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Article:

Travis, M (2014) Non-normative bodies, rationality, and legal personhood. *Medical Law Review*, 22 (4). pp. 526-547. ISSN 0967-0742

<https://doi.org/10.1093/medlaw/fwu015>

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NON-NORMATIVE BODIES, RATIONALITY AND LEGAL PERSONHOOD

This article questions how legal personhood is constructed by law. Elective amputation is used as a way of interrogating the institutional, material and discursive relations that combine in order to suspend legal personhood. Elective amputation is introduced in terms of medical and psychological explanations. Additionally, the perspective of self-identified elective amputees who choose to share their stories through online blogs is utilized to gain a narrative sense of how these individuals understand and engage with law. In particular, the areas of disability, sexuality and rationality are used to exemplify law's continuing commitment to normative embodiment as grounds for ascribing legal personhood.

Elective Amputation, rationality, normativity, legal personhood, disability, sexuality

I still suffer from depression, post-amputation, on the bright side it's not depression AND wanting to become an amputee, any more and I'm not depressed about being an amputee.... Now I've got the BIID out the way, I can't just blame it and say once that's gone, I'll be fine. It's gone, I'm still an asshole. Time to fix something else. I'm working on it, but it's not entirely easy. Just goes to show that one does not cause the other. BIID can sometimes tie into depression but it isn't necessarily the cause of it, so why would the depression be gone once the BIID has been dealt with[?]¹

I. INTRODUCTION

This article highlights law's continued commitment to the normative, masculine legal person, using elective amputation as a point of critical departure. The term elective amputation is used in reference to amputation where there is no underlying physiological reason for the removal of healthy tissue.² This article seeks to build upon the idea of rationality as an embodied ideal³ and the subsequent effect this may have on

¹ Tegumai 'Transabled Blog' (2009) <www.transabled.org> accessed 10/2013

² Understandably there are some instances where amputation is elective and motivated by the tissue not being healthy, but that is not the focus of this article.

³ A Grear, 'Sexing the Matrix: Embodiment, Disembodiment and the law – towards the re-gendering of legal rationality', In J Jones, A Grear, R Fenton & K Stevenson (eds), *Gender, Sexualities and Law* (Routledge: Oxon 2011) 39-52, M Gatens, *Imaginary Bodies; Ethics, Power and Corporeality*

legal personhood's claims to objectivity. Elective amputation presents a situation where issues surrounding rationality and the body clearly intersect. In seeking to change their bodies, in a manner that goes against normative concepts of the body, elective amputees are conceptualised as both irrational and sexually deviant. The effect of this is to relegate these individuals into the temporal space of the non-person. By conceptualising voluntary amputees (and people who would like to become amputees known as 'wannabes'⁴) as suffering from mental health problems (such as apotemnophilia and Body Integrity Identity Disorder or BIID), individuals are prevented from exercising autonomy over their bodies. The mental health issues that I refer to here will be more fully detailed further in this article but in brief apotemnophilia is a 'philia' or sexual fascination with being amputated.⁵ BIID, in contrast, concerns individuals whose perceived body image is that of an amputee and feel that they must lose a limb in order to conform to this perceived body image.⁶ Indeed, many BIID proponents point towards Gender Identity Disorder as a stepping stone to understanding BIID.⁷ The lack of choice that these individuals have in regards to their bodies is in stark contrast to, for example, gender reassignment surgery which would be in keeping with the (similarly sexualised) but normative body. This article draws upon feminist legal theory, particularly; Ngaire Naffine's work on legal personhood,⁸ Victor Seidler's notions of masculinity and

(Routledge: Oxon 1996), VJ Seidler, *Rediscovering Masculinity; Reason, Language and Sexuality* (Routledge: Oxon 1989).

⁴ RL Bruno 'Devotees, Pretenders and Wannabes: Two Cases of Factitious Disability Disorder' (1997) 15 *Sexuality and Disability* 243-260, RC Smith 'Amputee Identity Disorder and related Paraphilias' (2004) 3 *Psychiatry* 27-30.

⁵ J Money, R Jobaris & G Furth 'Apotemnophilia: Two cases of self-demand amputation as a paraphilia' (1977) 13 *The Journal of Sex Research* 115-125

⁶ MB First, 'Desire for Amputation of a Limb: Paraphilia, Psychosis or a New Type of Identity Disorder' (2005) 35 *Psychological Medicine* 919-928

⁷ This view is, of course, not without its criticisms, which can be seen at – 'A Comparison Between Transsexuality and Transableism' *Transabled* (2009) <<http://transabled.org/thoughts/a-comparison-between-transsexuality-and-transableism.htm>> accessed 10/2013

⁸ N Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 *MLR* 346-67, N Naffine, *Law's Meaning of Life; Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing: Oxford 2009), N Naffine 'Women and the Cast of Legal Persons'. In J Jones, A Grear, R Fenton & K Stevenson (eds), *Gender, Sexualities and Law* (Routledge: Oxon 2011) 15-25.

rationality⁹ and Moira Gatens' feminist critique of the body politic.¹⁰ To begin with the article explores the concept of voluntary amputation highlighting why it has presented a problem in both law and medical ethics as well as engaging with the experiences of people who have undergone elective amputation. The article then addresses the discursive, institutional and material justifications for the denial of legal personhood focussing on disability, sexuality and rationality as regions of negotiation. The article concludes by suggesting that the denial of choice to autonomous individuals in relation to voluntary amputation throws further light on the relationship between legal personhood and pervasive paradigmatic notions of the body.

II. ELECTIVE AMPUTATION

In this section a brief recent history of elective amputation in the UK is sketched. At the same time an overview of research taken from internet blogs regarding elective amputation will be provided in order to demonstrate a more comprehensive understanding of these individuals.¹¹ In the year 2000 there was widespread media uproar when it was reported that a surgeon in Scotland had performed amputations on two adult males where there were no underlying physical (physiological or dermatological) reasons for the removal of (apparently) healthy tissue. Both patients

⁹ VJ Seidler, *Rediscovering Masculinity; Reason, Language and Sexuality* (Routledge: Oxon 1989), VJ Seidler, *Unreasonable Men; Masculinity and Social Theory* (Routledge: Oxon 1994), VJ Seidler, *Man Enough; Embodying Masculinities* (SAGE Publications: London 1997), VJ Seidler, *Transforming Masculinities; Men, Cultures, Bodies, Power, Sex and Love* (Routledge: Oxon 2006).

¹⁰ M Gatens, *Imaginary Bodies; Ethics, Power and Corporeality* (Routledge: Oxon 1996)

¹¹ Internet blogs seem the most effective way of engaging with these individuals in part because of the difficulty of meeting them in real life and their assumed happiness in disseminating this information. At this relatively early stage of BIID (given its current non-inclusion in the DSM-V 2013) anecdotal information remains the main source of information on BIID. A possible disadvantage of using this information is its relative ease to fake and subsequent difficulties in verification. Unfortunately, during the writing of this paper and the publication the website that much of this information was taken from has been removed. Parts of it have been archived at <http://web.archive.org/web/20121022041540/http://transabled.org/> accessed 23/1/14.

had requested the amputation of a limb below the knee and after consultation with the surgeon, Robert Smith, and two psychiatrists, the requested surgery was performed. Smith described the individuals as two of the best informed patients he had ever come across and described the surgery as 'one of the most satisfying' he had ever performed.¹² After the information was discovered by the media, the NHS trust responsible for the area, the Forth Valley Acute Hospitals NHS Trust, denied further requests to perform similar surgeries with new Chairman Ian Mullen stating:

I don't believe [sic] it's appropriate for this type of operation to go ahead without consideration being given to the potential implications for the local reputation of the hospital and the concerns that might arise among the local population.... I also don't believe it's appropriate for an NHS hospital like the one here in Falkirk to be importing patients and treating them privately where this is clearly an unusual procedure.¹³

Since then both the legality and the morality of the acts have been questioned.¹⁴ The uncertainty of this area has been echoed, rather than clarified, by the British Medical Association who have noted:

...profound reservations about the ethical and legal acceptability of such operations. Having a psychiatric disorder does not, of itself, render a person unable to give valid consent, but may affect the individual's decision-making capacity in relation to issues connected with the disorder. Similarly, an apparently irrational decision should not automatically lead to the presumption that a patient lacks decision making capacity. Consent for amputation would, however, have to be carefully scrutinised.¹⁵

¹²C Elliott, 'A New Way to be Mad' The Atlantic Online (2000)

<<http://www.theatlantic.com/past/issues/2000/12/elliott.htm>> accessed 10/2013.

¹³ <http://news.bbc.co.uk/1/hi/scotland/625680.stm> (last accessed 10/2013)

¹⁴ For a discussion of the criminal law in relation to these issues see, for example, R Mackenzie, 'Somatechnics of Medico-Legal Taxonomies; Elective Amputation and Transableism' (2008) 16 Medical Law Review 390-412 at 403 and T Elliott, 'Body Dysmorphic Disorder, Radical Surgery and the Limits of Consent' (2009) 17 Medical Law Review 149-182 at 159. The morality of the acts has been discussed particularly in light of the 'yuk' principle as denoted by T. Elliott, 'Body Dysmorphic Disorder, Radical Surgery and the Limits of Consent' (2009) 17 Medical Law Review 149-182 at 159.

¹⁵ British Medical Association, Medical Ethics Today: the BMA's Handbook of Ethics and Law, (3rd edn BMJ Books: West Sussex 2012) at 86.

The Trust's commitment to this viewpoint was tested in 2005 when a French woman known as 'Lily' flew to the UK with the intention of being involved in an 'accident' that would lead to a double above the knee amputation.¹⁶ Having learned of the previous surgeries performed by Robert Smith, Lily chose to have her accident in the district of the Forth Valley Acute Hospitals NHS Trust. Both law and medicine did not enable Lily's elective amputation, so she instead used dry ice on both her legs in an attempt to damage them enough to require amputative surgery. She did this in the back of a rented car aided by only over the counter pain killers which she claimed 'did nothing to help the pain.'¹⁷ Upon being taken to hospital and having consulted a sympathetic surgeon it was agreed that amputative surgery would take place the following morning.¹⁸ Instead as Lily writes on her blog:

At exactly 8:50am, 10 minutes [before] the surgery was due to start, that same surgeon came into my room again, I thought he was going to escort me to the Operating Room, but he simply said "The shit has hit the fan"... The hospital administrator was now involved. He took this up with his superior and a few days later we heard that the case went as far as parliament and was turned down. It was also mentioned, that anyone that would come in to any of these hospitals, with the same condition, would only be given first aid and then transferred back to their home town or country and under no circumstances would an amputation be performed here.¹⁹

¹⁶ Much of this information is taken from Lily's Blog but where possible has been verified by news reporting such as S Leonard, 'Woman asks Falkirk hospital to cut off healthy legs' The Sunday Times, (3/4/05) <http://www.thesundaytimes.co.uk/sto/news/uk_news/article85322.ece> accessed 23/1/14, S Barber, 'Hospital refuses to amputate legs' The Falkirk Herald (7/4/05) <<http://www.falkirkherald.co.uk/news/local-news/hospital-refuses-to-amputate-legs-1-299120>> accessed 23/1/14, Anon, 'Falkirk hospital refuses healthy leg amputation' British Nursing News Online (3/4/05) http://www.bnn-online.co.uk/comments_display.asp?HeadlineID=436&Year=2005 accessed 23/1/14.

¹⁷ Lily, 'Lily's Story' Transabled (2009) <<http://www.transabled.org>> accessed 10/2013

¹⁸ This conflicts with Ian Mullen, chairman of NHS Forth Valley, view that, 'She was examined by a surgeon who decided she did not need surgery. She spent some days in hospital recovering.' Anon, 'Falkirk hospital refuses healthy leg amputation' British Nursing News Online (3/4/05) http://www.bnn-online.co.uk/comments_display.asp?HeadlineID=436&Year=2005 accessed 23/1/14.

¹⁹ Lily (n 17).

Lily was transferred back to France by medical plane.²⁰ The Forth Valley Acute Hospitals NHS Trust, after possibly consulting Parliament, most likely decided to handle her case in this way to prevent further association of their district with elective amputation.²¹ We can see here how discursive understandings of BIID (that it does not exist) are played out in institutional settings (medicine, in this instance reaffirming the discursive unintelligibility of BIID). Lily's desires were denied – not for medical reasons (as the leg was later removed), or purely budgetary reasons (the hiring of a medical plane being as, if not more, costly than amputative surgery). The surgery was denied by deeming the desire itself as unworthy of deliberation; consequently, denying similar cases from being considered in the future. Autonomy, in these instances, is temporarily suspended.

Lily's story continues, having been treated for her injuries and discharged from a French hospital Lily once more attempted to injure herself to the point where her leg would have to be amputated. She used the same dry ice method but this time from the comfort of her home and focussing on only one leg.²² Despite her protestations surgery was once again used to repair the leg. Lily reports that a further eight surgeries attempted to save the leg, during which she recalls feeling like 'some sort of weirdo.'²³ Lily's encounter made her feel like an outsider; a likely response, given the discursive and institutional resistance to her desires. The amount of resource consuming surgery seems odd given her stated intention to

²⁰ S Leonard, 'Woman asks Falkirk hospital to cut off healthy legs' The Sunday Times, (3/4/05) <http://www.thesundaytimes.co.uk/sto/news/uk_news/article85322.ece> accessed 23/1/14

²¹ Ibid. Hansard does not seem to show any evidence of discussion of this particular case. There is also no record of the Department of Health being consulted.

²² P Clervoy, V Vautier, J Naudin, 'Trouble de l'identité et de l'intégrité corporelle: interrogations pathogéniques et enjeux éthiques au-tour d'une pathologie émergente' (2009) *Ann Médico-Psychol* 167

²³ Lily (n 17).

repeat the attempt. During one of the surgeries, however, Lily caught a staphylococcus aureus infection which did eventually (after several consultations) lead to the removal of her leg. Writing of her experiences without the leg Lily notes:

I should have given you all a recent update - its now 2 months since my amp[utation] and things are just so great, I have no words to describe the happiness in which I live each day since the surgery. I woke up from surgery without pain and this happy feeling which has never left.²⁴

These feelings of relief and happiness are echoed by the experiences of others suffering from BIID who have achieved their desire of removal of one (or more) limbs.²⁵ Lily's story also highlights the discursive and institutional relationships and power struggles that are played out on the material body. Lily's desire for surgery is not only ignored, but is, at a variety of levels, incomprehensible.

In 2004 First conducted a seminal piece of research engaging with the experiences of over 50 people who had desired elective amputation.²⁶ Although First has described the research as 'small' and 'preliminary' it still represents the largest psychological investigation into this area to date.²⁷ Of the participants that made up this study 96% were Caucasian, 90% were male, 8 % were female and one participant identified as intersex.²⁸ The participants came from a range of different areas including the United States (77%), Canada, UK, Germany, The Netherlands, Sweden, Belgium and Australia.²⁹ 61% of the participants identified as heterosexual. 31% identified as

²⁴ Ibid

²⁵ First (n 6).

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

homosexual and 7% identified as bisexual.³⁰ First explains that one possible reason for the significant number of BIID individuals who identify as homosexual is due to the ‘snowball’ method of recruiting participants. As this is still the largest study of its kind we can use these characteristics as a starting point when considering individuals with BIID. A number of important themes arose in this and subsequent research in the area. Firstly, elective amputees feel that psychoanalysis, counselling, and psychotropic medication are completely ineffective in helping with their condition.³¹ In general sufferers felt that these treatments were unhelpful and medical professionals have little or no understanding of BIID. This view is perhaps understandable given the relatively little research into the area and the lack of inclusion in the previous American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (DSM) IV-TR 2000 and recently published DSM-V 2013.³² Secondly, there is a general consensus that elective amputation is not a sexual disorder and as a result is separate from and different to apotemnophilia.³³ Elective amputation, according to BIID sufferers, concerns a lack of consensus between the body and the way the body ‘ought’ to be.³⁴ The next section considers a brief overview of some of the medical explanations put forward to explain these phenomena.

³⁰ Ibid

³¹ MB First, ‘Desire for Amputation of a Limb: Paraphilia, Psychosis or a New Type of Identity Disorder’ (2005) 35 *Psychological Medicine* 919-928, RC Smith ‘Amputee Identity Disorder and related Paraphilias’ (2004) 3 *Psychiatry* 27-30, BD Berger, JA Lehrmann, G Larson, L Alverno & C Tsao ‘Nonpsychotic, Nonparaphilic Self-amputation and the Internet’ (2005) 46 *Comprehensive Psychiatry* 380-383.

³² MB First, ‘Desire for Amputation of a Limb: Paraphilia, Psychosis or a New Type of Identity Disorder’ (2005) 35 *Psychological Medicine* 919-928, BD Berger, JA Lehrmann, G Larson, L Alverno & C Tsao ‘Nonpsychotic, Nonparaphilic Self-amputation and the Internet’ (2005) 46 *Comprehensive Psychiatry* 380-383.

³³ MB First, ‘Desire for Amputation of a Limb: Paraphilia, Psychosis or a New Type of Identity Disorder’ (2005) 35 *Psychological Medicine* 919-928, RC Smith ‘Amputee Identity Disorder and related Paraphilias’ (2004) 3 *Psychiatry* 27-30.

³⁴ Ibid

III. MEDICAL EXPLANATIONS FOR ELECTIVE AMPUTATION

Various theories have been developed to explain elective amputation including both neurological and psychological accounts, as well as sexological explanations. At present there is no conclusive evidence of why this phenomenon occurs. Ramachandran and McGeough, for example, posit that the actions of these individuals could be due to a dysfunction of the right parietal lobe of the brain, which 'leads to an uncoupling of the construct of one's body image in the right parietal lobe from how one's body physically is.'³⁵ Others argue it may be to do with childhood trauma or issues of identification.³⁶ The following section traces some of the explanations given and their development over time. In particular the sexualization of this potential disorder is noted.

One of the first attempts to medicalize the voluntary amputation phenomena was made by John Money in 1977 where he described it as 'apotemnophilia' which comes from the Greek words for 'amputation' and 'love'.³⁷ Money located the phenomena within a range of mental disorders known as 'paraphilias' which are characterised by 'strong sexual urges behind the desire or behaviour.'³⁸ The DSMV (2013) classifies paraphilias as:

any intense and persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature, consenting human partners.... [T]he term paraphilia may be

³⁵ VS Ramachandran & P McGeoch, 'Can Vestibular Caloric Stimulation Be Used to Treat Apotemnophilia?' (2007) 69 *Medical Hypotheses* 250-252 at 250.

³⁶ First (n 6) at 925.

³⁷ Money (n 5).

³⁸T. Elliott, 'Body Dysmorphic Disorder, Radical Surgery and the Limits of Consent' (2009) 17 *Medical Law Review* 149-182 at 153.

defined as any sexual interest greater than or equal to normophilic sexual interests.³⁹

The validity of approaching voluntary amputation in this manner has been questioned. As Bridy notes:

“[A]potemnophilia” remains the term by which the condition is known, but cases that have come to light over the decades since the term was introduced suggest that the etiology and symptomatology of the condition are more multidimensional than Money had thought. More recent publications on the subject downplay the element of sexual fetishism, suggesting that although it is operant in some, it is not generalizable to all apotemnophiles.⁴⁰

Many researchers working in this area now contend that a desire to conform to their own body image is what motivates these individuals, rather than sexual deviancy.⁴¹ They argue, moreover, that the recent DSM-V (2013) should have reflected this.⁴² The idea of elective amputation as a method of matching ones identity to one’s own body is a view that has been expounded upon primarily by the Scottish surgeon, Robert Smith, who performed two elective amputations in the UK in 1997 and 1999 that were the catalyst for the ensuing media and academic debate. Both First and Smith posit that individuals seeking elective amputation are suffering from a previously unclassified mental disorder similar in nature to Gender

³⁹ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed) (American Psychiatric Publishing, London 2013) 685.

⁴⁰ A Bridy, ‘Confounding Extremities; Surgery at the Medico-ethical Limits of Self Modification’ (2004) 32 *The Journal of Law, Medicine and Ethics* 148-158 at 149.

⁴¹ A Bridy, ‘Confounding Extremities; Surgery at the Medico-ethical Limits of Self Modification’ (2004) 32 *The Journal of Law, Medicine and Ethics* 148-158 at 149, MB First, ‘Desire for Amputation of a Limb: Paraphilia, Psychosis or a New Type of Identity Disorder’ (2005) 35 *Psychological Medicine* 919-928, RC Smith ‘Amputee Identity Disorder and related Paraphilias’ (2004) 3 *Psychiatry* 27-30, BD Berger, JA Lehrmann, G Larson, L Alverno & C Tsao ‘Nonpsychotic, Nonparaphilic Self-amputation and the Internet’ (2005) 46 *Comprehensive Psychiatry* 380-383.

⁴² Additionally, some note should be made to the chequered past of Dr John Money. Money was responsible for the recommendation that a young boy should be raised as a girl after a botched circumcision. Though the individual in question later rejected his given gender identity and tragically took their own life Money used the research to push his own theory that sexual identity is a matter of construction rather than biology. See M Fox & M Thomson, ‘Cutting it: Surgical Interventions and the Sexing of Children’ (2006) 12 *Cardozo Journal of Law and Gender* 81-97 at 86.

Identity Disorder which they refer to as Body Integrity Identity Disorder (BIID).⁴³ They have unsuccessfully sought, along with many potential sufferers,⁴⁴ to have this disorder recognised by the recently published DSM-V (2013) as a ‘legitimate and separate diagnostic syndrome.’⁴⁵ Mackenzie notes that inclusion in the DSM is essential as it ‘acts as a gateway to treatment of mental disorders as recognised medical conditions.’⁴⁶ However, inclusion may be problematic, particularly in regards to whether surgery is the most effective or appropriate treatment. This is despite the view that surgery has proved largely successful in cases of Gender Identity Disorder.⁴⁷ Mackenzie notes that:

the evidence base for BIID is tiny, and very largely anecdotal, reports that amputation allegedly provides a permanent cure and relieves significant psychic suffering are problematic in terms of inclusion in the next edition of the DSM.⁴⁸

The online forums for elective amputees as well as Smith and First themselves have been quick to align themselves with those who have GID and frame their experiences and findings in similar terms.⁴⁹ Many transgender individuals resent this and have been quick to disassociate themselves from this group.⁵⁰ It remains to be seen whether the

⁴³ MB First, ‘Desire for Amputation of a Limb: Paraphilia, Psychosis or a New Type of Identity Disorder’ (2005) 35 *Psychological Medicine* 919-928, RC Smith ‘Amputee Identity Disorder and related Paraphilias’ (2004) 3 *Psychiatry* 27-30.

⁴⁴ See e.g. Tegumai (n 1).

⁴⁵ Elliott (n 38) at 156.

⁴⁶ R Mackenzie, ‘Somatechnics of Medico-Legal Taxonomies; Elective Amputation and Transableism’ (2008) 16 *Medical Law Review* 390-412 at 403.

⁴⁷ British Medical Association (n 15) at 86. Although there is some critical literature disputing this; see for example D Batty, ‘Sex-change Patient Complains to GMC: Consultant Broke Rules for Surgery, Says Businessman’ *The Guardian* (London, 18 February 2004) which concerns an individual rejecting their trans status or MJ Hird, ‘Out/Performing Our Selves: Invitation for Dialogue’ (2002) 5 *Sexualities* 337-356 for a critique of surgery as an appropriate way of defining gender. Also note that Gender Identity Disorder has been replaced in the DSM V with the new category of Gender Dysphoria.

⁴⁸ Mackenzie (n 46) at 403.

⁴⁹ MB First, ‘Desire for Amputation of a Limb: Paraphilia, Psychosis or a New Type of Identity Disorder’ (2005) 35 *Psychological Medicine* 919-928, RC Smith ‘Amputee Identity Disorder and related Paraphilias’ (2004) 3 *Psychiatry* 27-30.

⁵⁰ -- (n 7).

neurological or psychological causes of BIID are the same, to what extent they are similar; or whether they have chosen to phrase their experiences in the established language of GID. This could in part be due to the perceived ‘successes’ of GID in attaining a place in the DSM and the resulting transformative surgery that has been recommended and (to some extent) normalised. The identity politics of BIID as a result may have developed as an emulation of this particular ‘successful’ group. Despite the problems with the medicalization of Trans identity GID individuals are able to consent to surgery. Elective amputation, in contrast, exposes a situation in which the ability to consent to a medical procedure becomes removed, or at least, suspended. The next section considers situations where the ability to consent is suspended, focussing first on Ngaire Naffine’s understanding of legal personhood.⁵¹

IV. SUSPENDING PERSONHOOD

The ability to consent to (or decline) medical procedures is a manifestation of the individual’s right to autonomy and self-governance. Autonomy is an important element of western understandings of personhood⁵² and underpins approaches to almost all aspects of the legal system.⁵³ Legal personhood is an oft used, but ill-defined, concept of law and has been conceptualised in a number of different ways by a number of groups.⁵⁴ These definitions at various times overlap, compete and intermingle with one another. Law tends to take a broad approach to personhood that takes into account the

⁵¹ N Naffine, ‘Who are Law’s Persons? From Cheshire Cats to Responsible Subjects’ (2003) 66 MLR 346-67, N Naffine, *Law's Meaning of Life; Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing: Oxford 2009), N Naffine ‘Women and the Cast of Legal Persons’. In J Jones, A Grear, R Fenton & K Stevenson (eds), *Gender, Sexualities and Law* (Routledge: Oxon 2011) 15-25.

⁵² N Naffine, *Law's Meaning of Life; Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing: Oxford 2009).

⁵³ MA Fineman, *The Autonomy Myth; A Theory of Dependency* (The New Press: New York 2004).

⁵⁴ See Naffine (n 52) for an excellent investigation of these competing definitions.

individual it is addressing and the subject matter to which it refers.⁵⁵ Legal personhood is a device created through the discursive and the institutional impacting upon the material; cohering, as it does, loosely, although not exclusively, around the human body. For the purposes of this article, legal personhood is used to mean the way in which autonomy and normativity are given legal value and recognition. This definition is by no means a full one; legal personhood is a multi-faceted and layered concept. This is also not to say that individuals who do not exercise autonomy are not legal persons. Individuals who do not demonstrate autonomy are provided with a suspended, non-operational or diminished personhood when considered by law.⁵⁶ The rights associated with legal personhood mean that the state, for the most part, is unwilling to impose upon individual autonomy unless it is strictly necessary. To do otherwise would be to challenge, or diminish, the legal personhood of the individual. For Naffine the denial of autonomy can be used as evidence of law's conflation of personhood and masculinised normativity. In this context she refers specifically to the forced caesarean case of *Re MB (Medical Treatment) (1997)*⁵⁷ in which the UK Court of Appeal considered a woman's refusal to undergo a caesarian section due to her phobia of needles. Although the Court noted that a 'mentally competent patient [has] an absolute right to refuse to consent to medical treatment for any reason, rational or irrational, or for no reason at all' they found MB temporarily incompetent and allowed the caesarian to be undertaken. The Court demonstrated a willingness – and ability - to ignore the consent of the woman involved. She was relegated, temporarily, to the space of a non-person. Her difference from the standardized or paradigmatic body allowed her legal

⁵⁵ See for example, *In the Matter of Baby P (An Unborn Child) (1995) NZFLR 577*, *Tremblay v Daigle (1989) 62 DLR (4th) 634, 660*, *Attorney-General's Reference (No. 3 of 1994) [1998] A.C. 245* and *Re A (Children) (Conjoined Twins: Surgical Separation) [2000] 4 ALL ER 961*.

⁵⁶ For example, humans in permanent vegetative states or foetus's.

⁵⁷ *Re MB (Medical Treatment) (1997) 2 FLR 426*

personhood to be suspended. Perhaps an even clearer example of this took place in *St. George's Healthcare NHS Trust v. S* [1998]⁵⁸ which, similarly to *Re MB*, revolved around the issue of a forced caesarean. In this instance, however, the woman involved was deemed not to lack capacity or be suffering from any form of mental disorder. Although the appeal judges reaffirmed S's right to refuse medical treatment it was too late. The original trial judge had already allowed the surgical intervention to take place thus denying the autonomy of S. As Naffine notes:

[F]or most of the time, for most legal relationships, women clearly are persons. They can now bear personifying rights and responsibilities in much the same manner as men can as legal persons. But it is far less clear that women, as women, are persons in law. As soon as there is something about the condition of women which seems to mark them out as women, as specifically not-male, then problems of personification are encountered.⁵⁹

Naffine introduces the idea that there are moments in which personhood can be suspended that are contingent upon particular embodied experiences. This article pursues this idea using the elective amputation as a site of contestation that introduces interlinking themes of disability, sexuality and rationality. Individuals with BIID may not feel as if they fit within society but for the most part their legal personhood is intact – evidenced by the value placed on their day to day autonomous decisions and in keeping with Naffine's understanding of pregnancy.⁶⁰ For BIID individuals, where the ability to choose surgery is both legally and medically prohibited, autonomy is denied (through its lack of given value) demonstrating a temporal suspension of personhood.⁶¹

⁵⁸ 3 WLR 936

⁵⁹ N Naffine 'Women and the Cast of Legal Persons'. In J Jones, A Gear, R Fenton & K Stevenson (eds), *Gender, Sexualities and Law* (Routledge: Oxon 2011) 15-25 at 16-17.

⁶⁰ *Ibid*

⁶¹ Even if individuals could consent to the surgery issues of best interests would subsequently arise. I am grateful to one of the anonymous reviewers for this point.

This is an active, context-specific suspension only referring to the legal decision in question – in this instance, the denial of surgery. Legal personhood remains in effect in terms of other rights and responsibilities. A view reflected by the BMA’s guidelines on elective amputation.⁶² The temporality of suspension that Naffine notes is useful, as it takes into account the changes that an individual may experience over the course of their lifetime and the subsequent effect of these changes on legal personhood. It also highlights that individuals can simultaneously retain their personhood in some contexts, but have it suspended in others. Naffine’s approach in this regard has resonances with the work of Rosemarie Garland-Thomson.⁶³ Working in the area of disability studies Garland-Thomson introduces the term ‘material anonymity’ in reference to those who are able-bodied and therefore unaffected by the challenges of disability. Those who are able-bodied ‘fit’ into society precisely because of their ability to navigate the everyday topography of our existence. Grosz⁶⁴ and Whitehead⁶⁵ both share similar thinking in regards to gender and the social invisibility of the male body. They argue accordingly that the paradigmatic legal subject is the able-bodied white heterosexual male. This paradigmatic actor is afforded material anonymity that is only available to individuals who share these characteristics. ‘Others’ are rendered culturally exposed.

The prohibited choice to alter the body in a way deemed non-normative allows for a greater consideration of what law considers normative. As Karpin and Mykitiuk note, ‘[T]he idea of ‘normal’ or ‘normalcy’ sets the standard around which bodies are

⁶² British Medical Association (n 15) at 86.

⁶³ R Garland-Thomson, ‘Misfits: A Feminist Materialist Disability Concept’ (2011) 26 *Hypatia* 591-609

⁶⁴ E Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Indiana University Press: Bloomington 1994).

⁶⁵ S Whitehead, ‘Man: The Invisible Gendered Subject?’ In S Whitehead and F Barrett (eds), *The Masculinities Reader* (Blackwell:Oxford 2001) 351-368.

evaluated, regulated and are even permitted to materialise.’⁶⁶ The permission to materialise is particularly pertinent in the case of the elective amputee. This article seeks to trace the discursive, material and institutional factors that lead to the suspension of personhood using elective amputation as a point of critical departure. In particular, disability, sexuality and rationality are used as reference points for exemplifying the negotiations that take place between corporeality, discourse and institutions (such as law, medicine and psychology).

A. Disability

Disability has traditionally been a barrier for the attainment of full legal personhood. Differing from the explicit disenfranchisement of women, the historical intertwinement of voting with land ownership and wealth prevented disabled individuals from obtaining full legal personhood.⁶⁷ The capacity of disabled people to consent and, moreover, to refuse medical treatment has also led to legal challenge, casting the personhood of the disabled into further doubt.⁶⁸ Contemporarily, disability encompasses a wide range of impairments, we can note, for example, that mentally incapacitated individuals (which can include some mental illnesses) may lack capacity to consent to or refuse medical treatment. Physical disability, in contrast, will not normally affect an individual's capacity to consent (unless the person is unable to

⁶⁶ I Karpin & R Mykitiuk ‘Going out on a Limb: Prosthetics, Normalcy and Disputing the Therapy/Enhancement Distinction’ (2008) 16 *Medical Law Review* 413-436 at 414.

⁶⁷ Reform Act 1832

⁶⁸ KL Savell ‘Sex and the Sacred: Sterilization and Bodily Integrity in English and Canadian Law’ (2004) 49 *McGill Law Journal* 1093-1142. Note that this article pre-dates the Mental Capacity Act 2005 which has been seen (at least by some) as offering greater safeguards to the mentally disordered than the common law. M C Dunn, I C H Clare, A J Holland & M J Gunn, Constructing and Reconstructing ‘Best Interests’: An Interpretative Examination of Substitute Decision-making under the Mental Capacity Act 2005 (2007) 29 *Journal of Social Welfare and Family Law* 117-133

communicate).⁶⁹ BIID, however, takes place at the intersection of these two understandings of disability – it could be determined as a mental illness that leads to a desire for physical impairment. Consequently, there is a conflation of physical disability and mental illness in discursive and institutional understandings of BIID and their subsequent understandings of capacity. This conflation results in a lack of value attached to individual autonomy and, subsequently, a suspension of legal personhood.

At present, disability is defined at both the legal⁷⁰ and medical level.⁷¹ Both of these institutions use the body as a starting point for their understandings of disability highlighting an important relationship between the institutional and the corporeal. These relationships are also affected at the discursive level through the manner in which disability is approached. The traditional medical model, for example, constructs the disabled individual as the problem; normativity is encountered as a comparator for the disabled individual's experience.⁷² Normativity, and the use of the comparator, are not questioned.⁷³ Here we begin to see the interactions and connections between discursive understandings of normativity, the institutional utilization of this discourse and how it impacts upon the material. The social model of disability criticizes the medical model. This model argues that individuals are not disabled but rather environments can be disabling.⁷⁴ Differences from the norm can be remedied through environments that enable. This shift in thinking can be traced through using corporeality rather than the

⁶⁹ See ss.2 & 3 Mental Capacity Act 2005

⁷⁰ Equality Act 2010, c. 15, Part 2, Chapter 1, Section 6.

⁷¹ See for example the World Health Organization's International Classification Of Impairments, Disabilities, and Handicaps (1980)

⁷² Garland-Thomson (n 63).

⁷³ Ibid

⁷⁴ Ibid, T Shakespeare, N Watson, 'The social model of disability: An outdated ideology?' (2001) in SN Barnartt and BM Altman (ed.) *Exploring Theories and Expanding Methodologies: Where we are and where we need to go (Research in Social Science and Disability, Volume 2)*, (Emerald Group Publishing Limited: Bristol 2001) 9-28

discursive as a starting point for considerations of lived experience. Disabled individuals still face prejudice, however, due to their differences from the norm. As Naffine notes:

It follows also that the physically disabled are tacitly regarded as defective legal persons. They demonstrate a palpable failure to keep their bodies intact, to demonstrate bodily integrity with its associated dignity.... Law, with the broader culture, therefore participates in a subtle degradation of the individual who cannot control her limbs or is even missing a limb; who is wheelchair- or bed-bound.⁷⁵

Dominant social discourse continues to posit that certain types of body become desirable, whereas others are referred to as ‘what we might call anomalous, deviant or even disabled, are made pre-emptively undesirable.’⁷⁶ Elective amputees find it difficult to gain legitimacy in both the fields of law and medicine as they seek ‘bodily alterations which render them less, rather than more, normalised.’⁷⁷ The body of the elective amputee is both similar to and different from Naffine’s analysis of the disabled body. Firstly, amputation similarly questions notions of bodily integrity and wholeness as well as concepts of health and ability and in this way is relevant to Naffine’s conceptualisation of the disabled body. Secondly, and moving away from Naffine’s characterisation, the elective amputee has, thanks to John Money’s conceptualisation of apotemnophilia, been understood through a lens of sexuality.⁷⁸ Their status as ‘apotemnophile’ questions heteronormative understandings of sex and sexuality. As Elliott notes, ‘The suffix ‘philia’ is of great significance here, as it locates the condition within a group of mental disorders known as ‘paraphilias’, in which there is a strong

⁷⁵ Naffine (n 52) at 159.

⁷⁶ Karpin (n 66) at 415.

⁷⁷ Mackenzie (n 46) at 399. C.f with G Canguilhem, *The Normal and The Pathological* (Zone Books: New York 1991)

⁷⁸ Money (n 5).

sexual urge behind the desire or behaviour.⁷⁹ This is despite the fact that, as First notes, sexual motivations are primarily secondary in cases of elective amputation.⁸⁰ Although supporters of BIID are at pains to remove sexual desire from its definition there remains a discursive link with non-normative sexuality. As a consequence elective amputees become doubly removed from the normative, in so far as they are discursively characterised as neither fully healthy nor sexually normative.⁸¹ Each of these ideas will now be further considered.

Concepts of integrity, wholeness and health underpin ideas of the normal body.⁸² We can compare these with the legal idea(1) of the body characterised by integrity, boundedness and separation, itself, a masculine body.⁸³ To be unhealthy, whether in terms of disability or illness, is constructed as both abnormal and unmasculine.⁸⁴ Both masculinity and rationality require a disavowal of the body.⁸⁵ To be an amputee, whether or not through choice, requires a recognition of, and relationship with, the body that does not sit comfortably with the material anonymity required of masculinity or rationality. As Naffine notes:

The principal concern of law is (the policing of the boundaries of) the bounded heterosexual male body. Bodies which are not like this, or are not allowed to be like this, are somehow deviant and undeserving bodies... because they have

⁷⁹ Elliott (n 38) at 153.

⁸⁰ First (n 6).

⁸¹ Perhaps recognition of BIID in the DSM would provide a form of symbolic recognition at an institutional level that would be followed by a more general discursive acknowledgement of the issues.

⁸² M Brazier 'Introduction: Being Human: Of Liberty and Privilege' In SW Smith and R Deazley (eds), *The Legal, Medical and Cultural Regulation of the Body: Transformation and Transgression* (Ashgate: Farnham 2009) 1-12.

⁸³ N Naffine, 'The Body Bag', in N Naffine & RJ Owens (eds), *Sexing the Subject of Law* (Sweet and Maxwell: London 1997) 79-94 at 84-88. See also *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 ALL ER 961

⁸⁴ Fineman (n 53).

⁸⁵ A Grear, 'Sexing the Matrix: Embodiment, Disembodiment and the law – towards the re-gendering of legal rationality', In J Jones, A Grear, R Fenton & K Stevenson (eds), *Gender, Sexualities and Law* (Routledge: Oxon 2011) 39-52, VJ Seidler, *Rediscovering Masculinity; Reason, Language and Sexuality* (Routledge: Oxon 1989).

apparently lost their clear definition.... [The legal idea of the body] refuses to acknowledge diminutions and transformations in men's bodies when they occur, preferring to see the male form as immutable, as always managing to preserve its own distinctive nature. And it serves as a means of denying bodily integrity to women (and to men who refuse to behave like "true" men) who are deemed to lack clear boundary definition.⁸⁶

Again, the idea of the immutable masculine body feeds into ideas of the constant and unchanging legal person. Alternative masculinities and women are immediately deemed other and pathologised or made illegal.⁸⁷ The medical approach to disability promotes a binary approach to normality. This method fails to take into account the social model referred to earlier that recognises that society itself and environment can be disabling.⁸⁸ As Bridy notes:

Under the medical model, disability is regarded as a state of physical limitation in which no rational person would choose to exist. Presupposing that the non-disabled body is the object of universal desire and identification, adherents to the medical model must dismiss as necessarily irrational the apotemnophile's expression of a preference to be disabled. Stepping outside the medical model, however, the presumed mental incompetence of apotemnophiles is perhaps less obvious. Viewed from the vantage of the social difference theorists, the apotemnophile can be understood as implicitly challenging the pervasive stigma of disability not only by embracing but by seeking to literally embody an alternative conception of bodily integrity.⁸⁹

We can see, therefore, the entanglement of medicine, law, corporeality and discourse in our understandings and constructions of both normativity and disability; indeed they are mutually constitutive in their construction. The elective amputee challenges these

⁸⁶ Naffine (n 83) at 84.

⁸⁷ We can look towards case law to see how, even after male homosexuality was legalised, case law was still used to establish a bias. A comparison of *R v Brown* [1994] 2 ALL ER 75 and *R v Wilson* [1996] Crim LR 573, for example, is revealing of the homophobic attitudes of the judiciary. Similarly, the effective criminalisation of HIV transmission has cast light on to prejudices of both sexuality and race. See for example, M Weait, *Harm, Consent and the Limits of Privacy* (2005) 13 *Feminist Legal Studies* 97-122 and M Weait, *Intimacy and Responsibility; The Criminalization of HIV Transmission*. (Routledge-Cavendish: Oxon 2007).

⁸⁸ Garland-Thomson (n 63).

⁸⁹ Bridy (n 40) at 152-153.

constructions and questions law's commitment to the production of a normative legal personhood.

B. Sexuality

Sexuality, similarly, commands an exploration of the connections between law, medicine, discourse and the material. Heteronormativity, for example, has traditionally been rigorously enforced by both law⁹⁰ and medicine.⁹¹ These institutions have been keen to prohibit male homosexual acts at the material level and thus can be seen as a privileging of law's (hetero)normative person.⁹² As such we can trace the impact of institutions upon the material. At the discursive level homosexuality has been constructed through medicine and law as socially, morally and legally wrong, through narratives of disease⁹³ and mental health.⁹⁴ Collier raises some germane points related to these debates where he writes, 'Law is not just concerned with the heterosexual/homosexual dimension of male sexuality. It is concerned with the form that heterosexual behaviour takes....'⁹⁵ Collier suggests that the law is not just interested in bodies per se but also in controlling, to some extent, the behaviours that those bodies engage in. These behaviours can re-codify bodies from one category to their binary opposite; hetero/homo, dis/able, normal/deviant. Again, heterosexuality is used as a normative comparator.

⁹⁰ See for example the criminalisation of homosexuality under the Offences against the Person Act 1861 and Criminal Law Amendment Act 1885 as well as the partial decriminalisation under the Sexual Offences Act 1967. These have now been repealed by the Sexual Offences Act 2003.

⁹¹ Homosexuality was not removed, for example, from the American Psychiatric Association's Diagnostic Statistical Manual until 1986.

⁹² Simultaneously male and heterosexual

⁹³ C Waldby, *AIDS and the Body Politic: Biomedicine and Sexual Difference* (Taylor and Francis: London 1996).

⁹⁴ Homosexuality was not removed, for example, from the American Psychiatric Association's Diagnostic Statistical Manual until 1986.

⁹⁵ R. Collier, *Masculinity, Law and the Family* (Routledge: Oxon 1995) at 110.

Consequently, the normativity of the elective amputee is further questioned (or is further characterised as deviant) by the assumption of sexual motivations surrounding the surgery first suggested by John Money.⁹⁶ Apotemnophilia takes place outside of the heteronormative imagination and as such represents a discursive or symbolic challenge to heteronormativity. Though apotemnophilia and heterosexuality are not mutually exclusive categories the form of the behaviour categorises it as deviant. Explicit sexuality not in the recognised heterosexual form is deemed to be non-normative, irrational and, in the case of males, unmasculine. This brings it into direct conflict with understandings of legal personhood.⁹⁷ This is despite the fact that studies suggest that most BIID individuals self-define as heterosexual.⁹⁸ The presumption of apotemnophilia as a motivation for elective amputation has meant that the sexuality of all elective amputees has been discursively questioned and this coupled with the diminished status of disability in our society has led to further removal from the normative body and the body politic. On a material level, most individuals with BIID define themselves as heterosexual, whilst denying the sexual motivations for surgical intervention.⁹⁹ We can compare this, however, with the presumed heterosexuality of the transsexual. Because transsexuals fit into culturally accepted binary models of heteronormativity they have found it easier to gain legitimacy than those who offer alternatives to these binaries.¹⁰⁰ As Mackenzie notes the elective amputee does not seek to engage with the:

⁹⁶ Money (n 5).

⁹⁷ Naffine (n 83) 91.

⁹⁸ First (n 6).

⁹⁹ First (n 6). This is further supported by Melody Gilbert's film, *Whole* (2004) where a number of heterosexual BIID individuals were interviewed, including one of Smith's patients.

¹⁰⁰ AN Sharpe 'Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category' (2007) 15 *Feminist Legal Studies* 57-84

...socially approved desire for a normalised body which enables access to medical treatment, [instead finding themselves] subject to normative disapproval as indicating an improper exercise of autonomous choice. Most people empathise more with the desire to be a 'real' man or woman, or to have an appearance more in keeping with cultural aesthetics of beauty, than with a wish to have a limb removed.¹⁰¹

The presumption of heterosexuality is at the forefront of these debates. The presumed deviant sexuality of the elective amputee erodes the legitimacy of their requests. This is in contrast to the transgender movement who point towards heterorthodoxy in order to legitimate their claims of normalcy. Those with BIID are considered to have, or to be, deviant bodies with deviant desires. These desires fail, in contrast with the transgendered body, to lead back to normativity; signified by and within heterosexuality. Though the desires of those with BIID are not necessarily homosexual, they are certainly non-normative. The conflation of desires with sexuality, and the damning verdicts of John Money, have led to a popular and medicalized sexualization of BIID; a non-normative sexualization that seemingly dismisses the presumption of heterosexuality, or, at the very least, raises the spectre of the homosexual.¹⁰² As a result it is through normative approaches to both disability and sexuality that law understands its persons. Law justifies its suspension of personhood and the associated autonomy through discourses surrounding sexuality and disability. This article will now build upon these themes as it considers the presumed lack of rationality associated with the elective amputee.

C. Rationality

¹⁰¹ Mackenzie (n 46) at 405.

¹⁰² See Sharpe (n 100) for a further look at law's fear of accidental sexual contact with the homosexual.

Several negative implications can be drawn about law's physical person. Implicitly, his reason is not clouded by sickness or pain; his mind is not impaired by mental illness or disability.¹⁰³

Law has been keen to present itself as rational, reasonable and objective.¹⁰⁴ Western understandings of rationality posit that it is always disembodied and removed from the corporeal.¹⁰⁵ A range of feminist theorists have criticised this disembodiment, arguing that there is a conflation between rationality and the masculine on the one hand, and embodiment and femininity on the other.¹⁰⁶ Theorists of personhood that rely upon understandings of rationality point towards its universalism and objectivity.¹⁰⁷ This assertion is countered by the range of entities that have traditionally been denied personhood; which at different times has been mobilized to justify the exclusion of animals, children, women, non-white humans, homosexuals and disabled humans.¹⁰⁸ Rationality has been one of the key elements of maintaining the disembodied nature of personhood¹⁰⁹ whilst simultaneously allowing the distribution of personhood to be based on the normative body. As Gear writes, 'there is a body in disembodiment.'¹¹⁰ Analysis of rationality highlights the intertwinement of its institutional and discursive deployment and its reification of certain types of material experience.

¹⁰³ Naffine (n 52) at 144.

¹⁰⁴ Gear (n 104) at 41.

¹⁰⁵ Ibid

¹⁰⁶ Gear (n 104) at 41, E Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Indiana University Press: Bloomington 1994), M Gatens, *Imaginary Bodies; Ethics, Power and Corporeality* (Routledge: Oxon 1996).

¹⁰⁷ J. Locke, *An Essay Concerning Human Understanding* (Everyman: London 1993), B Garrett, *Personal Identity and Self-Consciousness* (Routledge: London 1998), N Naffine, *Law's Meaning of Life; Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing: Oxford 2009), A Gear, 'Sexing the Matrix: Embodiment, Disembodiment and the law – towards the re-gendering of legal rationality', In J Jones, A Gear, R Fenton & K Stevenson (eds), *Gender, Sexualities and Law* (Routledge: Oxon 2011) 39-52 at 41.

¹⁰⁸ Gatens (n 10).

¹⁰⁹ Gear (n 104).

¹¹⁰ Ibid

Rationality and reason began to gain legitimacy as scientific philosophy developed during the seventeenth century.¹¹¹ Victor Seidler contends that the Enlightenment period placed a new emphasis on science and the ‘new masculine philosophy’ which led to the idea that through reason, universal and impartial truths were discoverable.¹¹² Other forms of knowledge such as feelings, emotions, intuitions and fantasies were abandoned for this novel focus on reason. This was partly due to the imposition of rationality (and rational civilisation) on others through force: the burning of women deemed witches and colonialism were both justified in the names of rationality, science and masculinity.¹¹³ Rationality is characterised in terms of the Cartesian dualism between body and mind¹¹⁴ and as well as being prominent in philosophy, it has also been a factor in law’s understanding of the person.¹¹⁵ Irrationality – the absence of rationality - can be used as evidence for the temporary suspension of legal personhood and the rights that are exercised through it.¹¹⁶ Reading Naffine in conjunction with Garland-Thomson,¹¹⁷ it could be contended that rationality focussed approaches to legal personhood do not privilege disembodiment (characterised by the absence of the body), but instead privilege material anonymity.¹¹⁸ The paradigmatic subject – the white healthy heterosexual male – is rendered materially anonymous. Under this reading gender, race, sexuality and ability are characteristics that mark individuals as culturally and legally visible due to their departure from the norm. Their lack of material

¹¹¹ VJ Seidler, *Rediscovering Masculinity; Reason, Language and Sexuality* (Routledge: Oxon 1989) at 25, M Gatens, *Imaginary Bodies; Ethics, Power and Corporeality* (Routledge: Oxon 1996).

¹¹² VJ Seidler, *Rediscovering Masculinity; Reason, Language and Sexuality* (Routledge: Oxon 1989).

¹¹³ *Ibid* at 25, M Gatens, *Imaginary Bodies; Ethics, Power and Corporeality* (Routledge: Oxon 1996).

¹¹⁴ Seidler (n 112) at 14.

¹¹⁵ N Naffine, ‘Who are Law’s Persons? From Cheshire Cats to Responsible Subjects’ (2003) 66 *MLR* 346-67.

¹¹⁶ See *Re MB (Medical Treatment)* (1997) 2 *FLR* 426, Naffine (n 59).

¹¹⁷ Garland-Thomson (n 63).

¹¹⁸ Although this can be compared with Gear (n 104) and her use of the term quasi-disembodiment to outline law’s stance on the liberal subject.

anonymity also makes them targets for suspensions of legal personhood grounded in their irrationality. This has manifested in such diverse examples as pregnancy,¹¹⁹ sexuality,¹²⁰ anorexia,¹²¹ and Trans individuals who do not conform to binary understandings of sex,¹²² all of whom have, in varying degrees, been denied autonomy. Thus rationality is played out in terms of the body – the abstraction from the body privileges those who are not characterised through its norms.

For Seidler the rational actor is characterised by those who can reject their biological impulses and surpass their nature.¹²³ He contends that the denial of the body and nature and emphasis on rationality and the abstract are characteristics associated not only with rationality but also western masculinity.¹²⁴ Seidler argues that men are taught to disconnect from their emotions and instead to be rational.¹²⁵ The body has for the most part been absent in the Western intellectual tradition.¹²⁶ Legal relations have instead been conducted on the premise that the mind is the most important criterion in the ascription of legal personhood.¹²⁷ Seidler's approach to masculinity, gives us a useful

¹¹⁹ Again, in the case of women see the case of *Re MB (Medical Treatment)* (1997) 2 FLR 426 and Nгаire Naffine's Reading of it in Naffine (n 59) at 16-17.

¹²⁰ In terms of sexuality, see. *R v Brown* [1994] 2 ALL ER 75 and *R v Wilson* [1996] Crim LR 573, M Weait, 2005. Harm, Consent and the Limits of Privacy (2005) 13 *Feminist Legal Studies* 97-122 and M Weait, *Intimacy and Responsibility; The Criminalization of HIV Transmission*. (Routledge-Cavendish: Oxon 2007).

¹²¹ K Keywood, *My Body and Other Stories: Anorexia Nervosa and the Legal Politics of Embodiment* (2000) 9 *Social & Legal Studies* 495-513.

¹²² Sharpe (n 100).

¹²³ Seidler (n 112) at 15.

¹²⁴ VJ Seidler, *Rediscovering Masculinity; Reason, Language and Sexuality* (Routledge: Oxon 1989), VJ Seidler, *Unreasonable Men; Masculinity and Social Theory* (Routledge: Oxon 1994), VJ Seidler, *Man Enough; Embodying Masculinities* (SAGE Publications: London 1997), VJ Seidler, *Transforming Masculinities; Men, Cultures, Bodies, Power, Sex and Love* (Routledge: Oxon 2006).

¹²⁵ Seidler (n 112) at 15.

¹²⁶ J Price & M Shildrick 'Openings On the Body: A Critical Introduction', in J Price & M Shildrick (eds), *Feminist Theory and The Body; A Reader* (Edinburgh University Press: Edinburgh 1999) 1-14 at 1.

¹²⁷ Naffine (n 52) at 157. However, as Sharpe notes 'The importance placed on the body within transgender jurisprudence, including reform jurisprudence, points to the relevance of this corpus of the law to theoretical scholarship, including feminist legal scholarship, focusing on embodied subjecthood. Indeed, in view of the gendering of the mind/body distinction within Western philosophy and law...

analytical framework through which we can begin to understand this absence of the body from western philosophy.

The dominance of masculinity within our culture has been continued in part by its conflation with rationality. Both masculinity and rationality advocate a distance between the mind and the body; rationality overtly and masculinity through the social invisibility accorded to the male body.¹²⁸ As mentioned previously, both rationality and masculinity deride the roles of emotions and nature. To be emotional is seen as both irrational and effeminate (or to display a non-normative masculinity). Nature, similarly, is characterised as irrational and feminine; to be both rational and masculine one must try to avoid nature, the natural and the animalistic.¹²⁹ Consequently, rationality, which assumes itself to be a neutral, objective manner of thought free from the constraints of the body, becomes very much an embodied activity.¹³⁰ The cultural unintelligibility of certain types of body renders them susceptible to the suspension of legal personhood.

In Naffine's consideration of legal personhood she concluded that the most influential understanding of the legal person had been in terms of the rational moral actor.¹³¹ In the context of legal personhood rationality is seen as something distinct from the body that seemingly any entity could develop.¹³² Naffine points to the lack of rights

the different articulation of the distinction evident here might prove fertile ground for feminist legal theory.' AN Sharpe, *Foucault's Monsters and the Challenge of Law* (Routledge: Oxon 2010).

¹²⁸ Garland-Thomson (n 63).

¹²⁹ Though this is complicated by masculinity's reliance on its dominant position within society as natural as well as heteronormative appeals to being natural in contra-distinction to homosexuality. Perhaps there is a confusion within popular discourse between 'natural' as something that can be defined in contrast to science or scientific progress and the 'natural' in the sense that something can be culturally normative.

¹³⁰ Grear (n 104).

¹³¹ Naffine (n 115).

¹³² Naffine (n 115). See for example, I Kant, *Critique of Practical Reason* (Longmans, Green and Co: London 1788, 1889).

associated with animals or those in permanent vegetative states as evidence for this theory.¹³³ As previously noted, in western society there has been a huge conflation between the rational and the masculine.¹³⁴ As Ahmed writes,

[T]he disembodiment of the masculine perspective is itself an inscription of a body, a body which is so comfortable we needn't know it is there, a body which is simply a home for the mind, and doesn't interrupt it, confuse it, deceive it with irrationalism, or bleeding, or pregnancy.¹³⁵

As Ahmed notes the discursive relationship between rationality and masculinity is further complicated by its necessary intra-connection with the material. Exclusive political membership has allowed some, if not all, of the needs and desires of healthy white heterosexual male bodies to be 'dignified with the status of rationally grounded principles' and consequently established as rights, virtues and laws.¹³⁶ Having gained access into the political sphere, bodies deemed other will find themselves using rights, exhibiting virtues and according to laws that do not reflect their experiences, needs or desires.¹³⁷ Gatens highlights that the effects of exclusion from the body politic are not

¹³³ Naffine (n 52).

¹³⁴ A Grear, 'Sexing the Matrix: Embodiment, Disembodiment and the law – towards the re-gendering of legal rationality', In J Jones, A Grear, R Fenton & K Stevenson (eds), *Gender, Sexualities and Law* (Routledge: Oxon 2011) 39-52, M Gatens, *Imaginary Bodies; Ethics, Power and Corporeality* (Routledge: Oxon 1996), L Finley, *Reshaping Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning* (1989) 64 *Notre Dame Law Review* 886-891.

¹³⁵ S Ahmed, *Deconstruction and Law's Other: Towards a Feminist Theory of Embodied Legal Rights* (1995) 4 *Social and Legal Studies* 55-73.

¹³⁶ Gatens (n 10) at 99-100.

¹³⁷ M Gatens, *Imaginary Bodies; Ethics, Power and Corporeality* (Routledge: Oxon 1996) at 100. L Finley, *Reshaping Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning* (1989) 64 *Notre Dame Law Review* 886-891. See for example the long standing problems with rape law, domestic violence and pornography. See for example, K. Stevenson 'She Never Screamed Out and Complained: Recognising Gender in Legal and Media Representations of Rape' In J Jones, A Grear, R Fenton & K Stevenson (eds), *Gender, Sexualities and Law* (Routledge: Oxon 2011) 121-134, M Burton 'The Legal Construction of Domestic Violence: 'Unmasking' a Private Problem In J Jones, A Grear, R Fenton & K Stevenson (eds), *Gender, Sexualities and Law* (Routledge: Oxon 2011) 161-172 and C MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press: Cambridge 1991)

removed by the admittance of these bodies; the effects linger on in the form of customs, laws and embodied habits which are still present within society.¹³⁸

Elective amputation presents a very clear situation where rationality and the body intersect. To explicitly engage with the body, or even to talk about one's own embodied experience, risks positioning an individual as irrational, dangerous or closer to nature.¹³⁹ The act of body modification is in many circumstances considered irrational and we can see this in both legal and medical terms by again looking at the DSM-V (2013). Gender identity disorder and body dysmorphia are both recognised as psychological problems that affect the mental health of an individual.¹⁴⁰ As Elliott notes, 'In cosmetic surgery and gender reassignment surgery, the patient is also seeking to alter their physical body to fit their image of how their body ought to be.'¹⁴¹ The difference is perhaps the fact that these surgeries fit in with normative conceptions of the body whereas elective amputation is in quite stark contrast to normative conceptions of the body.¹⁴² Perhaps, simply by engaging with the body – and breaking from the confines of material anonymity - medico-legal discourse posits these individuals as irrational. Moreover, it is contended that masculinity and rationality require a renunciation of the body. To be an amputee, and more than this, to choose to become

¹³⁸ Gatens (n 10) at 141.

¹³⁹ Gatens (n 10) at 25. See, for example, the experience of the anorexic in *A Local Authority v E* [2012] EWHC 1639 (COP), those with HIV in *R v Dica* (2004) EWCA Crim 367 and pregnant women in *Re MB (Medical Treatment)* (1997) 2 FLR 426. See further the discussion in N Naffine 'Women and the Cast of Legal Persons'. In J Jones, A Grear, R Fenton & K Stevenson (eds), *Gender, Sexualities and Law* (Routledge: Oxon 2011) 15-25 at 16-17, M Wait, *Intimacy and Responsibility; The Criminalization of HIV Transmission*. (Routledge-Cavendish: Oxon 2007) and K Keywood, *My Body and Other Stories: Anorexia Nervosa and the Legal Politics of Embodiment* (2000) 9 *Social & Legal Studies* 495-513.

¹⁴⁰ I acknowledge here that is further research to be done in relation to both law and psychology's reliance on categorisations. The label of BIID is here being used as a political tool as well as a potential medical categorisation.

¹⁴¹ Elliott (n 38) 175.

¹⁴² *Ibid* at 165-166.

an amputee, requires an appreciation of, and connection with, the body that fits awkwardly with notions of both masculinity and rationality. As Seidler notes:

It is significant that as children we are taught to be silent when the doctor is around, only to talk if we are specifically questioned. It is as if nothing that we know about ourselves could be of any relevance in this situation. Strangely, it is as if we have been estranged from ourselves the knowledge of our own bodies that no longer belong to us, but only exist as constituted through the categories of medical knowledge.¹⁴³

Seidler, somewhat anecdotally here, highlights the level of which this disavowal from the male body has permeated society. Men are expected, he argues, not to discuss matters that relate to the health of their own bodies in a situation that would logically require them to. To engage with the body in this manner would take them outside of the realms of masculinity and, consequently, normalcy. Elective amputation follows a similar pattern to these already established dynamics between bodily modification and mental health/irrationality.¹⁴⁴ Rather than asking whether or not an individual has a mental health problem in regards to elective amputation this article wishes to question how we arrive at these decisions and how they are informed by normativity. By seeking to enter BIID into the DSM, Smith and others, propagate the idea that to deviate from the normative conception of the body - indeed, simply to engage with it - is irrational, or worse signification of a mental health disorder.¹⁴⁵ Though this can be seen as part of a strategy that enables surgical intervention, by characterising elective amputees as irrational, disruptive and dangerous law and medicine combine to limit the legal

¹⁴³ VJ Seidler, *Unreasonable Men: Masculinity and Social Theory* (Routledge: Oxon 1994) at 24.

¹⁴⁴ 'As anomalous as it may seem when viewed in a historical vacuum, elective amputation becomes less incomprehensible when it is viewed as a manifestation of the continuing social and cultural evolution of attitudes toward the body and its modification.' Bridy (n 40) at 152.

¹⁴⁵ 'It is important to recognize in this context that the mental disorders and illnesses categorized and defined in the DSM are not natural and immutable constructs; they are instead the products of a fluid and evolving disciplinary discourse that is itself shaped by a constellation of powerful social and cultural factors.' Bridy (n 40) at 150.

personhood of these individuals. They are legal persons up to the point in which they distance themselves from the paradigmatic normative body. In a sense, a rather circular argument begins to develop. By engaging with their bodies elective amputees are deemed irrational and mentally unhealthy which in turn suspends their legal personhood through the denial of their wish for surgery. This suspension of their legal personhood further serves to limit their autonomy and engagement with their bodies. This process reinforces (but also highlights) the medico-legal commitment to the normative body. In addition, referring back to the discussion of apotemnophilia, we can see how deviant understandings of sexuality tie into this debate. Engagement with the body becomes doubly disconcerting to normative concepts of the body when it is promoted as both a deviant sexuality and alternate masculinity.¹⁴⁶ The dangerousness of BIID individuals in law and medicine are paralleled in our understandings of their sexuality. Bayne and Levy, in contrast, reject the idea that all elective amputees are irrational.¹⁴⁷ They argue that elective amputees can act rationally and are capable of making rational decisions. Indeed, they indicate that amputation may be the rational course of action to an individual faced with similar circumstances of non-standard embodiment. This understanding, however, is in the minority and is not currently reflected either within the law or by the BMA.¹⁴⁸

V. CONCLUSION

¹⁴⁶ ‘Nonetheless, any association of violence, whether or not it is consensual, with sexual pleasure retains pejorative overtones, either through the potential involvement of the criminal law or historically contingent medico-legal allegations of perversity. Both, in my view, have hampered acceptance of elective amputation.’ Mackenzie (n 46) at 409.

¹⁴⁷ T Bayne & N Levy, ‘Amputees by Choice; Body Integrity Identity Disorder and the Ethics of Amputation’ (2005) 25 *The Journal of Applied Philosophy* 75-86

¹⁴⁸ British Medical Association (n 15) at 86.

Its been a little less than six months since the initial event and I can only say that I am happy to see each new day with the sense of self worth and purpose I should have had from the day I was born. This wasn't about losing [sic] a leg, it was about gaining my own sense of self. Now I am finding new directions wherever I look.¹⁴⁹

This article has attempted to unravel the relationship between the body, rationality, masculinity and legal personhood. To do this the example of elective amputation has been utilized. This examination has allowed for attention to be drawn to the hidden assumptions within both medicine and law that present healthy white heterosexual male bodies as generic bodies capable of informing all decisions and interests. Through a consideration of elective amputation we can see that disability, sexuality and rationality are utilized in different ways in both law and medicine in order to reinforce a normative approach to legal personhood.

The elective amputee draws attention to three interlinked but different areas where this privileging of the paradigmatic body occurs. Firstly, elective amputation questions our understandings of health and ability, normativity, as well as (masculine) notions of integrity and wholeness. Related to this is the idea that material visibility denotes irrationality. To engage with the body in such a 'drastic and irreversible'¹⁵⁰ way, therefore, is to be deemed irrational. Rationality, instead, is defined by a sense of distance from the body. Thirdly, and overarching the previous two strands is the apparent sexual deviancy of the elective amputee. The discursive ascription of 'apotemnophile' questions the sexuality of the elective amputee. This is despite the fact that, as previously indicated, sexual motivations are, for the majority, secondary in cases of elective amputation. Elective amputees are consequently understood as not

¹⁴⁹ Woodie, 'Transabled Blog' (2009) <www.transabled.org> accessed 10/2013.

¹⁵⁰ Elliott (n 38) at 160.

physically healthy and thus unmasculine, irrational and thus feminine, and displaying characteristics of sexual deviancy which again removes them from the realm of the normative healthy white heterosexual male body. We can see that BIID ruptures heteronormative understandings of the body on three levels. Firstly, on a physical level; challenging understandings of impairment and wholeness. Secondly, on the level of rationality; further challenging the separation of mind and body. Finally, through the discursive (rather than material) level of sexuality which enable challenges to be made to heteronormative understandings of sex and pleasure.

In the current patriarchal clime we see a continuing commitment to disembodiment within both law and medicine.¹⁵¹ An understanding of one's own body goes against the isomorphically related concepts of masculinity and rationality. Though the body is an extremely important indicator of whom or what may be deemed a legal person the myth of universality still seems to continue regardless. For Cheah, Fraser and Grbich the body and its normativity becomes the most important part of defining an individual as a legal person.¹⁵² The combination of these factors, however, works to limit the legal personhood of the elective amputee and temporarily relegate them to the space of non-person. Elective amputation demands a re-examination of the limits of autonomy, the value placed on normativity and the reasons law fails to give when suspending personhood. If personhood denotes the ways in which autonomy is given value then we must critically consider situations where this is diminished. This becomes all the more pertinent where autonomy is denied on the basis of assumptions that cohere around normative expectations of gender, race, ability and sexuality.

¹⁵¹ Grear (n 104).

¹⁵² P Cheah, D Fraser & J Grbich 'Introduction: The Body of Law', in P. Cheah, D. Fraser & J. Grbich (eds), *Thinking Through The Body of The Law* (Allen & Unwin: St Leonard's 1996) 1-14

