

R v BM: Errors in the Judicial Interpretation of Body Modification

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ABSTRACT

R v BM is the latest case to consider the *exceptions* to Offences Against the Person Act 1861 (OAPA). The exceptions allow an action causing injury that would be a criminal offence to become lawful *if* the person injured consents to the action. The outcome of this judgement is that body modifications are categorised as medical procedures (and therefore subject to the medical exception only) and new exceptions should not be developed on a case by case basis, instead allocating development of the exceptions to Parliament. Two implications follow from the *BM* judgement. First, it provided a limited definition of body modifications which are now categorised as medical procedures. Second, their Lordships have restricted further development of the lawful exceptions to offences against the person. This is a lost opportunity for developing the common law exceptions to the OAPA through an autonomy-based liberal judicial interpretation.

KEYWORDS: modification, body, autonomy, offences against the person, medical justification

I. INTRODUCTION

*R v BM*¹ is the latest case to consider the *exceptions* to the Offences Against the Person Act 1861 (OAPA). The exceptions allow an action causing injury that would be a criminal offence to become lawful *if* the person injured consents to the action. For example, boxers consent to their opponent hitting them and people receiving tattoos or piercings consent to the penetration of the skin involved. This case concerned a tattooist and body modifier who carried out the following acts: the removal of (for separate customers) an ear, a nipple and bifurcation of the tongue. Under the Local Government (Miscellaneous Provisions) Act 1982, Part VIII he was registered as a tattooist. However, there is no registration scheme for body modification and in neither case are qualifications required or available. These modifications were carried out in a commercial setting on the basis that they were a service provided by the appellant. Prior to this judgement no qualifications existed or were required for body modification activities but one result of this judgement is that only medical professionals are able to carry out body modifications (more on this shortly). These incidents escape the conflation of sexual activity and bodily injury or harm that featured so prominently in *R v Donovan*², *R v Brown*³, *R v Wilson*⁴ and *R v Emmett*⁵. Nevertheless, at trial BM was found guilty of three offences of wounding with intent under s.18 of the OAPA. Their Lordships in the Court of Appeal dismissed the appeal on the grounds that body modification was not an exception to the OAPA. This conclusion was reached on the basis that the activities carried out were a form of surgical procedure which could only be lawfully carried by medical professionals for medical purposes. Modifications were strictly defined as removal or mutilation which raises concerns around intersectional justice and discrimination against already marginalised individuals, such as transgenders, body modifiers and cultural/ethnic groups that practice body modification.⁶ Additionally, the court stated that '[n]ew exceptions should not be recognised on a case by case basis, save perhaps where there is a close analogy with an existing exception'.⁷ Rather development should come from Parliament instead of the judiciary but this will lead to the stagnation of the law concerning exceptions given Parliament's inaction in reforming the OAPA. This is problematic because it negates the incremental evolutionary advantage of common law and fails to respect autonomy in a postmodern social world.

We begin with a few preliminary issues. For current purposes it is a given that the current framework of offences plus common law exceptions is valid. Although the view that offences against the person needs wholesale reform, a view that the author shares, deserves consideration this work is focused on the actions of judges *within* that system. Secondly, it can be ar-

gued that body modification should not fall within the remit of the criminal law at all. As Lord Mustill noted in *Brown*, the scope of the OAPA is open to question and should be subject to further scrutiny.⁸ Consequently, the concern is how the judiciary responded to cases before them after prosecution rather than whether the case should have arisen in the first place. An analysis of these reforms to the OAPA must be deferred to another paper. Finally the focus is on body modifications carried out by one person on another, not self-modifications that someone carries out on their own body.

The following three parts of this article sets out critiques of the judges' decision. These critiques are independent of the positive autonomy-based liberal argument set out in Part V. Part II discusses the general features of the present law and the courts attempt to articulate underlying principles for the exceptions but the lack of explanation of these principles undermines their inclusion because the court applies them without further discussion. A second critique is made against the normative choice involved in the selection, again without explanation, of these principles rather than alternatives. Part III critiques the medicalisation of body modification and the failure to recognise modification as a distinct practice on postmodern grounds. The medicalisation of body modifications justified the criminalisation of *BM* but in doing so the court ignored the distinct roles aesthetic body modification and medical practice play thus universalizing medical standards across all physically injurious activity. Furthermore the judges conflated mental health and the desire for modification which raises concerns about the judges' personal prejudices and intersectional discrimination toward those who seek body modification. Part IV critiques the limits on future common law development that result for the *BM* judgement. An important and significant advantage of a common law legal system is the evolutionary adaptation that it allows; simultaneously alleviating Parliament's workload and allowing the law to reflect social changes. Yet the court's judgement severely restricts future incremental development of the law negating this advantage. Part V articulates an autonomy-based permissive interpretation of the exceptions and the reason this should have led to the inclusion of body modification. This argument is based upon the insights of moral error theory and postmodernism which negate the normative justifications for seeking to restrict autonomy. Part VI concludes that a review of this case by the Supreme Court is needed and that the judiciary should adopt a presumptively permissive approach to the exceptions.

II. GENERAL FEATURES OF THE EXCEPTIONS

As Lord Chief Justice Burnett noted, ‘the exceptions are laid down there to preserve the law as it was at that time’.⁹ Thus the exceptions are recognised as historico-cultural artefacts that created without further theoretical consideration. Indeed, even the medical exception has no particular legal grounding with Sir James Fitzjames Stephen’s noting that the existence of the medical profession assumed the truth of the medical exception.¹⁰ The current common law exceptions are tattooing, piercing, ritual circumcision, chastisement of children, sports, religious mortification and medical treatment (*R v Brown*) and – heavily qualified – branding (*R v Wilson*). These exceptions have long been acknowledged as arbitrary and *ad hoc*. Lord Mustill stated:

My Lords, there is nothing here to found a general theory of consensual violence. The court simply identifies a number of reasons why as a matter of policy a particular activity of which consent forms an element should found a conviction [or not]¹¹

Thus LCJ Burnett was correct in recognising the arbitrary nature of the exceptions calling them ‘at best *ad hoc*’ and reflection of ‘the values of society recognised from time to time but the judges’.¹² However the implications of this were not considered (more on this later).

BM is notable for the identification of two theoretical underpinnings for the exceptions but this consideration is not followed through in application. Much to his credit, Burnett LJ identifies ‘two features which may be thought to underpin almost all’ of the exemptions.¹³ First, that the exempted activity ‘produce discernible social benefit’ and second that it would be ‘unreasonable for the common law to criminalise the activity if engaged in with consent’ – what shall be termed *reasonable criminalisation*.¹⁴ Neither of these terms is particularly helpful and the judiciary does not clarify their conceptualisation of these terms when they do use them. This leaves us with highly ambiguous phrases that can be put to almost any use with the result that the particular judges’ notion of *benefit* or *reasonable* becomes *the de facto test* for judging any particular activity.

Social benefit seems to be equivalent to public policy – for example social benefit is produced by the ‘sporting exceptions and may even be true of boxing’.¹⁵ This is reinforced by the statement that the ‘recognition of an entirely new exception would involve a value judgement which is policy laden’.¹⁶ Yet no analysis of social benefit or policy is provided.

The notion of social benefit is a highly value-laden normative judgement that changes depending on the background views someone has. This is most clearly shown in relation to boxing and prize-fighting. Boxing is an exception, per *R v Coney*¹⁷, despite the fact that it intentionally causes injuries that are potentially more serious and harmful than the injuries caused in *BM*. In *Coney* a major concern was the public disorder associated with prize-fighting while boxing in contrast has been characterised ‘as an exercise of the manly diversion of self-defence and pugilistic skill’.¹⁸ We can thus see how social benefit can be easily equated to the prevailing normative standards of the judiciary concerning what is socially beneficial. This highlights the structural problems of *ad hoc* exceptions and the inconsistencies in the law. While coherence is not the only measure of law, it is an important consideration for articulating why we prohibit some conduct while simultaneously increasing the certainty for citizens.

It was submitted, on behalf of the defendant, that the conduct should be permitted because ‘it protects the personal autonomy of his customers’.¹⁹ This alternative interpretation of social benefit would hold that people ‘are usually the best judges of their own interests, and if they consent to damage, there is generally no reason why the law should protect them further’.²⁰ A judge who highly prizes autonomy might have accepted this argument and ruled that the notion of social benefit means respecting and promoting the autonomy of individuals to have body modifications. Such an interpretation would shift the law toward a form of ‘consent which genuinely honours individual autonomy’.²¹ Thus social benefit can be constructed in a number of ways and could have been used to justify the extension of the exceptions that allow for consent to act as a defence. Here social benefit was constructed to mean that which is already recognised (such as a boxing and chastisement) rather than constructing it to recognise a new exception. Yet this contradicts their recognition that ‘there is a need to reflect the general values of society’ including our social liberal values of autonomy, liberalism and self-determination.²² It would have been a valid interpretation to say that our culture recognises the choices of individuals in body modification.

The second factor concerning reasonable criminalisation will also depend entirely on one’s perspective. In *Brown* the majority view of sado-masochistic activity was that the criminal law should be applied and they rejected the view of those engaged in the activity that it was a component of a fulfilling life. Yet this was done from their perspective of what constitutes appropriate consensual sexual activity. While all legal terms possess some ambiguity, *rea-*

sonable is particularly troublesome with the result that it can reflect the discourses and prejudices of the judges and/or prevailing social attitudes. Thus how one constructs an activity will determine whether it is *unreasonable* for the criminal law to be applied. In *BM*, by constructing the activities as medical in nature it was inevitable that the appellant would be criminalised as he was constructed as a non-medical professional carrying out a medical procedure without medical justification. Their Lordships could just as easily have held that it was unreasonable to criminalise given the widespread practice of body modification and the lack of Parliamentary action to curb such activity. While most body modifications do not necessitate removal of body parts the restrictive definition of body modification in this case supported the move to a medical model for the activities rather than an autonomy-based model through the use of a highly provocative definition, i.e. mutilation.

These difficulties are further compounded by the lack of discussion whether these two factors operate concurrently or independently and, in any case, there is no discussion of whether these criteria were fulfilled. Rather, it seems to have been assumed. Clearly the judges thought there was ‘no proper analogy between body modification ... and tattooing, piercing or other body adornment’ although no reason was given to support this view.²³ Moreover there was no discussion of the criteria of social benefit or reasonableness – indeed they are raised in paragraph [40] and by [41] the decision has already been made not to extend the exceptions. It seems that the judges’ identified key criteria for *generally regulating exceptions* to the OAPA but either felt the outcome was self-explanatory, it would require an unmanageable level of theoretical discussion or might expose the role their personal attitudes play in judging the body modifications. Rather than engage in an analysis of social benefit and reasonable criminalisation, their Lordships take it as read that the activities are not of social benefit or should be reasonably left alone. Crucially, this assumption supports the medicalisation of body modifications.

III. CATEGORISATION AS MEDICAL PROCEDURES

By *positively* categorising body modifications as medical procedures their Lordships have effectively stated that body modification carried out for aesthetic purposes should only be performed for medical reasons. If not, they are unlawful. Clearly the purpose of body modifications as an aesthetic has been excluded from legal discourse by this maneuver. While the role of medical professionals is based upon acting for medical reasons, a body modifier would act exactly for those aesthetic reasons rejected by medical professionals and not for

medical reasons. This is to say no more than a piercer penetrates the skin for aesthetics purposes while a doctor pierces the skin for health reasons. The idea that non-medical body modifiers should act for medical reasons (absent voluntary assumption) is problematic because it universalises a highly specialised and specific set of practices. It takes medical goals and practice as *the* universal standard for all changes to the body involving injury. The point is not that body modifiers fail to act for medical reason but that they *should not* be expected to act for medical reasons – they should be expected to act for aesthetic reasons.

The imposition of a medical standard on non-medical practitioners fails to recognise that standards are contextual, contingent and lack objective truth or justification (per postmodernism and moral error theory²⁴). Furthermore, not only does this colonise other practices by medical narratives, it excludes particular ends as legitimate. Thus judges engage in a determination of what constitutes an appropriate end for individuals which requires normative judgements and further marginalises those in society who do not conform to conventional wisdom. In the context of our socio-political system, judges should not judge the ends to which people work – particularly when the effects are confined to them alone. This judgement makes medical professionals the sole gatekeepers when it comes to seeking modification. This may mean that the judiciary will not look closely at what medical justifications are put forth. When Dr. Robert Smith amputated two healthy legs (one from each patient) he justified these operations through Bodily Integrity Identity Disorder (BIID) and despite some concerns expressed by other medical professionals, no action was taken.²⁵ Thus people may be encouraged to medicalise their desires in order to access medical modifications.

Additionally their Lordships provided a restrictive definition to *body modification* as that which ‘involves the removal of parts of the body or mutilation’.²⁶ No definition has previously been provided by the judiciary in any judgement thus this represents an attempt to provide some clarity to the issue. It may be that body modifications which add to the body (i.e. implants) may be lawful while those modifications that remove or mutilate (such as scarification) will be unlawful unless they meet they meet the requirements of the medical exception. This would depend on what constitutes mutilation. Unfortunately their Lordship did not engage in any great detail with the concept of body modification or mutilation. The best we can infer from their judgement is that the removal of any body part will constitute mutilation. However, it should be noted that bifurcation does not entail the removal of parts, and as the judges did not distinguish this from the other modifications, we can conclude that mutilation

has a meaning wider than removal. Thus removal should be read as a form of mutilation rather than an attempted definition. This definition supported the characterisation of the activities as medical procedures because it necessarily defines body modifications as serious injuries. It is also more restrictive than the common usage which includes tattooing, piercing and other activities such as teeth filing, scarification or bifurcation of the tongue.²⁷

Thus the physical factors associated with these particular modifications played a role in justifying the adoption of a medicalised conceptualisation of body modification. This conclusion was further supported by the expert evidence of ‘John Murphy, an ear, nose and throat consultant and ... Nigel Mercer, a consultant plastic surgeon’.²⁸ Their evidence was that no medical professional would carry out modifications ‘for *aesthetic* purposes, but only for medical reasons’.²⁹ This is of course trivially and tautologically true – for medical professionals do not (or should not) act for aesthetic purposes – but this tells us nothing more than that medical professionals act for medical reasons. (Cosmetic surgery is an oddity as it blurs the boundary between aesthetic and medical reconstructive surgery although justified by medical practice on, purportedly, therapeutic grounds³⁰.) Their Lordships accepted the narrative ‘that the procedures in question are, in truth, medical and amount to cosmetic surgery’.³¹ This medicalisation supported the further claim that it was ‘not in the public interest to decriminalize such activities [even] when performed with the consent of the customers’.³² Yet public policy concerns about medical standards and expertise are out of place given that body modification is an aesthetic practice not a medical one. Public policy is relevant to medical practice because of the prominence and impact of medical professionals and their actions on society. By linking body modification to medical practice and then to public policy, the judges doubly justify their response of criminalisation.

Given the discussion of the medical experts concerning health implications, the judges thought that removal of body parts and bifurcation should be classed as medical activities due to the seriousness of the physical actions themselves. Thus the stronger argument concerns the potential health consequences of some of the modifications. The removal of an ear in particular involves some ‘hearing loss’ and carries a risk of ‘facial paralysis’ while all modifications carry an ‘inevitable risk of infection’.³³ Thus health and risks to health factors are perhaps a stronger basis for holding that these modifications are not protected lawful activities. Yet this approach is problematic due to lack of consistent application of physical harm to the exceptions. Extremely serious harm can be caused to another as long as it fits within the judges’ notion of

social benefit/public policy. Boxing, rugby and other contact sports are activities that inevitably cause harm to others but as they are deemed by judges to be socially beneficial they are lawful despite the intention and/or knowledge that they will cause serious harm.

The focus on the physical harms and risks involved was embedded into the very concept of body modification through the ‘removal of parts of the body or mutilation’ definition.³⁴ Yet as Theodore Bennett notes:

Fixing the limits of the definition of “body modification” is both problematic and politically loaded, as it relies on dominant cultural conceptions about what constitutes appropriate and socially valued types of body alteration.³⁵

Restricting the definition of body modification to the removal of body parts or mutilation (a highly provocative and emotive term with significant negative normative overtones) is to ignore the wide range of practices and forms of self-expression that body modification represents. The importance of self-expression comes from the fact that we are embodied entities; the body distinguishes us from others and is the primary means by which we are represented within and by which we participate in the social world. This judgement imposes a negative normative conception of body modification that is not reflective of contemporary society. This hardly comports with the understanding of the exceptions as ‘reflect[ing] the values of society recognised from time to time by the judges’.³⁶

Furthermore the association made between the desire for *body modifications* and *mental health* is problematic. It is worth quoting Lord Burnett at length to demonstrate the conflation of mental health with body modification:

The fact that a desire to have an ear or nipple removed or tongue split is incomprehensible to most, may not be sufficient in itself to raise the question whether those who seek to do so might be in need of a mental health assessment. Yet the first response in almost every other context to those who seek to harm themselves would be to suggest medical assistance. That is not to say that all who seek body modification are suffering from any identifiable mental illness but it is difficult to avoid the conclusion that some will be, and that within the cohort will be many who are vulnerable.³⁷

Despite his protestations to the contrary, he strongly links mental health to body modifications speaking of body modification as form of self-harm rather than as an aesthetic. Furthermore he presumes, without adducing any evidence, that in a cohort of people who desire body modification there ‘will be many who are vulnerable’.³⁸ By linking body modification to mental health (even in a qualified way), his Lordship reinforces the medical categorisation and suggests that the judiciary are protecting people. In this case that means protecting the individual receiving modification from their own supposedly dubious judgement. This is reinforced by the comparison with gender reassignment surgery – upon reflection, he argues, one can ‘appreciate the extensive nature of the protections provided in the medical context’.³⁹

Yet there seems to be no basis for this assertion beyond personal prejudice. No evidence is presented showing a high incidence of mental illness amongst people seeking body modification. This raises concerns around discrimination and intersectionality as those who deviate from the norm are effectively classified as mentally ill. This also ignores the differences between various forms of body modification such as transgender, cultural/ethnic, aesthetic and religious body modifications. As Andrew Beetham puts it:

Such comments seriously downplay the customer’s personal autonomy in favour of a more paternalistic approach by suggesting that anyone who wishes to undergo such treatment *must* by definition be mentally unwell and they *must* be protected at all costs from undergoing such procedures.⁴⁰

Thus the wide range of differences relating to modification are reductively analysed as arising from mental illness and effaced. Such conflation does not occur with other exceptions because they are discursively framed as positive and healthy rather than as physically damaging forms of self-harm. No judge has suggested that those who box are likely to have mental health issues. Yet here they are conflated without evidence and we can only infer that this is due to the judges’ personal attitudes that these modifications are aberrant. It is clear that their Lordships imposed their own understanding of *acceptable* body modifications rather than assessing whether society or Parliament had accepted these practices. Their Lordships should have considered the heterogeneity of contemporary society and the wider scope for individual autonomy and expression allowing the common law to reflect changes in society. Instead, they remitted any development of the law to Parliament.

IV. LIMITING FUTURE COMMON LAW DEVELOPMENT

Using this medical categorisation their Lordships concluded that ‘we can see no good reason why body modification should be placed in a special category of exemption’.⁴¹ However, additional statements made in the judgement will severely restrict the interpretative powers of the courts to expand the exceptions in future cases. The first statement is that adding to the exceptions is a step ‘only [to] be taken by Parliament’.⁴² Historically the judiciary developed the exceptions. This process has, rightfully, been criticised for its arbitrary nature as mentioned above. Nevertheless, the benefit of common law development is its adaptability to social changes. Their Lordships should have considered the evolutionary role of the law and its ability to reflect changes in society. Instead they stated that it is for Parliament to add any new exceptions on the basis that *BM*’s argument ‘envisages consent to surgical treatment providing a defence to the person performing the surgery whether or not that person is a suitably qualified as a doctor [sic]’.⁴³ Note that this characterisation is accurate only because their Lordships decided body modification is medical in nature. This step - allowing the consent of the “victim” to determine whether an activity is lawful – was too radical for the court to countenance thus justifying remitting the decision to Parliament. However, here the judges elided a move to an entirely consent-based OAPA with the addition of a new exception. Clearly, the judiciary is comfortable with consent determining the lawfulness of some actions; there was no reason why body modification could not be subject to the same rule.

The second statement reads:

New exceptions should not be recognised on a case by case basis, save perhaps where there is a close analogy with an existing exception to the general rule established in the *Brown* case.⁴⁴

The effect of this is that henceforth exceptions should not be added through the common law fossilising the existing law and preventing further adaptation by judges. Dyeing one’s eyeball, injecting saline under the skin to form into shapes, scarification and teeth filing may all be unlawful under this ruling. This statement coupled with the allocation to Parliament the responsibility of reform means that there is no possibility of these activities becoming lawful in the foreseeable future (after all Parliament has not seen fit to introduce a new Act concern-

ing offences against the person despite repeated suggestions over a decade by the Law Commission to do so).⁴⁵

This restrictive interpretation may be mitigated by the *close analogy* caveat if judges interpret it as a means for developing new exceptions. For example, per *Wilson*, branding has a dubious status as comparable to tattooing but will new exceptions have to be a close analogy with tattooing or with branding? Given the highly specific context of *Wilson* it is unclear whether all branding is included in the tattooing/piercing exception. For example, animal rights protestors who branded each other were threatened with arrest but ultimately no action was taken despite this clearly being outside the scope of the *Wilson* ruling conceptualising branding as personal adornment in the context of a loving relationship.⁴⁶ If branding is exempted then it is possible that scarification could be as well. Yet it is unclear whether something held comparable to tattooing (which is a recognised exception) can itself be a comparator – allowing scarification to be compared to branding – or whether the activity has to be compared to the original exception – that is to tattooing directly. Allowing close analogy with another close analogy may more easily lead to development than requiring all close analogies to be analogous to the root exception. For example, scarification involves removing the top layer of the epidermis to cause scarring in the desired pattern. Scarification is closer to branding than it is tattooing because it involves damaging the layer of skin rather than dyeing the skin. Yet if scarification can only be compared to tattooing then it may not be close enough for the analogy to hold. If, on the other hand, it can be compared to branding then the analogy may be successful.

The use of such a caveat will remain down to the discretion of particular judges hearing a case. A judge may think that scarification is comparable to tattooing/branding or they may not – but *what* they think will determine whether the caveat is used or not. However, if activities can be compared to an activity that is itself comparable to an exception then there may be more scope for development. Whether such an interpretation of *BM* will be adopted remains to be seen but it might provide a means for some common law adaption. Nevertheless, this will inevitably be more restrictive than allowing the courts to create new exceptions wholesale without the need for analogy; especially given the disparate nature of the exceptions. For example chastisement and boxing are not analogous thus an extension from one to the other under the *BM* scheme may not be possible.

The reluctance of the judges to recognise new exceptions may be due the concern that recognition ‘would involve a value judgement which is policy laden, and on which there may be powerful conflicting views in society’.⁴⁷ Yet there are always conflicting views about law and we rarely wait for sufficient consensus let alone complete agreement. Refusing to recognise body modification is also a value laden normative judgement – a conservative one that reinforces the existing law rather than developing it. Thus their Lordships could have justifiably viewed the exceptions as within the remit of the common law given that Parliament has not seen fit to make any changes to the exceptions or the OAPA and that the exceptions have always been determined by the common law.⁴⁸

The problem with Parliamentary and/or judicial inaction is that the law becomes static and ceases to reflect the society it regulates. Law has no objective foundational justification therefore no law can be right throughout time and circumstance rather all laws are contextual and socially grounded.⁴⁹ Stagnant law will cease to be grounded in a conterminous social reality. If this persists, law becomes irrelevant or tyrannical and its legitimacy will be called into question. Furthermore, in a liberal social democratic system laws are a reflection of social attitudes and beliefs. This does not, per se, require law to develop in particular ways but it does require that a mechanism for legal change because social attitudes are constantly in flux. The judges in *BM* have deactivated that mechanism by limiting the future judgements of the common law.

Clarifying all the exceptions or producing a general scheme would be a difficult task for any court. This may explain why LCJ Burnett stated that ‘such a bold step is one that could only be taken by Parliament’.⁵⁰ But wholesale reform is different from expanding the exceptions. Body modification could have been included given that tattooing and piercing are already exceptions. While fixing the term *body modification* is highly problematic, in the interests of legal efficacy and certainty the judges should have adopted the common meaning rather than their more restrictive understanding. This would have encompassed tattooing, piercing and other permanent changes to the body avoiding the association with mutilation. This would not be beyond the scope of the court’s authority given that *all the existing exceptions* are derived from common law. Rather than extend the exceptions to include body modifications their Lordships chose to entrench the status quo. Until such a time when Parliament acts we are left with the judiciary as the only means of reviewing and reforming the exceptions. Once precedence takes effect, the range of possible interpretations will be heavily restricted by this

judgement. This is problematic because the great strength of a common law system is the ability of judges to develop law over time and in response to societal changes without waiting for Parliament (with all its attendant political limitations) to act. Assigning responsibility to Parliament justifies judicial inaction yet Parliament will not act hence the stagnation of law.

Prior to this judgement, was not clear whether body modifications of the sort performed were criminal, Parliament had not acted to alter the exceptions or change the process by which they are created nor has Parliament acted to proscribe body modification yet the judges' interpreted their role and the law in a way that calcified the law in its current form and criminalised a set of consensual activities. They have not just stated that body modification must fall within the medical exception to be legal – they have positively restricted common law development in favour of an apathetic Parliament. Yet this need not have been the outcome as we shall see.

V. LIBERAL JUDICIAL INTERPRETATION

The *BM* judgement can be critiqued for four distinct reasons. First, the acknowledged historical and cultural *ad hoc* nature of the exceptions remains entrenched and unaddressed. Thus whilst recognising the particular societal normative origins of the exceptions no recognition of changing normative standards is incorporated into the judgement. Second, it universalises medical professional practices as the standard thus making the legality of an action dependent on whether it falls within the definition of body modification as, broadly, a mutilation. Third, their Lordships conflate mental health issues with body modification effectively holding that individuals who desire body modifications must be mentally impaired or unbalanced suggesting a problem of intersectional use of power. Not only does this colonise the aesthetic practices of body modification, it also negates the legitimacy of an individual's autonomy in seeking body modifications. Fourth, the judgement constrains the future development of the law regarding the exceptions to offences against the person. This inhibits the ability of future judges to revise the common law through an evolutionary process of judicial adaption to changing social norms. These are the independent critical arguments against the *BM* judgement but there is a positive autonomy-based argument for the recognition of a new exception of body modification.

The judges should have held body modification as a lawful exception to the OAPA for a number of reasons. First, moral error theory and postmodernism seriously undermine claims

to objectivity, truth, morality or independent normativity. Second, our contemporary population is heterogeneous with no recognised master narrative governing lives of all individuals. Third, we are a politically liberal State which prizes autonomy and this should have had greater consideration. Finally, the absence of Parliamentary action leaves the judiciary as the only official body that can adapt the law and they have a strong social duty to favour freedom of autonomy over their personal conception of valid socially useful activity.

Moral error theory and postmodernism undermine any claim to objective normative claims about the world.⁵¹ This is because such claims lack the foundational irreducible normativity required for these claims to stand independently of context. Thus claiming that cutting off someone's ear is an act of violence, a medical procedure or an aesthetic practice and subsequent determinations of right or wrong are a matter of contingent inter-subjective conceptualisation. Due to postmodernism and moral error theory there is no foundational normative grounds for restricting autonomy. We cannot say, categorically, that it is normatively wrong for someone to exercise their autonomy in a particular way because there is no objective independent support for this claim. While claims can be asserted they cannot be justified. Consequently, restricting autonomy on the basis that something is normatively wrong is an act of domination not of justice. This provides a negative argument against restricting autonomy rather than a positive argument for respecting it. Rather the allowance that must be given to autonomy is a default position in the absence of normative grounds for restricting it. We must instead accept the political nature of restrictions on autonomy and take pragmatic non-normative concerns as our starting point. Of course this means that the claim that cutting off an ear is a body modification is equally non-objective but this is only a problem if we try to adjudicate on the validity of views.⁵² Instead we need to begin from the position that these two conflicting views of factual events are equally invalid (in an objective sense). Thus moral error and postmodernism refute the judicial construction of body modifications as medical procedures as the authoritative and correct view to hold but does not rule out that one can hold this view.

While autonomy can form the basis for wholesale reform of offence against the person, for present purposes it justifies the more limited goal of directing judicial interpretation in a liberal manner. Thus autonomy can form *the underpinning principles for the exceptions* as long as the current framework is in place. Autonomy is crucial because it is the default loci of judgement in the absence of objectively prescriptive normative principles.⁵³ The judiciary

needed to mediate between these different perspectives instead of imposing one view over the other (at least on the basis of normative claims). In a liberal political order they should have permitted body modification as it is only self-affects. Public policy concerns were misplaced given that there is no effect on non-participants hence the importance medicalisation played as vector for the inclusion of public policy. As there is no way to resolve these different viewpoints through some objective foundational truth, the judiciary should not treat one view as more normatively justified than another but should adopted a permissive approach unless harm to others can be demonstrated (thus providing a pragmatic justification for potentially prohibiting the activity). No such demonstration was provided here reducing the judgement to an expression of judicial prejudice. This problem becomes more obvious once we take into account the diversity within the population.

The increasing heterogeneity of the population results in a more diverse normative ecology in which dominant master narratives are weakened or absent (in particular the decline of particular normative codes i.e. Christianity).⁵⁴ As more narratives are generated conflict will increase but these conflicts cannot be resolved through appeals to a reality outside of those very perspectives. Instead, we need to take these conflicts as our starting point by acknowledging that these views are ultimately without foundation and seek to address conflict another way. In other words, we must recognise the political rather than metaphysical nature of conflicting perspectives. Within the context of a liberal democratic social order, this normative variety requires that autonomy becomes the paramount consideration for exceptions and the basis of a presumptive liberal approach to judicial interpretation. This is not to say that liberalism has more normative justification than other political systems – although it is arguably better in securing individual freedom. Rather it is recognising that *our* political system is one premised upon liberal principles of autonomy, self-determination and inherent inalienable equality. Thus the call for a liberal approach to judicial interpretation is not grounded in a spurious objective claim but is based upon the self-declared nature of our socio-political order. The judiciary should have decided on an approach that allows each individual to live according to their own conception of a good life limited by the harm caused to others (which is not a factor in body modification).

Consequently, the liberal State must show harm to others rather than unevidenced public policy concerns which merely acts as a veil for the judges own personal conceptions of the right society. Obviously the concept of harm is ambiguous, being the subject of much discussion.

But what is required here is not that we have a rigid conception of harm rather *evidence* must be provided that allowing individuals to modify their bodies will affect others in a certain harmful way. This can form the basis of a discussion on the effects of particular behaviours. (This is unavoidably vague as the concept of harm has no fixed normative meaning for the same reasons stated above as well as being linguistically open.⁵⁵) Thus their Lordship's recognition of social values should have led them to conclude that in a liberal democratic society the judiciary should presumptively favour permission over prohibition unless evidence demonstrates to harm to non-participants. There was a failure to do so in this case.

The lack of evidence supporting such a conclusion can be seen through the way the judges skimmed over the application of the notion of social benefit and the allusion to mental health problems among those seeking body modifications. Moreover the only evidence that was adduced operated solely within the medical paradigm such that the medical description overrode the aesthetic nature of body modification. This evidence did nothing more than point out the particular medical concerns that these modifications created which tells us nothing about how we should treat an activity any more than pointing out the health risks of boxing, rugby, chastisement, flagellation, smoking, driving or mountain climbing tells us whether they should be subject or not to criminal sanction. By medicalising body modification, through the allusion to mental health problems, the judges were able to construct a discourse that treated the customers *themselves* as being harmed by the activity thus negating the need to demonstrate an impact on others.⁵⁶ As they were unable to show or even suggest how non-participants could be harmed by allowing body modification to be a lawful exception, their Lordships were forced to rely on the purported harm caused to the customers themselves to justify their interpretation. This simultaneously meant that the narratives of aestheticism and autonomy were suppressed and excluded from judicial discourse in favour of a criminalising medical narrative. This crucial role of judicial interpretation is a direct consequence of the lack of action by Parliament.

As discussed in the critique above, only Parliament and the judiciary can determine what the law is, thus their action or inaction greatly affects the legal regime – when Parliament does not act, the judiciary becomes the one remaining institution capable of updating the law. The absence of Parliamentary action requires that the judiciary act to protect individuals and safeguard their liberty on the basis that normative claims are not absolutely true or objective, that the population is increasingly heterogeneous and we are a liberal democratic State. Such an

approach by the judiciary may be seen as undermining the power of Parliament yet this is not the case. First, the judiciary would be acting absent any Parliamentary instruction not in contradiction to it. Second, Parliament could change the law if it so wishes through an Act of Parliament and the judiciary would abide by it.⁵⁷ This judicial approach can be justified by acting in accordance with the contemporary liberal political underpinnings of the UK, the historical common law origin of the exceptions, the lack of harm caused to others and the widespread existence of body modification practices which have not received Parliamentary sanction. For these reasons their Lordships in the Court of Appeal should have found that body modification was an exception to the OAPA permitting consent to be used as a defence.

VI. CONCLUSION

There are two main negative consequences from this judgement; future expansion of the exceptions through close analogy is likely to be extremely limited and body modifications as defined are now medical procedures and subject to medical standards and justifications. This was an error on the judges part on the basis that they were mistaken to define body modification as mutilation and removal of parts, they were wrong to conflate mental health and body modification (which justified the narrative that they were protecting people) and it was incorrect to restrict future common law development as Parliament has chosen not to act and left the exceptions in place. This was a lost opportunity for developing the common law concerning exceptions to the OAPA. Lord Burnett noted that ‘there is a need to reflect the general values society’ but the Court of Appeal failed to follow this up by considering body modifications a lawful exception.⁵⁸ Furthermore, given Parliament’s reluctance to tackle reform of offences against the person, the judiciary is the only State body capable of modifying the law and by abdicating responsibility for doing so it has failed as an evolutionary mechanism for legal adaptation.

The defect in this judgement is that insufficient priority was given to autonomy and individual consent reflecting the changed and changing social environment. While it is more desirable that the role of autonomy and consent as the basis for offences against person is addressed, given that the Court of Appeal would not engage in such a wholesale change it was preferential in the particular case that they amend the exceptions to include body modification. The lack of Parliamentary action and the common law exception framework combine to create uncertainty and arbitrary criminal punishments. Ideally, offences against the person should be reformed. However, for judges operating within the confines of the existing framework, a

clear general principle must be articulated that can introduce some coherence and predictability to the law. It is argued here that this should be an autonomy-based individualistic principle.

One can but hope that an appeal to the Supreme Court will be made and heard so that the significant defects in this judgement can be remedied. Alternatively, Parliament should legislate to make body modifications lawful but given their inaction so far this is a faint hope. Regardless, in our liberal socio-political system judges should presumptively favour permitting consent to be a defence when considering the exceptions to the OAPA according due respect to autonomy.

¹ [2018] EWCA Crim 560

² [1934] 2 KB 498

³ [1994] 1 AC 212 (HL)

⁴ [1996] QB 47

⁵ (CA, 18 June 1999)

⁶ Above n.1 at para.42

⁷ Ibid at para.41

⁸ Above n. 3, 256-8

⁹ Above n.3 at 221

¹⁰ J.F. Stephens *Digest of the Criminal Law* (FH Thomas: St Louis, 1878) 144. See P. Lewis, 'The Medical Exception' (2012) 65 *Current Legal Problems* 355-376 for more on the medical exception.

¹¹ Above n.3 at 264

¹² Above n.1 at para.24

¹³ Ibid at para.40

¹⁴ Ibid at para.40

¹⁵ Ibid at para.40

¹⁶ Ibid at para.41

¹⁷ (1882) 8 QB 534

¹⁸ Above n.3 at 228

¹⁹ Above n.1 at para.34

²⁰ G. Williams *The Sanctity of Life and the Criminal Law* (Faber & Faber: London, 1958) 104

²¹ P. Alltridge 'Consent to Medical and Surgical Treatment - The Law Commission's Recommendations' (1996) 4 *Medical Law Review* 143

²² Above n.1 at para.39

²³ Ibid at para.42

²⁴ J. L. Mackie *Inventing Right and Wrong* (Penguin Books, 1990); J. Olson *Moral Error Theory* (Oxford University Press, 2014) and G. Minda *Postmodern Legal Movements* (New York University Press, 1995).

²⁵ *The Observer* 'My left foot was not part of me' 06.02.2000

<https://www.theguardian.com/uk/2000/feb/06/theobserver.uknews6> accessed 28.09.2018

²⁶ Above n.1 at para.42

²⁷ For an idea of the conceptual and semantic variety represented by term body modification seem. M. Featherstone 'Body Modification: An Introduction' (1999) *Body & Society* 5(2-3) 1-13

²⁸ Above n.1 at para.12

²⁹ Ibid at para.17 (emphasis added)

³⁰ Above n.11 at 358-9

³¹ Above n.1 at para.37

³² Ibid at para.37

³³ Ibid at para.13

³⁵ T. Bennett *Cuts and Criminality* (Routledge: London, 2015) 118

³⁶ Above n.1 at para.24

³⁷ *Ibid* at para.43

³⁸ *Ibid*

³⁹ *Ibid*

⁴⁰ A. Beetham 'Body Modification: A Case of Modern Maiming?' (2018) 82(3) *The Journal of Criminal Law* 208

⁴¹ Above n.1 at para.45

⁴² *Ibid*

⁴³ *Ibid*

⁴⁴ *Ibid* at para 41

⁴⁵ It should be noted that in none of their reports have the Law Commission proposed that the offence plus exceptions framework be changed – either by increasing the exceptions or removing them entirely. Thus adopting the Commission's proposals would not affect the structural problem of the offence plus exceptions framework. See: Law Commission, *Criminal Law: Consent and Offences Against the Person* CP No 134 (1994); Law Commission, *Consent in the Criminal Law* CP No.139 (1995); Law Commission, *Reform of the Offences Against the Person* Com No.361 (2015)

⁴⁶ L. Hickman 'Is human branding an animal-rights stunt too far?' *The Guardian* 21.01.2013

<https://www.theguardian.com/world/shortcuts/2013/jan/21/human-branding-animal-rights-stunt> accessed 10/09/2018

⁴⁷ Above n.1 at para.41

⁴⁸ Above n.45

⁴⁹ Above n.24 Minda

⁵⁰ Above n.1 at para.45

⁵¹ Above n.24

⁵² Obviously, there are more than two ways of conceptualising such an activity but for simplicity only these two opposing views will be considered. It is quite irrelevant that there are more than two conflicting views when we acknowledge the existence of conflict rather than its cause.

⁵³ Above n.24 Mackie

⁵⁴ Office for National Statistics *Ethnicity and National Identity in England and Wales: 2011* (2012); Office for National Statistics *Religion in England and Wales 2011* (2012); G. Catney 'The Changing Geographies of Ethnic Diversity in England and Wales, 1991-2011' (2016) *Population, Space and Place* 22

⁵⁵ Clearly, harm is an open linguistic term that can have many meanings which deserve due consideration but such an exposition is not possible within the present article. For discussions see: Joel Feinberg *The Moral Limits of the Criminal Law Vol.1 Harm to Others* (Oxford University Press: Oxford, 1984); Matthew Hanser 'The Metaphysics of Harm' 77(2) *Philosophy and Phenomenological Research* (2008)

⁵⁶ A similar form of judicial construction was used in *Brown* where their Lordships in the House of Lords construed the participants and victims.

⁵⁷ The question whether the judiciary should be able to overrule Parliament is a separate question and not applicable under the current constitutional order with which we are concerned.

⁵⁸ Above n.1 at para.39