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The Boundaries of Legal Personhood: Disability, Gender and the Cyborg

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Abstract

By considering the death of the disability activist Engracia Figueroa as the consequence of her wheelchair being damaged by an airline, this article asks whether law could accommodate a definition of legal personhood that encompasses the possibility of bodies augmented by prosthetics, technology, and mobility aids. The use of mobility aids by disabled people and the role of prosthetic penises in so-called ‘gender fraud’ cases offer two useful provocations to consider the ways in which legal personhood, if defined as largely mapping on to an ideal, normative body, is becoming an increasingly inadequate legal concept in the modern age. Drawing on the work of Donna Haraway and the figure of the cyborg, this article argues that a more protean, flexible, and fluctuating understanding of legal personhood would offer both a more accurate and utopian conception of the body in law than the current essentialist approach found in a number of legal areas and particularly in English criminal law.

Keywords Legal personhood · Disability · Gender · Cyborg

Introduction

In July 2021 Engracia Figueroa, a prominent American disability activist, flew from Los Angeles to Washington DC to take part in a political rally at which she was due to speak about raising wages for home care workers. On her return flight with United Airlines her wheelchair, ‘which was custom-designed to support her spinal cord injury and left leg amputation’ and had cost over \$30,000, suffered significant damage while stored in the cargo hold, forcing her to use a loaner chair provided by the airline (Riley 2021). For several months afterwards, Figueroa had to fight the airline to cover the costs of a new custom-made wheelchair, while the airline tried to argue for a cheaper repair instead. Using a wheelchair that was not properly fitted

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to her body for several months led to the development of a pressure sore, which ultimately became so severe that the infection migrated into her hip bone. She died of complications from this injury in October 2021, aged just 51. Before her death Figueroa argued that wheelchairs were ‘an extension of our body’, which airlines are entrusted with and therefore should be expected to care for as if they were a person (Spoccia 2021).

On average US airlines alone damage or destroy 30 wheelchairs a day (Spoccia 2021). While this is mostly treated as property damage equivalent to lost or damaged luggage, more recently the campaign network Hand to Hand have argued that the death of Figueroa had been directly caused by United Airlines damaging her wheelchair beyond repair (Riley 2021). This has led a number of high profile disability activists to argue that mobility aids, and wheelchairs in particular, should be treated as an extension of a disabled person’s body and therefore damage to a mobility aid should attract either the same criminal law penalty as equivalent harm being done directly to a person’s body, or be subject to the ability to bring a civil law personal injury claim (Salvini 2021). While similar cases of damaged mobility aids involving airline passengers in the UK have so far not had fatal consequences, there have nevertheless been numerous instances of disabled people suffering physical and emotional harms as a result of such incidents (Dixon 2023). This has led to increasing demands for the Civil Aviation Authority to intervene and enforce stricter regulation on airlines who damage or lose mobility aids (Disability Rights UK 2023). However, is treating mobility aids as essentially a more significant form of luggage sufficient to address the kinds of losses and harms suffered by disabled people who are suddenly deprived of mobility aids? Fundamentally these cases raise important questions for legal experts and scholars about the divide between people and objects in law and the way this has been traditionally translated into our concept of legal personhood and our understanding of what in law makes up a person.

In contrast to the arguments made by disability activists, current understandings of legal personhood suggest that law envisages people as comprised of generally statically patterned bodies and identities (see e.g. Naffine 2012). Even where law allows for a change of status that amends one’s legal personhood, as is the case with both marriage and changes of gender markers,¹ such change is envisaged as leading to a new static way of being. In these instances, law recognises that further change might be necessary; hence marriages are not truly permanent and gender markers can in theory be changed more than once (Grabham 2010). However, law’s engagement with bodily patterns that are themselves changing and variable is generally more tentative and conditional. Law, and criminal law in particular, recognises that objects can form an extension of the body in certain circumstances, but only where such objects are clearly connected to the body. As such, mobility and other technological aids used as by disabled people are part of a person when they are used as a

¹ In England and Wales the *Gender Recognition Act 2004* allows a person to change their legal gender status from female to male and vice versa as long as applicants meet a number of stringent conditions and their application is successfully assessed by a Gender Recognition Panel consisting of medical and legal experts (Renz 2020).

medium through which to exert force upon a body, in the case of common assault for instance, but become 'mere' property when separated from their owner. This creates a limiting 'either/or' dualism contingent upon understandings of 'connection' to the body that limits the usefulness of the concept of legal personhood for a significant section of the population.

In the first section of this article, I will provide a brief overview of key elements of critical thought on legal personhood as a concept, focusing in particular on the extension of legal personhood beyond the boundaries of the solitary human body. In the second part of this article, I will turn to English criminal law as an especially fruitful vantage point from which to consider the limitations of legal personhood in the modern age; focusing in particular on, firstly, mobility aids and violent offences and, secondly, so-called 'gender deception' cases. Even though violent offences against the person and sexual offences both sit within criminal law, they engage with the question of legal personhood in subtly different ways that contribute to the core argument of this article. In the final part of this article, I will draw on the post-structuralist work of Donna Haraway's *Cyborg Manifesto* to argue that the current conception of legal personhood is inherently essentialist and insufficient in its approach to differentiating between legal persons and objects, which has the effect of excluding and mis- or only partially recognising people in law.

Legal Personhood Between Common Sense and Fiction

What constitutes legal personhood is clearly not uncontested.² Ngaire Naffine (2009) highlights that most debates about legal personhood are underpinned by differing theoretical approaches to law itself and the ways in which it does, or should, intersect with morality. Dave Fagundes (2001) suggests that the definitions given to this legal concept alternate between treating it as a 'commonsense determination' of who is human and recognising it as a 'legal fiction unrelated to biological conceptions of humanity'. Legal personhood, for Fagundes (2001, p. 1746), serves a dual function of both designating who, or what, is capable of holding legal rights and duties, but also who properly counts as human. In analysing the contradictory positions taken by the American legal system on the legal personhood of slaves, Fagundes (2001, p. 1750) argues that jurisprudence is clearly divided on whether legal personhood is tied to a biological notion of humanness or a more pragmatic identification of who is subject to which laws. For Fagundes, law then assumes a hermeneutic function. Recognising something as a legal person also assigns it a certain normative worth, which in turn can change cultural understandings of personhood outside the law (Fagundes 2001, p. 1760). The definition of legal personhood is therefore not a neutral construct based on nature, but rather is foundationally linked to social values

² This is not intended to be an exhaustive discussion of all scholarship of legal personhood. Rather, for the sake of brevity, what follows focuses on the work of scholars that critically engage with legal personhood and in particular with more recent legal and social developments that impact our understanding of legal personhood.

and ethics. As Christopher Stone (1972, 2010), in his seminal essay on whether legal personhood should be extended to non-human animals and objects, suggests what is, and even more importantly, is not, a legal person is clearly a matter of social convention rather than natural fact, and is evidently a changeable and evolving concept. This convention in turn determines what harms are recognised in law, what actions are considered wrong, and how such actions should be penalised or regulated (Stone 1972, p. 455). Stone consequently suggests that it would be better to define legal personhood in reverse, by considering what a socially just and fair world would look like, and then to define legal personhood on the basis of what allocation of rights would enable such a world to flourish. One key aspect of such a world would be the capacity to bring a legal claim for ‘damages calculated by loss to a nonhuman entity, not limited to economic loss to humans’ (Stone 2010, p. xii).

For Stone (1972, p. 496), legal personhood, crucially, does not require fixed and stable (human) characteristics. Naffine (2012, p. 68), drawing on Stone, in her analysis of legal personhood, argues that legal personhood to date is defined by an inherent ‘anthropocentrism’, which is based on the understanding that ‘humans are categorically different from animals and from the rest of nature and that this difference should sound in law’, with embryos, the dying, and so-called ‘abnormal human births’³ currently defining the outer edges of law’s conception of personhood. Despite this she notes that certain non-human objects, including ships, have in various instances been recognised as legal persons (Naffine 2009, p. 35). In contrast, animals generally remain clearly outside the boundaries of legal personhood (Sunstein 2000). For Naffine (2012, p. 70), the policing of legal personhood, both by religious and secular humanist thinkers, is underpinned by a profound essentialism that perceives humans as having ‘a true and essential nature’ that remains largely untouched by culture or location, and which is stable over time. Law then, at present, presupposes a natural and causal link between our understanding of what it means to be human and legal personhood. Instead, Naffine (2012, p. 78) suggests that both the human and legal personhood are more properly understood as ‘transient cluster concepts’, made up of socially contingent fluctuating and multiplicitous characteristics. Similarly, she argues that jurisprudentially the concept of legal personhood is evidently ‘contaminated’ and can therefore not properly be understood as following one single school of jurisprudential thought (Naffine 2009, p. 43). Selkälä and Rajavuori (2017, p. 1019) argue that it would be inaccurate to say that, as frequently claimed, legal personhood as a whole has been ‘grossly undertheorized’. Instead, they argue that it has been constructed in a somewhat piecemeal fashion, with frequent attempts to extend its reach leading to a fairly uneven application of this concept overall. However, in practice this has meant that legal personhood has been extended beyond its initial reach of white, upper-class men, to others on firstly, the basis of their similarity to the ‘ideal’ legal person and then later based on arguments around the ‘dignity and humanity’ of those who had been initially excluded, including disabled people (Selkälä and Rajavuori 2017, p. 1041). All the while firmly restricting it as a category for almost exclusively human use.

³ See, e.g. in *Re A (Children)* [2001] Fam 147.

Recognising the non-human legal person

Since the publication of Stone's essay 50 years ago, understandings of legal personhood as solely anthropocentric seem to have gradually shifted. One of the less prosaic extensions of legal personhood can be found in the recognition of corporations in multiple jurisdictions as having legal personhood over the last three decades,⁴ thereby granting them the same legal duties and rights as a person (Lipton et al 2010). This can be done by either defining a corporation's legal personhood through the personhood of the individuals it consists of, or by treating it as a distinct artificial entity (Amao 2008).⁵ In either construction corporations then become legal persons with the capacity to both own property and be owned by others as property, although this right isn't currently held in relation to other kinds of legal persons, such as humans (Amao 2008, p. 111). However, Fagundes notes that due to the different theoretical approaches to the legal personhood of corporations, American courts have been inconsistent in recognising the legal personhood of corporations when it comes to legal areas beyond property rights (see also Calverley 2008), voting rights for instance, despite at times treating them as 'peculiarly humanoid' and capable of human emotions such as embarrassment or anxiety (Fagundes 2001). A similarly man-made challenge to legal personhood can be found in calls for the legal recognition of Artificial Intelligences as legal persons (Calverley 2008). David Calverley argues that as legal personhood is already extended to 'non-biological' entities like corporations, it could in theory also be expanded to AI by focusing on the interlinking concepts of 'intentionality' and 'autonomy', which he argues are two of the core components of legal personhood (Calverley 2008, p. 524).

The recognition of legal personhood for non-human objects and phenomena started to become a more significant legal reality when in August 2014, representatives of the Whanganui Iwi signed an agreement with the government of New Zealand to grant legal standing to the Whanganui River (Hutchison 2014). This was the first instance of recognition of the legal personhood of a non-human derived phenomenon and the consequent recognition of the legal rights and obligations that go along with this status. As Hutchison points out, changes in who or what is granted legal personhood clearly reflect 'changing values' in society more broadly (Hutchison 2014, p. 180). She argues that the decision to recognise the Whanganui River as having legal personhood clearly reflects a recognition of Māori values in which 'the river is not regarded as something that can be owned by humans but is seen as having an intrinsic value of its own' and that in particular, to be a legal person rather than property, the river 'is not separate but part of the people' (Hutchison 2014, pp. 180—181). For Hutchison (2014, p. 182) the status of the river as a legal person then parallels that of corporations as legal persons in that both hold a dual status as property owners, but also as property capable of being owned by others, in the case of the river by the local Māori people, in addition to the legal rights and duties of

⁴ A process which Fagundes (2001, p. 1765) argues "cheapens the distinctiveness of legal personhood" by pushing the concept of legal personhood beyond its natural limits.

⁵ For an alternative approach to corporate legal personhood see Gear (2007).

any legal person. Since 2014, litigation and campaigning in a number of other jurisdictions including India,⁶ Colombia and the US have raised similar claims for the granting of legal personhood to other rivers (Clark et al 2018).

Legal personhood is clearly a complex concept, made up of overlapping, contradictory, and situational definitions (see also Travis 2014). Piyel Haldar (2013) has in fact argued that the legal person is always constructed through the ‘technology of the image’, which has of course changed and advanced over time, thereby ultimately also changing the legal person it produces. Overall, there seems to be a gradual acceptance that legal personhood does not need to be the sole domain of humans. However, what does not seem to have been taken up widely is the argument made by both Stone and Naffine, that legal personhood does not need to rely on a fixed, static, and essentialist notion of what it means to be a ‘person’ in law. It is becoming increasingly apparent, that legal personhood as a concept can no longer be read as a causally linked descriptor for humans, if it in fact ever was. Legal personhood is increasingly being expanded to grant rights and recognition to non-human entities, including natural phenomena and social/economic constructs like corporations. Drawing on these jurisprudential developments, would it be possible to recognise a more protean version of legal personhood, in which the entity being recognised may shift in its composition over time? In some way this seems the logical extension of recognising both corporations and natural phenomena like rivers, neither of which are static in regard to the individual elements that make up their respective legal entities. Following Stone (2010, p. 2–3) ‘each successive extension of rights to some new entity has been, theretofore, a bit unthinkable’ and that as a result any proposed change to the current iteration of legal personhood will at first seem ‘odd or frightening or laughable’. Disability and gender then offer two particular provocations for thinking through legal personhood that challenge its current essentialist approach. The argument of this article is not that objects should be recognised as legal persons, although there increasingly is value in that proposition too, but rather that it seems important to consider whether it would be possible to come to a more fluid understanding of both the legal person, and the person by law, and therefore make it possible for objects to assume some of the legal properties (to remain unharmed, to be constitutive of that person) that law generally accords to organic body parts. Importantly, this is not intended as an argument for the extension of criminal law or for more severe criminal penalties, rather this article draws on criminal law as a case study, as this is one site where law currently frequently has to reckon with the limits of the legal person and one that is relatively underexplored in contrast to medical, company, and constitutional law (Naffine 2009).⁷

⁶ *Lalit Miglani v. State of Uttarakhand and others*, Writ Petition No. 140 of 2015, High Court of Uttarakhand at Nainital (India), MCC 139/2017.

⁷ For an analysis of legal personhood in the context of elective amputations, see Travis (2014).

Criminal Law as a Site of Legal Personhood

Mobility aids and their connection to the legal person

Sylvia Federici (2020, p. 53) argues that '[a]s the point of encounter with the human and non-human world, the body has been our most powerful means of self-expression and the most vulnerable to abuse.' Considering the body in law then seems crucial to our understanding of what it means to be a legal person. However, as Nafine (2009, p. 144) notes, the actual embodied form of the legal person often remains vague in both law and jurisprudence, where, if it is envisaged at all, it is primarily as a rational, able-bodied adult (see also Grosz 1994). Although, as Sabrina Gilani (2021, p. 171) notes 'a theory of the body is curiously absent from criminal law', current English criminal law clearly recognises that at times the human body can be extended in its form and reach through objects in certain circumstances. For instance, in *R v Thomas*⁸ the Court held that touching a person's clothing, such as the hem of a skirt, can constitute an assault on the person themselves for the purposes of criminal law, even if the defendant does not come into contact with that person directly. Similarly, in *R v Clouden*⁹ pulling someone's handbag out of their hands amounted to exercising force on the person holding the bag, despite the fact that the defendant never touched the victim. Criminal law, then, recognises that in some circumstances objects have a transitive capacity for harm or force, even if the victim themselves was not actually harmed by the touching or interaction with the object.

Disability has historically been a factor in preventing some people from being recognised as having full legal personhood (see, e.g. Travis 2014; Selkälä and Rajavuori 2017). As such it seems particularly important to take challenges by disability activists to existing definitions of both legal personhood and what counts as a person in law seriously. Applying existing criminal law principles to the use of mobility aids suggests that someone grabbing a mobility aid being used by another person is clearly exercising force on that person's body and would potentially amount to an offence under the *Offences Against the Persons Act 1861*. Indeed, in *R v Proctor (Alex)*¹⁰ the appellant attacked a wheelchair user, Karl Dean, tipping his wheelchair over and knocking Mr Dean to the ground. Mr Dean was physically injured and his wheelchair also suffered significant damage. The appellant was charged with assault occasioning actual bodily harm against Mr Dean and criminal damage in relation to the wheelchair. In his rejection of the appeal Mr Justice Jay stated that: 'The offence of criminal damage in relation to the wheelchair offended the public and, therefore, deserved a consecutive sentence of three months. It was a mean offence and the public had to know that vulnerable people were entitled to the protection of the courts.'¹¹ Here law treats the touching of an object, the wheelchair, as equivalent

⁸ *R v Thomas* [1985] Crim LR 677 6.

⁹ *R v Clouden* [1987] Crim LR 56.

¹⁰ *R v Proctor (Alex)* [2021] EWCA Crim 808.

¹¹ *R v Proctor (Alex)* [2021] EWCA Crim 808.

to the touching of a body and imposes a sentence legally proportionate to the injury caused, designating it as equivalent to pushing over a person directly, but compounded by the additional damage caused to the wheelchair.

Such instances also operate under a curious paradox, while in principle here law treats touching an object identically to the touching of a person and vice versa, in practical terms such acts of non-consensual touching and moving also turn the person into an object themselves. Wheelchair users become obstacles to be moved around with no more thought than one might move an awkwardly placed office chair or suitcase, possibly even accompanied by a warm glow of satisfaction for the able-bodied person, certain in their knowledge that they either helped the poor vulnerable wheelchair user or merely exercised their able-bodied privilege in moving through space unencumbered. Law of course only intervenes in such instances when there is either harm to the person or property damage to the wheelchair or other mobility aid. In that instance, wheelchairs and other mobility aids, are only treated by law as an extension of the body, while in direct contact with their owner. Otherwise, they revert to being mere belongings or property, subject to criminal laws regarding property offences, such as criminal damage¹² for instance, but not more than that. As such if in *R v Proctor* the appellant had tipped over the victim's wheelchair without it being occupied by the victim, he would have been only liable for criminal damage to the wheelchair as a form of tangible property. Indeed, there are fairly intuitive reasons for why law generally treats harm to people more severely than harm to property or objects, the latter can be repaired or replaced, the former generally less so. However, medical/scientific research is increasingly challenging the distinction between organic bodily components and technological/artificial ones.

Beyond the legal argument for mobility aids as an extension of the body, emerging research on brain plasticity suggests that disabled users of mobility aids, including wheelchairs and prosthetics, start to perceive them as a natural extension of their bodies over time (Pazzaglia and Molinari 2016). While this research originally focused on assistive devices that mimicked organic body parts and/or 'normal' bodily functions, prosthetic limbs for instance, more recent evidence suggests that technology, which offers different functionality, can similarly be part of a person's own understanding of their body through the 'plastic shaping of the bodily self' (Galli and Pazzaglia 2015). Papadimitriou (2008, p. 691) argues that in this sense the incorporation of technology as part of the embodied and relational self transcends the 'oppositional distinction able-bodied/disabled' (see also Zitzelsberger 2005).

While an injury to the leg of an ambulatory person might make it challenging for that person to get around, a bent or broken wheel will have the same, if not worse, effect on a wheelchair user. In fact, even beyond the tragic death of Figueroa, stories of wheelchairs being damaged during air travel in particular are so common that rarely a month goes by without one making the news, including during the 2021 Paralympics when an Irish Paralympic athlete discovered that his wheelchair had been damaged beyond repair on the way to Tokyo, endangering her chance of competing in the sporting competition at all (Young 2021). In such a situation, a wheelchair is

¹² S.1 Criminal Damage Act 1971.

suddenly no longer an extension of the body, but rather is treated identically to a lost or damaged suitcase. Certainly, no abled-bodied person would be asked to complete a claims form if airport staff smashed their legs during transit. Law is capable of recognising in both instances that harm has occurred and imposes criminal or other sanctions accordingly. However, what about the harms that are not being recognised here? Wheelchairs, particularly for non-ambulatory wheelchair users are that person's mobility. Consequently, the loss of a wheelchair inevitably constrains someone's life and their capacity to participate in economic and social activities of daily living. Even the fear of damage to a wheelchair can be sufficient to deter wheelchair users from relying on air travel, thereby imposing limitations that do not apply to solely ambulatory persons (Poria et al 2010).¹³ However, because at present wheelchairs are only treated as part of a legal person when they are essentially the conduit for actions exerted upon that person, law has no capacity to conceptualise these other harms that go beyond either criminal damage or a direct injury to the person mediated via a mobility aid. As Gilani (2021, p. 173) highlights 'bodies that may not bleed or sense pain or stop working, or whose limbs are synthetic and replaceable, may pose problems for a criminal law of homicide and assault', however, these problems arguably extend significantly beyond this one area of criminal law. In the context of violent offences against the person criminal law has primarily engaged with the divide between the legal person versus property that can be owned by a person by focusing on property as a conduit for violence against the legal person, while in the context of sexual violence criminal law has more explicitly engaged with the issue of the body itself.

'Gender Deception' and the legal person

While violent offences against the person and property offences are perhaps the most well-developed areas of criminal law in terms of its attempts to distinguish what forms part of a person in law and what is merely an object, more recently sexual offences have become another site where criminal law has to reckon with the changing nature of human bodies. In English criminal law penetration with a penis is specifically treated as rape under s.1 *Sexual Offences Act 2003* (SOA), in contrast penetration with a penis shaped sex toy is treated as so materially different as to amount to a separate offence, namely assault by penetration (s.2 SOA). The Scottish *Sexual Offences Act 2009* also makes the same distinction. This differentiation has become most notable in the context of so called 'gender deception' or 'gender fraud' cases, which deal with the question of whether deception as to a person's gender can vitiate consent to sexual activity. These cases engage with questions around the constituent parts of legal personhood in two distinct but overlapping ways: a) regarding whether

¹³ This issue is not just limited to mobility aids, which can be relatively easily separated from the person normally using them and therefore might be perceived as inherently at greater risk of damage. Research on the use of prosthetics has highlighted that people who use prostheses that are directly anchored to their body are more fearful of damage than those who use less integrated prosthetics (Lundberg et al 2011).

someone's formal legal gender status, either as assigned at birth or as modified by a Gender Recognition Certificate, affects their potential liability in this context; and b) by challenging to what extent one's (legal) gender can be modified through objects such as sex toys or prosthetics, or whether the use of such objects may actually be considered evidence of deception.

The leading case on gender deception in English law is the Court of Appeal decision in *R v McNally*.¹⁴ The defendant and the complainant met through a social networking site when they were both teenagers. They later met in person and engaged in a sexual relationship, during which the complainant assumed that McNally was male. She subsequently 'discovered' McNally's female gender. McNally was convicted of six counts of assault by penetration, as the court found that the complainant's consent had been vitiated due to McNally's deception regarding her gender. Similarly, in *R. v. Newland*¹⁵ the defendant was a university student, described by the presiding judge, Judge Dutton, as an 'intelligent, obsessional, highly manipulative, deceitful, scheming and thoroughly determined young woman'. The defendant befriended a fellow university student, the female complainant X. Simultaneously they also contacted X through a fictitious Facebook profile under the name 'Kye', presenting themselves as a man (Pidd 2017). Over a period of two years Kye and X established a romantic relationship, which involved multiple sexual encounters, during which Newland used a prosthetic penis (Sharpe 2017). Consequently, Newland was convicted of assault by penetration.

This case, which is the most thoroughly reported of the existing gender fraud cases, firstly seems to suggest that without a formal legal change of gender status through the *Gender Recognition Act 2004* and an application for a Gender Recognition Certificate, a person's gender is for all purposes that which they were assigned at birth (Travis 2019). This seems to be further confirmed by other cases such as *R v Wilson* (not reported), in which the defendant did identify as male but was nevertheless convicted under the equivalent Scottish provision (Sharpe 2014). As Alex Sharpe (2017, p. 165) notes regarding the complainant in *Newland* 'Thus her sense of touch proved insensitive to the contours and smooth surface of Newland's body [...] and to the prosthetic penis which Newland used'. Sharpe here suggests that the complainant was wilfully ignorant of Newland's gender, but this also suggests that a clear distinction can be drawn between 'real' and 'fake', or prosthetic, body parts. Boukli and Copson (2019, p. 41) argue that 'the evidentiary accounts considered in court attest to a heteronormative understanding of both the encounters and of distinct ways of being beyond heteronorms'. The use of a prosthetic penis in queer and trans culture may a) be considered a fairly common item to use during a sexual encounter and b) be understood by the user or wearer as a part or extension of their body (Straayer 2020). Instead, in the heteronormative setting of the criminal justice system, the use of a prosthetic penis becomes evidence of an intention to deceive. Childs (2016) suggests that the judgment points towards the 'real' deception in *Newland*'s case being about anatomy rather than about legal status.

¹⁴ *R v McNally* [2013] EWCA Crim 1051.

¹⁵ *R. v. Newland* [2015] Chester Crown Court, unreported.

The recently amended Crown Prosecution Service (2021) *Legal Guidance: Rape and Sexual Offences* does not provide a conclusive resolution to this issue. Instead, the guidance states that prosecutors should consider the ‘full surrounding circumstances’ to assess whether deception as to gender occurred. These include: ‘How the suspect perceives his/her gender; What steps, if any, he/she has taken to live as his/her chosen identity; What steps, if any, he/she has taken to acquire a new gender status.’ Given that a legal change of gender status is not in and of itself conclusive evidence that no deception has taken place, this would then suggest that one’s legal personality seems to be mostly defined by legal gender status assigned at birth (Cooper and Renz 2016, 2023), rather than any subsequent changes. The guidance beyond that seems to define gender as a personal identity, rather than drawing on a structural account of gender, where gender is defined primarily by material and relational practices (Cooper 2019). It is also not clear what this would mean for those intersex people who do not fit into a purely binary understanding of sex/gender, including its embodied characteristics, or non-binary or agender people who do not identify with a binary gender at all.¹⁶

To date there have been no cases in this area that involve a surgically constructed penis (i.e. a phalloplasty), as such it is unclear what surgical body modification would mean for this legal area, beyond being part of the ‘surrounding circumstances’ considered by prosecutors. Treating a surgically constructed penis as legally relevant enough to change the charge from s.2 SOA, assault by penetration, to s.1 SOA, rape, would surely then create a logical contradiction with any claim that the victim was deceived regarding the suspect’s gender. Currently law seems incapable of considering a sex toy or prosthetic penis as anything other than an object that exists separate from one’s personhood. In contrast, drawing on insights both from disability research and gender non-conforming people’s accounts of their own understandings of their bodies it might be more accurate to think of a prosthesis in this context as an adaptive device that supports someone’s gender expression and may in fact be perceived as simply another body part, albeit one that is removable (Straayer 2020; Langer 2014).

Qualitatively for trans people there may be little difference between a prosthetic penis and a prosthetic leg, in the sense that both provide a function a person’s body otherwise lacks. However, in law only the use of the former is potentially seen as an attempt at ‘deception’. In the context of ‘gender deception’ cases then, legal personhood noticeably operates as a legal fiction. Sex here, as an element of legal personhood, exists separately from the actual human body it describes and supposedly maps on to. Instead, legal personhood (and its subcomponent of sex) relies on legal certification at birth as a type of permanently persisting status quo, rather than being purely causally linked to bodily features, social relations, or personal identity. Even a formal change of legal status seems to be insufficient to conclusively alter one’s legal personhood regarding sex/gender creating a strange anomaly in this area in which legal personhood is mediated by both the body (or an idealised version of it) and a specific legal status given to the otherwise biological or social concepts of sex

¹⁶ My thanks to Avi Boukli for drawing this point to my attention.

and gender (Cooper and Renz 2016). Beyond this, criminal law here also creates a clear distinction between the ‘natural’ and seemingly unchangeable human body as something that aligns with legal personhood, and objects or property that serve as a modification or extension of the body, which are ignored for the purpose of establishing legal status and legal personhood. Legal personhood here then clearly operates as the kind of legal fiction Peter Goodrich (1990) has identified as emblematic of law, which continuously seeks to portray itself as a neutral instrument despite being acutely political in its construction of facts and reality.

Both disability and gender then offer specific ‘thoughtways’ (Renz and Cooper 2022) regarding the human and legal body, that intersect with the property dimension of legal personhood, by suggesting that something that is generally considered property, such as a purchased phallus or a wheelchair, can also be a fundamental part of a person’s body, identity and abilities. These thoughtways also challenge essentialist definitions of personhood that presume that the legal person is always equivalent to a human body with ‘normal’ capabilities and made up of the expected number of purely organic parts. Further, disability and gender both point to the need for the recognition of non-human objects as legal persons in the sense that they can be part of people, but also separate from them. However, in contrast to demands for the recognition of natural phenomena, disability and gender currently also most clearly draw out the ‘transient cluster concepts’ Naffine describes as defining legal personhood by highlighting the fact that objects like mobility aids are not always going to be directly connected to a person and that law will increasingly need to find a way to reckon with this fluctuating dimension of the legal person and the body as recognised in law. Existing jurisprudence and scholarship on legal personhood seem to suggest that the boundary cases for legal personhood focus on the status of the foetus, conjoined twins, and euthanasia, with an emerging boundary case around the status of natural features such as rivers or forests, as well as the status of artificial constructs, such as corporations. Fagundes argues that in the future more boundary cases may emerge in the context of technological advancement, particularly regarding the status of artificial intelligence and of genetically modified animals (see also Calverley 2008). Disability and gender, however, currently seem to point towards a different type of emerging boundary case, namely the status of humans when in interaction with, or modified by, technology and other objects. This new type of boundary case has not presently received much attention in the context of engagements with legal personhood and the body in law more generally.

Personhood for a Legal Feminist Cyborg?

In contrast to the absence of in-depth engagements with removeable body parts in legal scholarship, post-structuralist scholarship has been grappling with the question of the body for several decades now. In Donna Haraway’s (2013, p. 149) groundbreaking essay *The Cyborg Manifesto* she describes the cyborg as ‘a cybernetic organism, a hybrid of machine and organism, a creature of social reality as well as a creature of fiction.’ She sees the cyborg as lacking both ‘an origin story’, but also as ‘oppositional, utopian’ (Haraway 2013, p. 150–151) and about ‘potent fusions,

and dangerous possibilities' (Haraway 2013, p. 154). A hopeful interpretation of the cyborg then, points towards 'lived social and bodily realities in which people are not afraid of their joint kinship with animals and machines, not afraid of permanently partial and contradictory standpoints' (Haraway 2013, p. 154). Others have built on Haraway's work to argue that we are very close to, if not already living in, a future in which humans can no longer be presumed to have a standard, unmodified body (see e.g. Kurzweil 2005). Similarly, postmodern scholars including Rosi Braidotti (2013a) have suggested that the differentiation between the human and non-human is becoming increasingly porous and hard to logically sustain.

Haraway (2013, 2016) uses the concept of the cyborg to investigate how and why boundaries and dichotomies between human/non-human or man/woman are created and maintained in contemporary society. These artificial dichotomies in turn shape our understanding of bodily capacities, desire and power in certain ways (Haraway 2016; Deleuze 2021; Braidotti 2013b; Käll 2017). For Haraway in particular the construction of bodies is inherently related to the exercise of power and the effects of capitalism in particular (Haraway 2016; Käll 2017). Selkälä and Rajavuori (2017) drawing on Haraway argue that within science and technology the boundaries around the biological human body have become increasingly blurred, leading personhood to also shift in its form, but without ever fully abandoning the divide between personhood and objects.

Haraway (2013, 2016) herself engages deeply with the cyborg's connection to gender, and specifically its non-binary and post-gender nature. The application of Haraway's theory of cyborg feminism to disability and disabled bodies is also not new, although it has received less mainstream scholarly attention. The combination of human and machine as represented by the cyborg naturally resonates with those whose bodies already rely on such fusions to function. As Sonya Huber (2017, p. 35) suggests '[i]n this fusion the dangerous binaries and dualisms of man/women, human/nature and others might be overcome – though the path to overcoming is not obvious.' In the UK the news that the National Health Service will start to fund the provision of an 'artificial pancreas', a small device worn next to the body that independently regulates the level of insulin in the bloodstream for those with Type 1 Diabetes (Gregory 2022), just as an original pancreas would, suggests we are moving ever closer to a world in which the boundaries between human and machine are porous. As Haraway (2013, p. 220) asks '[w]hy should our bodies end at the skin, or at best include other beings encapsulated by skin?'

Naffine (2009, p. 45) argues that at least in a 'Legalist' understanding of legal personhood there is no reason why legal personhood could not be understood as fluid and situational, although her emphasis here is on the possibility of according different kinds of legal status to a unified entity, such as pregnant woman or a foetus. Further, she notes that it is already possible for something to be treated as a legal person in one setting, but as property in another (Naffine 2009, p. 49). Drawing further on understandings of the posthuman and Haraway's Cyborg Feminism in particular, can we imagine legal personhood as capable of recognising the 'potent fusions' and 'dangerous possibilities' that come into being when bodies come in contact with, and are extended by non-human objects? Lau (2019) argues that Haraway's work can be helpful in thinking through the future directions of legal

personhood as a concept, by pointing towards the issue of how Artificial Intelligence could be incorporated into legal frameworks in the near future. I would argue that in the present day shifting to an explicitly non-anthropocentric and non-static framework of legal personhood would enable law to recognise humans with removeable parts, as well as encompassing that what law sees as a person might shift and change over time and in different contexts. While this might at first seem to push the concept of legal personhood beyond its limits, it is worth noting that certainly in the context of criminal law the legal subject and person can already be understood as an artificially created kind of Cyborg. The legal subject of criminal law is always constructed through the concepts of Actus Reus and Mens Rea, which are defined by legal doctrine and filtered through the availability of evidence and witness accounts to create an artificial defendant who may, or more likely may not, map on to the actual defendant's own experience of their actions.¹⁷ Given then criminal law's already tenuous link between legal personhood and the actual subjects involved in this legal area, expanding legal personhood to more accurately encompass the vastness of human existence is unlikely to bring it to breaking point. In an American context Gowri Ramachandran (2010) has suggested that criminal law should take into account how damage to prosthetics or mobility aids can impair a person's functioning in the same way as damage to an organic body part would. However, her argument is that this should be primarily addressed through rhetoric – by identifying such objects more clearly as part of a person's body – rather than extending the definition of legal personhood itself. In contrast Gilani (2021, p. 189) sees the proliferation of what she terms 'bionic bodies' as a reason to re-examine how criminal law has historically always sought to constrain what kind of bodies can be subject to criminal law and in the process has constrained both freedom and agency for many. I would like to extend this argument even further: Given the contemporary challenges posed to static understandings of human bodies, re-considering the limits of legal personhood in light of emerging and embedded relational interactions between humans and technology seems a crucial step towards a more expansive and nuanced understanding of legal personality.

Concluding Thoughts

The first part of this article considered existing scholarship on legal personhood and highlighted the already constructed and contingent nature of legal personhood, as well as its increasing expansion to entities that can no longer be seen as being an extension of the human body. In the second part of this article, I used two examples from English criminal law, namely violent offences against the person and the use of mobility aids as well as so-called 'gender deception' cases to flesh out two aspects that seem important when highlighting the limitations of the contemporary approach to legal personhood. The use of mobility aids in the context of criminal law demonstrates both the extremely narrow distinction between

¹⁷ My thanks to one of the anonymous reviewers for bringing this important point to my attention.

legal persons and objects, with objects like mobility aids only being considered relevant for the purpose of violent offences to the extent that they act as a conduit for violence or harm. In contrast the legal engagement with the use of prosthetic penises in gender deception cases highlights the inherently essentialist nature of legal personhood, which still seems incapable of recognising bodies extended through or augmented by objects normally considered property. In the final part of this article, I drew on Haraway's conception of the Cyborg as a way to reimagine legal personhood in a way that is more flexible, expansive, and explicitly contingent.

In some ways then, a more progressive and in Haraway's words 'oppositional, utopian' understanding of legal personhood, would be to think of it less as being largely identical to an abstract ideal of the human body and more like the Portuguese man o'war. When it was first discovered it was assumed to be another species of jellyfish, but now occupies its own exclusive branch in the family Physaliidae because the Portuguese man o'war is not actually a jellyfish but is in fact up to seven different zooids acting in concert (Munro et al 2019). All of them fulfil different functions from providing the capacity to move, to the ability to grasp things, digest whatever the Portuguese man o'war comes into contact with, and continuously interact with each other to produce specific outcomes for the creature as a whole. Through their relationship to each other and the way they interact the different zooids come to construe a fairly unique and, at least for the observer, unified organism. Consequently, the man o'war is treated as multiple individuals for some classification purposes, while being a single individual from an ecological perspective.

Using the figure of the man o'war, legal personhood could take on a more protean quality, in which legal personhood can incorporate both the human and the non-human into a unified entity for legal purposes, even if that entity is at times separated from some of its constituent parts. In this model legal personhood acknowledges both the material reality of embodiment and the more ephemeral dimension of relationality. Such an approach would avoid creating effectively yet another hierarchy of personhood, with some ideal form of the (human) legal person at the top (see Esposito 2009; Selkälä and Rajavuori 2017; Soirila 2017). Instead, this makes apparent the inherently artificial nature of legal personhood as a concept, by decoupling it from some imagined link to the human body as it only really exists in the abstract.

Shifting legal personhood in this way might in some ways provide a relatively straightforward solution for responding to claims to treat mobility aids as part of the legal person. It would allow, for instance, a wheelchair user to have their wheelchair treated as a constitutive part of their person both when in use and when separated from it, in the sense that damage to the wheelchair could be treated as directly equivalent as damage to the person themselves, without having to evidence either a transitive injury to the person or the way in which damage to the chair has impaired the user's ability to function (cf. Ramachandran 2010). This approach would also avoid having to distinguish between property and components of someone's body, which is likely to become ever more difficult and contested as medical and scientific interventions on the body proliferate, not just in the context of disability and/or restoring 'normal' bodily functions.

A more challenging proposal might be how legal personhood can more accurately engage with sex/gender. This is because legal gender (Cooper and Renz 2023), at least in some contexts, currently involves both a formal legal status and an embodied component (or multiple components). The dual aspect of sex/gender in law seems to be at least partially what it is at stake in identifying ‘deception’ in gender deception cases. One way of addressing this could be the wholesale removal of gender’s formal legal status for everybody, which would mean that legal gender would no longer form part of legal personhood (see e.g. Braunschweig 2020; Cruz 2002, Canoot and Decoster 2020; Cooper and Renz 2016, 2023; Cooper et al 2022). In that way gender might then become more similar to disability in its possibility for the body to be modified or supplemented through objects without having to reckon with the effects on both legal personhood *and* legal gender status at the same time. Feminist theorists have frequently criticised legal personhood’s focus on rationality and the consequent erasure of its embodied nature, which has led to legal personhood presupposing the existence of a normative (and therefore male) body (see e.g. Grosz 1994; Grear 2011). Both non-normatively gendered and disabled bodies inherently challenge definitions of legal personhood that universalise a certain embodied understanding and try to draw a neat dividing line between people and objects. They point towards an alternative definition of legal personhood that takes the body it attaches to seriously, without demanding that this body remain fixed, static, or coherent across its lifespan. Adopting such a Cyborg-like approach to legal personhood would make legal personhood better able to cope with the rapid pace of changing medical and technological intervention, while also providing a more accurate way of engaging with the realities of bodies, which are constantly in flux in their composition and relational engagement with objects and other bodies and are always and inescapably contingent and contextually situated.

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Gender Recognition Act 2004

Lalit Miglani v. State of Uttarakhand and others, Writ Petition No. 140 of 2015, High Court of Uttarakhand at Nainital (India), MCC 139/2017.

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