

AUTHORITY WITHOUT IDENTITY: DEFENDING ADVANCE DIRECTIVES VIA POSTHUMOUS RIGHTS OVER ONE'S BODY¹

INTRODUCTION

Do directives for future treatment, medical and otherwise, retain moral authority after their author becomes demented? Recent philosophical and policy discussions of this question have largely ignored the moral rights persons have over their bodies², even though the history of advance medical decisionmaking begins with the assertion that "every human being of adult years and sound mind has a right to determine what shall be done with his own body."³ In what follows, I will argue that persons' rights over their bodies can ground the continuing moral authority of medical and other directives after the onset of dementia, even if we accept an assumption many believe would undermine the post-dementia moral authority of such directives: that dementia produces a complete discontinuity in personal identity, such that the ante-dementia individual is a separate individual from the post-dementia individual.

Future-directed requests and refusals are commonly formalized in the form of an *advance directive*,

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.⁴

Advance directives can direct treatment both during states of temporary incompetence – e.g. surgical

¹ [Acknowledgements removed for review].

² The two most prominent recent discussions are Ronald Dworkin, *Life's Dominion* (New York: Vintage, 1994): 218-241, and Jeff McMahan, *The Ethics of Killing* (Oxford: Oxford UP, 2002): 493-503. In the policy arena, see President's Council on Bioethics, *Taking Care: Ethical Caregiving in Our Aging Society*. Washington, DC: President's Council on Bioethics, 2005, and Carol Levine, "The President's Council on Autonomy: Never Mind!" *Hastings Center Report* 36.3 (2006): 46-47.

³ Justice Benjamin Cardozo, in *Schloendorff v. Society of New York Hospital*. 211 N.Y. 125, 105 N.E. 92 (1914), qtd. in Barbara Brown, "The history of advance directives: a literature review." *Journal of Gerontological Nursing* 29.9 (2003): 4.

⁴ Allen Buchanan, "Advance Directives and the Personal Identity Problem," *Philosophy and Public Affairs* 17.4 (1988): 277. Advance directives can additionally nominate a proxy who can direct treatment on the person's behalf.

anesthesia – and during permanent incompetence, such as that caused by severe dementia. They can also direct the treatment of the body -- requesting or refusing organ donation and burial arrangements – even after the person herself no longer exists.⁵

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 dementia produces constitute "the development of a new person" whose present interests should direct care.⁶ 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."⁷

That Dresser's conclusion follows from her premises has been almost unanimously accepted.⁸ Her critics have instead primarily challenged the premises themselves, proposing non-psychological theories of personal identity⁹ or arguing that identity-supporting psychological facts

⁵ Buchanan and Brock, 98-100 and 164-67; Tanya Hernandez, "The Property of Death," *University of Pittsburgh Law Review* 60 (1999): 971-1027.

⁶ Rebecca Dresser, "Life, Death, and Incompetent Patients: Conceptual Infirmities and Hidden Values in the Law," *Arizona Law Review* 28.3 (1986): 373-405, and "Dworkin on Dementia: Elegant Theory, Questionable Policy," *Hastings Center Report* 25.6 (1995): 32-38. The view of personal identity Dresser accepts is original with Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984). The moral authority of advance directives in dementia cases has been challenged in a similar way by Seana Shiffrin, "Autonomy, Beneficence, and the Permanently Demented," in Justine Burley, ed., *Dworkin and His Critics* (Oxford: Blackwell, 2004): 196-217, and by Agnieszka Jaworska, "Vanishing Persons and the Authority of the Former Self: Dilemmas in Alzheimer's Disease," paper presented at the American Philosophical Association Pacific Division Conference, San Francisco, CA, January 2007. 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, at least in part, Shiffrin's and Jaworska's objections.

⁷ Dresser, 380-81.

⁸ See Dworkin, "Philosophical Issues Concerning the Rights of Patients Suffering Serious Permanent Dementia," report for the U.S. Congress Office of Technology Assessment (1987): 7 ("If...identity does not survive dementia, many of these...arguments and conclusions would have to be abandoned"); Shiffrin, 207 ("If the demented person is not the same person who wrote the advance directive, then there is no reason--autonomy-centered or otherwise--to respect the advance directive. The power of autonomous decision does not extend this far."); Jennifer Radden, "Second Thoughts: Revoking Decisions Over One's Own Future," *Philosophy and Phenomenological Research* 54.4 (1994): 787; and Eric Rakowski, "The Sanctity of Human Life," *Yale Law Journal* 103.7 (1994): 2054.

⁹ Jeff McMahan argues for an "embodied mind" account of personal identity, on which identity is preserved as long as there is continuity of the same capacity for consciousness (66-69). On this view, dementia, since it does not

survive dementia.¹⁰ In contrast, I will challenge the validity of Dresser's argument: even if dementia proves to undermine personal identity, the continuity of the body can support the moral authority of advance directives. *Contra* Dresser, there is a "particular reason" why the ante-dementia person should have a say in the fate of the *body* that the post-dementia individual occupies: this body is the same body that the ante-dementia person occupied during life.¹¹ The persistence of disagreement about the criteria of personal identity gives this critique particular practical appeal. Additionally, this critique could combine with the arguments of Dresser's other critics to suggest that advance directives retain moral authority whether or not personal identity has a psychological basis.

I build on the observation that the pre-dementia individual occupied the same body that the post-dementia individual now occupies by proposing that rights over bodies can be acquired by *historical* embodiment in a body, as well as by current embodiment in that body. Since historical embodiment is a backward-looking fact, rights grounded in historical embodiment can endure even after the rightholder ceases to exist and therefore to occupy her body, and can potentially retain

destroy the capacity for consciousness, cannot undermine personal identity, though it can undermine psychological connectedness. Dworkin argues that we should simply accept that personal identity survives dementia as a common-sense intuition ("Philosophical Issues," 101, and his reply to Shiffrin in *Dworkin and his Critics*, 367-68). Dworkin's view has some affinity with those of two others: Jeffrey Blustein, "Choosing for Others as Continuing a Life Story: The Problem of Personal Identity Revisited," *Journal of Law, Medicine, and Ethics* 27.1 (1999): 1073-110, who proposes a "narrative" view of identity on which a person's identification with a later individual counts as his being identical to that individual, and David DeGrazia, "Advance Directives, Dementia, and 'The Someone Else Problem,'" *Bioethics* 13.5 (1999): 373-391, who argues that Dresser's argument can be resisted if personal identity depends on bodily rather than psychological continuity.

¹⁰ DeGrazia 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" (393n11). Support for DeGrazia's conjecture can be found in the literature on dementia, e.g. Stanley B. Klein, Leda Cosmides, and Kristi A. Costabile, "Preserved knowledge of self in a case of Alzheimer's dementia," *Social Cognition* 21.2 (2003): 157-165. However, dementia does seem to undermine other measures of identity: cf. Donna Rose Addis and Lynette J. Tippett, "Memory of Myself: Autobiographical Memory and Identity in Alzheimer's Disease," *Memory* 12.1 (2004): 56-74.

¹¹ Note that this proposal is very different from holding that *personal identity* follows from bodily continuity, which would imply that the ante-dementia individual has direct authority over the post-dementia *individual* herself, since the ante- and post- dementia individuals would merely be different stages of the same person. This distinction separates my view from Dworkin's, since Dworkin grounds the moral authority of advance directives in autonomy (i.e. rights over one's *self*) rather than in rights over one's *body*. This distinction is noted by Buchanan, who describes autonomy-based directives as grounded in "self-determination" and body-based directives as grounded in the "right of disposal" over one's body.

force even if another individual later occupies the same body.¹² Granting moral significance to historical embodiment can explain prevailing practices concerning burial and organ donation, which presuppose that rights over one's body must be respected posthumously even when respecting them significantly affects others.¹³ It also can in part explain why a person has a "just prior claim" to her own body, even when others later become located within and dependent upon this body.¹⁴

I then argue that the ante-dementia person can assert rights to the body based on historical embodiment, and that these rights can continue to exert moral force even when claims grounded in current embodiment, such as those of the post-dementia individual, are also present. This result would call Dresser's account into question, since she claims that the ante-dementia person has *no* special moral claims with respect to the post-dementia individual. I further argue that claims grounded in historical embodiment can at least 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.

RIGHTS OVER BODIES: CONTENT, ACQUISITION, AND COMPETING CLAIMS

While the *acquisition* conditions for rights over bodies will be more central to what follows, it is useful to briefly summarize 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

¹² The distinction between historical and non-historical principles of ownership is due to Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974): 152-160. Accepting the relevance of the distinction does not require accepting, as Nozick does, the primacy of historical principles over non-historical principles: see T.M. Scanlon, "Nozick on Rights, Liberty, and Property," *Philosophy and Public Affairs* 6.1 (1976): 3-25, and David Schmidtz, *Elements of Justice* (New York: Cambridge UP, 2006): 198-207.

¹³ See, for instance, James Muyskens, "An Alternative Policy for Obtaining Cadaver Organs for Transplantation," *Philosophy and Public Affairs* 8.1 (1978): 95, and McMahan, 448.

¹⁴ Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1.1 (1971): 47-66, 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.

ways, even posthumously.¹⁵ Our rights over our bodies are also intuitively more stringent than our rights over ordinary property.¹⁶

How are rights over bodies acquired? This question is notoriously underexplored.¹⁷ 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 do not automatically track current embodiment exclusively.¹⁸ I will argue that *historical* embodiment, as well as current embodiment, can produce rights to a body.

Why might we believe that rights to bodies can be acquired via historical embodiment? For one, this view most parsimoniously explains a number of our intuitions. Consider our 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 and she is no longer currently embodied in them. In contrast, the organ donor’s rights can be explained if historical embodiment – that is, having been

¹⁵ Holly M. Smith, “Whose Body is it, Anyway?” *Philosophical Perspectives* 6 (1992): 75-76.

¹⁶ Smith, 76 (“many of us are willing that people be taxed in order to buy blood for the seriously ill, but we feel much less willing that anyone should be forced to give his own blood to the ill”), and David Boonin, *A Defense of Abortion* (New York: Cambridge UP, 2003): 249-254. Thomson, *The Realm of Rights*, 225-26, recognizes a similar distinction (“On any view, I am more intimately related to my body than to my typewriter”), and Kymlicka, in his *Contemporary Political Philosophy* (Oxford: Oxford UP, 2002), suggests that Dworkin also accepts this distinction (155-56). The distinction is comprehensively challenged in Cecile Fabre, *Whose Body is it, Anyway? Justice and the Integrity of the Person* (Oxford: Oxford UP, 2006).

¹⁷ Smith, 76; Frances Kamm, *Creation and Abortion* (New York: Oxford UP, 1992), also observes that there are “genuine problems...in determining where someone's body belongs to himself and to no other.”

¹⁸ Smith 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 (i.e., 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” (76).

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.¹⁹

Similarly, current embodiment alone cannot explain why persons have a posthumous moral right to refuse organ donation. In contrast, historical embodiment effectively 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 bodies throughout our lives.²⁰ Some do challenge the existence of posthumous rights in general – and our posthumous rights over our bodies in particular²¹; however, there is a strong countervailing belief that rights can endure after death, in particular rights over one’s body.²² Even many who support the compulsory posthumous taking of internal organs pause at requiring the donation of entire bodies.²³

More generally, the relevance of history to ownership is a pervasive theme throughout moral and political philosophy. I can have rights to an object by virtue of historical facts, and these rights

¹⁹ I am grateful to [redacted] for the suggestion that historical embodiment derives its moral force from the length of past embodiment as well as having been the first person embodied in the body. Brief initial embodiment by one individual followed by lengthy, unchallenged embodiment by another individual would present a more unclear case. However, in the dementia case and all others I will discuss, the historically embodied individual was embodied in the body in question for a substantial period of time.

²⁰ Kamm, *Morality, Mortality*, vol. 1 (New York: Oxford UP 1993), 221, 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).

²¹ See John Harris, "Organ Procurement: Dead Interests, Living Needs," *Journal of Medical Ethics* 29 (2003): 130-34, and "Law and Regulation of Retained Organs: The Ethical Issues," *Legal Studies* 22 (2003): 527-49. See also H.E. Emson, "It is Immoral to Require Consent for Cadaver Organ Donation," *Journal of Medical Ethics* 29.3 (2003): 125, who argues that "No one has the right to say what should be done to their body after death," and believes that "the body should be regarded morally as on loan from the biomass to the individual of whom it is, during life, a part." Hillel Steiner, *An Essay on Rights*, rejects persons’ posthumous rights over their bodies on grounds similar to Emson’s (273).

²² On posthumous rights in general, see Thomas Nagel, "Death," *Nous* 4 (1970): 78, and Joel Feinberg, "Harm to Others," in *Harm To Others*, Oxford: Oxford UP, 1984: 79-95. The related idea of posthumous interests goes back to the *Nicomachean Ethics*. On posthumous rights to one’s body in particular, see McMahan, 448 and Muyskens, 95, and, in the law, Hernandez, 971-75.

²³ Fabre, 118-123, suggests that mandatory donation of certain organs, like the face, could be permissibly refused. See also Kamm, *Morality, Mortality*, who suggests 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” (222). We seem to see “the person himself” most in his own entire body.

can be strengthened by longstanding past ownership.²⁴ The significance of historical embodiment may reflect a similar truth where the body is concerned.²⁵ Ultimately, even though persons are in general currently embodied in the bodies over which they have rights, 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. Historical embodiment can explain these rights.²⁶

Of course, the moral significance of historical embodiment in the above cases does not show that historical embodiment has 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, by considering cases, that granting

²⁴ Schmidt, 208-15; A. John Simmons, “Historical Rights and Fair Shares,” *Law and Philosophy* 14 (1995): 149-184; Meir Dan-Cohen, “The Value of Ownership,” *Journal of Political Philosophy* 9.4 (2001): 404-434; Stephen Munzer, *A Theory of Property* (Cambridge, UK: Cambridge UP, 1990). Thomson, *The Realm of Rights*, notes that “ownership” is a perfectly intelligible description of our rights over our bodies (225-26).

²⁵ One might believe that the property analogy suggests that rights to a body should be assigned to the body’s *creator* rather than to the person historically embodied there. Locke, 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 (*Two Treatises of Government*, ed. Ian Shapiro, New Haven: Yale UP, 2003). A similar claim about property is defended obliquely by Nozick, 174-78. Susan Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), persuasively challenges the “labor-mixing” view where bodies are concerned, claiming that parents would then own their children: 75-85. 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.

²⁶ Historical embodiment can also explain some of the practices whose force Dworkin uncritically attributes to psychological continuity and personal identity surviving dementia: for instance, he 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]” (“Reply to Shiffrin,” 368). I believe these practices are perfectly intelligible without assuming that identity or psychological connectedness survives dementia: we may dread and plan for dementia at least in part because we care about our bodies, and about how the treatment of our bodies will affect our loved ones and projects. Certainly, we seem to dread and plan for death even though we *a fortiori* will not be psychologically connected or identical to our dead bodies. Thus, I would reverse 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” (207): I believe that the temporal range of our control could extend beyond identity to encompass simple bodily continuity.

some moral weight to the former individual's claim of historical embodiment, even in the presence of the latter individual's claim of current embodiment, best explains our 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.²⁷

In what follows, I will assume *arguendo* that the post-dementia individual has full moral status. However, dementia may well erode moral status in actuality. When considered as a *separate individual* from the ante-dementia individual – as Dresser's argument demands – the post-dementia individual has few properties that mark her as a person with full moral status,²⁸ and lacks the potential to have those properties in the future.²⁹ If the post-dementia individual has a lower moral status than the ante-dementia person, her rights-claims are correspondingly weaker.³⁰ Those who assign historical embodiment little or no moral weight when the currently embodied individual is a full-blown person may be more willing to grant the moral relevance of historical embodiment in the cases below if they consider the actual, attenuated moral status of the post-dementia individual, rather than granting the more demanding assumption that the post-dementia individual has full moral status. Even this weaker conclusion would deal a severe blow to Dresser's view, and would in practice support the moral authority of advance directives.

HISTORICAL AND CURRENT EMBODIMENT: THE UNAUTHORIZED TRANSPLANT

²⁷ [redacted] objected that responses to controversial fictional cases should not be used to support a moral principle; rather, principles should drive our intuitions about controversial cases. However, I believe that intuitions about the cases I consider support the overarching principle that historical embodiment has moral force. The idea of deriving principles from cases in this way owes much to Kamm, *Morality, Mortality*, p. 7-10. See also McMahan, 78, and Boonin, 9-14, for the idea that coherence between several cases can support a principle.

²⁸ Kuhse, 355-60; Buchanan and Brock, 199.

²⁹ Some believe an individual's potential properties affect her moral status, e.g. Jim Stone, "Why Potentiality Matters," *Canadian Journal of Philosophy* 17.4 (1987): 815-830. Elizabeth Harman, "The Potentiality Problem," *Philosophical Studies* 114 (2003): 173-98, believes potentiality can be morally significant once status is otherwise established.

³⁰ See McMahan, 398, for a similar claim about the pregnant woman and fetus in the context of abortion.

One fictional case that can generate intuitions about competing claims of historical embodiment and current embodiment begins with a well-known trope from the personal identity literature. After a tragic accident in which one woman, Julia, is run over by a streetcar, and another, Mary Frances, suffers a stroke while witnessing the scene,

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.³¹

Imagine that Mary Frances explicitly refused to have her body used, but the surgeon proceeded regardless.³² There is little philosophical discussion of unwilling body-transplant participants, but a case can be made that Mary Frances retains a right over her body, given that she never authorized Dr. Matthews' use of the body.³³ She was the last person to have a right over her body, and did nothing to lose her moral right to this body. Even though Julia now also has rights over the body by virtue of current embodiment, Mary Frances does not seem obviously to 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 intuition 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 a right to the body certainly does not immediately show that Julia may be evicted from the body.³⁴ Indeed, some may believe that Mary Frances is *all-things-*

³¹ John Perry, *A Dialogue on Personal Identity and Immortality* (Indianapolis: Hackett, 1978): 38. The vignette illustrates an idea from Sydney Shoemaker, *Self-Knowledge and Self-Identity* (Ithaca, NY: Cornell University Press, 1963).

³² Perry says nothing about Mary Frances' consent, or lack thereof. In the story, Mary Frances' husband does protest the transplant, apparently due to a belief that the embodied person *was* Mary Frances. It would have been perfectly open to him, however, to argue that his loved one's body should not have been used without her consent.

³³ Samuel Wheeler does discuss a similar point: "that a thing has been incorporated into a person's body only gives him a property right to it, even *prima facie*, if its incorporation violated no one else's rights. If I take your arm while you're asleep, and attach it to myself, I don't have a property right to it, since it's not clear that it's really part of my body" (187). Keeping in mind the earlier discussion of the metaphysical and moral senses of "mine," I would amend Wheeler's claim: the arm is not *legitimately* part of his body, rather than not "really part" of his body.

³⁴ See Wheeler, 187-88: "[i]f I innocently buy your arm from someone, now dead, who stole it from you in your

considered entirely barred from affecting the body now that Julia occupies it. Nonetheless, this is perfectly compatible with Mary Frances having strong, though ultimately defeated, special moral claims on her side. These claims can generate a “moral residue” that would not be present in a case where Mary Frances was an unrelated person who had never occupied the body.³⁵ For instance, they can suggest that Mary Frances is owed compensation for the use of her body.³⁶ And even defeated reasons would suffice to rebut Dresser’s argument that the ante-dementia individual has no more of a claim to affect the post-dementia individual than an unrelated person would.

I will note one possible disanalogy between the unauthorized body transplant and the dementia case: the former involves an unauthorized actor, Dr. Matthews, while the latter does not. Since the post-dementia individual came to occupy the body via a natural process rather than via human agency, one might believe that she acquires a full natural right to the body.³⁷ However, moral rights are retained even when nature, rather than injustice, is responsible for a deprivation: a house’s dead owner 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.³⁸

sleep, subtler problems of rights and compensation arise.” It is hard to know what intuitions to have about this case; however, fictional and mythical cases about dead bodies that have come under others’ control suggest that the moral pull of “leaving the body to rest in peace” could perhaps justify evicting Julia. Certainly, people in such cases hardly ever respond that the current controller of the dead body, however innocent, has an uncontested claim merely by virtue of having current control.

³⁵ For the idea of a “moral residue,” see, for instance, Nancy Davis, “Rights, Permission, and Compensation,” *Philosophy and Public Affairs* 14.4 (1985): 374-384.

³⁶ See Erik Jaffe, “She’s Got Bette Davis[s] Eyes’: Assessing the Nonconsensual Removal of Cadaver Organs under the Takings and Due Process Clauses,” *Columbia Law Review* 90.2 (1990): 528-74, for examples where people are compensated for organs taken nonconsensually after their death, even (and perhaps especially) if those organs were transplanted into others. Radhika Rao, “Property, Privacy, and the Human Body,” *Boston University Law Review* 80 (2000), makes a similar suggestion about compensation for the posthumous use of others’ bodies.

³⁷ Kamm considers this idea in *Creation and Abortion*, 99-101.

³⁸ For this judgment in the case of a living owner, see Kamm, *Creation and Abortion*, 47: “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 the innocent person if doing so is necessary to evict them, as does Thomson, “Self-Defense,” *Philosophy and Public Affairs* 20.4 (1991): 283-310. Against this view, see McMahan, 398-418, and Michael Otsuka, “Killing the Innocent in Self-Defense,” *Philosophy and Public Affairs* 23.1 (1994): 74-94.

ADVANCE REFUSALS OF LIFE SUPPORT: DEMENTIA AND POSTHUMOUS PREGNANCY

The case considered above suggests that historical embodiment may retain moral significance even posthumously, and even in the presence of another's current embodiment. Even for those whose intuitions about these cases deny that historical embodiment has *greater* or *overriding* moral force, the case indicates that historical embodiment continues to exert some moral pull, which is enough to defeat Dresser's argument. 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 ordinary property. Historical dispossession continues to cast a moral shadow over property, even if the new occupants were completely innocent in the original loss. 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.³⁹

However, *how much* significance historical embodiment has is still an open question. I will now discuss a hard case: can the ante-dementia individual's moral rights over her body justify actions affecting the body in a way that will lead to the post-dementia individual's death – for instance, discontinuing artificial ventilation? Advance directives refusing life support after the onset of dementia are commonly discussed in the philosophical literature and not infrequently made in practice, so answering this question is important.⁴⁰

³⁹ The proper resolution of situations involving innocent acquisition of goods over which others retain moral rights is discussed throughout moral and political philosophy. See e.g. Jeremy Waldron, "Superseding Historical Injustice," *Ethics* 105 (1992): 4-28, and Daniel Butt, "On Benefiting From Injustice," *Canadian Journal of Philosophy* 37.1 (2007): 129-152.

⁴⁰ For instance, Buchanan and Brock, 164-65. See also Dwenda Gjerdingen et al., "Older Persons' Opinions About Life-Sustaining Procedures in the Face of Dementia," *Archives of Internal Medicine* 8 (1999): 421-25, which suggests that most non-demented older persons do not want invasive life-sustaining medical procedures (e.g. artificial ventilation) if they were to become demented. While these persons may believe that they *themselves* will suffer from unauthorized treatments, they may also believe that they would not want their *bodies* treated in certain ways even if they no longer exist. Note that I do not consider advance requests for voluntary euthanasia, since such requests are legally impermissible and morally controversial even for *competent* patients: for an argument against allowing such requests,

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.”⁴¹ She 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 a full right to life. I will argue that the ante-dementia individual may similarly refuse to provide bodily support to the post-dementia individual even when this will lead to the post-dementia individual's death.

Of course, abortion and the dementia case are disanalogous in important ways: the pregnant woman currently exists and is currently embodied in her body, whereas the ante-dementia individual no longer exists and is not currently embodied in the body over which she asserts moral rights. Furthermore, the fetus is much less robustly embodied in the body than the post-dementia individual is: it does not exert typical agential control over the woman's body, nor does it sense directly through the woman's body. Notwithstanding these disanalogies, I will suggest that the pregnant woman's moral rights over her body:

- 1) are strong enough to override the fetus's claims regardless of how robustly the fetus is embodied in the body;
- 2) remain strong enough to override the fetus's claims even after death

Do the pregnant woman's moral rights remain strong enough to override the fetus's claims even if the fetus is robustly embodied *and* the woman is dead? I will argue that they do, although I believe that reasonable people can disagree. If I am right, this suggests that the ante-dementia individual's

see Leslie Francis, “Advance Directives for Voluntary Euthanasia: A Volatile Combination?” *Journal of Medicine and Philosophy* 18.3 (1993): 297-322.

⁴¹ Thomson, “A Defense of Abortion,” 56. Thomson substantiates 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, the connected person may permissibly disconnect himself even when doing so would lead to the violinist's death.

rights over her body could similarly justify an advance directive disconnecting that body from life support, even when honoring the directive would lead to the post-dementia individual's death.

1) Fetal Embodiment

Some have made the case that the fetus is fully currently embodied in the pregnant woman's body, and thereby acquires moral rights to this body.⁴² However, appealing to historical embodiment can allow a pregnant woman to retain a right over her body even if we grant that the fetus is currently embodied there. Frances Kamm, for instance, has proposed a thought-experiment that seems to illustrate 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.⁴³

Kamm also considers a variation where the new person can exert agential control over the body and feel pain through it, and argues that the first occupant still retains moral rights to the body in this case.⁴⁴ Of course, mere temporal priority may not be a sufficient basis for moral rights⁴⁵; however,

⁴² Mark Wicclair, "The Abortion Controversy and the Claim That This Body is Mine," *Social Theory and Practice* 7.3 (1981): 337-46; Jim Stone, "Abortion and the Control of Human Bodies," *Journal of Value Inquiry* 17.1 (1983): 77-85; Kenneth Einar Himma, "Thomson's Violinist and Conjoined Twins," *Cambridge Quarterly of Healthcare Ethics* 8 (1999): 428-439. Smith, 78-84, rejects the idea that the fetus is currently embodied in the woman's body.

⁴³ Kamm, *Creation and Abortion*, 99-101. Kamm presumably means that it is "not Bud's body" in the moral sense, rather than the metaphysical sense.

⁴⁴ Kamm, *ibid* ("But suppose one sign of Bud's presence is that the first occupant notices his arms and legs moving in response to Bud's expressed desires and Bud suffers when the first occupant is physically attacked").

⁴⁵ 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

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.”⁴⁶ That the pregnant woman retains overriding moral rights over her body suggests that abortion is permissible even if the fetus is currently embodied in her body.⁴⁷

2) Posthumous Pregnancy

Technological advances have enabled brain-dead women to gestate fetuses to term.⁴⁸ I believe that in such cases, the dead pregnant woman's rights over her body require us to respect her wishes for her body, even if honoring those wishes 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 to gestate a fetus, both seem to seriously violate the woman's rights. Analogously, our attitudes about posthumous sexual violations do not judge posthumous rape as substantially less wrong than rape of a living individual who is comatose or asleep.⁴⁹

There are also disanalogies between posthumous pregnancy and ordinary pregnancy that strengthen, rather than weaken, the case for honoring refusals of treatment. First, the dead pregnant

grant the relevance of historical embodiment.

⁴⁶ Boonin, 245-46 (italics mine)

⁴⁷ Boonin, 246.

⁴⁸ Daniel Sperling, “Maternal Brain Death,” *American Journal of Law and Medicine* 30 (2004): 453-500.

⁴⁹ “Whatever our metaphysical or religious beliefs, we typically understand a recent corpse to have an especially intimate connection with the person who was. Therefore, just as we abhor rape, including rape of a person who is asleep or in a coma, we also abhor sexual violation of the corpse” (Martha Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton: Princeton UP, 2004): 156.) Some law on posthumous rape makes a similar argument: “‘against her will’ has been interpreted to mean ‘without her consent,’ and has been satisfied in cases in which the victim was drugged, asleep, unconscious, or in a coma. We see no reason why it should be any less applicable in a case in which the defendant has rendered the victim permanently unconscious by killing her” (*Lipham v. State*, 257 Ga. 808, 809-810 (364 SE2d 840) (1988), qtd. in Tyler Ochoa and Christine Jones, “Defiling the Dead: Necrophilia and the Law,” *Whittier Law Review* 18 (1997): 553.)

woman may have all of her major posthumous interests – not having tubes and chemicals inserted into her body against her expressed preferences, not being treated in an undignified way nor as a mere “fetal container”, and not burdening her family – frustrated if her body is conscripted to intimately support another person. In contrast, while a living woman suffers much more experiential inconvenience from pregnancy, she also generally remains able to pursue her projects and goals.⁵⁰ That the dead woman is “worse off,” in a sense, than the living woman may support the permissibility of her aborting the fetus.⁵¹ Second, removing life support from the dead pregnant woman, unlike terminating a pregnancy in a living woman, does not involve causing direct physical harm to the fetus; it does not kill the fetus, but rather lets it die.⁵² These two factors are equally present in the dementia case, and similarly support discontinuing life support there.

In sum, while posthumous rights may be weaker than rights during life, they are still arguably sufficient to support Thomson’s argument for the permissibility of abortion: 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.”⁵³ Even some who standardly oppose abortion concur that disconnecting life support in posthumous pregnancy is

⁵⁰ Joel Feinberg, “Abortion,” in Feinberg, *Freedom and Fulfillment: Philosophical Essays* (Princeton: Princeton University Press, 1992): 67. See also John Martin Fischer, “Abortion and Self-Determination,” *Journal of Social Philosophy* 12.2 (1991): 5-13.

⁵¹ 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 it from her even in order to save others (“Some Ruminations on Rights,” 58), 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.

⁵² Some see this factor as morally significant: e.g. John Finnis, “The Rights and Wrongs of Abortion: A Reply to Judith Thomson,” *Philosophy and Public Affairs* 2.2 (1973): 141. See also McMahan, 378-392.

⁵³ Sperling, 498. See also Janice MacAvoy-Snitzer, “Pregnancy Clauses in Living Will Statutes,” *Columbia Law Review*, 87.6 (1987): 1280-1300, Laura M. Purdy, “Commentary on ‘The Baby in the Body,’” *Hastings Center Report* 24.1 (1994): 32, and Jeffrey Spike, “Brain Death, Pregnancy, and Posthumous Motherhood,” *Journal of Clinical Ethics* 10 (1999): 57. Even some who reject the permissibility of terminating pregnancy hold that the woman retains a moral right to her body that justifies compensating her: Rao, 158, argues that “the state may conscript [the dead pregnant woman’s] body for public use as a fetal incubator just as it may conscript any other form of property. If it does, however, it must provide just compensation” (158). Rao notes that Pennsylvania law mandates such compensation.

permissible.⁵⁴ Likewise, posthumous rights over one's body may well be sufficient to justify discontinuing life-support for the post-dementia individual.

Combining the Cases

Can posthumous rights over one's body justify ending the life of a 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 share Kamm's intuition that the first occupant retains moral rights over her body even if "the first occupant notices his arms and legs moving in response to [the later occupant's] expressed desires and [the later occupant] suffers when the first occupant is physically attacked," and believe that such rights can be strong enough to justify discontinuing support.⁵⁵ I also have the intuition that death does not erode moral rights over one's body enough to undermine Thomson's argument. But people can reasonably disagree about these two intuitions. Furthermore, the *combination* of the two disanalogies between ordinary unwanted pregnancy and the dementia case could have a synergistic moral effect that would further weaken the applicability of Thomson's argument – and thus the case for discontinuing life support.⁵⁶

On the other hand, as with posthumous pregnancy, there are also disanalogies between the dementia case and ordinary pregnancy that *strengthen* the case for discontinuing support in the dementia case. First, dementia rarely results from a voluntary act, whereas pregnancy often does.⁵⁷

⁵⁴ Hazel Markwell and Barry Brown, "Bioethics for clinicians: 27. Catholic bioethics," *CMAJ* 165.2 (2001): 189-192, hold that Catholics otherwise opposed to abortion may still respect a dead pregnant woman's advance refusal of support. Several Catholic thinkers quoted in Peter Singer, *Rethinking Life and Death* (New York: St. Martin's, 1994), make a similar claim.

⁵⁵ Kamm, 101.

⁵⁶ See Shelly Kagan, "The Additive Fallacy," *Ethics* 99 (1988): 5-31, and McMahan, *The Ethics of Killing*, 392, for examples of synergistic interactions between morally relevant facts.

⁵⁷ 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" (101) Two of the strongest arguments against Thomson's analogy between the violinist case and pregnancy appeal to pregnancy's voluntariness (Boonin, 148-188). Additionally, many opponents of abortion

Second, pregnancy is shorter and finite, while dementia can last for a long and indefinite period, particularly if the body is on artificial support.⁵⁸ Third, the post-dementia individual lacks the potential for future personhood that a typical fetus has.⁵⁹ Finally, remember that both the post-dementia individual and the fetus likely do not in actuality have full moral status.

Ultimately, the argument that the pregnant woman's historical embodiment in her body overrides the current embodiment of others in that body is at least plausible, even if not decisive. Although it may be distasteful to deny an individual who is currently embodied in a body the use of that body when she needs it to remain alive, doing so can be morally justified when another person has a right to the body.⁶⁰

ADVANCE DIRECTIVES IN EVERYDAY CASES

I have argued that we may disconnect the post-dementia individual from life support, but I recognize that this intuition is controversial. However, most challenges in dementia care do not have life-and-death implications. Here, historical embodiment faces less opposition: 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 ends that are contrary to the ante-dementia person's interests.

consider terminating an entirely unchosen pregnancy (e.g. one that resulted from rape) permissible (Mary B. Mahowald, "Is there Life after Roe v. Wade?" *Hastings Center Report* 19.4 (1989): 24.) While suicide can prevent dementia, this is clearly too high a price to ask (Dena Davis, "Help! My Body is Being Invaded By An Alien!" *American Journal of Bioethics* 7.4 (2007): 60-61).

⁵⁸ Fischer, "Abortion and Self-Determination," argues that nine months of pregnancy is not a great enough burden to justify discontinuing support.

⁵⁹ See Harman, 173-98, and Stone, 815-830. Even if the post-dementia individual will continue to be a person for some time, she is on an inexorably downward trajectory towards an eventual loss of personhood.

⁶⁰ Kamm (277) 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" (ibid.)

Analogously, even if a landlord must grant a woman who would otherwise die of hypothermia access to her rental property, no-one believes that the woman, once inside, acquires more extensive rights against the landlord – rights to remodel the house or to rent rooms inside to others.

How extensively may the ante-dementia individual affect the post-dementia individual's life in order to protect ante-dementia interests? The ante-dementia 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 post-dementia individual occupies the body. Her right is over the body, not over the post-dementia individual herself.⁶¹ For example, an advance directive authorizing another person to have sex with the (living, breathing) body would lack moral force, since it would take advantage of the post-dementia individual's existence in the body. In contrast, an advance directive refusing to have the body moved to a different town would have moral force, since such a directive is applicable to a comatose body and gains nothing from the post-dementia individual's presence. Note, also, that the post-dementia individual still retains rights against bodily trespass by persons other than the ante-dementia person.⁶²

Considering the ante-dementia person's right over her body can incorporate ante-dementia commitments into caregiving decisions. Many real-life challenges in dementia care involve caretakers deciding whether to prevent the post-dementia individual from engaging in activities, such as having sex with new partners or consuming religiously prohibited food, that would undermine central

⁶¹ The definition of "*body-ownership*" I offer here is intended to be considerably weaker than, and to contrast with, G.A. Cohen's influential definition of *self-ownership* in his *Self-Ownership, Freedom, and Equality* (New York: Cambridge UP, 1995): "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" (67). This refinement may help answer the concerns about the "enslavement" of the post-dementia individual raised by Shiffrin and by Buchanan and Brock (157-58). I am particularly indebted to [redacted] for pressing me here.

⁶² See Boonin, 278-79, who observes that the fetus retains rights against everyone except the pregnant woman even if Thomson's argument is accepted.

bodily interests of the ante-dementia person.⁶³ Restricting pursuits that would undermine the ante-dementia individual's interests is arguably permissible, especially when doing so would not violate the post-dementia person's right to life, take advantage of her presence within the body, nor even completely deprive her of autonomy.

CLOSING THOUGHTS

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 accepting assuming that dementia undermines personal identity makes the post-dementia individual a separate being with her own moral claims, this very separateness denies the post-dementia individual a moral claim to what is the ante-dementia individual's. Buchanan and Brock identify this problem well:

The new system would 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.⁶⁴

My account extends Buchanan and Brock's criticism, pointing out that these new individuals would lack not only finances and family support, but also exclusive rights to the bodies they occupy. While I have made the case that the ante-dementia individual has a very broad permission to control the body, even those who disagree should reject Dresser's overbroad assertion that the ante-dementia person has *no claim* at all to affect the post-dementia individual.

Note, in closing, that I do not see the post-dementia individual as a sinister or malicious

⁶³ These examples are inspired by cases from Jaworska, "Vanishing Persons."

⁶⁴ Buchanan and Brock, 177.

force to be eliminated at all costs; 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.⁶⁵

The same is true for using the ante-dementia person's body against her will to support the post-dementia individual.⁶⁶ Recognizing the moral significance of persons' rights over their bodies can allow the ante-dementia individual and her caregivers to preserve her central bodily interests, and could give them the option of discontinuing artificial support before an intolerable situation is reached. 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 - upon one's own body.

⁶⁵ Margaret O. Little, "Abortion, Intimacy, and the Duty to Gestate," *Ethical Theory and Moral Practice* 2 (1999): 301.

⁶⁶ Davis, 60-61.