

## Moral authority and proxy decision-making

### 1. Introduction

Extended decision-making through the use of proxy decision-makers has been enshrined in a range of International Codes, Professional Guidance and Statute,<sup>1</sup> and is now widely seen as a useful means through which we can exercise control over decisions that affect our lives when we have lost capacity to make these decisions for ourselves.<sup>2</sup> Although there may be an expectation by currently competent individuals wishing to make use of this provision that appointing a proxy will allow control to be retained over important decisions, numerous concerns have been raised as to how we might best establish the way in which a proxy makes their decisions that can shape, curtail or restrict the decisions a proxy can make. These concerns have tended to focus on content, that is, the kind of decision the proxy can make and the way in which a decision is arrived at, such as through substituted judgements or best interest approaches. However, there is little theoretical work that has tried to explain how or why proxy decision-making is anything other than a useful practical or legal convention when it comes to autonomous adults wishing to appoint their own proxy to cover future incapacity. Therefore, there remains an

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<sup>1</sup> For example, the UK Mental Capacity Act (2005) section 9.1; The General Medical Council (2010); the US National Guardianship Association (2007); Nuffield Council on Bioethics (2009); CIOMS-WHO (2002) section 6. Court cases such as *Re Quinlan* (1976) in the US have also contributed to establishing the groundings for the legal status of the proxy, albeit in terms of who might be suitable as a proxy in cases where there was no clear appointment of them by a still competent individual.

<sup>2</sup> I will here limit myself to discussion of proxy consent for adults appointed prior to the loss of competence by the person they are acting as proxy for. The issue of proxy consent for adults who have never been competent, for adults who did not appoint their proxy before losing competence, and for children, all involve a different set of ethical considerations that do not directly stem from arguments surrounding extending our autonomy and transferring our authority.

ethical question as to how we might provide a substantial theoretical basis to explain why it is that we should respect the decisions made by a proxy and that would also serve to underpin the legal or pragmatic institutions of proxy decision-making.

Asking such a question about ethical underpinnings is to move the focus of debate surrounding proxies away from the content and nature of their decision-making judgements to one of authority and scope: a question surrounding who is making the decision. Moreover, this is not 'authority' in terms of whether or not we have made legal provision for a proxy decision-maker or whether we need, as a matter of pragmatics, to designate someone to take up the burden of decision-making for someone who has become incapacitated. Rather, it is a question of moral authority. I take moral authority to correspond to a normative relation between persons, such that the decision of a person is sufficient to give us a moral obligation to assent to, obey or respect that decision.<sup>3</sup> It is therefore a question pertinent to those cases where a still-competent individual wishes to appoint a proxy for when they lose decision-making capacity, where we can ask what grounds we might have for respecting the decision of the proxy they have designated rather than the decisions of some other person or group of people. The simple response – that it is because the individual for whom they will be proxy did, in fact, designate them, either because they so wished it or because they have some sort of legal facility to do so – does not provide an answer to this ethical question about proxies. Moreover, answering this question will give an indication of the shape and scope of a proxy's decision-making role in a way that appeal to the content of their decisions won't.

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<sup>3</sup> This is broadly the account given in Anscombe (1981).

I will argue that we cannot account for the moral authority of a proxy through one of the most widespread approaches used to establish moral authority – appeal to a direct extension of our contemporaneously made autonomous decision-making – without generating some problematic challenges about their status. This, in turn, indicates that appeal to some other theoretical foundation for their authority might be a better route to follow. Also, by recognising the challenges that an autonomy-based underpinning for the authority of proxy decision-makers creates, the role of the proxy themselves can be better understood and interpreted in terms of the limitations and scope of their decision-making. We will know, for example, whether we have a good ethical basis for challenging or accepting an unusual decision even if it is in accord with accepted approaches to the way in which the decision is arrived at, or whether a decision of a certain type is within the remit of an appointed proxy.

With contemporaneously made autonomous decisions, views are remarkably settled as to the foundation of this position, whereby competent, autonomous (adult) individuals are generally considered to be free to make any decision they like about refusing or accepting possible options with regard to most aspects of their life.<sup>4</sup> By contrast, there is little explicit discussion as to how it is we might transfer or ‘bequeath’ such decision-making authority to another person so that they can make decisions on our behalf in a way that would be a direct extension of our own autonomous decision-making authority. This is not to say that justifications for respecting the decisions of a proxy are not available to us on moral grounds other

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<sup>4</sup> There are well-recognised limitations to this, such as on subjecting others to communicable diseases, on what is legally permissible, and on the right to receive any treatment that is demanded.

than as a bequeathed extension of our own autonomy, such as making appeal to the status of the proxy themselves as being in some way trustworthy or worthy of respect, or the way in which guardians or other decision-makers are appointed for children or people who have never been competent, often with a default to the 'next of kin'.<sup>5</sup> Moreover, there are plenty of cases where we grant limited decision-making authority to others to act as our agents whilst we are ourselves still competent, autonomous agents. However, the reason for addressing the transfer of authority in this way is that it is a direct challenge to an account widely used as an explanation of the ethical foundations for extended decision-making the "extension view".<sup>6</sup> This is the view that we can un-problematically extend our autonomous decision-making authority, if we make the correct provisions, once we have lost competence. There are, however, subtle but important differences between respecting an individual's autonomy and transferring one's autonomous decision-making authority to someone else altogether, such as irrevocability and the implications of such a transfer, that I will draw upon to argue that the extension view is a poor basis upon which to ground proxy decision-making.

In order to highlight problems over the transfer of authority, I pose a two-horned dilemma for how we might conceive of decision-making authority using proxies. On the one horn of the dilemma, if proxies lack the moral authority of a contemporaneous autonomous decision then their use is curtailed because we would lack the moral obligation to respect a proxy's decisions that we would have

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<sup>5</sup> See, for example, O'Neill & Ruddick (eds) (1979); Aiken & LaFollette (eds) (1980); Gaylin & Macklin (eds) (1982); Jonas (2007).

<sup>6</sup> The 'extension view' of precedent autonomy is a term used by Davis (2009) pp 349-374, and advocated by Buchanan & Brock (1990) and Dworkin (1994) pp 218-241.

were they the decisions of the still-autonomous individual.<sup>7</sup> This would require us to establish the authority of a proxy on a different foundation and, as such, one which would not carry with it the same moral obligations that are associated with autonomous decision-making. If, however, proxy decisions do have the same moral authority of contemporaneous autonomous decisions then the other horn of the dilemma arises by creating the possibility for the repeated application of the extension of authority process. This would potentially allow the originally appointed proxy to appoint their own proxy to make decisions for both them and the person they were originally proxy for, resulting in decisions by decision-makers to whom the authority had not been initially extended. Although this second horn may be unlikely to manifest itself in practice, it still tells us something about the foundations of proxy decision-making and the extent to which it offers us control over future treatment decisions and whether this can really be said to be an extension of the original appointing individual's autonomy. Awareness of such potential limitations might then have practical consequences in terms of whether we want our policy to be supported by theory and, subsequently, if policy is to reflect theory then whether this might impact on individuals as to whether they engage proxy decision-makers at all and upon what basis their decisions should be made.

My argument is in three parts. In the first part, I begin by examining the nature of the moral authority that a proxy has to make decisions on behalf of another. I argue that if we accept an autonomous individual can in some way transfer or 'bequeath'

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<sup>7</sup> This is not to say that similar conceptual problems do not arise in the case of other methods of extended decision-making, such as advance directives. Rather, the use of proxies produces clearer illustrations of the dilemma and is therefore most suited to discussion.

moral authority to a proxy to make decisions on their behalf then we are faced with another question over how we characterise the ethical basis for respecting a proxy's decisions. This, in turn, leads us to consider whether a proxy can be limited in the scope of things they are empowered to decide about whilst retaining a decision-making authority that we have a duty to respect.

In the second part, I present the dilemma itself in terms of a problem over the transitivity of authority; a relation understood in this context as: if A is a legitimate decision-maker for B, and if B is a legitimate decision-maker for C, then A is a legitimate decision-maker for C.<sup>8</sup> The importance of the transitivity concern is that it is a relation we would expect to be present in bequeathing moral authority if such authority was equivalent to the decision-making powers that fully autonomous agents have over themselves.<sup>9</sup>

In the third part, I consider and reject various responses to the problem posed by the dilemma. In doing so, we gain important insight into the nature of extended decision-making through proxies. If a growing number of people wish to make use of proxies as a means of retaining some overall control over their lives and protecting themselves from unwanted medical interventions then we should be clear as to

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<sup>8</sup> By 'legitimate' I mean 'according to appropriate moral requirements'. I will leave legal legitimacy to one side as this paper concerns conceptual and ethical issues. Although there has been much discussion of who the legal decision-maker is, this is separable from the question of whether we have an ethical obligation to respect such decisions in the same way as we do in cases of contemporaneous autonomous decisions. One notable exception is Dworkin (1988) pp 85-99, concerning representation and the proxy.

<sup>9</sup> I do not mean by this that there is a formal equivalence between the two such that the relation would be reflexive, symmetric and transitive. This is instead a claim about the requirement to respect the authority. If bequeathed authority has the equivalent requirement to be respected as that of the bequeathing autonomous individual, then we have the same requirements to follow the instructions of bequeathed authority as we do to follow the instructions of an autonomous agent.

what this involves. This is not, itself, intended as an argument against the use of proxy decision-making, although it may potentially be used to underpin an argument for paternalism towards non-autonomous people.<sup>10</sup> Rather, the dilemma reveals we cannot proceed as if appointing a proxy was an unproblematic extension to our autonomous decision-making. If we still wish to embrace proxy decision-making, it should not be seen, ultimately, as simply transferring or ‘bequeathing’ one’s own contemporaneously made autonomous decision-making authority. Instead, viewing proxies as ‘advisors in decision-making’ and giving an alternative – and more limited – basis for their authority to make decisions on behalf of the incapacitated individual would form the best basis of our ethical underpinnings for proxy decision-making.

## **2. Autonomy and Moral Authority for Proxy Decision-Making**

Although there has been growing concern over the amount of emphasis placed on autonomy in fields such as bioethics in recent years,<sup>11</sup> there is little doubt that autonomy and the corresponding ethical duty of respect for autonomy play a fundamental role in forming the underpinnings of extended decision-making. This view is often seen as placing very strong requirements to respect an autonomous individual’s “virtually unlimited right” to refuse treatment should they wish to make a decision about future treatment choices.<sup>12</sup> Extended decision-making is therefore often conceived, at its most basic, as intended to provide an extension of our

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<sup>10</sup> I shall not consider this line in depth, as it is a substantive issue in its own right. I raise it in recognition that this might be a more radical response to the problem of being unable to justify an extension of our autonomy.

<sup>11</sup> See, for example, O’Neill (2002); Wilson, (2007); Dawson (2010).

<sup>12</sup> As expressed in Buchanan (1988). This is the dominant view in the literature on the topic and is true not only of proxy decision-making but also other major approaches to extended decision-making, such as advance statements. See also Wrigley (2007a) for a discussion of the implications of this for advance directives.

contemporaneous autonomous decision-making. In the case of proxies, this is broadly conceived as an extension of the decision-making process whereby a still autonomous person designates another individual as a surrogate decision-maker to assume decision-making power with regard to their care or treatment, should they become incompetent to decide.<sup>13</sup>

Although such an account of proxy decision-making appears to be a natural extension of autonomous wishes, whereby we are able to choose who should make decisions for us; it leaves a number of conceptual and ethical questions implicit or unanswered. First and foremost amongst these is how we are to characterise autonomy when it is used to underpin extended decision-making using proxies. Given the numerous accounts of autonomy available and that no one account has been settled on as forming the basis for extended decision-making, I shall focus upon those aspects of autonomy that I consider most suited to grounding proxy decision-making.

The relevant aspects of autonomy, often characterised in terms of ‘personal’ or ‘individual’ autonomy, are those that concern the nature of certain kinds of choice and the corresponding rationale to respect such choices. This includes the view that takes autonomous individuals to be free in the sense of self-determination; that is to

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<sup>13</sup> See, for example, the characterisation of proxies given in Buchanan & Brock (1990) or Wrigley (2007b). It should be noted that these arguments concern only proxies appointed by the individual on whose behalf they make decisions and not proxies who are appointed by others, in such roles as advocates or wards of court, or who take up a ‘presumptive authority’ as a proxy, such as a family member.



make certain sorts of choices for themselves.<sup>14</sup> These elements – self-determination through self-governance or sovereignty over ourselves – are central to a range of well-developed accounts.<sup>15</sup> Once autonomy is conceived in terms of having sovereignty over ourselves, the moral basis of respect for autonomy directly follows as a corollary: we respect autonomous decisions by individuals because of their right to control what happens within that sphere of sovereignty. Characterising autonomy in terms of control or self-government over one's self is also important to account for the possibility of extending decision-making as a way that is designed to perpetuate such self-determination.

Although this conception of autonomy provides a clear justification for an individual to retain control over their contemporaneous autonomous decisions, what happens when we try and extend decision-making beyond that through a proxy is distinctly murky by comparison. The implicit thought is that if autonomous agents have sovereignty over themselves and are free to control what happens within that sphere of sovereignty (in terms of refusing or accepting treatments), then their wish to appoint a proxy to make treatment decisions on their behalf is another aspect of respecting that control they have over themselves. However, much of the explanatory work seems to depend on a presumption that the proxy can somehow

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<sup>14</sup> This is in contrast to conceptions that are concerned with the possession of certain capacities to make certain kinds of choice, for example, an account of autonomy that associates it directly with a capacity might indicate that once a person has lost that capacity, it would be impossible to extend decision-making past that point. A range of concerns about the implications of loss of capacity in relation to extended decision-making are discussed in the literature. See, for example, Wrigley (2007a). Kantian views of autonomy might also not admit of transfer, as argued by Kuflick (1984).

<sup>15</sup> Although there are numerous differences and nuances between them, such an account of autonomy is found in, for example, Dworkin (1988) pp 15-16; Feinberg (1986) p 54; Beauchamp & Childress (2001) p 58.

readily have this decision-making authority transferred to them at the request of a still autonomous individual just in virtue of them being selected as a proxy.

In order to attempt to capture what processes are at work in transferring decision-making authority to a proxy, it is important to distinguish three closely related elements that underpin the moral authority of a proxy to make decisions. These are:

- (i) The scope of the proxy directive
- (ii) The authority of the proxy in relation to what falls under (i)
- (iii) The ethical basis for respecting a proxy's decisions given (i) and (ii).

Although strongly linked, each plays a separable role in establishing the foundations of proxy decision-making. In (i), the scope of the proxy directive concerns what areas the proxy can make decisions about concerning the person they are proxy for. The scope might be limitless, with a proxy instructed to make decisions over all aspects of a person's life, or the scope might be limited to specific areas, such as financial decisions or to medical treatment. The scope may even be limited to specific decisions, such as making medical treatment decisions for certain conditions but not for others.

In (ii), the second element concerns what authority judgements made in (i) have when they are made by a proxy. One may consider transferring or 'bequeathing' authority to a proxy in one of two basic ways or some third way that lies intermediate between the two. The first is that the proxy is appointed to act as an advocate rather than a direct extension of one's decision-making authority, so that

the proxy is an additional spokesperson for representing one's views where decisions are being considered by those with the duty of care for the incapacitated individual. This confines the proxy to an advisory role of being 'one voice amongst many' when treatment decisions are considered by all those involved, such as medical teams, family members, etc. but still gives the proxy an important function in virtue of being independent from those other decision-makers and having been selected specifically to fulfil a decision-making role. This basis would automatically have implications for (iii), the third element that underpins moral authority, because it would mean that, aside from considering the views put forward by a proxy, we do not have the same ethical obligation to respect the proxy's decisions that we have to respect contemporaneous autonomous decisions.<sup>16</sup> This still leaves open some alternative account for explaining the authority of the proxy that is not based on a direct extension of one's autonomy, however, such an account would not be able to utilise the same very strong obligations of authority that derive from such autonomy-based extension arguments.

At the other end of the spectrum is the approach whereby one grants absolute decision-making power, where a proxy is appointed with the intention of their making decisions with an authority that should be followed as if it were a contemporaneous autonomous decision of the person who appointed them. This still leaves a third option of the proxy being more than an advisor but with limitations on their authority. For example, a proxy may be appointed with the authority to refuse

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<sup>16</sup> This does not mean that the views put forward by the proxy should not be considered or that they are not in some way important in virtue of the appointed role a proxy has, just that we are not morally obliged to respect them as we would be for a contemporaneous decision made by an autonomous agent. See Keywood (2003) for an explanation of the advocate-type role of a proxy.

any treatment other than a life-saving one, or that they may be able to overrule the decisions of one doctor but not the decision of an entire specialist treatment team. This does not mean that there are no alternative foundations for proxy decision-making outside the ethical conception I am discussing. For example, one could hold a view that it is purely a legal construction and we therefore have a legal obligation to respect a proxy's decisions. This would not, however, mean that proxies were an extension of autonomous decision-making or explain why their decisions are the sort of thing we should respect such that they are enshrined in law. This is why the foundational ethical question as to what underpins the decision-making authority of proxies is of genuine importance: without it we are unable to determine why it is we should justify one particular system over another, even though we may be in agreement that the aim of facilitating health care decision-making is a broad social good.<sup>17</sup> I will return to discuss the implications for intermediary positions in section 3.

I have so far characterised the authority in (ii) only in terms of the authority that the person appointing the proxy wishes them to have. For authority to be effective, what is also needed is an explanation of how this connects with (iii) to form the ethical basis for respecting a proxy's judgement. This requires a conception of authority in a normative sense of 'that which we have a moral duty to respect' or 'the right to be obeyed'.<sup>18</sup> This also distinguishes it from the practical sense of the term, such as

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<sup>17</sup> See also Davis (2004) for a discussion of establishing precedent autonomy as a means of settling conflicts between known conflicting preferences of an incompetent person.

<sup>18</sup> This is the basic characterisation given by Anscombe (1981) p 43. There are, of course, other conceptions of authority that we are all familiar with and which might have some bearing on how we respond to a proxy's judgement, such as legal authority or more broadly political authority. However,

‘authority in the field’, questions about the appropriateness of the standing of the proxy (such as are they a fit and proper person), or their legal standing.

However, although we may have a moral duty to obey the contemporaneous treatment decisions of a still autonomous agent that does not mean we automatically have a similar duty towards the decisions of their proxy. Simply defining ‘authority’ in terms of ‘that which we have a moral duty to obey’ does little explanatory work as to how or why it is that this ‘duty to obey’ might be transferred to another person by bequeathing it to a proxy. How a proxy might be bequeathed such a degree of authority based on an account of how autonomy can be extended in such a way as to grant an equivalent decision-making authority to another person has never been made explicit by any view that endorses an extension account of autonomy as a basis for forms of extended decision-making.

Current accounts of precedent autonomy do not indicate that we can simply pass on authority to just anyone we choose. It is not as simple as making the case for respecting future-oriented, non-contemporaneous wishes that might be provided in the form of an Advance Directive, whereby we have reason to respect those wishes because the (now) incapacitated person actually decided that was what he or she wanted. Even where it would be my autonomous decision that someone make decisions on my behalf, I am in effect saying that it is their decisions (that of the proxy) that should now be respected as if they were my own, whilst recognising that they are not my own decisions *per se*. The demands of autonomy only cover those

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my focus here only concerns whether there is any sort of ethical duty stemming from a respect for autonomy by which we should respect proxy decision-making.

decisions that I directly make myself. Even in cases where I allow another to make decisions on my behalf, such as by appointing an accountant to make decisions about my financial transactions, these are all decisions that I might approve or reject as I see fit. The crucial asymmetry in appointing a proxy is that the transfer of decision-making authority is absolute in a way that contemporaneous autonomous decision-making does not allow; that is, it is authority over me rather than by me.<sup>19</sup> Even alternative accounts of precedent autonomy that are based on notions of integrity and ‘whole-life’ wishes rather than those concerned primarily with self-governance or sovereignty over one’s self (Dworkin 1994), do not explicitly explain how I could transfer decision-making authority to another person in this way precisely because they are based on the view that the value of autonomy is to protect character and a certain capacity such that it “allows each of us to lead our own lives rather than be led along them” (Dworkin 1994, p 224). Although it may be a genuine wish that someone else makes decisions on our behalf, it would seem that the appointment of a proxy does not neatly cohere with living our own life but rather with having someone else make decisions about our life.

However, it does still seem to be possible to grant other people authority over ourselves in certain contexts, the most obvious being in politics. Just such an approach is taken by Gerald Dworkin (1988) in one of the few attempts to directly establish the underpinnings of proxy consent.<sup>20</sup> It is therefore important to consider

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<sup>19</sup> One might wish to draw parallels to Kant’s account of the wrongness of slavery in this regard – that decisions as to what I may or may not do are made by others rather than myself and this undermines my very status as an autonomous agent. See, for example, Haltman (2007) p 113.

<sup>20</sup> Dworkin’s arguments simply equate modes of political representation with proxy decision-making. For example, the view that there exists an ‘identity of interests’ corresponding between a patient and

how such an account from political philosophy could provide a substantial theoretical basis in the case of transfer of authority to proxies. Although a detailed exploration of the concept of authority is beyond the scope of this paper, some explanation as to how authority can be transferred to others is essential for our understanding of the moral authority of proxies.

The concept of “authority” is itself challenging to define but it can be characterised in terms of:

“performing the task of deciding what actions are required by the reasons for action that its subjects accept and gives to the subjects directives which they treat as replacing these reasons as a basis for action.”<sup>21</sup>

Such a characterisation can explain the process taking place in extended decision-making using proxies. That we accept the transfer of authority in decision-making to a proxy is because we can provide a set of reasons to obey the instructions of a proxy on the grounds that they are reasons we already would accept as a basis for following such decisions.

So what could these reasons be? Three broad claims are usually offered as reasons for extending decision-making authority:<sup>22</sup>

(a) It increases scope of personal autonomy by allowing individuals a degree of self-determination in relation to their care when no longer competent.

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their proxy is taken to be a justification *simpliciter* for their authority (p 91). However, this does not, by itself, give a reason why the proxy and not some other person with similar interests has authority.

<sup>21</sup> McMahon, (1987) pp 306-7. This is based on Raz, (1985).

<sup>22</sup> See Buchanan and Brock (1990) pp 98-9.

- (b) It gives rise to improved welfare, for example, by allowing a shortening of a perceived valueless or suffering life, the continuance of a valued life, or the protection from unwanted bodily violations.
- (c) It allows individuals to practice a form of altruism, by allowing them to relieve emotional or financial concerns or to attempt to relieve social burdens on resource use.

Each of these reasons is, of itself, an aspect of exercising an autonomous choice. Should a person choose to practice greater self-determination, or to guard their perceived future welfare, or to practice a perceived future good, they are all choices that arise from an initial decisions made by an autonomous agent. This, in turn, provides a reason we would normally accept as sufficient for following that decision because we already acknowledge a duty to respect the autonomous wishes of that agent. This means that the reasons we have to accept the authority of a proxy are all grounded in our respect for the appointing person's autonomous decisions. That is, we accept the authority of a proxy because their decisions are exactly replacing what we would already accept as reason to respect such decisions – the autonomous choice of the person who appointed them. Even if someone who is charged with the treatment of a patient should consider a decision provided by a proxy to be unwise or against their judgement, they still have an adequate reason to accept the authority of that decision given that the decision is just a replacement of the autonomous wish of the patient in question. The upshot of this is that if we are to grant that a proxy has the moral authority to make decisions then it is because these decisions are the equivalent of a contemporaneously-made autonomous decision by



the now incapacitated person. In other words, proxy decisions have moral authority because they are the equivalent of a contemporaneous autonomous decision.

However, as I will discuss in the next section, it is questionable whether the considerations that justify autonomy also justify the transferring of authority to a proxy.

It is worth noting that the two commonly recognised guidance principles of proxy decision-making are also attempts to capture something of the reasons why we should follow the instructions of a proxy. Such principles determine the way in which a proxy is required to formulate their decisions concerning the incapacitated person.

The two major approaches are:

**(SJ)** Substituted Judgement: where the proxy uses their special knowledge of the incapacitated person's preferences to make the decision that the person would have made, were she competent.

**(BI)** Best Interests: where the proxy makes an assessment of the person's best interests and makes a decision based on that assessment.

The guidance principles have come under some considerable critical discussion for a variety of reasons and opinion is divided as to which principle should be followed.

Some, such as Dan Brock (1993), have favoured a substituted judgement role.

Others, such as John Harris (2003), have argued for a best interests formulation.

In both cases, there is an attempt to provide a reason why we should respect the judgement of a proxy based on the content or type of judgement it is rather than who made that decision. With the substituted judgement role (SJ), the reason is that attempting to replicate the actual decision-making process of the incapacitated person is the closest we can get to determining what their contemporaneous autonomous wishes would have been, were they still competent.<sup>23</sup> This allows a continuation of self-determining decisions to be made on the grounds that they are just the sort of self-determining decisions that the incapacitated person would have made. In the case of Best Interests (BI), the reason is that the proxy's decisions are protecting the perceived welfare of the incapacitated person by a means previously decided by the person appointing them. Hence a proxy can be appointed on the understanding that they have a particular principle guiding their role and that this principle is replicating one of the reasons we understand as important for respecting a person's autonomous decision at the time the proxy was appointed.

### **3. Challenges to Extending Decision-Making**

The moral authority of decisions made by proxies seems, therefore, to derive from a prior respect for a person's autonomous choice to extend their decision-making through the act of appointing them, supported in turn by an account of the nature of authority. This is true not only of proxies appointed under the substituted judgement standard but also those appointed under the best-interests standard, as it is a claim about how they derived their decision-making authority in the first place rather than the basis upon which they may their decisions. If a proxy has the moral authority to

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<sup>23</sup> Whether such counterfactual claims are themselves coherent is extremely dubious. See Barnbaum, (1999) and Wrigley (2011) for further discussion.

make decisions, it is because their decisions have the same authority as a contemporaneously-made autonomous decision. However, there is more to be said about the implications that stem from accepting such authority. In particular, we cannot uncritically assume that extending decision-making by bequeathing the authority to a proxy is unproblematic. After all, just because I wish to bequeath authority to someone does not automatically mean that others will regard them as having authority. The concern here is that we might still doubt whether extended decision-making generates the equivalent moral authority to a decision made contemporaneously by a fully autonomous agent. One important way this concern arises is through the following question:

**(MA)** If moral authority associated with decision-making is extendable by transferring decision-making powers to a proxy then is such authority continuously transferable?

The concern raised by (MA) is that if you agree to the principle of being able to extend decision-making in a way that transfers your own moral authority as an autonomous agent, then you would have to face the question of the transitivity of that transfer.

To illustrate this concern, suppose person A appoints a proxy, person B, in the belief that this grants the proxy all of the decision-making powers over personal welfare and treatment decisions for A. Also suppose that person B becomes in some way incapacitated or unable to make decisions affecting their own or anyone else's

treatment. However, also suppose that person B knew that this would happen, for example through being diagnosed with some condition that leads to gradual deterioration of their cognitive state (or perhaps person B was immensely prudent and made provision in the case of a sudden eventuality). As such, person B appoints a proxy of their own – person C.

Suppose not only this, but also that person B was aware they still had the responsibility of decision-making for person A, and so B determines that person C is to make decisions on their behalf for person A as well. Such a transfer could be continuously iterated as many times as you like. Provided this is done in line with the theoretical basis upon which the proxy was appointed, the decision is not going against their role. Hence proxy B might think it was in A's best interests to be represented by C when B is no longer capable of deciding for A; or that C could make substituted judgements for B, which would include B's judgements about A.

The concern is that if extended decision-making conveys with it the same moral authority to make decisions as the original autonomous agent would have, then part of decision-making authority is the ability to choose to extend your moral authority by appointing a proxy, given that appointment of a proxy is itself a decision about the personal welfare and treatment decisions of an individual. But this would mean that we must accept the transitive nature of transferring decision-making authority, so that the proxy of our own proxy could become our proxy, or that our own proxy could write an advance directive indicating treatment for us. The concern is therefore whether moral authority to make decisions is transitive in this way:

**(T)** If C is proxy to B and B is proxy to A then can C be proxy to A?

This problem can be captured in argument form to make the inferential problem clear:

**(TA) The Transitivity Argument**

1. We respect the autonomous decisions of an individual, **A**, and we respect their authority to extend those decision (via a proxy).
2. Extended decision-making should be respected *as if it were* the decision of the autonomous individual who extended it in this way.
3. So (from 1. and 2.) we respect the authority of decisions made by proxies as if they were the autonomous decision of the individual they concern.
4. If a proxy decides to extend their own decision-making, those decisions should be respected (from 1. and 2.)
5. A proxy's decision-making authority includes decisions about individual **A** (from 1., 2. and 3.)
6. Therefore a proxy's authority to extend their decision-making about individual **A** should be respected (from 4. and 5.)
7. Therefore a proxy can extend their decision-making through another proxy and that will include authoritative decisions about individual **A** that should be respected (from 4., 5. and 6.)
8. Therefore we should accept extended decision-making is transitive, *ad infinitum* (**corollary of 7.**)

Doubtless the first response to this conclusion is simply, “why is this important?” Why isn’t the answer just, “no, you cannot transfer this authority repeatedly”? The problem with such a response, however, is that rejecting this transitivity would also be to deny that extended decision-making carries with it the sort of authority it is expected to possess if we are to be obliged to respect it in the first place.<sup>24</sup> This point is crucial and requires some further clarification.

If extended decision-making is to extend the authority to make decisions as the original autonomous agent would have had, then part of this decision-making authority is the ability to choose to extend your authority by appointing a proxy. The point being that we would be obliged to accept the decisions issued by a proxy *as if they were the autonomous individual making them* (otherwise we would not have sufficient reason to accept the transfer of authority in the first place). Therefore, by appointing a proxy, the practice of transferring decision-making authority is itself endorsed. Any proxy appointed would subsequently be equally placed to do likewise. As the person appointed as proxy has authority over their own decision-making and part of that decision-making comprises authority over the person they are proxy for, then a transfer of the proxy’s decision-making authority would have two (or potentially more) people within its scope.

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<sup>24</sup> It might be the case that, once this conceptual dilemma is revealed to people, they attempt to appoint a proxy with a caveat specifying that their authority should not be treated as if it is transitive. For a discussion of this point, see (L1) in Section 4, below.

At this point, an advocate of extended decision-making may wish simply to bite the bullet and accept the possibility of multiple iterated proxies. As long as those engaging in the process were clear that this is a possibility, then there is nothing intrinsically wrong with it. However, accepting this does seem to pose a more severe practical problem for substituted judgement approaches to proxy decision making than for best-interests approaches, as transitivity may result in someone very far removed from the initial person to whom the decision-making authority was bequeathed making decisions that directly affect the treatment of an individual.<sup>25</sup> That one could claim that a proxy appointed by a proxy was a genuine extension of the, now-incapacitated, initially appointing individual's autonomy is to stretch the concept of autonomy to its limits as the originally appointing individual is now quite far removed from the process.

Such concerns, in turn, may lead to a change in practice and attitude towards extended decision-making in order to avoid the loss of knowledge about an individual's wishes and preferences that are central for the success of a substituted judgement approach. On the one hand, individuals appointing a proxy may wish to take the judgement of their proxy in appointing another proxy as part of their good faith in the judgements of their initial proxy, so that the substituted judgement of their proxy would take the following form: "As proxy to person A, I, person B, make the substituted judgement that if B became incapacitated then A would want B to appoint a proxy C who could make substituted judgements as if they were B."

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<sup>25</sup> It is important to remember that the standard for appointing a proxy on the substituted judgement (SJ) basis is not that they are the person best placed to make substituted judgements but only that they are the person of whom it is desired that they should make decisions based upon that principle.

Alternatively, they may wish to agree that judgements may ultimately have to be made on best interests grounds and their initially appointed proxy is still best placed to determine who should be appointed to make those judgements, such that: “If B became incapacitated then they could make a substituted judgement for A to appoint a proxy C who could make decisions for A in their best interests.” This could ultimately be seen as an endorsement of the whole proxy appointment process where proxy decision-making is retained as a dynamic means of meeting new challenges that may arise and also as a means of at least attaining some link between an initially appointed decision-maker and any subsequent ones, albeit we must also recognise that by appointing a proxy we set it into motion but we may potentially end up with a proxy far removed from our initial choice.

If, on the other hand, the transitivity conclusion is something that you wish to reject, two possible alternatives arise:

**(R 1)** Show that transfer of decision-making authority is not transitive but nevertheless conveys the same authority as the original autonomous agent, with a limit on the ability to extend decision-making powers further.

This looks like an ideal result for proponents of proxy decision-making to adopt. However, what is less than clear is how one might limit powers in a non-arbitrary way. If we are to allow the basic principle that autonomous agents can extend their decision-making authority and we wish to consider such extended decision-making has the same authority as the autonomous agent, any arbitrary block on the authority would indicate it is not the same kind of authority an autonomous agent



has. If it is a different kind of authority then it is no longer obvious that we have any strong obligation to respect decisions made through the extended decision-making process, as their whole underpinning was based on respect for autonomy.

The other option is:

**(R 2)** Agree that the transitivity of a full decision-making authority is unacceptable and thereby acknowledge that extended decision-making is of a different and more limited kind than you would have over yourself as an autonomous agent.

You could thereby reject the transitivity on the grounds that although you can bequeath your decision-making authority through a proxy, the limited authority this gives the proxy means as soon as a proxy tries to bequeath these decision-making powers, they find they can no longer do so as we have no grounds for accepting their wishes to do so. This, however, has similar problems to (R1): you would have to accept that because these extended decision-making methods do not have the same kind of authority that we find in an autonomous individual we might not be obliged to honour any of their decisions in the same way, as diminished authority does not convey the same requirement to respect it as the wishes of an autonomous agent. So the corollary of this position is that it is not just the authority to transfer decision-making power that goes; it is also the authority over treatment decisions themselves. The upshot of this is that such decisions could reasonably be overturned for paternalistic reasons because they do not have the moral authority of autonomously made decisions over oneself. Such a view of authority that the proxy may have under

this view corresponds with what Uniacke (2013, p 98) calls “consideration respect”, whereby we take account of someone’s wishes but then come to a decision upon a balance of consideration. Nevertheless, in both (R1) and (R2) there are still potential defences that could be offered to justify why we should still accept the authority of their proxy which must be considered in more detail before the extension view account of authority would need to be replaced by some alternative moral underpinning for proxies.

#### **4. The ‘Setting of Limits’ Defence**

The responses (R1) and (R2) require a proponent of extended decision-making to try and block the problem through specifying strict limits on transferring authority. This way they can both retain the authority of the extended decision-making process whilst heading off the potential problem that multiple transfers of authority might raise.

There are two routes by which this setting of limits might be implemented:

**(L 1)** Attempt to specify one and only one individual to be the decision-maker.

Such that a still competent person creates a clear directive appointing a proxy with the caveat that, “I authorize you – and only you – to make decisions relating to my treatment.” The thought is that the proxy cannot thereby transfer this authority any further.

Or, alternatively:

**(L2)** Attempt to make a universal prohibition that will apply to all.

Such that a still-competent person creates a clear directive along the lines of “No one is to administer treatment x on me” (where ‘x’ is, for example, CPR). The thought behind this is that the directive will stay in place for the lifetime of the patient and takes precedence over any other decision.

In the case of (L 1), it is open to the concern that limiting the scope of authority of the appointed proxy by bequeathing to them the decision to make some decisions (those they directly make for the person who appointed them) but not others (decisions about who determines decisions), is to bequeath them authority of a nature and degree less than that of an autonomous agent. As such, it is not clear that we are morally obliged to respect any decision they make in the way we are obliged to respect the decisions of an autonomous agent, although we may wish to establish the authority of a proxy to make decisions on some other basis, such as their innate trustworthiness or the respect they were held in by the incapacitated person.

However, without the strong obligations derived from an account decision-making authority based on an extension of autonomy, the decisions would be those of an advisor with a special relationship to the incapacitated person, rather than as if they were the autonomous person making self-governing decisions. This might be a concern for anyone wishing their proxy to be able to make or reproduce decisions that seem odd, irrational or unusual to another third party or if they had views that could be considered not typically in their best interest. Although an autonomous agent is at liberty to make such decisions about their life or their treatment, an

advisor's decisions along the same lines will always be subject to additional third party scrutiny and potential refusal.

However, this concern might itself be countered on the grounds that proxies can be appointed with very specific remits in other areas of life, such as arranging a person's financial affairs, without loss of their authority to make decisions within that narrow remit. As a proxy appointed with such a remit would not be able to make decisions over other areas of the incapacitated person's life, why should the case of a proxy appointed to make welfare and treatment decisions be any different?

This raises the question as to whether we can bequeath authority over a very narrow scope to limit the area of decision-making over which a proxy makes decisions. It seems entirely feasible to designate that a proxy is only appointed in order to make decisions in some narrow band of one's future treatments, for example in relation to the use of a ventilator, but they are not appointed in order to make decisions over other treatment areas, such as blood transfusions. In appointing a proxy in this way, an autonomous agent is attempting to bequeath to the proxy the decision-making authority as if they were that autonomous agent themselves but only within that narrow scope.

The additional question as to whether a proxy could appoint another proxy to make decisions on their behalf in the same way within the narrow area of scope depends upon how we understand scope as well as authority. 'Scope' could be interpreted as:

**(S1)** Incorporating all decisions that relate to a designated area

or

**(S2)** Involving a distinction between 1<sup>st</sup> and 2<sup>nd</sup>-order decisions for a designated area.

On the simple understanding of scope in (S1), a proxy, B, could appoint their own proxy, C, to cover decisions concerning person A, as an extension of the decision-making authority B has so long as proxy C's decisions fall within the scope that person A designated. The rationale behind this is that determining who should make the treatment decisions for someone is itself a decision concerning the welfare or treatment of an individual, which would mean this was within the remit of a proxy tasked with making even a narrow-scope treatment decision. As such, it could plausibly be made on the basis of a substituted judgement (person A would have wanted their proxy, person B, to appoint person C as proxy to make substituted judgements for them, should B become incapacitated) or a best interests judgement (proxy B determines that it is in the best interests of person A that person C take over as their proxy should B be incapacitated). This can be replicated for other kinds of scope. For example, if person A appointed their proxy, B, with an unlimited scope, then B would bequeath the authority to another proxy, C, to make all decisions affecting A. Whereas if person A appointed a proxy with a limited scope, such as refusal of certain treatments, then proxy B could only bequeath authority to proxy C within that same narrow scope of treatment options for A.

The other view of scope (S2) is that it involves higher-order decisions. The proxy for person A could remain completely authoritative for 1<sup>st</sup>-order decisions within the

designated scope. A 1<sup>st</sup>-order decision would be one that, for example, relates directly to decisions concerning the acceptance or refusal of medical treatment. However, the proxy might not have 2<sup>nd</sup>-order decision-making powers within their scope. 2<sup>nd</sup>-order decisions are those that concern decisions about who gets to make decisions. This would mean that transferring or bequeathing decision-making authority to another proxy would not fall within the scope of the original proxy.

What is important to the conceptual understanding of proxy decision-making is the issue of the scope of the decision-making does not directly help with the concerns over the legitimacy of the transfer of authority itself. That is, if we wish to make distinctions between 1<sup>st</sup> and 2<sup>nd</sup>-order scope for proxy authority, we can still ask is what is bequeathed in terms of 1<sup>st</sup>-order decision-making the sort of authority an autonomous agent has? Limiting the higher-order decision-making of a proxy would force the claim that they lack the authority of contemporaneous autonomous decision-making. If this is the case, we are back to the concern that we must offer an alternative moral underpinning as to why we have any reason to respect proxy decisions which may involve a weaker obligation to respect those decisions.

This does not mean that we could not appoint a proxy with a narrow remit that was restricted to 1<sup>st</sup>-order decision-making (or even many different proxies, each with their own narrow remit). Making such an appointment upon clear grounds would still give those charged with delivering our treatment and welfare provision a reason to treat the decision of the proxy as a good indication of wishes and preferences of the incapacitated person. But understanding that a proxy decision provides a good

indication of treatment wishes is very different from having a moral obligation to respect such a decision. It would precisely be the moral obligation to respect a proxy's decisions that would be lost by narrowing the scope of their remit in this way. Proxies could no longer make decisions with the same authority that the incapacitated individual could have were they still competent. Hence, if the expectation is that proxy decision-making is a direct extension of autonomous decision-making then narrowing the scope of decision-making authority will directly undermine this presumption.

The alternative approach to preventing transitivity problems was the second limitation defence (L 2) whereby an additional universal prohibition is issued, such as "no one is to attempt to resuscitate me". Such clear and universal directives do not seem to suffer from the transitivity problem I have outlined. There remains a separate problem as to the coherency of such sweeping statements amongst the many separable problems raised in the literature concerning the generalisability of advance statements (for example, in this case would attempting to clear the blockage from someone choking on a piece of food mean that they were attempting resuscitation).<sup>26</sup> However, as there is no attempt to bequeath authority to another decision-maker through this process, transitivity is not itself an issue. Indeed, making such advance directives may be the clearest route for those wishing to retain the authority of extended decision-making without the danger of the transitivity concern.<sup>27</sup>

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<sup>26</sup> See, for example, Buchanan (1988).

<sup>27</sup> This is not to say that such advance directives are unproblematic, only that they are not directly subject to transitivity concerns.

## 5. Conclusion

Proxies can provide a very useful service in terms of guiding treatment for an incapacitated individual and be a great help to health care providers in determining the best course of treatment. Therefore their existence and their function are likely to be a desirable aspect for providing insight into an incapacitated individual's life and desires. The mere fact that anyone is identified to help make these decisions might therefore be widely considered as a boon. However, the need for clarifying the ethical underpinnings of a proxy's status is most needed in those challenging areas or cases where their authority to make certain decisions comes into question. It is therefore important for anyone wishing to engage in the practice of appointing a proxy to have a clear view of the nature, scope and limits of the decision-making authority of their proxy. The aim of this paper has been to bring into question one significant way in which we might establish this ethical underpinning. Each option in light of the transitivity concern has implications for how we should understand and interpret the process of decision-making using proxies if we base an account of their authority on the extension view of autonomy.

The strong obligation to respect the decision of a proxy under such a view, whereby moral authority is transferred or bequeathed to the proxy by an autonomous individual, is both challenging to capture and has potentially problematic implications. If we accept that it is possible to convey moral authority as an extension of one's contemporaneously made autonomous decision-making then we have to accept that it could be extended to someone who we do not know, or agree



with, and that they could end up making major decisions about our treatment options. This may not be seen as problematic if an individual would be otherwise left without a proxy and one must be identified by health care providers from some predetermined list of relatives or through the state, on the grounds that at least there is some connection between the now incapacitated individual and the choice of proxy. However, it would be difficult to consider the proxy appointed by a proxy as a genuine extension of the original individual's own autonomous decision-making. Alternatively, we could accept that our extended decision-making does not have the same authority as would our contemporaneous autonomous decision-making, and as such, is open to paternalistic rejection by others. Again, this route may not be seen as a problem if individuals are content with appointing a proxy on some other grounds, such as the trustworthy nature of a potential proxy. Either way, it is important that proxy decision-making is viewed in the appropriate light and not seen as a simple and unproblematic means of guaranteeing that our current views and opinions will be adhered to when we are no longer able to express them.<sup>28</sup>

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