



# FREE TO CONSENT

## The case for legalising body modification, BDSM, and transhumanism

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BRIEFING PAPER

### EXECUTIVE SUMMARY

- Under English law, consent is not a defence to a charge of actual bodily harm (ABH) or grievous bodily harm (GBH), except for certain socially sanctioned activities.
- Judicial findings that body modification (i.e. the Dr Evil case) and types of BDSM (i.e. *R v. Brown*) are unlawful raise philosophical and legal questions about consensual activities in which neither party is aggrieved.
- The law is applied inconsistently. People can consent to some potentially harmful activities, such as: ear piercings, contact sports and religious flagellation, but cannot consent to body modification or pleasurable sexual activities.
- The type of activities in which consent is a valid defence has been arbitrarily determined by the judiciary, reflecting their biases and prejudices, rather than an objective determination of consent and harm.
- Although undoubtedly well intentioned, and designed to protect individuals or society from harm, past verdicts that prevent people from consenting to certain activities represent a serious infringement on personal liberty. Individuals should be free to consent to sado-masochistic encounters and body modification.
- The people who are most likely to suffer from laws that do not allow individuals to consent are sexual minorities and members of subcultures - whose activities fall outside of cultural norms and therefore attract an instinctive disgust reaction.
- The development of transhumanism - technology to evolve beyond our current physical and mental limitations - could also be limited by existing laws that prevent body modification.
- If the Government wishes to enable greater personal freedom, protect minority expressions, and enable emerging technologies, the Offences Against the Person Act should be reformed so that consent becomes a valid defence to charges of ABH and GBH. The onus would be on the defendant to prove that the alleged victim had consented to the acts.
- Practitioners of body modification should be allowed to apply for a licence from their local authority in the same way as tattooists and body piercers.
- These steps would ensure that vulnerable people are still protected and that consent cannot be used inappropriately as a defence, while also upholding the rights of individuals.

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Autonomy over one's own body and the right to act as you please, so long as your actions do not cause harm to another person, are two fundamental principles of liberalism. As JS Mill put it in the famous Harm Principle:

*"The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."*<sup>1</sup>

Although people have not always been able to enjoy the universal application of this principle, they are now, in Western democracies at least, applied to people regardless of their race, religion, gender, or sexuality.<sup>2</sup>

What happens, though, when a conflict between these two principles becomes apparent? This paper considers how the liberal principles of individual liberty and not causing harm to others interact with law relating to the infliction of violence.

The paper will explore the limits of these principles. It will consider the law relating to actual bodily harm, grievous bodily harm, and the role of consent. It will examine how the law in this area has developed and the impact that this has had on the concept of individual freedom and on minority groups. Finally, this paper examines the case for reforming the current legislation and sets out policy proposals to improve the system.

## WHAT IS THE CURRENT LEGAL SITUATION?

The law relating to actual bodily harm and grievous bodily harm is set out in the Offences Against the Person Act 1861. The statute consolidated a large number of offences, from crimes impeding a person escaping from a shipwreck to preventing a clergyman from executing his duties. As colourful as some of the offences listed in the Act are, the sections relevant to actual bodily harm (ABH) and grievous bodily harm (GBH) are 18, 20, and 47.

Section 18 of the Offences Against the Person Act 1861 provides that:<sup>3</sup>

*Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, with intent, to do some grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.*

Section 20 of the Act states:

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<sup>1</sup> Mill, J.S., *On Liberty*, (London: Penguin, 2010).

<sup>2</sup> United Nations, 'What are Human Rights?', 2019.

<sup>3</sup> HM Government, *Offences Against the Person Act 1861*.

*Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude.*

Section 47 reads:

*Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable to be kept in penal servitude.*

The case law offers two helpful definitions of ABH. Justice Lynsky stated in 1954 that: ‘Actual bodily harm includes any hurt or injury calculated to interfere with the health or comfort of the victim’.<sup>4</sup> Lord Justice Hobhouse, in a 1994 case, stated that: “The word “actual” indicates that the injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant”.<sup>5</sup>

The law has developed a set of circumstances in which the consent of the victim can provide a defence where the injuries involved ABH or GBH. These include:<sup>6</sup>

- Sporting activities;
- Dangerous exhibitions and displays of bravado;
- Rough and undisciplined horseplay;
- Surgery;
- Tattooing and body piercing;
- Religious flagellation; and
- Male ritual circumcision.

It should also be noted that the Crown Prosecution Service (CPS) has, in recent years, clarified that when a person will be prosecuted for the transmission of HIV. A person is not guilty of ‘reckless HIV transmission’ in certain situations, such as if they had previously made their partner aware of their infection, or if a condom was used.<sup>7</sup>

An in depth analysis of the law relating to HIV transmission goes beyond the scope of this paper. However, it does serve as an example of how the law on assault has developed in recent years to allow for consent in certain situations. Moreover, it highlights the fact that sometimes a law can be applied inconsistently and in a manner which makes vulnerable people and members of minority groups disproportionately likely to be prosecuted. For example, as Weait points out:

*‘The first transmission cases in the UK were brought against, respectively, a convicted drug user, three black African male migrants, a Portugese immigrant heroin addict, a white man who infected a woman in her eighties, a gay man and two heterosexual women,*

<sup>4</sup> *R v. Miller* [1954] 2 All ER 529.

<sup>5</sup> *R v. Chan-Fook* [1994] 2 All ER.

<sup>6</sup> *R v. Brown* [1994] 1 AC 212.

<sup>7</sup> Crown Prosecution Service, *Intentional or Reckless Sexual Transmission of Infection*, <https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection>.

HIV transmission is criminalised and often results in headlines, whereas the transmission of other diseases is not criminalised or receives far less attention. This dynamic suggests that the moral panic surrounding the HIV/AIDS crisis of the 1980s and 1990s and may reflect ongoing institutional prejudice against people with HIV.<sup>9</sup>

This issue of criminalisation based on the background, behaviour, or identity of defendants will become relevant later in this paper.

As an aside, it is important to point out that patients with HIV who receive effective treatment can expect to enjoy comparable lifespans to those who do not carry HIV.<sup>10</sup> Furthermore, recent studies have shown that those receiving effective treatments cannot pass on the virus.<sup>11</sup>

## WHAT HAS BEEN THE IMPACT OF THE LAW?

The Offences Against the Person Act has served an incredibly important role over the past 158 years. It has resulted in the conviction of some of the country's most violent offenders. This has allowed the victims of crime to receive justice and protected the public from harm.

However, it has also resulted in situations in which people have seen their rights curtailed by the state and have often been unfairly incarcerated and experienced the associated stigma and loss of opportunity that comes from a criminal conviction. In practice, it appears that the court have allowed personal feelings of disgust - a strong moral instinct - to shadow the interpretation of the law, in such a way that undermines personal choice and has a disproportionate impact on minorities. The following two case studies illustrate how the law relating to ABH and GBH can adversely impacts the rights of individuals.

### CASE STUDY ONE: SADO-MASOCHISM

In the landmark case of *R v. Brown* (1994), the Appellate Committee of the House of Lords heard an appeal from a group of men who were convicted of offences under sections 20 and 47 of the Offences Against the Person Act. The men had engaged in consensual sado-masochistic activities which resulted in some injuries. The injuries were said to have brought about sexual gratification both those inflicting the pain as well as and those receiving it. The Appellate Committee of the House of Lords dismissed the men's appeal by a majority of 3 to 2.<sup>12</sup>

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<sup>8</sup> Weait, M., 'Taking the blame: criminal law, social responsibility and the sexual transmission of HIV' (2001), 23 *Journal of Social Welfare and Family Law* 441.

<sup>9</sup> Beattey, R., 'The great bathhouse bugaboo: A practitioner's inquiry into the criminal and public health policy of gay bathhouses' (2008) *Michigan State University Journal of Medicine & Law* 341.

<sup>10</sup> NHS, *What is the Life Expectancy of Someone with HIV?*

<sup>11</sup> Cohen, M., 'Successful treatment of HIV eliminates sexual transmission', *The Lancet*, 2 May 2019.

<sup>12</sup> *R v. Brown* [1994] 1 AC 212.

Academic Monica Pa, has set out five features which are generally present in sado-masochistic encounters:<sup>13</sup>

- Dominance and submission - the appearance of control of one partner over the other;
- Role-playing - the participants assume roles that they recognise are not reality;
- Consensuality - the voluntary and mutual agreement to engage in sado-masochistic activity and to respect certain specified limits;
- Sexual context - the presumption that the activities have a sexual or erotic meaning;
- Mutual definition - participants must agree on the parameters of what they are doing.

In *R v. Brown*, their Lordships held that the law had developed a list of circumstances in which the consent of the victim may constitute a valid defence where the injuries involved ABH or GBH (as discussed in the previous section). The majority stated that this list could be extended, but only if it was in the public interest.<sup>14</sup>

The majority in *R v. Brown* held that sado-masochism should not be added to the list of exceptions because, in addition to failing to benefit society, it was harmful.<sup>15</sup>

The decision in *R v. Brown* has been the subject of a great deal of academic debate. There are conflicting arguments as to whether or not the verdict of the Appellate Committee was correct.<sup>16,17</sup> However, there is perhaps a wider consensus on the troubling way in which their Lordships allowed their personal views on sexual relationships, the activities of the appellants, and sense of personal disgust to shape their decision.

The following are quotes by members of the House of Lords during the appeal:<sup>18</sup>

*Lord Templeman: '[sado-masochism] is degrading to body and mind'.*

*'Society is entitled and bound to defend itself against a cult of violence'.*

*Lord Lowry: '[the purpose of sado-masochism is] to satisfy a perverted and depraved sexual desire. Sado-masochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society. A relaxation can only encourage the practice of homosexual sado-masochism, with the physical cruelty that it must involve (and which can scarcely be regarded as a 'manly diversion')...'.*

<sup>13</sup> Pa, M., 'Beyond the pleasure principle: the criminalization of consensual sado-masochistic sex' (2001) 11 *Texas Journal of Women and the Law* 51.

<sup>14</sup> *R v. Brown* [1994] 1 AC 212.

<sup>15</sup> *Ibid.*

<sup>16</sup> Duff, A., 'Harms and Wrongs' (2001) 5 *Buffalo Criminal Law Review* 13,39.

<sup>17</sup> Hanna, C., 'Sex is not a sport: consent and violence in criminal law' (2001) 42 *Boston College Law Review* 293.

<sup>18</sup> *R v. Brown* [1994] 1 AC 212.

*Lord Slynn: “Nor is it necessary to refer to other facts which are mentioned in the papers before the House which can only add to one’s feeling of revulsion and bewilderment...”*

*Lord Mustill: “It is sufficient to say that whatever the outside might feel about the subject matter of the prosecution — perhaps horror, amazement or incomprehension, perhaps sadness — very few could read even a summary of the other activities without disgust”*

*“Thus, whilst acknowledging that very many people, if asked whether the appellants’ conduct was wrong, would reply ‘Yes, repulsively wrong’.”*

*“Leaving aside repugnance and moral objection, both of which are entirely natural...”*

These quotes show that the members of the Appellate Committee were disgusted by the actions of the appellants. Not only that, but they also seemed confused by their activities and felt that they posed a wider risk to society.

Moreover, some of the language used appears to imply a degree of homophobia, especially with regards to the repeated references to the sexuality of the appellants. One commentator argued that the activity ‘pathologises gay male sexuality’.<sup>19</sup> Similar comments were also made in the Court of Appeal, where one of the justices remarked: ‘It is some comfort at least to be told, as we were, that “K” has now, it seems, settled into a normal heterosexual relationship’.<sup>20</sup>

This is not to suggest that their Lordships espoused deliberate homophobia in their judgment, but rather that their discomfort with the practices and sexuality of their appellants had an impact on their reasoning.<sup>21</sup>

At the very least, it would appear that the decision of the majority was based on a heteronormative understanding of gender and sexuality. The numerous references to ‘manly pursuits’ and their Lordships’ unwillingness to accept homosexual sado-masochism as a valid form of sexual expression would serve to highlight this point.

Furthermore, it has been argued that the views of the majority in *R v. Brown* relating to the concepts of pain and pleasure played an important role in their judgment. For example, Weait has argued that the law views pain as a punishment. Therefore, in situations where pain is actually pleasurable, in the minds of their Lordships, a fundamental basis of the law risks being undermined.<sup>22</sup>

Moreover, it appears likely that the judgment would have been different if the appellants had been heterosexual. For example, in the case of *R v. Wilson (1996)*, a man used a hot knife to brand his initials on his wife. The Court of Appeal held that

<sup>19</sup> Stychin, C., *Law’s Desire: Sexuality and the limits of justice*, (1995, Abingdon: Routledge).

<sup>20</sup> Stychin, C., ‘Unmanly Diversions: The Construction of the Homosexual Body (Politic) in English Law’ (1994) *Osgoode Hall Law Journal*, 32 (3).

<sup>21</sup> Tasmania Law Reform Institute, *Consensual Assault*, June 2017.

<sup>22</sup> Weait, M., ‘Fleshing it out’ in Bentley, L., & Flynn, L., (eds), *Law and the Senses: Sensational Jurisprudence*, (1996, London: Pluto Press).



this fell within the category of a ‘lawful infliction of actual bodily harm’ because it was in the confines of a marital relationship.<sup>23</sup> The troubling nature of this case and the ways in which it relates to domestic violence will be discussed at a later point in this paper. It is, however, noteworthy that injuries that came about in the context of a heterosexual marriage were legal, whereas comparable injuries involving homosexual men were not.

It should be pointed out that in *R v. Emmett (1999)*, the dangerous sexual activities of a heterosexual couple did lead to a conviction under section 47 of the Offences Against the Person Act.<sup>24</sup> Again, this case will be dealt in more detail at a later stage, but it should be noted that, given the facts of the case, the claim that the victim consented appears dubious.

Irrespective of the sexuality of those involved, it would appear that sado-masochism falls outside of the perceived norms of sexual activity. It has been relegated to the outer limits of social acceptability, alongside sex work. It falls outside the charmed circle of sexual values.<sup>25</sup> Understandings of sado-masochism, in a similar manner to sex work and homosexuality, have historically been shaped by discourses of criminal law and psychology; this, therefore, goes some way to explaining the treatment of the activity by the law.<sup>26</sup>

The law relating to ABH, GBH, and consent concerning sado-masochism has developed in a manner founded on a hetero-normative view of gender, relationships, and sexuality, alongside a conservative view of pleasure, pain, and punishment. This has resulted in a sexual minority suffering unfair discrimination and the law lacking clarity.

## CASE STUDY 2: BODY MODIFICATION

In *R v. BM (2018)*, the appellant was charged with three counts of actual bodily harm for performing the following procedures:<sup>27</sup>

- Removal of a customer’s ear;
- Removal of a customer’s nipple; and
- Splitting a customer’s tongue to resemble that of a reptile.

While it was accepted that all the customers had consented to these acts, the court held that consent did not constitute a valid defence in these cases. As such, the appellant’s appeal was dismissed. The applicant was subsequently reported to be

<sup>23</sup> *R v. Wilson* [1996] 2 Cr App R 241.

<sup>24</sup> *R v. Emmett* [1999] EWCA Crim 1710.

<sup>25</sup> Rubin, G., ‘Thinking sex: Notes for a radical theory of the politics of sexuality’, in Vance, C. (eds) *Pleasure and danger: Exploring female sexuality*, (Boston: Routledge & Kegan Paul, 1984).

<sup>26</sup> Morris, M., ‘Incidental sex Work: Casual and Commercial Encounters in Queer Digital Spaces’, *Durham University*, 2018.

<sup>27</sup> Beetham, A., ‘Body Modification: A Case of Modern Maiming?: *R v. BM* [2018] EWCA Crim 560; [2018] WLR (D) 187’, (2018) *The Journal of Criminal Law*.



Brendan McCarthy, also known as Dr Evil.<sup>28</sup> A petition in support of McCarthy amassed more than 13,400 signatures.

BM argued that his procedures were a natural extension of piercings and tattoos, which do not attract criminal liability. As such, he argued, body modifications should be allowed on grounds of public interest, in order to preserve the personal autonomy of his customers.

The court rejected this argument. It held that the acts in question constituted: 'medical procedures performed for no medical reason and with none of the protections provided to patients by medical practitioners,' adding that: 'The personal autonomy of the appellant's customers did not justify removing body modification from the ambit of the law of assault'.<sup>29</sup>

Again, the line of argument here appears to suggest that it is not in the public interest to allow body modification due to the potential resultant harm, despite the fact that countless activities which pose an obvious danger to participants such as contact sports, mountain climbing, and skydiving are not criminalised.<sup>30</sup>

Furthermore, it could be argued that there is no real difference between getting a tattoo or a piercing and some forms of body modification. Thus, it is unclear why piercings and tattoos enjoy near-universal legal and social acceptance, whereas some forms of comparable body modification amount to ABH or GBH in the eyes of the law.

Many view body modification with disgust, often failing to understand why a person would choose to alter their bodies in such ways.<sup>31</sup> Moreover, many people who undergo body modification are members of a small yet prominent subculture which is often misunderstood.<sup>32</sup> It seems, therefore, that a sense of disgust motivates opposition to body modification - which does not afflict tattoos or piercings even though both involve the changing and adornment of one's body and are therefore comparable in nature.

As a result of the law relating to ABH and GBH, members of a subculture are not able to exercise autonomy over their own bodies. Moreover, as with the law concerning sado-masochism, the law relating to body modification is ambiguous. For, while the court found that the specific acts conducted by BM amounted to ABH, there is a wide spectrum of procedures in body modification which may or may not

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<sup>28</sup> BBC News, 'Dr Evil': Wolverhampton modification artist admits GBH, <https://www.bbc.co.uk/news/uk-england-birmingham-47198786>.

<sup>29</sup> *Ibid.*

<sup>30</sup> Baker, J., 'The Harm Principle vs. Kantian Criteria for Ensuring Fair, Principled, and Just Criminalisation', (2008) *Australian Journal of Legal Philosophy*, vol. 33.

<sup>31</sup> Egan, K., 'Morality-Based Legislation is Alive and Well: Why the Law Permits Consent to Body Modification but Not Sadomasochistic Sex' (2007) 70 *Albany Law Review*.

<sup>32</sup> Roberts, D., 'Modified People: Indicators of a Body Modification Subculture in a Post-Subculture World' (2015) *Sociology*, vol. 49.

be deemed illegal. As a result, body modification practitioners and their customers are left in a legal limbo.<sup>33</sup>

As a result of the law relating to ABH and GBH, members of a specific subculture do not enjoy autonomy over their own bodies. Moreover, as with the law concerning sado-masochism, the law relating to body modification is somewhat ambiguous. For, while the court found that the particular acts undertaken by BM amounted to ABH, there is a wide range of body modification procedures which may or may not be deemed illegal. As a result, body modification practitioners and their customers are left in a legal limbo.<sup>34</sup>

## THE LEGAL CASE FOR REFORM

As discussed, the legislation surrounding ABH, GBH, and consent is found in the Offences Against the Person Act 1861. The age of a statute alone does not necessarily render it unfit for purpose.

However, the Offences Against the Person Act has received a great deal of criticism over the years, and is in serious need of reform. Its attempt to incorporate a variety of offences into a single statute has caused difficulties for the courts.<sup>35</sup>

As has been demonstrated, the Act addresses offences which seem unlikely to the point of negligibility in the context of contemporary Britain. Furthermore, those who originally drafted the legislation were demonstrably unable to foresee some of the activities which have now attracted criminalisation such as the reckless transmission of HIV, sado-masochism, or body modification.

A positive feature of common law, as opposed to the legal system in civil law jurisdictions, is that it does not attempt to produce comprehensive lists of legal and illegal activities. Rather, it develops on a case-by-case basis, allowing the judiciary to apply legislation and legal principles according to their discretion in order to sensibly formulate an appropriate manifestation of the law in any given situation.<sup>36</sup>

However, given that *R v. Brown* remains the main authority on the law of consent relating to ABH and GBH, the situation is unlikely to change markedly in the absence of a similar case appearing before the Supreme Court. Even in such a situation, the Justices may well decide that the issues would be more appropriately decided by Parliament, and thus revert to the precedent laid down in *R v. Brown*.

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<sup>33</sup> Keenan, M., 'Tongue splitting, ear removal and branding - the limits of consent as a defence to extreme body modification' (2018) *Kingsley Napley*.

<sup>34</sup> Keenan, M., 'Tongue splitting, ear removal and branding - the limits of consent as a defence to extreme body modification' (2018) *Kingsley Napley*.

<sup>35</sup> Eugenicos, A., 'Should We Reform the Offences Against the Person Act 1861?' (2017) *The Journal of Criminal Law*, vol. 81(1).

<sup>36</sup> Dainow, J., 'The Civil Law and the Common Law: Some Points of Comparison' (1966) *The American Journal of Comparative Law*, vol. 15.

The core principles that laws should be easily understood and applied to everyone equally are fundamental tenets of the rule of law.<sup>37</sup> However, as has been shown in this paper, the law relating to ABH and GBH fails on this count. In relation to sado-masochism and body modification there is a great deal of ambiguity, in addition to the troubling appearance of disproportionality with regards to the prosecution of some minority groups.

As such, there is a strong case to be made for reforming the Offences Against the Person Act profoundly, and thereby clarifying the law around ABH, GBH, and the defence of consent. We will set out what should be done at a later point in this paper.

## THE MORAL CASE FOR REFORM

It is a core principle of liberalism that individuals should have autonomy over their own bodies. As philosopher Robert Nozick said: ‘Individuals have rights, and there are things no person or group may do to them’.<sup>38</sup>

If somebody chooses to engage in consensual sado-masochistic encounters, or to have their bodies modified, neither the state nor society ought to step in and stop them. Moreover, such a restriction must not be enforced by criminal law, which is the ‘State’s most coercive form of social control’.<sup>39</sup>

This point is made powerfully by Moran in the context of *R v. Brown*:

*‘In the final instance this is not only a violence of domination through the imposition of an idiosyncratic view of the world and its enforcement by way of an arbitrary decision, but also the more familiar violence that is punishment, in this instance the sentences ranging from four and a half years to two years, and the violence in the act of arrest and in the process of detention for interrogation, in subsequent loss of jobs, homes, and good health’.*<sup>40</sup>

As such, the law as it currently stands represents an assault on individual freedoms. It prevents people from doing as they please with their bodies. Furthermore, the law has had an unacceptably disproportionate impact on marginalised groups in society.

It also interferes in one of the most intimate parts of life, one that is central to a person’s identity, namely: sexuality. The UK shamefully prosecuted men for homosexuality prior to the Sexual Offences Act 1967. As a result, many men went to prison and had their lives destroyed. Many others lived under the constant threat

<sup>37</sup> Bingham, T., *The Rule of Law*, (2011, London: Penguin).

<sup>38</sup> Nozick, R., *Anarchy, State, and Utopia* (1974, New York: Basic Books).

<sup>39</sup> Roberts, P., ‘The Philosophical Foundations of Consent in the Criminal Law’ (1997) 17 *Oxford Journal of Legal Studies* 389.

<sup>40</sup> Moran, L., ‘Violence and the law: the case of sado-masochism’ (1995) 4 *Social and Legal Studies* 225.

of exposure or blackmail. This mass tragedy was rooted in the simple fact that their sexuality deviated from the perceived norms of society and the government.<sup>41</sup>

It could be argued that the situation is similar for those who engage in sado-masochism. For many, sexual activity of this kind and the relationships that come with it form an important part of their identity. In addition, other practices do not grant the same level of sexual gratification.<sup>42</sup> These people should not face prosecution owing to their sexual identity or consensual sexual practices.

An additional argument follows the line of harm reduction. This notion is most obvious in terms of body modification. For example, if procedures are unregulated and there is a prevailing degree of uncertainty about which procedures are legal and which are not, the chances of unforeseen catastrophe are notably increased. If, however, the practices were legalised and regulated in a less ambiguous fashion the procedures could be carried out with a much lessened risk of adverse consequences

The same is true of sado-masochistic activity. If a person were to suffer an injury requiring medical treatment, they might reasonably be reluctant to seek medical assistance. This is because they might be worried about the legal implications for themselves or their partner. Moreover, given the stigma attached to criminal activities, there might again be a reluctance on the part of patients to be open with their doctor about the nature of their injuries.

## LOOKING TO THE FUTURE

A further reason for reform relates to the ways in which the law could impact individuals in the future as society changes and new technologies develop. Taking a more liberal approach to consent would pave the way for increased technological and developmental augmentation of the human body, which could tap into the potential for considerable improvements to health and wellbeing and, ultimately, allow humanity to flourish, now and far into the future.

Transhumanism, a relatively modern philosophical movement, suggests that humanity can enhance itself through the proper and intrinsic use of science and technology. Although transhumanism is too broad a topic to address fully in this paper, it merits a concise discussion in this context. Previously the preserve of the ideological fringes, transhumanism as a philosophy has gradually moved into the mainstream of academic scrutiny in recent decades.<sup>4344</sup>

<sup>41</sup> Dryden, S., 'A Short History of LGBT Rights in the UK' *British Library*.

<sup>42</sup> Martinez, K., 'Bound in Theory and Practice: A Mixed-Methods Exploration of Consensual Sadomasochism' (2011) *University of Colorado, Boulder*.

<sup>43</sup> Bostrom, N., 'A History of Transhumanist Thought', *Journal of Evolution and Technology*, Vol. 4, April 2005.

<sup>44</sup> Le Dévédec, N., 'Unfit for the future? The depoliticization of human perfectibility, from the Enlightenment to transhumanism', *European Journal of Social Theory*, 2018.

It is a loosely defined movement that has developed over the past half-century. The philosopher Max More defines it as follows:

*“Transhumanism is a class of philosophies of life that seek the continuation and acceleration of the evolution of intelligent life beyond its currently human form and human limitations by means of science and technology, guided by life-promoting principles and values”.*<sup>45</sup>

A longer definition is also provided by More:

*(1) The intellectual and cultural movement that affirms the possibility and desirability of fundamentally improving the human condition through applied reason, especially by developing and making widely available technologies to eliminate aging and to greatly enhance human intellectual, physical, and psychological capacities.*

*(2) The study of the ramifications, promises, and potential dangers of technologies that will enable us to overcome fundamental human limitations, and the related study of the ethical matters involved in developing and using such technologies.*<sup>46</sup>

As such, transhumanism is a movement that seeks to improve human abilities and capabilities through the use of science and technology, beyond the presumed limits imposed by nature. This has great potential to bring about immeasurable benefits. For example, human enhancement could lead to improvements in human cognition, granting humanity a deeper understanding of its existence and surroundings and lead to scientific and technological breakthroughs.<sup>47</sup> It could help to eliminate disease and tackle the effects of ageing, allowing humans to live longer, healthier, and happier lives.<sup>48,49</sup> Tasks could be undertaken with greater efficiency and accuracy, thereby boosting productivity and delivering high levels of economic growth, leading in turn to previously unimaginable improvements in living standards.<sup>50</sup> Sports, for instance, could become even more exciting, with athletes performing as yet incomprehensible feats.<sup>51</sup>

The application of a transhumanist philosophy has implications for the future of humanity. There is, in theory, no reason why the human race cannot continue to survive and thrive indefinitely – perhaps even hundreds of millions of years from

<sup>45</sup> More, M., ‘The Philosophy of Transhumanism’, in (eds), More, M., & Vita-More, N.,

*The Transhumanist Reader: Classical and Contemporary Essays on the Science, Technology, and Philosophy of the Human Future*, (2013, New York: Wiley).

<sup>46</sup> *Ibid.*

<sup>47</sup> Schneider, S., ‘Future Minds: Transhumanism, Cognitive Enhancement and the Nature of Persons’, *University of Pennsylvania*, 2008.

<sup>48</sup> McConnel, C., & Turner, L., ‘Medicine, ageing and human longevity’, *EMBO reports*, July 2005.

<sup>49</sup> Dvorsky, G., ‘Better Living through Transhumanism’, *Journal of Evolution and Technology*, vol. 19, September 2008.

<sup>50</sup> The British Academy, *Human enhancement and the future of work*, 7 November 2012.

<sup>51</sup> Miah, A., ‘Towards the transhuman athlete: therapy, non-therapy and enhancement’, *Sport in Society*, vol. 13, 2010.

now.<sup>5253</sup> There will, however, be difficult and unavoidable challenges which could result in the exponentially increasing complexity of humanity's continued existence. It was in this vein that physicist Michio Kaku posited that humans should embrace the benefits of augmentation so that humanity can survive and flourish long into the future.<sup>54</sup>

Despite the countless potential benefits of human enhancement, developments in this field will no doubt be hampered by ethical concerns and a legal system which has failed to keep step with advances in science and technology. Many of these concerns are legitimate and reasonable; this debate raises important questions about what it means to be human.<sup>55</sup>

However, these concerns should not be allowed to impede human progress. It is essential that researchers working in science and technology are able to innovate freely, unrestricted by the hindrance of burdensome regulations. As such, the technological research sector urgently needs a regulatory framework that is flexible enough to remain perpetually abreast of any and all scientific and technological progress in order to foster innovation with maximum efficiency and effectiveness.

Many of these innovations will not be realised for decades or even centuries to come. However, it is essential that legal foundations are laid down so that the law can develop alongside scientific and technological innovation, at a sufficient pace so as not to constrain innovation. As such, it is important that the law relating to consent is reformed. This is for two primary reasons, which are set out below.

First, those who wish to augment their bodies using new technologies, as well as those undertaking research in this area, need permission to do so. Under the current law, such activities and developments are difficult to the point of being unachievable, and could even result in criminal charges being brought against researchers. The way the law in this area currently works violates the right of the individual to alter their body, thus undermining their autonomy, as well as stifling innovation by inhibiting the advancement of science and technology.

Second, people who alter their bodies through body modification tend to find themselves maligned by mainstream society. On the one hand, this is to be expected; the powerful emotion of disgust is triggered when people bear witness to something which clearly deviates from the norm.

However, as pointed out by evolutionary psychologist Diana Fleischman, disgust of this kind is holding us back in social and evolutionary terms. She argues: 'Humans use disgust to protect the status quo, and it has become a default response to anything alien or strange, including new technologies, especially those which involve

<sup>52</sup> Parfit, D., *Reasons and Persons*, (Oxford: Clarendon, 1984).

<sup>53</sup> Beckstead, M., 'On the Overwhelming Importance of Shaping the Far Future', *Rutgers University*, 2013.

<sup>54</sup> Kaku, M., *The Future of Humanity*, (New York: Doubleday Books, 2018).

<sup>55</sup> Bostrom, N., 'Transhumanist Values', *Review of Contemporary Philosophy*, vol. 4, May 2005.

food or altering nature or the human body'.<sup>56</sup> For this reason, it is imperative that steps are taken now to address the societal perception of human enhancement. Allowing people to modify their bodies would allow great strides to be made towards the comprehensive addressing of this issue by helping to normalise the activity.

## WHAT SHOULD BE DONE?

It is important that the law relating to serious crimes such as ABH and GBH is up to date so that it can be effectively used to prosecute violent offenders, protect society, and ensure that the rights of individuals are upheld. Furthermore, innovation should be not only permitted, but encouraged, so that future generations can take full advantage of developments in science and technology. There are two key policies that could help achieve these goals.

### POLICY ONE: CONSENT SHOULD BE GIVEN GREATER CONSIDERATION

The Offences Against the Person Act should be reformed, such that the statute provides for the validity of a defence based on consent. The Act should state that any defendant can rely upon consent as a defence, although the burden must continue to sit with the defendant, such that they must seek to prove to the court that the recipient had consented to the injuries.

The Act should state that when considering the defence of consent, regard should be paid to the fact that some people engage in behaviour which much of the population finds distasteful, but that this cannot be sufficient grounds for prosecution alone.

There must, of course, be limits. These reforms should be restricted to cases of ABH and GBH. Moreover, extra care will have to be taken to ensure that consent is not misused in order to defend domestic violence. As was alluded to earlier in this paper, two of the most frequently cited cases on this matter, namely *R v. Wilson* and *R v. Emmett*, often carry the deeply troubling suggestion that they may, in fact, have been cases of domestic violence.

### POLICY TWO: BODY MODIFICATION REGULATION

Body modification practitioners should be granted a licence by their local authority in the same way as tattoo artists and body piercers. The licence should be dependant on demonstrating that they have the necessary skills and experience to carry out the procedures they are offering in a safe and hygienic environment.

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<sup>56</sup> University of Portsmouth, *Knee-jerk disgust is holding humans back*, 20 February 2017.



It is the role of the law to ensure that those who pose a significant risk of harming others are punished, while at the same time upholding individual freedoms by not curtailing the rights of citizens. This can be a difficult balancing act, and we have seen in this paper that it has not always worked well.

The law relating to actual bodily harm, grievous bodily harm, and consent has proven problematic. It has infringed upon the rights of individuals to do as they please with their bodies and has had a disproportionate impact on minority groups. Furthermore, it has the potential to hinder human development and innovation.

If the Government wants to protect the rights of individuals, ensure that minority groups are not unfairly targeted, vulnerable people are protected, and reap the benefits of developments in science and technology, the Offences Against the Person Act needs reforming to give a more prominent role to consent in deciding which acts are illegal and which are not.

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