination. It is then investigated whether one or the other or some sort of combination of autonomy and identity conceptions better advances a solution to these highly emotional and important issues and how making a distinction between maternity and motherhood assists in talking more coherently about the decisions women make in this context.<sup>8</sup> I conclude that making autonomy dependent on claims to ‘authenticity’ restricts personal freedom and thus ultimately personal identity.

## 2 Anonymous birthing and the European Court of Human Rights

In *Odièvre v France*, the ECtHR, by a majority of ten judges to seven, upheld the provisions of the French Civil Code that enable anonymous birthing. The issue in the case is presented in terms of a right of access to information about one’s origins pursuant to Article 8 of the ECHR. The adult applicant alleged that the fact that her birth had been kept a secret, with the result that it was impossible for her to find out her origins, amounted to a violation of her ECHR rights under Article 8 and Article 14.<sup>9</sup> Some reference is made in the case to the birthgiver and why women give birth anonymously. Although the case primarily concerns the issue of personal identity under Article 8 as it applies to the applicant, the adult child born anonymously, I interpret this in the context of the ECtHR’s jurisprudence on Article 8 generally as impacting on a woman’s right to give birth anonymously as relevant to *that woman’s* personal identity right.

6 Article 8 provides ‘1. Everyone has the right to respect for his private and family life . . . 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

7 Steiner, 2003, p. 430.

8 It is not intended that this piece provide a comparative perspective on the issue, for which see O’Donovan, 2002.

9 Her Article 14 argument was that the confidentiality protected in France amounted to discrimination on the grounds of birth. Article 14 provides that ‘the enjoyment of the rights and freedoms set forth in [the ECHR] shall be secured without discrimination on any ground such as . . . social origin, association with . . . birth or other status’.

France continues an ancient tradition whereby a birthgiver may enter a hospital, give her name as X indicating that she does not wish to reveal her identity, give birth and leave the child in the hands of the authorities. At the time of the ECtHR's decision, legislative amendments had followed growing activism and campaigns in France on the issue of access to one's biological origins. The French law under review in the case does not call into question the right to give birth anonymously but allows arrangements to be made for disclosure of identity subject to the mother's and the child's express consent being obtained.<sup>10</sup> So a distinction is still made between maternity and motherhood with X women not legally being mothers. This ancient tradition in France is traced back to the time of St Vincent de Paul, in around 1638, who introduced the use of the *tour*, a sort of revolving crib housed in the wall of a charitable institution. The mother would place the child in the crib and ring a bell. The *tour* would then pivot and the child would be collected. The aim was said to prevent infanticide, abortion and babies being exposed.<sup>11</sup> The French Revolution introduced reforms making medical care available to mothers who gave birth anonymously. Further changes occurred to the French law, embodied now in the 2002 provisions under review in *Odièvre*. The justification for anonymous birthing is alleviation of mothers' distress when they do not have the means to bring up their children.<sup>12</sup> Three categories of women who choose to give birth anonymously have been identified by the French government: young women not yet independent, young women still living with their parents in Muslim families originating from North Africa or sub-Saharan Africa, and isolated women with financial difficulties. It is said that seeking confidentiality sometimes conceals more serious problems, such as rape and incest, which are not always revealed by those concerned.<sup>13</sup> Steiner comments on the French position as follows: 'one has to place the French legislation relating to anonymous birth in the wider context of parenthood, a concept in French family law at the heart of which has always existed an adult-centred individualistic philosophy of freedom of choice'.<sup>14</sup> To a degree, the concept of parenthood in French law is a question of volition and in this sense is therefore deontological – it is the woman's right to accept or renounce motherhood on the child's birth. It implies a concept of freedom of choice as self-determining, a concept more fully explained in the next section.

Examining the position in other European countries, the ECtHR notes that it is relatively rare for mothers to be entitled to give birth anonymously under European domestic legislation.<sup>15</sup> As the ECtHR analyses it, Luxembourg and Italy do not impose a statutory obligation on the natural parents to register a newborn child or to state their identity when registering it. Many countries however make it obligatory to provide the names of the mother and of the father. Other jurisdictions, such as Belgium and Hungary provide a way for mothers to give birth *discreetly*. In discussions on the issue in Belgium, where there is a current trend towards the right to give birth discreetly, largely as a result of a large number of women crossing the border to give birth anonymously in France, the Consultative Committee on Bioethics in 1998 set out two lines of argument that they found defensible from an ethical standpoint.<sup>16</sup> The first considered it unacceptable for children to be brought into the world without parents and so facilities to give birth discreetly should be provided, without completely

10 The existing system of anonymous birthing is embodied in Law no. 93-22 of 8 January 1993, Article L.222-6 of the Social Action and Families Code, as amended by law no. 2002-93 of 22 January 2002 on 'access by adopted persons and people in State care to information about their origins': see paragraphs 15–18.

11 *Odièvre* para 15.

12 *Ibid.* para 36–39.

13 See the French government's submissions at para 36 of *Odièvre*.

14 Steiner, 2003, p. 430.

15 *Odièvre* para 19.

16 *Ibid.*

closing the door on attempts to trace the parents. Proponents of the second line of argument saw the ethical dilemma involved as the clash of two values: the life of the child and the right of everyone to know his or her natural mother. In the face of this dilemma, the primary concern had to be protection of the life and the development of the child. Giving birth anonymously was accordingly considered perfectly legitimate and acceptable. In Hungary, mothers may decide to remain anonymous by abandoning their newborn child in a special, unsupervised room in the hospital. In Germany, with the rising number of abandoned babies as justification, the protection of the child's life is given priority over the protection of the child's identity.<sup>17</sup> In the face of these rising numbers, some German Lander have instituted baby boxes, where babies can be left anonymously. Once a bell is rung, the birthgiver, or the person who brings the baby, leaves without giving their identity, and legislation allowing anonymous births has been under active consideration.<sup>18</sup> So the language of justification in these jurisdictions is protecting the child's life and development.<sup>19</sup> Deontological justification for the rights of the woman are not engaged so much as the rights of the child to live and be protected, which could be described as utilitarian in terms of the overall welfare of society and consequentially having the effect of providing women with the choice to give birth anonymously, or in terms of the deontological rights of the child.

The case before the ECtHR was brought by a child, now an adult, of an X woman. The applicant had been adopted when a child and much later, in 1990, when she was twenty-five years old, consulted a social services file and managed to obtain non-identifying information about, as the ECtHR puts it, her 'natural' family. Information in that file showed that her biological parents had been cohabiting for seven years; had one other child before she was born; that her father was Spanish, married to another, with a 'legitimate' daughter, he, according to the 'mother' refused to have anything to do with the applicant. It is reported in the file that the mother 'appears to have no will of her own and is content to go along with her partner's wishes. She has not visited her daughter at the clinic, saying that she does not wish to become attached.' The file notes that the woman showed no emotion at their separation. The parents' appearance is described, as well as information about the applicant's birth details, e.g. her weight, etc. In 1998, the applicant applied for further information about her birth and to obtain copies of any documents because she had learnt, not only of the existence of her older brother, but also of two other siblings born after her. She was told to apply to the relevant court but that a ruling in her favour would contravene the relevant law.<sup>20</sup>

Because the applicant wanted to discover the circumstances in which she was born and abandoned, including the identity of her biological parents and brothers, the court considered the case to involve private life rather than family life rights under Article 8. This is because the applicant claimed to be entitled, in the name of 'biological truth', to know her personal history, based on her inability to gain access to information about her origins and related identifying data.<sup>21</sup>

The ECtHR has already an established set of case-law providing that Article 8 protects a right to identity and personal development and the right to establish and develop relationships with other human beings and the outside world.<sup>22</sup> This has taken the form of the preservation of mental

17 See discussion by O'Donovan, 2002, at p. 371.

18 See further on this, Scheiwe, 2003, and O'Donovan, 2002.

19 The French government also cited an Austrian law of 2001 lifting an Austrian ban on anonymous birthing, although no explanation as to their reasons for doing so is provided: see para 37 of *Odièvre*.

20 *Odièvre* paragraphs 9–14

21 *Ibid.* at para 28.

22 See, for example, *Bruggeman and Scheuten v West Germany* (1981) EHRR 244; *Niemietz v Germany* (1992) 16 EHRR 97; *Goodwin v UK* (2002) 35 EHRR 18; *I v UK* Application no. 25680/94 Judgment 11 July 2002; *Pretty v UK* (2002) 35 EHRR 1; *Von Hannover v Germany* Application no. 59320/00 Judgment 24 June 2004.

stability being an indispensable precondition to the effective enjoyment of the right to respect of private life.<sup>23</sup> Matters of personal development include details of a person's identity as a human being and, what the court described as the vital interest protected by the ECHR in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents as demonstrated in *Mikulic v Croatia*.<sup>24</sup> Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 and therefore that Article applied here.<sup>25</sup>

The applicant argued that she had an even more meritorious claim than the applicant in *Gaskin v the UK* who had been successful before the ECtHR. In that case, a violation of Article 8 existed when the applicant was denied access to information about his childhood in care. Additionally, in *Odièvre*, the applicant argued that the validity of her claim was confirmed by *Mikulic*, in which the ECtHR had found in favour of a child in a dispute involving the competing rights of the child with her biological father. The court had condemned the inefficiency of the Croatian courts for leaving, as they expressed it, the child in a state of prolonged uncertainty regarding her personal identity.<sup>26</sup> The French government's arguments highlighted the birthgiver's perspective. It argued that its system took into account the 'mother's' and child's health, protecting the mother's life while observing the rights and freedoms of others.<sup>27</sup> A request by a child to be given access to information about his or her identity could come into conflict with the freedom which the French government argued all women enjoyed to 'decline their role as mother' or to assume responsibility for the child. The French government cited *Gaskin* to support its contentions as illustrating the importance of keeping official files confidential if reliable information was to be obtained and third parties protected. The French legislation, according to the French government, was aimed at reconciling these competing interests in three respects: first, by trying to encourage mothers to assume responsibility for the birth of their children, through psychological and social support; second, by affording such children access to certain non-identifying information; and third, by providing that the mother could waive confidentiality. These interests were reinforced by the machinery put into place by the recent amendments to the law.<sup>28</sup> Thus, the government argued that a careful balance had been struck between the interests of the woman in not disclosing the birth and the child's interest in gaining access to information about its origins.<sup>29</sup>

The ECtHR's majority analysis agreed that *Gaskin* establishes that people have a vital interest in receiving information necessary to know and understand their childhood and early development. They saw *Mikulic* as involving the weighing of the vital interest of a person receiving the information necessary to uncover the truth about an important aspect of his or her personal identity against the interest of third parties in refusing to be compelled to make themselves available for medical testing: in that case the alleged father who refused to submit to DNA tests in a paternity claim. *Mikulic* is authority for the state having a duty to establish alternative means to enable an independent authority to determine such a dispute speedily. *Gaskin* and *Mikulic* were both distinguished by the majority as the issue of access to information about one's origins and the identity of one's natural parents is not of the same nature as that of access to a case record concerning a child in care or to evidence of alleged paternity. The applicant here is trying to trace *another person* who has expressly

23 See *Bensaid v UK* Application no 44599/98 para 47.

24 Application no. 53176/99 Judgment 4 September 2002.

25 *Odièvre* para 29.

26 *Ibid.* para 34.

27 *Ibid.* para 36.

28 *Ibid.* para 39.

29 *Ibid.* para 38.

requested that information about the birth remain confidential.<sup>30</sup> In the judgment of the majority of the ECtHR, various interests had to be weighed. The interests of the applicant, now an adult, but a biological child of others, in knowing her origins under Article 8 of the ECHR are therefore placed against the interests of the birthgiver, 'in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions'.<sup>31</sup> To elaborate, the arguments were presented of those, on the one hand, who have a right to know their origins, and the history of their personal development, these being derived from a wide interpretation of the scope of the notion of private life.<sup>32</sup> On the other hand, not only is there a woman's interest in remaining anonymous in order to protect her health, further considerations are stated to be the general interest of protection of the child's health too; the avoidance of abandonment and illegal abortions: all issues I argue which concern the birthgiver's autonomy and personal identity as self-determination. Other considerations are stated to include the effect on other third parties such as the applicant's siblings, adoptive parents and biological father. Autonomy is therefore recognised by the ECtHR's observations that the two private interests with which it is confronted are not easily reconciled. Moreover, the court clearly states that the conflicting interests 'do not concern an adult and a child, but two adults, each endowed with her own free will'.<sup>33</sup> It is noted that the right to respect for life, a higher-ranking value guaranteed by the ECHR, is one of the aims of the French system. As the court saw it, the full scope of the question for the court to resolve is: *Does the right to know imply an obligation to divulge?*<sup>34</sup> Because of the diversity across Europe, the court afforded France a margin of appreciation, and agreed with the French government's arguments as to the right balance being struck.

The joint dissenting opinion of seven of the judges highlights the child's identity right and, I argue, to the detriment of the birthgiver's identity right.<sup>35</sup> They point to the developing jurisprudence of Article 8 that is said to include the right to personal development and to 'self-fulfilment' as part of the right to respect for family life. They strongly state that the issue of access to information about one's origins concerns 'the essence of a person's identity', and is 'an essential feature of private life protected by Article 8'. Being given such access and 'thereby acquiring the ability to retrace one's personal history is a question of liberty, and therefore, human dignity'. As such, it is stated to lie 'at the heart of the rights guaranteed by the Convention'.<sup>36</sup> Although the mother's right is said to concern her personal autonomy, the dissenters found that the different interests involved had not been balanced but instead 'the mother . . . has a discretionary right to bring a suffering child into the world and to condemn it to lifelong ignorance'.<sup>37</sup> They make clear that, in their opinion, the right to identity – as an essential condition of the right to autonomy and development – is within the inner core of the right to respect of one's private life. As such, any margin of appreciation, is greatly reduced.<sup>38</sup> They disagree over the distinction between *Gaskin*, *Mikulic* and this case, in fact they state

30 Ibid. para 42 and 43.

31 Ibid. para 44.

32 See para 44 of *Odièvre*, *Johansen v Norway* 7 August 1996 Reports 1996-III p. 1008 para 78; *Mikulic v Croatia* Application no. 53176/99 para 54 and 64 ECHR 2002-I; *Kutzner v Germany* Application no. 46544/99 para 66.

33 *Odièvre v France* at para 44. Children also have identity rights pursuant to the United Nations Convention on the Rights of the Child, Articles 7 and 8. This raises issues wider than those covered in this Article, including the autonomy of the child.

34 Ibid. para 45.

35 *Odièvre* joint dissenting opinion of Judges Wildhaber, Sir Nicholas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää.

36 *Ibid* at para 3.

37 Ibid. para 4 and 7.

38 *Ibid.* para 11, citing as authority for a right to autonomy *Pretty v UK* Application no. 2346/02 para 61 ECHR 2002-III, and for a right to development, *Bensaïd v UK* Application no. 44599/98 para 47 ECHR 2001-I.

that the arguments of the *Odièvre* applicant may even be stronger.<sup>39</sup> As will be shown, the dissenters' views chime with ideas of autonomy as self-realisation or authenticity, signifying a lack of autonomy as self-realisation on the part of the birthgiver – otherwise why would she give birth to a 'suffering child' who has to endure 'lifelong ignorance'? Meanwhile, the offspring should have a right to know everything about her origins because this is necessary to her personal identity, again on an authenticity or self-realisation basis.

### 3 Self-determination and self-realisation

Women's choices and identity are fundamental issues in feminist theory. Critiquing the formation of women's preferences and related ideas of autonomy have been recurring subjects in feminist scholarship. Yet, at the same time, retaining some notion of autonomy is central to feminists concerned with women controlling their own lives. For some second wave feminists, children and childbirth issues have been central to arguments about autonomy. Debates over issues such as abortion, extra-uterine-birth, work-life balance, bodily integrity and making life plans involve arguments about women's freedom of choice: in some shape or form, their autonomy. However a woman's decision to 'accept' maternity, or at least to remain pregnant and give birth, but to refuse motherhood, is largely unexamined.

Recent feminist theory can be seen to have divided on issues concerning women's 'autonomy' and its formation in oppressive conditions that have resonance to the issues discussed at the ECtHR.<sup>40</sup> As already mentioned, that court has made clear that Article 8's protection of a human right to respect one's private life now provides a right to personal autonomy, identity and integrity.<sup>41</sup> These three concepts interconnect with each other and into the overarching idea of personal freedom. Yet becoming a free person has taken scholars in different directions. I label these for the sake of clarity in this article as self-determination and self-realisation and discuss these here in the context of refusing motherhood. However, the labelling used varies amongst commentators and is often used inconsistently. The ECtHR does not mention these at all, and in fact makes little distinction between autonomy, identity and integrity, but I have elsewhere identified how the court has a tendency to use these to mean personal freedom as self-determination is protected rather than self-realisation, although the latter interpretation is evident in some instances, including in the opinion of the dissenting judges in *Odièvre*.<sup>42</sup>

#### 3.1 Self-determination: giving birth then refusing motherhood is a matter of personal choice

By self-determination, I mean aiming to become something you are not yet – becoming a person who is different to, more than, or better than, what you are now. This presupposes a distinction between what you currently are and an image of what you can become if you become all you want to be, if you develop your potential and decide your purpose as a human being.<sup>43</sup> This in many ways finds support in liberal and existential work and also strands of Nietzschean postmodernism. In its most

39 Dissenting opinion at para 19.

40 See, for example, Butler, 1990; Brown, 1995; Lacey, 1998; Battersby, 1998; Cornell, 1998; Jackson, 2000, 2001; Jackson and Lacey, 2002; James and Palmer, 2002; Knop, 2004.

41 See *Tysiac v Poland* Application no. 5410/03 Judgment 20 March 2007 at para 107, citing *Pretty v the UK* (2002) 35 EHRR para 61, *Glass v UK* Application No. 61827/00; *Sentges v The Netherlands* Application No. 27677/02 8 July 2003; *Pentiacova v Moldova* Application No. 14462/03; *Nitecki v Poland* Application No. 65653/01 21 March 2002.

42 See further on this Marshall, 2008.

43 Guignon, 2004, p. 3.



extreme versions, self-determining freedom does not recognise any boundaries and it can end up as extreme anthropocentrism.<sup>44</sup> The ability to make choices has often been represented as a way of being that is somehow independent of the context in which the individuals who exercise it are living. These ideas of autonomy as being somehow pre-social or pre-existing entail something similar to Kantian notions of a person who is capable of rational choice through exercising his or her own moral judgments governed by moral law.<sup>45</sup> Representations of the person in these ways, as independent, isolated, 'atomistic' and 'unencumbered', have been particularly criticised by communitarians and ethic of care theorists.<sup>46</sup> Some feminists also have characterised them as privileging male norms and male ways of knowing and being.<sup>47</sup> Many are critical of modern preoccupations with personal freedom as free expression with rights and the subjectivity of human thought perceived as egocentric and devaluing the community, other people and those who provide care for us. With this modern focus on one's individual life, people are said to experience a loss of purpose through the lack of a broader vision or meaning to life: 'the dark side of individualism is a centring on the self, which both flattens and narrows our lives, makes them poorer in meaning, and less concerned with others or society'.<sup>48</sup> As many feminists investigating the concept of autonomy have made clear, a person's freedom or autonomy is created in and through his or her relations with others, in a context, and that person makes sense of their freedom and identity in that setting. But there is no clear explanation of what it means to say that a woman has a choice in the context of giving birth and refusing motherhood. Most feminists would agree that the ideology of motherhood constructs both maternity and motherhood in terms of connection, physically and emotionally, and that women have not fitted in with the traditional idea of autonomy. For some this 'connection' means that women are not viewed as persons in their own right, with choices to make about ways of being and living. Their capacity for motherhood as a natural, biological phenomenon prevents women from being capable of living a fully autonomous life. These feminists call for women to overcome their 'natural' state to become free and autonomous. To an extent this call is seen in the French literature on anonymous birthing and can be linked to existential feminist theory, where becoming a woman is a socially constructed condition.<sup>49</sup>

For existential feminists, 'woman' is a creation, the 'other' to man. What women need to do, therefore, is to contest this construction because it prevents them from living an autonomous and self-willed life: the ideal for everyone. Although it is acknowledged that a *completely* autonomous life is impossible because as part of the human condition all persons are constrained by social and moral norms and bodily needs, individuals are still capable of constantly and deliberately taking responsibility for their obedience and disobedience to authority and to their bodies. To exercise 'real' choice, individuals must aim to transcend the social and the physical. For women, this means transcending female biology and instead entering into public life, engaging in their own projects and exploits. In such a presentation of becoming a woman, female biology is represented as conflicting with, and in opposition to, the ideal of the free autonomous subject reaching out to transcendence. Female biology and the female body drag this free autonomous subject back to a 'merely natural' existence: the female body is an intrinsic obstacle to transcendence and 'real' choice. Women achieve autonomy by actively choosing not to be immersed in their biology, including choosing not to become pregnant, not to have children and not to become mothers. What is proposed instead is a new order

44 Taylor, 1991, p. 68.

45 Kant, 1988; see also Dworkin, 1999.

46 Taylor, 1992; Sandel, 1998; see analysis also by Reece, 2003, Chapter 2.

47 See Lloyd, 1984.

48 Taylor, 1989, p. 4.

49 De Beauvoir, 1953/1997; Lloyd, 1984.



in which woman becomes part of the world of the active other; woman becomes like man in order to escape the debilitating and endlessly disempowering impact of femininity as the condition of otherness.<sup>50</sup> However, in this type of feminist work, no distinctions are explicitly made between pregnancy and motherhood: both of these conditions need to be refused.

Certain radical feminist thinkers, particularly in the early second wave, reach similar conclusions to those of existential feminists about transcending female biology. The starkest example perhaps of this type of work can be seen in Shulamith Firestone's *Dialectic of Sex* (1971). In that analysis, the natural reproductive difference between the sexes is described as the first division of labour at the origins of class.<sup>51</sup> It is a natural, biologically based, imbalance of power between men and women. However, given that individuals are no longer 'just' animals, they can oppose nature. For women to be free of the constrictions of nature, human reproduction needs to become artificial reproduction with children being born to both sexes equally or independently of the other.<sup>52</sup> Any dependence between the child and the mother would give way to a greatly shortened dependence on a small group of others in general, 'freeing' women from their reproductive biology. Again, no distinctions are made between the capacity to be a childbearer and a mother. Clear boundaries are drawn between child 'production' and subsequent development, but it is assumed that this can only happen if children are 'produced' separately from the natural reproductive and gestation process. It seems to be assumed that if women continued to be childbearers in the 'natural' way, they would be mothers simply by virtue of that.

Any form of agency necessarily involves reflection, choice and action from the individual concerned. The debates often set up the interdependence of persons and individual autonomy as binary opposites.<sup>53</sup> On the one hand, a social constructionist account can create a deterministic account of preferences and a denial of agency. On the other hand, concepts of autonomy have been said to assume a pre-existing freedom which does not exist for many women or which may not exist at all, for *anyone*. It has been queried whether they are, or need to be, opposites.<sup>54</sup> As Jackson states:

[a] crucial initial step might be the recognition that autonomy is not something an individual either has or does not have. It is not a static or innate quality, rather a person's capacity to make meaningful choices about their lives may fluctuate according to a complex matrix of social, economic and psychological factors.<sup>55</sup>

The very possibility of self-criticism presupposes the reality of a self founded in certain beliefs and relationships.<sup>56</sup> A self-determining view of freedom can grow in a person's life as he or she makes it something they wish it to be, usually thinking it will be something better for them, though these commitments and projects and choices are made in contexts.<sup>57</sup> As Jennifer Nedelsky reflects, feminist theory has to hold on to autonomy, whilst arguing for a contextually situated self: '[t]he problem, of course is how to combine the claim of the constitutiveness of social relations with the value of self-determination.'<sup>58</sup> So even in the feminist literature on autonomy in reproduction and

50 See Evans, 1997, p. 45.

51 Firestone, 1971, pp. 8–9.

52 See also Chodorow, 1978; O'Brien, 1981; Dally, 1982.

53 See analysis by Jackson, 2001, p. 3.

54 Jackson, 2001; Nedelsky, 1989.

55 Jackson, 2001, p. 4.

56 Dilman, 1991, p. 262.

57 Ibid. p. 264.

58 Nedelsky, 1989, p. 221.

abortion, where women can refuse to become mothers by not becoming pregnant or having terminations, maternity is conflated with motherhood. Women who continue their pregnancy are generally assumed to want a child; the assumption being that, if they did not, they would terminate the pregnancy. Yet in the context of reproductive choices generally, Jackson explains that such choices are shaped by multiple external influences but they are the only choices available and they are therefore of critical importance to one's sense of self.<sup>59</sup> The decision to have an abortion, for example, is made because, for a variety of reasons, this particular woman does not want to carry her pregnancy to term or give her child away, including in the anonymous birthing system available in France under examination in *Odièvre*. That the woman in question is not in control of all of those reasons should not mean her deeply felt preference should be ignored. As Jackson's analysis makes clear, even if it is recognised that social forces may shape and constrain choices, the sense of being the author of one's own actions, especially when they pertain to something as personal as reproduction, is profoundly valuable to all of us. When an individual's reproductive preferences are disregarded, we undermine their ability to control one of the most intimate spheres of their life.<sup>60</sup>

A conceptual distinction between maternity and motherhood suggested by O'Donovan and Marshall involves autonomy and freewill arguments which correlate with Bonnet's conclusions in her French empirical studies on the issue of anonymous birthing.<sup>61</sup> Bonnet argues that the women involved gave up their children to protect them, as a gesture of love.<sup>62</sup> The children were safeguarded from infanticide and abuse because anonymity was a *choice* for their birthgiver. Bonnet's argument is that a woman's right to give birth anonymously is a fundamental freedom, linked to privacy,<sup>63</sup> and is a right to renounce forever the motherhood of a particular child.<sup>64</sup> Making the distinction may be important because empirical research indicates that, aside from pregnant women who do not seek an abortion for personal reasons, or cannot do so because of legal prohibitions, some enter into a state of denial. Others, aware of their pregnancy, cannot cope with the steps necessary to terminate.<sup>65</sup> Surrogacy, where a different intention is agreed and proclaimed at an earlier stage, might be an exception, but even here, the surrogate appears to have an accepted and acceptable social identity:<sup>66</sup> she is a surrogate mother. But the identity of a woman 'who gives away her child' is less acceptable; she, unlike the surrogate mother or the woman who gives up her child for adoption, is not performing that one last, altruistic, sacrificial, *maternal* act to promote the welfare of her child. If choices and identity are construed in a self-determining way, women continuing with their pregnancy and giving birth but then refusing motherhood could be seen as a woman's right to exercise her freedom to make her own choices on this matter. It involves ideas of privacy, including potentially her privacy to withhold the fact of the birth from others. Such choice may be, in practice, tied into safeguarding, protecting or offering a better life to, children, and not necessarily based on what might be preferable to the woman concerned. Considerations may include, for example, the

59 Jackson, 2001, p. 7.

60 Ibid.

61 O'Donovan and Marshall, 2006.

62 On this, see O'Donovan, 2000 and 2002, discussing Bonnet, 1991, and Lefaucheur, 2000. See also Lefaucheur, 2004. *Gesture of Love* is the title of Bonnet's book on the subject and was influential in the early 1990s in debates in the French parliament on the issue of anonymous birthing as well as in country-wide debates generally.

63 Of such importance in the French legal system that it is a breach of an aspect of private life to publish without her consent, information that a woman is pregnant, even though her condition is visibly public – see para 37 of the *Odièvre* judgment.

64 O'Donovan, 2000, p. 82; 2002, p. 363.

65 Brockington, 1996.

66 Stumpf, 1986, pp. 187–208; but see Munro, 2001.

possibility of abuse of the newborn child from others close to the woman. But, ultimately, regardless of the reasons, it is the individual woman who makes the decision. If autonomy is 'rooted in the idea that individuals should be able to pursue their own goals according to their own values, beliefs and desires',<sup>67</sup> then women are making a self-determining choice when they refuse motherhood in this way.

As O'Donovan has argued, various stories are told of motherhood: they range from natural instinct, to altruism or martyrdom, to self-interest, and unpicking these is difficult. Not only are individual childhood stories of motherhood subjective and particular, but suggestions of a woman's choices after giving birth touch on fears of abandonment and rejection.<sup>68</sup> Further, abortion entails a decision being made by the pregnant woman before a child has been born and brought into physical existence outside the woman's body. If an abortion happens, no child will be born. In adoption or abandonment situations, a living child exists. This, of course, has implications in terms of personal identity issues. As for the personal identity of the offspring, a new person with his or her own rights exists. As for the parents, two people are now responsible for a child's welfare. Yet concern for a full sense of one's identity is made to hinge on knowledge of the exact identity of one's biological mother, the birthgiver, as if a person cannot be 'whole' unless they know this fact. Men can still remain permanently anonymous, at least, if they are not sperm donors.<sup>69</sup> That said, there is a growing trend towards the 'need' to know one's biological 'father' to have a sense of completeness of one's sense of self or identity.<sup>70</sup>

### 3.2 Self-realisation: giving birth then refusing motherhood is not an autonomous 'authentic' choice

In contrast to Bonnet's research, another French empirical study by Lefaucheur adopts a different conception of autonomy. Her emphasis is on hardships of various kinds by the women involved. These reflect not a right to choose but a *lack* of resources and therefore a lack of autonomy. The issues for these women include fear of parental reaction, pressure by parents from a religious or conservative background, personal problems, an inability to cope with another child, domestic violence and large families in economic difficulties. This position is further investigated in the context of feminist literature on women's self-discovery and authentic choice. The positions of the two French feminists' empirical studies have thus been described as follows:

[to] Lefaucheur, it is precisely because . . . women lack autonomy that they seek anonymity and the consequent adopting out of their child. For Bonnet, however, such action is a mark of choice and freedom, and is a woman's right. Both use the word autonomy but come up with different definitions.<sup>71</sup>

Lefaucheur's view correlates with those who suggest that the only moment to exercise choice in relation to motherhood is the moment of confirmation of pregnancy. Those women who enter into a state of denial, or fail to confront a decision on abortion, might be regarded as powerless and paralysed and therefore as lacking autonomy.<sup>72</sup> The applicant in *Odièvre* argued in such a vein, claiming that women who give birth anonymously are not exercising a woman's right but are

67 Jackson, 2000, p. 468–469.

68 See O'Donovan, 2000, 2002.

69 Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004.

70 See Mikulic, above footnote 24.

71 O'Donovan, 2002, p. 371.

72 Research on infanticide suggests that a proportion of cases can be explained in these terms. See Brockington, 1996, and O'Donovan, 2002.

making 'an admission of failure'. Problems related to youth, difficulties in gaining access to the job market, the isolation and financial predicament of single-parent families and domestic violence were cited in the applicant's arguments: the distress of such women could be addressed by providing the necessary help or enabling them to make their children available for adoption. Accordingly, the applicant criticised the French legal position of allowing a woman to act as if she had never given birth: this is, she argued, a 'legal fiction'.<sup>73</sup> I interpret this view of autonomy as personal freedom in the sense of only being free when a person makes choices in line with a pre-existing identity, self-realisation, discovery or authenticity. This contrasts with the conception of freedom as self-determination. Self-realisation directs you to realise and to be that which you already are. This has recently been described as the 'modern view of authenticity'.<sup>74</sup> The ideal of the authentic self is one involving a project of becoming the person you are. The aim is self-discovery to recover the lost you.<sup>75</sup> This finds resonance in Aristotelian and communitarian views of the self, and it may be seen in much of the popular personal development industry.<sup>76</sup> As Guignon explains, the basic assumption built into the ideal of authenticity is that, lying within each individual, there is a deep, 'true self' the 'real me'. The ideal of authenticity asks you to get in touch with the real you, achieving genuine self-knowledge, and to express your inner traits in your actions in the external world. It is only by expressing your true self that you can achieve self-realisation and self-fulfilment as an authentic human being. But as Guignon asks – what exactly is this inner self, what does it include and exclude? If this true self includes some fairly nasty or banal characteristics or is actually the result of advertising and the media or some other powerful forces, what are the consequences?<sup>77</sup>

This idea of a true or essential self lying within each person has been subjected to rigorous, diverse and massive critique by a variety of scholars. A detailed analysis of this is beyond the scope of this article. Yet, there are times in life when a sense of commitment places constraints on people's lives from which they may not be able to unbind themselves without self-betrayal and personal disintegration.<sup>78</sup> Like the applicant in *Odièvre*, many would say that giving birth to a baby involves such a commitment and therefore that anonymous birthing leads to self-betrayal and personal disintegration. Therefore the women involved are suffering from a lack of autonomy. Such views chime with conceptions of the self in some ethic of care or cultural feminist work,<sup>79</sup> communitarian conceptions of selfhood,<sup>80</sup> and versions of what Helen Reece has recently described as the 'post-liberal self'.<sup>81</sup>

In English law and in the general understanding of 'womanhood', the 'idea that a woman, after giving birth, might make a rational decision not to become a mother is not entertained'.<sup>82</sup> In

73 *Odièvre* para 30.

74 Guignon, 2004.

75 Taylor (1989) describes the evolution of this development as modern freedom being won by our breaking loose from older moral horizons. People used to see themselves as part of a larger order. In some cases, this was a cosmic order, a 'great chain of Being', in which humans figured in their proper place along with the angels, heavenly bodies, and our fellow earthly creatures. This hierarchical order in the universe was reflected in the hierarchies of human society. People were often locked into a given place, a role and station that was properly theirs and from which it was almost unthinkable to deviate. Modern freedom came about through the discrediting of such orders: see also Guignon, 2004, p. 3.

76 See, for example, McGraw, 2001.

77 Guignon, 2004, p. 9.

78 Regan, 1986, p. 27.

79 Gilligan, 1982; West, 1988; Rich, 1976.

80 Sandel 1982/1998; Taylor, 1992; Avineri and De-Shalit, 1992; Etzioni, 1988.

81 Reece, 2003. Although I use the term here, this version of the self draws on a rich pre-liberal tradition – see, for example, Guignon's analysis (2004).

82 O'Donovan, 2000, pp. 66 and 77.

adoption or surrogacy situations her decision is framed in terms of the welfare of *her* child; she is seen to be acting as a 'good' mother by sacrificing her motherhood for the good of her child. When put in terms of her exercising a real choice about her life, however, her actions become recast as selfish and her 'abandonment' of her child damages his or her welfare. What is interesting about both these discourses is that in both the welfare of the child outweighs any value attached to (women's) autonomy. Even in the *Odièvre* decision the exercise of autonomy was framed in the discourse of welfare: 'persons who seek disclosure at any price, even against the express will of their natural mother, must ask themselves whether they would have been born had it not been for the right to give birth anonymously.'<sup>83</sup> Or, it might be added, been born and lived for long, if abandoned and not found. Finally, developments in England and Wales seem also to be linking child welfare to knowledge of biological origins, which will affect concepts of women's autonomy because they inhibit even further the separation of maternity and motherhood.<sup>84</sup>

Ideas of a feminine sense of connection, or a revaluation of the relational self, make for a very different view of autonomy from that discussed above. The claim varies from 'women's lives are not autonomous'<sup>85</sup> to 'we are all produced by our communities'<sup>86</sup> to 'we are self-realising agents seeking to discover our true selves'.<sup>87</sup> In some instances, there seems to be a draw towards notions of 'authenticity', with inauthenticity seeming to entail that one's actions or decisions are out of line with one's *identity*. 'Authenticity', as used in this discourse, must be understood in relation to agency and becoming: 'autonomy comes from agency which takes place within a context of becoming.'<sup>88</sup> Thus a constrained subject is to strive for authenticity in their actions. Many now try to resolve:

'the issue of how to understand autonomous agency once one has given up the idea that there is a true self to be discovered. If the self turns out not to be a fixed star to guide one's deliberations but rather a shifting, inchoate, plural and perhaps even illusory point of reference, it becomes much harder to say what it is that makes some desires truly one's own and others not.'<sup>89</sup>

On this understanding of personhood, although selves would be seen as narrative inventions, they are nonetheless real, because 'we really are the characters whom we invent'. Actions are chosen to ensure that there is a pattern into which they will fit to try to make sense of ourselves. In this self-realisation version of personal identity and freedom 'we are self-realising agents seeking to discover our true selves'.<sup>90</sup>

Identity can thus be presented as a matter of choice, but also as created by choices. The subject of post-liberal theory, 'embedded and constituted by context'<sup>91</sup> is the product of his or her relationships

83 Concurring opinion of Judge Ress joined by Judge Kuris at para 4.

84 Of course the separation of paternity and fatherhood traditionally has been allowed, but these trends may affect this separation as well. See for example recent changes to the law abolishing anonymity for gamete donors in licensed assisted reproduction clinics. The rationale behind this change, similar to the dissenters in the ECtHR, and arguments as to a sense of one's self which will be explored in this section, reflects a seemingly growing need for one to be 'complete' through knowledge of one's biological origins.

85 See West, 1988.

86 See McIntyre, 1981; Avineri and De-Shalit, 1992.

87 See Griffiths, 1995.

88 Ibid. p. 179.

89 Velleman, 2005. See also Battersby (1998) who argues for a construction of identity in terms of living forces and birth, not as a state of matter that is dead or as a characteristic of a soul or a mind that remains fixed and constant, no matter which of its qualities or attributes might change. In this self-determining sense, for example, identities are deconstructed and reconstructed in relational terms.

90 Griffiths, 1995.

91 Reece, 2003, p. 14.

and experience. Although the context varies, both personal characteristics and a self develop. It is this achievement that leads to 'authenticity', where actions and decisions *fit* with one's sense of self. But the constant effort of seeking authenticity is frustrating and although the post-liberal subject will never be complete, the subject may reproach herself for failing to achieve the self-realisation that knowledge entails. It may mask conventional or reactionary standards underlying the essential self – even though seeking to avoid this – similar to that which is said to be 'natural'.

As O'Donovan accurately points out, the conventional reaction to a woman who 'gives away' her child is one of distaste, even horror. This is an 'unwomanly' woman, one more like the wicked stepmother of fairytales than a 'real woman'.<sup>92</sup> Even those sympathetic to her plight may tell the woman that the decision to renounce motherhood after giving birth is a debilitating action. Indeed, existing adoption law in the UK seems to illustrate this with a woman being unable to give her child for adoption within the child's first six weeks of life.<sup>93</sup> When it is said 'you will regret that later', or 'it is not natural' the message is that the self is divided against the self, that the proposed action is inauthentic.<sup>94</sup> This post-liberal self is a complex creature. It is supposedly self-realising rather than self-determining. In many ways it seeks to become its 'true' self, one that fits with what it has been conditioned to be.<sup>95</sup> This reflects a different direction in what personal autonomy and identity can mean, turning it into ideas of self-realisation, realising what is already there, through some sort of process of self-discovery. It is this version which is evident in the minority dissenting opinion of the ECtHR when they speak of the essence of identity and self-fulfilment. Even though this is expressly in the context of the offspring's identity right, it implies that the birthgiver ought to behave in certain ways.

#### 4 Reconceived autonomy and identity matters

More sophisticated versions of autonomy have sought to reconceive it, aiming to retain the indispensable notion to feminism that women should be free to make their own choices, while acknowledging the socially constructed quality of the choices people make.<sup>96</sup> Such theorists question what enables people to become autonomous. They answer that autonomy is a capacity that has to be developed – it can flourish through human relationships or lie undeveloped.<sup>97</sup> Relatedness is not the antithesis of autonomy but its precondition.<sup>98</sup> Autonomy can thus be conceived of as a quality that develops and exists *because of* the interdependency of persons and encouragement of supportive others. Decisions to become pregnant, remain pregnant, become a mother on birth or not, can all be viewed as exercises of a series of choices by the particular women involved in those decisions in a social context. A view that presents each of these decisions as situations that happen to women without any choice on their part can be criticised for hindering women's ability to live lives of their own choosing – to forge their own identities. While this is received feminist wisdom for understanding decisions to terminate or continue a pregnancy, it is not when it comes to understanding how one could remain pregnant and give birth, yet not be a mother. But the decision not to take up

92 O'Donovan, 2000, 2002.

93 Adoption and Children Act 2002 s 52(3).

94 Reece (2003) argues that the search for authenticity, in following the right path in personal decisions, can be never-ending, and is an aspect of the therapeutic state. Eventually this search is coercive, as much so as the traditional rules it replaces.

95 Guignon, 2004.

96 Nedelsky, 1989; MacKinnon, 1989; Nussbaum, 1999, 2000; MacKenzie and Stoljar, 2000; Jackson, 2001.

97 Nedelsky, 1989.

98 Ibid.; MacKenzie and Stoljar, 2000; Jackson 2001.

mothering once one has given birth is based on identity. The individual woman may be unable to see herself capable of childrearing at present. Not unlike the 'encumbered self',<sup>99</sup> that is, a self claimed by inescapable duties, the 'refusing self', like any other type of self, might be said to make a decision conditioned by the present and past aspects of her life.<sup>100</sup> The 'romantic ideal'<sup>101</sup> creates social problems in the decision to renounce motherhood, and essentialist notions of womanhood contribute to a discourse of condemnation.

Linking *self-realisation* or authenticity as used in this article to identity, in the sense of realising or bringing to fruition one's essential core, one's 'real' or 'true' self or identity, evident in some of the ECtHR's reasoning and particularly in that of the dissenting opinion in *Odièvre* in relation to the offspring's identity right but also to the criticisms of the birthgiver's behaviour, entails ideas of 'true' and 'real' identity. These say that one needs full knowledge of one's biological mother to be complete and have a sense of one's own identity. It also implies that a woman who gives birth makes 'wrong' or 'inauthentic' choices by giving birth anonymously and may open a space for state intervention, imposing standards.<sup>102</sup> As already shown, the joint dissenting opinion in *Odièvre* highlights the child's identity right.<sup>103</sup> The divergence of the majority and this dissenting opinion illustrates the complexity of what exactly any right to identity may mean. The dissenters found that the different interests involved had not been balanced but favoured the mother's 'discretionary right' to give birth to a suffering child who is, in their view, forever ignorant.<sup>104</sup> Such views are odd given that women and men always have such 'discretion' when deciding to have a child, and it is not known whether that new person will have a 'suffering' life or not. It also seems inaccurate to describe the offspring's 'condemned' state as one of 'lifelong ignorance'. When it comes to situations involving knowledge of one's biological origins, one's biological 'parents' are involved. These parties have rights to autonomy and identity. Why forcing such people into divulging every detail of their offspring's origins is necessary to the latter's sense of self or identity is not convincingly explored or explained. It seems that self-realisation or authenticity arguments have been accepted here by the dissenters without explicit acknowledgement. This could be interpreted as implying that those who choose not to find out about their biological parentage – with the emphasis in the judgment on the mother's identity, not the father's – lack in their identity or sense of self in some way. If the decision to renounce motherhood is said to be 'inauthentic', to be, that is, the illegitimate result of social conditions that overwhelm and contradict the birthgiver's self-identity, it at best, judges, and, at worst, condemns, ostracises and even endangers the lives of, individual women. Little account is given to the possibility that internal and external factors may be liberating as well as constraining for some; an 'autonomous subject' can make life plans, change her situation and resist the conditions of oppression: identity matters have a context. Individuals can and do make choices, even within constrained circumstances and situations. If it is recognised that individuals can and do exercise some form of *self-determination* which is part of one's overall identity through life, then there is less room for stigmatism and condemnation.

Economic and social circumstances may be part of the reasons why a woman gives up the child to whom she has given birth and such injustices need to be fought. Rather than, however, view her

99 Sandel, 1982/1998, p. 19.

100 Reece, 2003, Chapter 1.

101 This term has been coined by Alison Diduck, who notes that relationships between parent and child 'are assumed to be based upon the irrationality of ever-enduring love or upon timeless and universally understood *duty*': 'the romantic' ideal; Diduck, 2003, p. 83.

102 Reece, 2003.

103 See section 2 above.

104 *Odièvre*, dissenting opinion, at para 4 and 7.



either as a victim of those circumstances – a non-free agent – or as a free agent who is exercising inauthentic choices and thus sabotaging her identity, we must promote her autonomy as encouraging a capacity and freedom to make choices that take both her conditions and her agency seriously and help her to forge an identity that does so as well.

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