

Authority without identity: defending advance directives via posthumous rights over one's body

Govind Persad

Correspondence to

Dr Govind Persad, Sturm College of Law, University of Denver, Denver CO 80210, USA; gpersad@alumni.stanford.edu

Received 30 May 2018
Revised 3 September 2018
Accepted 27 October 2018

ABSTRACT

This paper takes a novel approach to the active bioethical debate over whether advance medical directives have moral authority in dementia cases. Many have assumed that advance directives would lack moral authority if dementia truly produced a complete discontinuity in personal identity, such that the predementia individual is a separate individual from the postdementia individual. I argue that even if dementia were to undermine personal identity, the continuity of the body and the predementia individual's rights over that body can support the moral authority of advance directives. I propose that the predementia individual retains posthumous rights over her body that she acquired through historical embodiment in that body, and further argue that claims grounded in historical embodiment can sometimes override or exclude moral claims grounded in current embodiment. I close by considering how advance directives grounded in historical embodiment might be employed in practice and what they would and would not justify.

INTRODUCTION

Should directives for future treatment, medical and otherwise, be honoured after their author develops dementia?ⁱ This paper offers a novel argument that they should. It contends that individuals have rights over their bodies that persist after the onset of dementia and that these rights can ground the continuing moral authority of advance directives even if we accept an assumption many believe would undermine that authority: that dementia produces a complete discontinuity in personal identity, such that the predementia and postdementia individuals are distinct individuals rather than stages in the same individual's life.

One prominent definition of an advance directive describes it as

a document whereby a person when competent issues more or less specific instructions as to which forms of care or treatment she wishes to have or not to have under certain circumstances, when she is no longer competent to decide.¹

Other definitions include broader statements of principles that should direct medical care, or the nomination of a proxy who can direct treatment on the person's behalf.² Advance directives, whether specific, broad or proxy based, can direct treatment during states of temporary incompetence, like

general anaesthesia, as well as during permanent incompetence, such as severe dementia. They can also direct the treatment of the body—for instance, requesting or refusing organ donation and burial arrangements—even after the person who inhabited that body no longer exists.^{3,4} (While wills can sometimes also direct the disposition of the body, this does not exclude advance directives from being relevant to the disposition of the body.)

Rebecca Dresser has challenged the moral authority of advance directives in dementia cases. On Dresser's view, personal identity comprises psychological continuity and connectedness, and the psychological changes that dementia produces constitute 'the development of a new person' whose present interests—rather than those of her predementia predecessor—should direct care.^{5,6ii} According to Dresser, 'there is no particular reason why the past [ante-dementia] person, as opposed to any other person, should determine the present [post-dementia] person's fate' (pp. 380–381).⁵

That Dresser's conclusion follows from her premises has been almost unanimously accepted. Her critics have instead primarily challenged those premises, defending non-psychological theories of personal identity or arguing that identity-supporting psychological facts survive dementia.ⁱⁱⁱ In contrast, I challenge the validity of Dresser's argument: even if we assume for the sake of argument that dementia breaks the continuity of personal identity, the continuity of the body can support the moral authority of advance directives. *Contra* Dresser, there is a 'particular reason' why the predementia person should have a say in the fate of the *body* that the postdementia individual occupies: she occupied the same body first during her own life.

I begin by proposing that rights over a body can be acquired by *historical* embodiment in that body,

ⁱⁱThe view of personal identity Dresser accepts is original with Parfit.³² The moral authority of advance directives in dementia cases has been challenged in a similar way by Shiffrin¹² and by Jaworska (unpublished data). Shiffrin and Jaworska argue that psychological changes due to dementia, even if they do not destroy personal identity, can be significant enough to undermine the arguments Dworkin and McMahan offer if these arguments base the moral authority of advance directives on psychological considerations. Although I focus on Dresser's argument in this paper, I believe that the alternative, bodily basis for the moral authority of advance directives I propose can also counter Shiffrin's and Jaworska's objections.

ⁱⁱⁱDeGrazia (p. 393, n11)¹⁰ suggests such a critique: 'Even if person B could not remember life as person A, B would probably have many overlapping chains of memory that extend bit by bit to that earlier time'.

ⁱDworkin²⁸ and McMahan.²⁹ see President's Council on Bioethics³⁰ and Levine.³¹



© Author(s) (or their employer(s)) 2018. No commercial re-use. See rights and permissions. Published by BMJ.

To cite: Persad G. *J Med Ethics* Epub ahead of print: [please include Day Month Year]. doi:10.1136/medethics-2018-104971

as well as by current embodiment. Like other rights grounded in historical associations, rights grounded in historical embodiment can endure even after the rightholder ceases to occupy her body and can potentially retain force even if another individual later occupies the same body.^{iv} Granting moral significance to historical embodiment explains, and coheres with, practices concerning burial and organ donation, which presuppose that rights over one's body must be respected posthumously even when doing so affects others. It also can explain why a person has a 'just prior claim' to her own body, even when others later become located within and dependent on this body.^v

I then argue that the predementia person can assert claims to the body based on historical embodiment and that her claims retain moral force even in the presence of competing claims—like those of the post-dementia individual—that are grounded in current embodiment. This result calls Dresser's account into question, since Dresser claims that the predementia person has *no* special moral claims with respect to the postdementia individual. I additionally argue that claims grounded in historical embodiment can—at least sometimes—override or exclude moral claims grounded in current embodiment, by examining analogies between dementia and posthumous pregnancy. I close by considering what sorts of decisions advance directives grounded in historical embodiment would and would not justify in practice.

Two notes on my methodology in this paper. First, I employ—following, among others, Jeff McMahan, David Boonin and Frances Kamm—what might be called a 'preservationist' method that attempts to make preexisting case-based judgments cohere with one another, and with other judgments one might make in hypothetical cases.^{vi} I recognise that this preservationist methodology is itself controversial and do not attempt to offer a foundational argument for it here. I also do not expect the arguments here to be persuasive to someone who rejects the moral legitimacy of the case-based judgments that I regard as cohering with, and mutually reinforcing, the historical embodiment account (for instance, I do not expect them to be persuasive to someone who rejects the existence of posthumous rights). Second, I recognise that some of the conclusions I reach—such as the conclusion that rights grounded in historical embodiment can justify causing the death of a person with full moral status against her will—are difficult to accept.^{vii} Given the lack of attention to the position I defend in the literature, showing that these conclusions have a defensible basis is itself a major step. I also defend the more modest conclusion that rights grounded in historical embodiment can justify honouring advance directives that would not cause the death of a person, either because they would not cause death at all or because they would cause the death of an individual who is not a person.

^{iv}The distinction between historical and non-historical principles of ownership is due to Nozick.³³ Accepting the relevance of the distinction does not require accepting, as Nozick does, the primacy of historical principles over non-historical principles. See Scanlon.³⁴

^vThomson⁷ bases abortion rights on a pregnant woman's 'just prior claim' to the body in which the fetus is located and on which it depends, while granting *arguendo* the assumption that the fetus is a person with full moral status.

^{vi}See McMahan (p. 246).^{29 35}

^{vii}Compare McMahan's discussion of his conclusion that there is no right to defend one's life against an innocent attacker in *The Ethics of Killing* (p. 411).²⁹

RIGHTS OVER BODIES: CONTENT, ACQUISITION AND COMPETING CLAIMS

While the *acquisition* conditions for rights over bodies will be more central in what follows, it is useful to briefly summarise the *content* of these rights. Our rights with respect to our bodies include rights to exclude others from our bodies and to use and dispose of our bodies in various ways, even posthumously.⁸ Our rights over our bodies are also typically regarded as more stringent than our rights over typical forms of property (p. 76).^{8viii} This is true whether rights over the body are treated as property rights: this paper's argument does not presuppose an answer to the much-debated question of whether rights over bodies should be understood as property rights, quasiproperty rights or some other type of rights.

How are rights over bodies acquired? This question is notoriously underexplored (p. 76).^{ix} One tempting proposal is that sensing the external world through a body and controlling its movement—that is, being *embodied* in a given body—generates moral rights to that body: '[a]fter all, your body is the one through whose eyes you see, whose injuries you feel, and whose movements you directly control'. However, moral rights to a body need not automatically track current embodiment.^x We can see this via an example: if someone has a stroke and parts of her body lose feeling, she does not thereby lose her right to those parts. Nor do rights over one's body parts depend on one's need for those parts: otherwise, people would not have special claims to their inessential body parts, like appendixes or hair. I argue that *historical* embodiment, as well as current embodiment, can produce rights to a body. This approach parsimoniously justifies and makes coherent several common moral commitments. Consider, for instance, the belief that an organ donor retains the right to direct removed organs to particular loved ones. Were only current embodiment relevant, it would be difficult to explain why the organ donor continues to have rights over her organs once the organs leave her body. In contrast, the organ donor's rights can be explained if historical embodiment—that is, having been the first person to be embodied in a body and having been embodied in the body for a substantial length of time—generates rights to that body and its parts.

Similarly, historical embodiment effectively explains the view that persons have a posthumous moral right to refuse organ donation and more generally explains the strength we attribute to our posthumous rights over our bodies: we were the first ones embodied in our bodies, and we were embodied in these

^{viii}Smith (p. 76)⁸ and Boonin.²⁰ The distinction is comprehensively challenged in Fabre.³⁶

^{ix}Smith (p. 76)⁸; Kamm¹⁹ also observes that there are 'genuine problems... in determining where someone's body belongs to himself and to no other'.

^xSmith notes the way in which language exacerbates the appearance that one automatically follows from the other: '[I]n everyday conversation, people often talk about some piece of a human body as "belonging" to them. Thus, one hears people say "That's my foot you're standing on", and in philosophical contexts people often talk about an entire body as belonging to them. Thus Descartes states "...I possess a body with which I am very intimately conjoined" . Such talk tends to conflate two kinds of claims that we must keep distinct. On one hand, there is the metaphysical claim that a certain person (ie, psychological entity) has a special metaphysical relationship, usually involving sensation and control, with a given body. On the other hand, there is the moral claim that a certain person has moral rights to the use and enjoyment of a given body. Clearly these two claims are conceptually distinct' (p. 76).⁸

bodies throughout our lives.^{xi} While my argument is unlikely to be compelling to those who reject the existence of posthumous rights in general, or our posthumous rights over our bodies in particular, there is a strong countervailing belief that rights—in particular rights over one's body—can endure after death. Thomas Nagel argues that posthumous rights can be grounded in the relation between living people and events occurring after their deaths, and Joel Feinberg makes a similar argument.^{9,10} Even many who support the compulsory posthumous taking of organs pause at the compulsory taking of entire bodies.^{xii} Furthermore, even if posthumous rights cannot be grounded in the surviving interests of the body's current occupant, there may be a case for adopting a policy of honouring a person's wishes about what will happen after her death, in order to avoid creating a perverse incentive to commit suicide in order to prevent a later occupant from thwarting those wishes.^{xiii}

Historical embodiment can also explain some of the practices Dworkin regards as supporting the view that psychological continuity and personal identity survive dementia. For instance, Dworkin observes that 'People often take steps to guard against ignominy or to secure or protect their reputation after their death, and they think they are acting in their own, not other people's, interests,' and argues that 'People's dread of and preparation for dementia would be inexplicable without [the assumption that personal identity survives dementia] (p. 368)'.¹¹ *Contra* Dworkin, these practices may be explicable and defensible even if identity or psychological connectedness do not survive dementia. We may dread, and prepare for, dementia not because we believe we will survive dementia, but because we care about our bodies and about how the treatment of our bodies will affect our loved ones and projects. Certainly, we often dread and plan for death even though we will not be psychologically connected or identical to our dead bodies: while some might criticise our practices of caring about what happens to our bodies after death as irrational, the above discussion of posthumous rights suggests that the value we attach to our bodies and their treatment can survive death, just as other values can. Thus, I would reverse Seana Shiffrin's proposal that 'it may not be obvious that the temporal range of one's control should extend to encompass the entire span of one's existence as the same person over time' (p. 207)¹²: I believe that the temporal range of our control could extend beyond identity to encompass simple bodily continuity.

Beyond the specific case of the body, arguments for the relevance of history to rights are pervasive in moral and political philosophy. Many believe that individuals can acquire rights by virtue of historical attachments and relationships and that such rights can be strengthened by the long-standing nature of those attachments and relationships.^{13–15} The significance

^{xi} Kamm (p. 221)³⁷ argues that '[o]ne's relation to one's body is, at the very least, regular, intimate, and associated with the person one is. If we take its parts and give them to others (but *not* if we let them rot in the ground), we prevent their use-history's ending with the person. *Their identity as belonging to the person alone is not retained*' (italics in the original).

^{xii} Fabre (pp. 118–123)³⁶ suggests that mandatory donation of certain organs, like the face, could be permissibly refused. See also Kamm who claims that 'the more we see' the person himself in the body part, the more significant it is if its use-history does not end because we take it after death for someone else's use' (p. 222).⁴² We see 'the person himself' most in his own entire body.

^{xiii} Davis at pp. 60–61; Battin.³⁸ Partridge³⁹ and Callahan⁴⁰ reject the idea that persons can be harmed after death but still argue that there are other good reasons to respect the preferences of the deceased.

of historical embodiment may reflect a similar truth where the body is concerned.^{xiv} Even though persons typically are currently embodied in the bodies over which they have rights, it is plausible that they have some rights over these bodies that do not depend on current embodiment alone and that can endure in the absence of current embodiment.

That historical embodiment has moral significance, however, does not yet show that claims grounded in historical embodiment have moral weight—much less overriding force—when competing with claims grounded in current embodiment. Posthumous rights over one's body could simply be extinguished once another individual comes to occupy that body. Rebutting Dresser's argument requires showing that historical embodiment retains some moral weight even when competing claims exist—for instance, in cases where one individual was historically embodied in a body that another now occupies.

In the following sections, I will argue that granting some moral weight to claims of historical embodiment, even in the presence of claims grounded in current embodiment, best explains and coheres with our case-based intuitions. I take the coherence of this intuitive picture to support the plausibility of the underlying principle that historical embodiment can be a source of moral rights.

In what follows, I will assume for the sake of argument—in order to consider the strongest counterarguments possible—that both the historically and the currently embodied individual have full moral status. However, this assumption is contestable in practice. When considered as a separate individual—as Dresser's argument would entail—the postdementia individual has few properties that mark her as a person with full moral status and lacks the potential to have those properties in the future. If the postdementia individual has a lower moral status than the antedementia person, her claims are correspondingly weaker. Those who regard a currently embodied *person's* bodily rights as overriding any claims grounded in historical embodiment may not regard the claims of a currently embodied individual who lacks full moral status as similarly overriding. Even the conclusion that historical embodiment supports advance directives in cases where the predementia and postdementia individuals differ in moral status would deal a substantial blow to Dresser's view and could support the moral authority of advance directives in many cases.

HISTORICAL AND CURRENT EMBODIMENT: THE UNAUTHORIZED TRANSPLANT

One case that can illuminate the relative priority of historical and current embodiment comes from the following vignette of John Perry's. After a tragic accident in which one person, Julia, is run over by a streetcar, and another, Mary Frances, suffers a stroke while witnessing the scene:

^{xiv} One might believe that the property analogy indicates that rights to a body should be assigned to the body's *creator* rather than to the person historically embodied there. Locke,⁴¹ for instance, believed that property rights were acquired by 'mixing labor' with objects and that our bodies were God's 'property' since he created us. A similar claim about property is defended obliquely by Nozick (pp. 174–178).³⁶ Okin⁴² persuasively challenges the 'labor-mixing' view where bodies are concerned, claiming that parents would then own their children. I believe that the historical embodiment view captures much of the Lockean view's plausibility but avoids the problem Okin identifies. Embodiment—historical or current—is the appropriate way to acquire rights over bodies, while creation may be an appropriate way to acquire rights over property.

Julia's healthy brain and wasted body, and Mary Frances' healthy body and wasted brain, were transported to a hospital where a brilliant surgeon, Dr. Matthews, was in residence. He had worked out a procedure for what he called a 'body transplant.' He removed the brain from Julia's head and placed it in Mary Frances', splicing the nerves, and so forth, using techniques not available until quite recently.¹⁶

Perry uses this vignette as an entry point for discussing the *identity* of the resulting individual, but I will use it for a different purpose: to examine who has a *right* to use the body in which Mary Frances was formerly embodied. Imagine that Mary Frances' advance directive explicitly refused the posthumous use of her body for a transplant, but Dr Matthews proceeded regardless.^{xv} Mary Frances still plausibly retains a right over her body, given that she never authorised Dr Matthews' use of the body. Even though Julia may now have also acquired rights over the body by virtue of current embodiment, Mary Frances does not obviously lose *all* moral claims to her body simply because she has ceased to exist and another person is now embodied in that body. The historical embodiment account can explain the reaction that Mary Frances retains some claims to her body even when another person is currently embodied in that body.

Of course, that Mary Frances retains some claims to the body does not settle what should happen when her claims and Julia's conflict. Indeed, some may believe that Mary Frances is all-things-considered entirely barred from affecting the body now that Julia occupies it. Even this view, however, is compatible with Mary Frances retaining strong moral claims to the body. These claims can generate a 'moral residue' that would not be present where Mary Frances was an unrelated person who had never occupied the body. For instance, they can suggest that Mary Frances is owed compensation for the use of her body. And even defeated claims, or claims to compensation, would undermine Dresser's argument that the antedementia individual has no more of a claim to affect the postdementia individual than an unrelated person would.

One disanalogy between the unauthorised body transplant and the dementia case is that the former involves an unauthorised actor, Dr Matthews, while the latter does not. That the postdementia individual came to occupy the body via a natural process rather than via human agency might strengthen her claim to the body.^{xvi} However, rights grounded in historical facts are retained even when nature, rather than injustice, is responsible for a deprivation: a house's dead owner, for instance, plausibly retains some claim to his property whether he was killed by inclement weather or an unjust army, and even if others come to occupy the house during his enforced absence.^{xvii}

^{xv} Perry says nothing about Mary Frances' consent, or lack thereof. In the vignette, Mary Frances' husband protests the transplant, apparently due to a belief that the embodied person *was* Mary Frances. He could, however, instead have argued that his loved one's body should not have been used without her consent.

^{xvi} Kamm considers this idea in *Creation and Abortion* (pp. 99–101).¹⁹

^{xvii} For this judgment in the case of a living owner, see Kamm (p. 47)¹⁹: 'One simply has a right not to have someone on the body or property to which one is entitled, even if the wind put them there'. Kamm believes that this entitlement can sometimes justify harming or killing an innocent person if doing so is necessary to evict them, as does Thomson.⁴³ Against this view, see McMahan (pp. 398–418).²⁹

ADVANCE REFUSALS OF LIFE SUPPORT: DEMENTIA AND POSTHUMOUS PREGNANCY

The case of Mary Frances indicates that historical embodiment may retain moral significance even in the presence of another's current embodiment. Even for those who deny that historical embodiment has *greater* or *overriding* moral force, the case indicates that historical embodiment continues to exert some moral pull. It should not be surprising that historical embodiment continues to have moral relevance even in the presence of current embodiment when we consider the analogy to property rights. Historical dispossession continues to cast a moral shadow over property, even if the new occupants gained possession in an innocent way. This moral shadow is often enough to justify reparations and can sometimes even be significant enough to justify reclaiming the property from its later occupants.^{xviii}

However, the comparative strength of claims grounded in historical embodiment and those grounded in current embodiment remains an open question. I will first discuss the hardest case for my view: can the predementia individual's rights over her body justify actions affecting that body in a way that will lead to the postdementia individual's death—for instance, discontinuing artificial ventilation? Advance directives refusing life support after the onset of dementia are commonly discussed both in the philosophical literature and in practice, so answering this question is important.

I will explore the question of whether bodily rights grounded in historical embodiment can justify discontinuing life support by analogy to a similar problem in the morality of abortion. Judith Jarvis Thomson asserts that 'a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body – even if one needs it for life itself (p. 56)'.^{7,xix} Thomson famously argues that a pregnant woman may discontinue support to a fetus she is gestating, even if we grant the assumption that the fetus is a person with full moral status. I will argue that the predementia individual may similarly refuse to provide bodily support to the post-dementia individual even when this will lead to the postdementia individual's death.

Of course, the abortion and dementia cases are disanalogous in at least two important ways. In the abortion case, the pregnant woman exists and is currently embodied in her body, whereas the predementia individual no longer exists and therefore is not currently embodied in any body. Furthermore, the postdementia individual in the dementia case is much more robustly embodied than the fetus in the abortion case: a fetus does not exert agential control over the woman's body, nor does it sense directly through the woman's body. Notwithstanding these disanalogies, I will argue by examining cases that the pregnant woman's moral rights over her body:

1. Would be strong enough to override the fetus's claims even if the fetus were robustly embodied in the body.
2. Remain strong enough to override a fetus's claims even after the woman's death.

^{xviii} The proper resolution of situations involving innocent acquisition of goods over which others retain moral rights is discussed throughout moral and political philosophy. See, for example, Waldron⁴⁴ and Butt.⁴⁵

^{xix} Thomson supports this claim by proposing a thought-experiment in which a violinist with a life-threatening kidney ailment depends for life on a person to whose circulatory system he has been physically connected. According to Thomson, disconnection is permissible even if it would lead to the violinist's death.

Would the pregnant woman's moral rights remain strong enough to override the fetus's claims even if we combine these two disanalogies—that is, if we consider a case where the fetus is robustly embodied *and* the woman is dead? I will argue that they would. If I am right, this suggests that the predementia individual's rights over her body could similarly justify an advance directive disconnecting that body from life support, even when honouring the directive would lead to the postdementia individual's death.

I recognise that the analogy between dementia and posthumous pregnancy is an imperfect one and that it might appear more attractive to simply argue for the relevance of historical embodiment without reference to analogies. However, the literature on the right to discontinue support for a fetus is exceptionally rich and well developed and contains strong support for the claim that a person previously embodied in a body has the right to have support discontinued for an individual who later becomes embodied in that body. It is also methodologically appealing to use a relationship (pregnancy) about which well developed, even if controversial, judgments exist to explore the proper resolution of a case—dementia leading to discontinuity in personal identity—about which our judgments are less developed.^{xx} Another virtue of examining this case is that it addresses the objection that Mary Frances' rights in the unauthorised body transplant case derive from her being the same individual as Julia, rather than from historical embodiment.^{xxi} In the posthumous pregnancy case, the woman and fetus are clearly not the same individual, which means that the woman's posthumous rights can more clearly be identified as stemming from historical embodiment.

Fetal embodiment

Some argue that fetuses are embodied in the bodies of the women gestating them and thereby have moral rights to those bodies.^{17 18xxii} However, appealing to historical embodiment can support the claim that pregnant women's rights should take precedence over those of fetuses, even if we grant the assumption that both are embodied in the same body. Frances Kamm proposes a thought experiment that illustrates the moral force of historical embodiment:

[S]uppose that new people come into existence simply by budding, as persons, inside the bodies of already existing young people and that these young people have no control over whether or when this happens. Furthermore, the new people (Buds) come into existence simply by taking over the bodies of already existing people, who die in the process, losing out on further good life. This is the 'normal' course of nature. If the already existing person refused to die, would it be permissible for him to claim that the body was his, because he was its first 'occupant'?... [M]y sense is, it is not [the] Bud's body, because someone else is its first occupant. (p. 99–101)^{19xxiii}

Kamm also considers a variation where the new person can exert agential control over the body and feel pain through it

^{xx}The choice to employ the posthumous pregnancy case as an analogy does what MacKinnon⁴⁶ calls for, by using the pregnancy relationship as a central moral example against which others are compared.

^{xxi}I am grateful to an anonymous referee for this objection.

^{xxii}Smith (p. 78–84)⁸ rejects the idea that the fetus is currently embodied in the woman's body.

^{xxiii}Kamm (pp. 99–101).¹⁹ Kamm presumably means that it is 'not ([he] Bud's body' in the moral sense, rather than the metaphysical sense.

and argues that the first occupant still retains moral rights to the body in this case (p. 99–101).¹⁹

It is important to acknowledge that mere temporal priority ('first embodiment') may not be a sufficient basis for moral rights.^{xxiv} As Kamm points out, however, historical embodiment is more than simple temporal priority: 'The organs inside [the pregnant woman's] body were provided to her by nature *well before* the fetus began to make use of them'. This echoes arguments elsewhere in moral theory that the length and closeness of one's historical attachments can determine whether those attachments give rise to rights. The pregnant woman's historical embodiment in her body supports the claim that abortion is permissible even if the fetus is also currently embodied in that body (p. 246).²⁰ Similarly, the predementia individual's historical embodiment in the body is a factor that strengthens the case that she has a right to direct the discontinuation of support for a postdementia individual who later becomes embodied in that body.

Posthumous pregnancy

Technological advances have enabled pregnant women to gestate fetuses to term even after brain death.²¹ In such a case, the pregnant woman's rights over her body support honouring an advance directive refusing life support, even if doing so leads to the death of the fetus. Although death puts a pregnant woman beyond the reach of experiential bodily harm, it does not cause her to lose *all* moral rights: she retains rights grounded in historical embodiment. While using the body of a dead woman against her will to gestate a fetus may not be *as* wrong as using the body of a living woman against her will to gestate a fetus, both seriously violate the woman's rights. Analogously, many attitudes about posthumous sexual violations do not judge them as substantially less wrong than the violation of a living individual who is comatose or asleep.²² Similarly, using the body previously occupied by the predementia individual against her will to support the postdementia individual could plausibly be understood as a rights violation.

There are also disanalogies between posthumous pregnancy and ordinary pregnancy that strengthen—rather than weaken—the case for honouring advance directives. First, a dead pregnant woman may have all of her major posthumous interests—not having tubes inserted into her body against her expressed preferences, not being treated as a mere 'fetal container', and not burdening her family—frustrated if her body is conscripted to intimately support a fetus. In contrast, while a living woman suffers much more experiential inconvenience from pregnancy, she also typically remains able to pursue other projects and goals.^{23xxv} That the dead woman is 'worse off', in a sense, than the living woman may strengthen her claims.^{xxvi} Second,

^{xxiv}Himma makes this complaint: 'Suppose that Joe came into the world without Tom and lived as an independent person for an hour. After an hour, Tom sprouted, so to speak, from that part of Joe's body to which Tom was thereafter joined. It hardly seems plausible to think that the difference between coming into the world together and coming into the world one hour apart could possibly make any difference with respect to whether Tom needs express or implied consent from Joe to use his body'. Himma then considers a reply: 'In the case of pregnancy, of course, the mother has lived a life, made plans, and developed certain expectations about the future'. This seems to grant the relevance of historical embodiment.

^{xxv}See also Fischer.⁴⁷

^{xxvi}The pregnant woman's subjective interests may also support her claims: Thomson has argued that if a person values something highly 'for no morally suspect reason', we may not take

removing life support from the dead pregnant woman, unlike terminating a living person's pregnancy, does not cause affirmative physical harm to the fetus; it does not kill the fetus, but rather lets it die. Interestingly, some who typically oppose abortion conclude—perhaps for these reasons—that disconnecting life support in posthumous pregnancy is permissible even if it leads to a fetus's death.

These two factors—that supporting the new occupant may defeat all the prior occupant's interests, and that discontinuing support involves letting die rather than killing—are equally present in the dementia case and similarly support discontinuing support there.

In sum, Thomson's argument for the permissibility of abortion retains force in cases of posthumous pregnancy and extends by analogy to the dementia case. As Daniel Sperling argues, if 'the woman had given explicit instructions about what should be done in case of maternal brain death...physicians are obliged to follow her instructions, regardless of the gestational age of the fetus (p. 498)'.²¹ Likewise, the predementia individual's posthumous rights over her body are plausibly sufficient to justify discontinuing life support for the postdementia individual.

Posthumous, non-embodied claims versus living, embodied claims

Can one person's posthumous rights over a body justify ending the life of another person with full moral status who is robustly currently embodied in that body, in either the dementia case or the case of posthumous pregnancy? I agree with Kamm's claim that the first occupant retains moral rights over her body even when the later occupant is fully and robustly embodied and believe that such rights can be strong enough to justify discontinuing support (p. 101).¹⁹ I also do not believe death erodes moral rights over one's body enough to undermine one's rights grounded in historical embodiment.

I recognise that some might worry at this point that our responses to the cases I have discussed above, such as the posthumous pregnancy, sexual violation, unauthorised body transplant and organ donation cases, are better explained and justified not by reference to historical embodiment but instead by reference to a plurality of other, potentially inconsistent values. These might include sex equality (in the posthumous pregnancy case), disgust (in the sexual violation case) and the desire to preserve public trust (in the body transplant and organ donation cases). To some extent, this simply represents a methodological disagreement with an approach like mine that relies on case-based judgments. Some, like Joshua Greene, have argued that rather than trying to use case-based judgments as support for a principle, like the relevance of historical embodiment, that 'expresses some plausible value or conception of the person or relations between persons', we should recognise that our case-based judgments are arbitrary post hoc rationalisations of non-reflective emotional responses.²⁴ Unlike Greene, I believe the task of identifying compelling principles that systematise our case-based responses is a worthwhile one. My claim is not that historical embodiment is the only factor explaining our judgments but that it is one plausible explanation that offers a coherent account of our

it from her even in order to save others (p. 58),⁷ although she seems to retreat from this claim in *The Realm of Rights*. An advance directive explicitly refusing artificial support for posthumous pregnancy arguably places just such a high subjective value on posthumous bodily control. Even supporters of compulsory cadaveric organ donation, such as Fabre, grant the force of genuine conscientious objections.

moral practices and that it has attractiveness independent from its capacity to unify our case-based judgments. While I recognise that there are other important factors that shape our case-based responses, I believe that historical embodiment represents a major commonality across them.

I also grant that the combination of the two disanalogies between Thomson's original abortion case and the dementia case (that the currently embodied person is robustly embodied and that the historically embodied person is asserting a posthumous right) could have a synergistic moral effect that would further weaken the force of the predementia individual's claims.²⁵ There are also disanalogies between the dementia case and the abortion case, however, that *strengthen* the case for discontinuing support in the dementia case. First, dementia rarely results from a voluntary act, whereas pregnancy often does.^{xxvii} Second, pregnancy is shorter and finite, while dementia can last for a long and indefinite period, particularly if the body is on artificial support. Third, the postdementia individual lacks the potential for future personhood that a typical fetus has.^{xxviii}

In sum, although it may be wrenching to deny an individual who is currently embodied in a body the use of that body when she needs it to remain alive, withdrawing life support can be morally justified when another person has a prior right to the body.^{xxix} I grant, however, that the argument that historical embodiment should take precedence over current embodiment is most controversial when honouring an advance directive grounded in historical embodiment requires disconnecting the postdementia individual from life support. In the next subsection, I turn to situations where honouring the advance directive can be done without life-and-death implications: here, I believe the argument faces less opposition.

ADVANCE DIRECTIVES IN EVERYDAY CASES

Where honouring an advance directive does not entail the postdementia individual's death, the case for doing so becomes stronger. Even if the currently embodied person has a moral claim to use the body to preserve her life, this does not entail a right to use that body to pursue other ends. Analogously, even if someone at risk of hypothermia is morally permitted to enter an unoccupied home to warm herself, no-one believes that the endangered person, once inside, acquires more extensive rights against the home's owner, such as rights to remodel the home or rent rooms inside to others.

^{xxvii} Kamm identifies this factor when discussing whether the woman, as first occupant, may refuse support to the fetus: 'In particular, the fact that the fetus is created because of what the woman does may make her resistance less appropriate morally' (p. 101).¹⁹ Two of the strongest arguments against Thomson's analogy between the violinist case and pregnancy appeal to pregnancy's voluntariness (pp. 148–88).²⁰

^{xxviii} See Harman (pp. 173–198)⁴⁸ and Stone (pp. 815–830).⁴⁹ Even if the postdementia individual will continue to be a person for some time, she is on an inexorably downward trajectory towards an eventual loss of personhood.

^{xxix} Kamm (p. 277)¹⁹ suggests something similar where individual body parts are concerned: 'The fact that we may not take someone's organs that he did not receive from us does not always mean that it would be morally wrong to take back the organs we had given him'. While Kamm only considers cases where body parts are reclaimed in order to be donated to others, it is not unreasonable to think that body parts could be justifiably reclaimed in order to rectify rights violations. Although Kamm grants that 'many would object to a doctor removing an organ from its first recipient when that person could continue to live', she believes that we may take the organs back 'even if [the recipient] will die as a result of us doing so' (p. 277).¹⁹

How far can rights grounded in historical embodiment support the predementia individual's claim to affect the postdementia individual's life? The antedementia person should only retain, at most, all of the rights that she would have over her body if it were in a permanent coma: she may not *take advantage* of the fact that the postdementia individual occupies the body. Her right is over the body, not over the postdementia individual herself.^{xxx} For example, an advance directive authorising another person to have sex with the body occupied by postdementia individual would lack moral force, since it would take advantage of the postdementia individual's existence in the body. In contrast, an advance directive refusing to have the body moved to a different town would have greater moral force, since such a directive gains nothing from the postdementia individual's existence in the body. Similarly, after the death of the postdementia individual, the predementia individual's advance directive should govern the disposition of the body's original organs, but not the disposition of any new additions to the body made by the postdementia individual. Note, also, that the postdementia individual still retains rights against bodily trespass by persons other than the antedementia person.^{xxxi}

That the predementia individual's right is only over the body, not over the postdementia individual, raises the question of how to evaluate situations where the predementia individual's *goal* in exercising rights grounded in historical embodiment is explicitly that of affecting how the postdementia individual's life goes. These exercises of rights may be motivated, for instance, by the belief that life with dementia is inherently degrading or by the belief that the predementia individual and the postdementia individual are the same. The former belief might legitimately be criticised as biased against individuals with dementia and the latter—given the assumption that Dresser's premises are correct—might legitimately be criticised as metaphysically mistaken. Yet, if the predementia person genuinely does have claims grounded in historical embodiment, I argue—following Thomson, Boonin and others—that any objections to the motivations underlying her exercise of her rights might justify a negative evaluation of her moral character or of her rational consistency but do not justify limiting the exercise of her rights.

Recognising that a predementia individual's bodily rights survive the onset of dementia can support the incorporation of antedementia commitments into caregiving decisions. Many real-life challenges in dementia care involve caretakers deciding whether to prevent the postdementia individual from engaging in activities, such as pursuing sexual relationships with new partners or consuming religiously prohibited food that would undermine central bodily interests of the antedementia person.^{xxxii} Restricting pursuits that would undermine the antedementia individual's interests is arguably permissible, especially when doing so would not violate the

postdementia person's right to life, take advantage of her presence within the body, nor even completely deprive her of autonomy.

CONCLUSION

Dresser's discontinuous-identity objection to the moral authority of advance directives attempts to undermine the moral authority of advance directives by moving advance directives' effects from the *intrapersonal* realm into the *interpersonal* realm. However, while assuming that dementia undermines personal identity makes the postdementia individual a separate being with her own moral claims, this very separateness removes the postdementia individual's moral claim to what the predementia individual possessed. Buchanan and Brock identify this problem well when they worry that setting a high threshold for the psychological continuity required for personal identity

[W]ould result in the 'births' of large numbers of new persons who would, as it were, spring full-blown into the world and who would not, strictly speaking, be the sons, daughters, husbands, wives, or friends of anyone. Such 'new persons' would have no financial assets (nor debts), nor would any individual or family be responsible for them... The price for setting the threshold of psychological continuity high is that doing so enormously complicates and magnifies the problem of intergenerational justice. (p. 177)³

My account extends Buchanan and Brock's criticism, pointing out that these new individuals would lack finances and family support and exclusive rights to the bodies they occupy. While I have made the case that the antedementia individual has a very broad permission to control the body, even those who disagree should reject Dresser's assertion that the antedementia person has *no claim* at all to affect the postdementia individual.

In closing, my argument for considering the moral force of historical embodiment does not cast the postdementia individual as an unjust actor. Rather, I argue for considering the moral costs produced by her location within another's body. Here, the analogy to unwanted pregnancy is again relevant:

... the complaint here is not with the fetus, it is with the state. The complaint is with the idea of forcing a woman to be in a state of physical intimacy with and occupation by this unwitting entity. For, unwitting or not, it still intertwines and intrudes on her body; and whatever the state's beneficent motives for protecting the interests of the fetus, it matters that the method used for that protection involves forcing others to have another entity live inside them.²⁶

The same is true for using the antedementia person's body against her will to support the postdementia individual.²⁷ Recognising the moral significance of persons' rights over their bodies can allow a predementia individual and her caregivers to be assured that her central bodily interests will be protected postdementia. Ultimately, being able to shape the terms of one's openness to the changes dementia brings is worlds apart from having those changes forced—and enforced—on one's own body.

Twitter @GovindPersad

Acknowledgements Thanks to Agnieszka Jaworska, Collin Anthony, Theresa Berens, Daniel Halliday, Joseph Millum, Julie Tannenbaum, Margaret Little, Connie Rosati, David Boonin, Jeff McMahan, Rebecca Dresser, Colleen Gallagher, Daryl Pullman, Paul Kelleher, Eric Vogelstein, Howard Nye, Gerard Vong, Andria Bianchi, Katy Fulfer, Patricia Marino and audiences at the National Institutes of Health and the University of Waterloo for helpful discussion. A much earlier version of the paper was presented at the Rocky Mountain Ethics Congress and posted online for discussion there; thanks to Eric Chwang for his insightful comments on that occasion and to the audience for their discussion. Thanks also to two anonymous referees at the Journal of Medical Ethics for their detailed comments.

^{xxx}The definition of 'body-ownership' I offer here is intended to be considerably weaker than, and to contrast with, Cohen's influential definition of *self-ownership* in his *Self-Ownership, Freedom, and Equality*: 'According to the thesis of self-ownership, each person possesses over himself, as a matter of moral right, all those rights that a slaveholder has over a complete chattel slave as a matter of legal right, and he is entitled, morally speaking, to dispose over himself in the way that a slaveholder is entitled, legally speaking, to dispose over his slave' (p. 67).⁵⁰ This refinement helps answer the concerns about the 'enslavement' of the postdementia individual raised by Shiffrin and by Buchanan and Brock (pp. 157–158).³

^{xxxi}See Boonin (pp. 278–279),²⁰ who observes that a fetus retains rights against everyone except the woman gestating it even if Thomson's argument is accepted.

^{xxxii}These examples are inspired by cases from Jaworska (unpublished data).

Contributors I am the sole author of this manuscript.

Funding The authors have not declared a specific grant for this research from any funding agency in the public, commercial or not-for-profit sectors.

Competing interests None declared.

Patient consent Not required.

Ethics approval This article was not based on human subjects research.

Provenance and peer review Not commissioned; externally peer reviewed.

REFERENCES

- 1 Buchanan A. Advance directives and the personal identity problem. *Philos Public Aff* 1988;17:277.
- 2 Brett AS. Limitations of listing specific medical interventions in advance directives. *JAMA* 1991;266:825–8.
- 3 Buchanan A, Brock D. *Deciding for others: the ethics of surrogate decision making*. New York: Cambridge University Press, 1989:164–7.
- 4 Hernandez T. The property of death. *University of Pittsburgh Law Review* 1999;60:971–1027.
- 5 Dresser R. Life, death, and incompetent patients: conceptual infirmities and hidden values in the law. *Ariz Law Rev* 1986;28:373–405.
- 6 Dresser R. Dworkin on dementia. Elegant theory, questionable policy. *Hastings Cent Rep* 1995;25:32–8.
- 7 Thomson JJ. *A defense of abortion: Philosophy and Public Affairs*, 1971:47–66.
- 8 Smith HM. Whose body is it, anyway? *Philosophical Perspectives* 1992;6:73–6.
- 9 Blustein J. Choosing for others as continuing a life story: the problem of personal identity revisited. *J Law Med Ethics* 1999;27:20–31.
- 10 DeGrazia D. Advance directives, dementia, and ‘the someone else problem’. *Bioethics* 1999;13:373–91.
- 11 Dworkin R. Reply to Shiffrin. Burley J, ed. *Dworkin and his critics*. Oxford: Blackwell, 2004:367–8.
- 12 Shiffrin S. Autonomy, beneficence, and the permanently demented. Burley J, ed. *Dworkin and his critics*. Oxford: Blackwell, 2004:196–217.
- 13 Simmons AJ. Historical rights and fair shares. *Law Philos* 1995;14:149–84.
- 14 Tadros V. The persistence of the right of return. *Politics, Philosophy & Economics* 2017;16:375–99.
- 15 Munzer S. *A theory of property*. Cambridge, UK: Cambridge University Press, 1990.
- 16 Perry J. *A dialogue on personal identity and immortality*. Indianapolis: Hackett, 1978:38.
- 17 Wicclair MR. The abortion controversy and the claim that this body is mine. *Soc Theory Pract* 1981;7:337–46.
- 18 Himma KE. Thomson’s violinist and conjoined twins. *Camb Q Healthc Ethics* 1999;8:428–39.
- 19 Kamm F. *Creation and abortion*. New York: Oxford University Press, 1992.
- 20 Boonin D. *A defense of abortion*. New York: Cambridge University Press, 2003:249–54.
- 21 Sperling D. Maternal brain death. *Am J Law Med* 2004;30:453–500.
- 22 Nussbaum M. *Hiding from humanity: disgust, shame, and the law*. Princeton: Princeton University Press, 2004:156.
- 23 Feinberg J. Abortion. Feinberg J, ed. *Freedom and fulfillment: philosophical essays*. Princeton: Princeton University Press, 1992:67.
- 24 Greene J. The secret joke of Kant’s soul. Sinnott-Armstrong W, ed. *Moral psychology, vol. 3: the neuroscience of morality: emotion, disease, and development*. Cambridge, MA: MIT Press, 2007:35.
- 25 Kagan S. The additive fallacy. *Ethics* 1988;99:5–31.
- 26 Little MO. Abortion, intimacy, and the duty to gestate. *Ethical Theory Moral Pract* 1999;2:295–312.
- 27 Davis D. Help! My body is being invaded by an alien!. *Am J Bioeth* 2007;7:60–1.
- 28 Dworkin R. *Life’s dominion*. New York: Vintage, 1994:218–41.
- 29 McMahan J. *The ethics of killing*. Oxford: Oxford University Press, 2002:493–503.
- 30 President’s Council on Bioethics. *Taking care: ethical caregiving in our aging society*. Washington, DC: President’s Council on Bioethics, 2005.
- 31 Levine C. The President’s council on autonomy: never mind!. *Hastings Cent Rep* 2006;36:46–7.
- 32 Parfit D. *Reasons and persons*. Clarendon Press: Oxford, 1984.
- 33 Nozick R. *Anarchy, state, and Utopia*. New York: Basic Books, 1974:152–60.
- 34 Scanlon TM. Nozick on rights, liberty, and property. *Philosophy and Public Affairs* 1976;6:3–25.
- 35 Kamm F. *Intricate ethics*. Oxford: Oxford University Press, 2007.
- 36 Fabre C. *Whose body is it, anyway? Justice and the integrity of the person*. Oxford: Oxford University Press, 2006.
- 37 Kamm F. *Mortality, volume I: death and whom to save from it*. New York: Oxford University Press, 1993:221.
- 38 Battin M. *The least worst death*. Oxford: Oxford University Press, 1994:160.
- 39 Partridge E. Posthumous interests and posthumous respect. *Ethics* 1981;91:243–64.
- 40 Callahan JC. On harming the dead. *Ethics* 1987;97:341–52.
- 41 Locke J. Shapiro I, *Two treatises of government*. New Haven: Yale University Press, 2003.
- 42 Okin S. *Justice, gender, and the family*. New York: Basic Books, 1989:75–85.
- 43 Thomson J. Self-defense. *Philosophy and Public Affairs* 1991;20:283–310.
- 44 Waldron J. Superseding historical injustice. *Ethics* 1992;105:4–28.
- 45 Butt D. On benefiting from injustice. *Can J Philos* 2007;37:129–52.
- 46 MacKinnon CA. Reflections on sex equality under law. *Yale Law J* 1991;100:1281–328.
- 47 Fischer JM. Abortion and self-determination. *J Soc Philos* 1991;22:5–11.
- 48 Harman E. The potentiality problem. *Philos Stud* 2003;114:173–98.
- 49 STONE JIM. Why potentiality matters. *Can J Philos* 1987;17:815–29.
- 50 Cohen GA. *Self-ownership, freedom, and equality*. New York: Cambridge University Press, 1995.