

SCORE AND PIERCE: CRIMES OF FASHION? BODY ALTERATION AND CONSENT TO ASSAULT

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Body alteration and body adornment practices are becoming increasingly popular and varied in form. However, these activities constitute a prima facie assault by the body alteration artist on the recipient. Many activities, such as organised sport and surgery, are recognised as legal "exceptions" and consent is available as a defence to an assault charge. Tattooing and ear piercing are activities included within the recognised "exceptions". These are also forms of body alteration. The issues explored in this paper are whether less mainstream forms of body alteration should be similarly considered a legal "exception".

This paper will examine the current legal framework of consent to assault in sport, dangerous exhibitions, surgery and sado-masochism, and its application to body alteration. It is concluded that the creation of a separate "exception" category for body alteration is the appropriate legal response. In addition, to minimise health risks associated with body alteration it is suggested that the activities of body alteration artists be subject to government regulation.

I BODY ALTERATION DEFINED

Body alteration and body adornment are not new. What is considered attractive and desirable varies greatly across different cultural and geographic groups. Central African tribes insert disks into the women's lips to distort their size and appearance; people of South America decorate their faces with tusks imbedded in their cheeks and chins.¹ These practices are usually viewed by Westerners as bizarre and ghastly, even barbaric. Traditionally, tattooing and ear piercing have been the only forms of body alteration

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1 "Jewelry makes the human" *Pittsburgh Post-Gazette*, Pittsburgh, USA, 30 March 1994, Lifestyle Section, 1.

generally accepted in the western world, with the latter rising to popularity as recently as 30 years ago.² The 1990s have seen the widespread emergence of dramatically different body alterations, referred to as "non-mainstream body modification", and it is these alterations which are the subject of this paper. They include body piercing, branding, scarification, 3-D implants and other forms of non-mainstream body alteration.³ Body alteration is steadily gaining popular acceptance. The issue addressed in this paper concerns the legal response.

II POTENTIAL CHARGES ARISING FROM BODY ALTERATION

A The Charges

There are several potential charges relating to body alterations arising from the Crimes Act 1961. They arise under sections 196, 193, 188 and 66 of the Act.

1 Section 196 Common assault

This offence carries a maximum sentence of one year imprisonment. Body alteration is a *prima facie* assault, which is defined as the intentional application of force to the person of another.⁴

2 Section 193 Assault with intent to injure

This offence carries a maximum sentence of three years' imprisonment. Section 2(1) of the Act defines "to injure" as "to cause actual bodily harm". This phrase "should be given its natural and ordinary meaning" and while not necessarily permanent, the injury must be more than "merely transient and trifling".⁵

All the body alterations discussed in this paper are capable of satisfying this test and therefore constitute actual bodily harm.

3 Section 188 Wounding with intent

It is an offence under this section to wound, maim, disfigure or cause grievous bodily harm. "Wounding" means the breaking of the skin and a flow of blood,⁶ which occurs in some body alterations (for example, scarification).

2 Mia Farrow's character on the television series "Peyton Place" in the 1960s could be considered a pioneer of mainstream ear piercing. See above n 1.

3 Refer to the Appendix for a description of non-mainstream body alterations.

4 Section 2(1) of the Crimes Act 1961.

5 *R v Donovan* [1934] 2 KB 498, 509.

6 *R v Waters* [1979] 1 NZLR 375, 378.

"Disfiguring" is altering the appearance⁷ which again is characteristic of some body alterations, particularly implants. Whether body piercings are disfigurement is arguable. It should be noted that permanent injury is not required.⁸

"Grievous bodily harm" is "really serious hurt ... or ... harm".⁹ As previously noted, the harm need not be permanent. The injury must be one which interferes with the person's health to the extent that "any part of the body was unable to perform its functions fully, either as a result of pain or otherwise."¹⁰ More radical body alterations such as scarification may incapacitate the recipient for a period of time.¹¹ Piercings done through the tongue make eating difficult for at least a week due to swelling and pain. Discomfort during recovery from other alterations is not difficult to envisage.¹² These conditions are arguably serious enough to constitute grievous bodily harm.

It is therefore probable that all forms of body alteration would satisfy one or more of these elements. The section provides for two levels of intent.¹³ If the body alteration performed were classified as constituting injury or grievous bodily harm then it may be argued that the body alteration artist necessarily possessed that level of intent. Therefore, dependent upon the nature of the body alteration, the body alteration artist may face up to a total of either seven or 14 years imprisonment.

4 Section 66 Parties to offences

Pursuant to this provision, if an offence has been committed under sections 196, 193 or 188, the recipient of the body alteration may also be liable for aiding and abetting an assault on themselves. The recipient would be subject to the same penalties as those imposed on the artist - up to 14 years in prison.

7 J B Robertson *Adams on Criminal Law* (Brookers, Wellington, 1996) 366.

8 *R v Rapana and Murray* (1988) 3 CRNZ 256. This applies equally to wounding, maiming and grievous bodily harm: *R v James* (1980) 70 Cr App R 215.

9 *R v Waters*, above n 6, referred to in *Adams on Criminal Law*, above n 7, 363.

10 *Wayne v Boldiston* (1992) 85 NTR 8 (NT SC), referred to in *Adams on Criminal Law*, above n 7, 364.

11 One person reported not being able to move for weeks after a cutting session for fear of reopening the wounds. See "Futuresex: The Final Frontier", *The Observer*, San Francisco, USA, 22 October 1995, 30.

12 For example genital piercings, branding.

13 Section 188(1) provides a maximum prison term of 14 years if the person acts with the intent to cause grievous bodily harm. Section 188(2) provides a maximum prison term of 7 years if the person acts recklessly or with intent to injure.

B Defences

Section 20 of the Crimes Act 1961 preserves common law principles and defences, therefore the common law defence of consent to assault still operates in New Zealand.¹⁴ Lord Lowry stated in his judgment in *R v Brown*:¹⁵

Everyone agrees that consent remains a complete defence to a charge of common assault and nearly everyone agrees that consent of the victim is not a defence to a charge of inflicting really serious personal injury (or 'grievous bodily harm'). The disagreement concerns offences which occasion actual bodily harm.

Therefore, the defence of consent would protect body alteration artists charged with the offence of common assault. Whether this defence is available to sections 188 and 193 charges is not clear. Body alteration artists may be exposing themselves to the risk of imprisonment every time they perform a body alteration on another person, despite the fact that they act on that person's request. The recipient of the body alteration may also face charges under section 66 of the Act.

C Section 204A Female genital mutilation

Female genital mutilation is the excision, infibulation or mutilation of a woman's labia major, labia minora or clitoris.¹⁶ This is a broad definition which may be interpreted as including female genital piercing. Therefore a body alteration artist performing, or a

14 There is some disagreement as to whether consent is a defence to assault or whether it is an element of the offence, the absence of which is to be proved by the prosecution. See John A Devereux "Consent as a Defence to Assaults Occasioning Bodily Harm - The Queensland Dilemma" (1987) 14 UQLJ 151, 151; N Bamforth "Sado-Masochism and Consent" [1994] Crim LR 661, 661; *R v Brown* [1993] 2 All ER 75, per Lord Jauncey, 92. For the sake of conciseness, consent will be referred to as a defence to assault in this paper.

15 [1993] 2 All ER 75, 93. The *Brown* case concerned a group of men who indulged in sado-masochism (S-M) for sexual gratification. The activities of the group included laceration and burning of genitalia and the use of instruments such as fish hooks and cat-o'-nine-tails. All group members were willing and eager participants. None sustained permanent injury, all instruments were sterilised, and code words were used to halt activities at the submissive's request. The group's activities were conducted very privately and were only discovered accidentally by police. Five members of the group were charged with numerous offences, including assault causing actual bodily harm, and three of them with unlawful wounding. The case was heard by the House of Lords on the issue of whether lack of consent is an element of these offences. A majority of three judges held it was not, either on the grounds that consent was immaterial where bodily harm occurred, or by refusing to place S-M within a category of recognised exceptions to this rule. The two dissenting judges were more liberal in their approach to the law of consent, and to the activities of the group. The appellants appeal to the International Court of Human Rights in 1997 failed.

16 Definition contained in s 204A(1).

woman receiving, such a piercing could be liable for a maximum prison term of seven years. Section 204A(6) specifically states that consent is not a defence to the act.

There exists therefore considerable potential for gender bias and discrepancies in the application of the law in relation to body piercing. Particularly if the piercing would otherwise have attracted lesser charges, such as assault with intent to injure.¹⁷

The application of the offence of female genital mutilation to female genital piercings would be a misapplication of legislation which was introduced to, among other reasons, "[protect] women's interest in sexual pleasure."¹⁸ Female circumcision, the practice the legislation is aimed at, is an extremely painful and often dangerous operation involving the partial or total removal of female genitalia. Its principal purpose is to facilitate the control of women through "the suppression of female sexuality".¹⁹ As sexual intercourse becomes an intensely painful and thoroughly unenjoyable experience for women who have been subjected to the procedure, men can be assured of the women's chastity and, therefore, their loyalty.

This is a stark contrast to the motivation for undertaking a female genital piercing, which is to enhance sexual pleasure, not destroy it.²⁰ To associate female genital piercing with the practice of female circumcision is seriously misguided and moreover constitutes a serious misconstruction of the intention of the legislation.

III CONSENT IS NO DEFENCE: EXCEPTIONS AND REINFORCEMENTS

Criminal liability for body alteration may potentially arise from a number of sections of the Crimes Act 1961. The following is an analysis of activities which, like body alteration, are also *prima facie* assaults. Some are recognised legal exceptions to which consent is available as a defence, whereas other activities are barred from the application of the defence of consent to assault.

A *Sport and Consent*

The law has stated on numerous occasions that an action which would otherwise be assault is acceptable within the context of organised sport through the operation of consent; whereas in other instances, such as a prize fight or a street fight, an assault has

17 This offence carries a maximum sentence of three years' imprisonment.

18 L. Bibbings and P. Alldridge "Sexual Expression, Body Alteration and the Defence of Consent" (1993) 20 *JL & Soc* 356, 362.

19 Above n 18, 362.

20 Refer to the discussion on motivations for body alteration in the Appendix.

occurred regardless of consent.²¹ It would seem the reason for this is that sports such as wrestling and boxing are seen as "manly diversions",²² competitions of "strength and dexterity"²³ and "in the public interest" or having "significant social value".²⁴ Whereas fighting in a public place is contrary to the public interest: "it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason."²⁵ Prize fights are felt to "serve no valuable purpose"²⁶ which infers that violent sports do serve a valuable purpose.

In any event, organised sport has been recognised as an exception whereby bodily injury can ensue and consent will act as a bar to assault charges.²⁷ The reason for this exception appears to be the perceived social benefit in sport. Certainly the imposition of criminal liability for injuries inflicted during the course of play would radically alter the game and in fact make many sports impossible to play.²⁸

Consent to assault in sport can be distinguished from other types of assault in that the consent does not relate to a discrete event or specific injury; the player or competitor consents to the *risk* of numerous injuries.²⁹ Thus, for example, a rugby player entering the field consents to the risk of a minor injury (a bruise or graze) right through to serious injuries such as a broken bone or bloody gash. Inexperience of the players may also introduce a higher degree of risk to participants. The players' incompetence in performing certain manoeuvres may potentially result in more severe injuries.³⁰

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- 21 Refer *R v Coney* (1882) 8 QBD 534, *Attorney-General's Reference (No 6 of 1980)* [1981] 2 All ER 1057.
- 22 John A Devereux "Consent as a Defence to Assaults Occasioning Bodily Harm - The Queensland Dilemma" (1987) 14 UQLJ 151, 154.
- 23 Foster Crown Law (1762) as quoted in John Devereux "The More Things Change the More they Stay the Same: Consent to Serious Assault in Queensland" (1991) 16 UQLJ 282, 283.
- 24 Above n 7, 146. Also refer to discussion in *R v Jobidon* (1991) 66 CCC (3 d) 454, 495.
- 25 *Attorney-General's Reference (No 6 of 1980)*, above n 21, 1059.
- 26 Above n 23, 283.
- 27 See *R v Jobidon*, above n 24, 495; *R v Welch* (1995) 101 CCC (3 d) 216, 238; *R v Brown*, above n 15, per Lord Templeman, 79, per Lord Jauncey, 88, per Lord Mustill, 109; *Attorney-General's Reference (No 6 of 1980)* above n 21, 1059.
- 28 The Law Reform Commission of Canada *Working Paper 38: Assault* (1984) 30.
- 29 The Law Commission (UK) *Consultation Paper No 134: Criminal Law, Consent, and Offences Against the Person* (HMSO, 1994), para 2.5.
- 30 For example those sustained from a collapsed scrum in a rugby game.

Conduct of players on the field is governed by the rules of the game which are structured to restrict the incidence of injury as much as possible. Players may also be accepted as consenting to other rougher forms of conduct, not contained in the rules (and may in fact be infractions of the rules), but which form part of behaviour to be reasonably expected as part of the game.³¹ The injuries being consented to at the start of play are therefore not accurately assessable by the participants.

Generally speaking, if the contact is "unintentional, instinctive or reasonably incidental"³² consent will operate. If it is unduly aggressive, deliberate and "off-the-ball" (that is, not in the course of play) it will be assault.

The presence of a referee was considered a valuable feature of sporting events by Lord Jauncey in his decision in *Brown*,³³ presumably as a referee would be able to stop the game should events get out of hand. Further, the formalised step of having a referee present indicates that the rules will be enforced, so players may safely consent to a level of risk acceptable to them.³⁴

The comparison to body alteration is pronounced. A body alteration "injury" is specifically authorised and undertaken by the body alteration artist with due care and skill. The recipient does not risk receiving injuries greater than that which they had consented to. The considered and deliberate manner in which people undertake body alteration is far removed from the haphazard risk-taking of contact sport. The skill and knowledge of the referee to control the game is equivalent to the body alteration artist's expertise in performing body alterations. The body alteration artist however, has the advantage of direct control over the activities. The referee, as a third party observer, must step in to prevent further injury.³⁵

That sport, inherently violent, is a well documented exception to assault laws rests upon its value to the public. The actual social benefit of sport, however, can be difficult to articulate without reference to anthropological and psychological texts. The simplest approach is to consider that it is difficult to imagine a world without contact sport. The fact that sport is an integral part of our society lies at the heart of its legal acceptance.

31 Above n 7, 147.

32 Above n 28, 34.

33 Above n 15, 85.

34 Above n 29, para 11.13.

35 This statement is made on the assumption that the alteration is performed by an experienced, professional body alteration artist. Obviously the risk of sustaining a more serious injury is heightened when an amateur artist performs the procedure. Refer to discussion in Part IV of this article.

B Dangerous Exhibitions and Consent

Dangerous exhibitions are another legally recognised exception to assault law³⁶ which are more difficult to justify than sporting exceptions. Examples include stunt men and women performing death-defying dare-devil tricks and freakshow performers nailing stakes into their noses and eating lightbulbs.³⁷ These are activities where the social benefits are virtually impossible to identify, aside from pure public entertainment. Sopinka J in *R v Jobidon*³⁸ found dare-devil activities to be "a socially valuable cultural product",³⁹ which is an indication that "culture is in the eye of the beholder" rather than a testimonial to great culture.

Although there is some opinion that the value of such entertainment is a great deal less than in previous eras,⁴⁰ this is thrown into doubt by the resurgence in popularity of freakshows. An example is the US Jim Rose Circus Sideshow.⁴¹ Acts in the circus include Mr Lifty, who dangles various weighty objects (such as steam irons) from rings in his nipples and ears, and The Torture King (aka The Human Pincushion) who, as his name suggests, presses corsage pins into his body.⁴² The shows also include people who are "freaks" in the traditional sense - that is, physically deformed in some way.

Freakshows fly in the face of social policy arguments as their exploitation of disabled and disfigured people is a far cry from 1990s "political correctness." It is doubtful that even Sopinka J could class them as a cultural experience.⁴³ Perhaps the popularity of these events demonstrates that this is where public interest lies. If the law of assault is to be guided by general public acceptance, as is the case with sports, then it should not interfere in these dangerous exhibitions.

36 Above n 7, 146; above n 23, 285; *R v Jobidon*, above n 24, 495.

37 Just a couple of the acts performed by Jim Rose Circus Sideshow performers. See "Over the Edge?" *Los Angeles Times Orange County Edition*, Los Angeles, USA, 10 September 1992, 4.

38 Above n 24.

39 Above n 24, 495.

40 Above n 29, 36.

41 The Jim Rose Circus has infamy enough to have been represented on *The Simpsons*, a US cartoon TV programme.

42 Above n 37.

43 Jeff Gilbert, music director at a US rock radio station, says of the Jim Rose Circus: "At every show, someone loses their lunch". Above n 37.

It was suggested in the English Law Commission Consultation Paper⁴⁴ that the law should not concern itself with setting out which risks a person can or cannot take with their own body. This was then qualified with the assertion that they could not take absolutely *any* risk, and that the "context of entertainment does not permit the taking of a risk of serious injury."⁴⁵ Therefore, it is unclear whether shows such as Jim Rose's would be included in the dangerous exhibitions exception to assault, or even if this exception is still relevant today.⁴⁶

Body alteration shares many features of these exhibitions. The injury inflicted is controlled and deliberate, and is not intended to cause any more discomfort than is necessary to achieve the desired result (a body modification or applause from the crowd). Therefore apart from their differing motivational factors, the two activities are analogous in many respects. The principal motivations for body alteration are those of adornment, sexuality and self-expression, values upon which society places great worth. Dangerous exhibitions are financially motivated and staged purely for the entertainment of others. While it is agreed that capitalism and entertainment are central to modern western society, it is submitted that the values represented by body alteration are of far greater social utility than those of dangerous exhibitions.

C Surgery and Consent

Criminal liability for bodily harm arising from surgery was overcome by section 61 of the Crimes Act 1961 provided it is a "reasonable surgical operation intended for the patient's benefit"⁴⁷ and is performed with the patient's consent.

This law is easily understood in the context of medical treatment. That is, the patient will be physically better off having received the treatment. The surgeon is not considered to be committing harm at all.⁴⁸ However, what of other forms of surgery which are, in reality, forms of body alteration? Cosmetic surgery, sex-change operations or organ donation (such as a kidney) for example. These are also presumably legal, although they

44 Above n 29, para 11.16.

45 Above n 29, para 11.20.

46 Obviously many of the stunts performed in a show like Jim Rose's, or any dangerous exhibition, are self-inflicted and therefore technically not assaults. However the element of audience participation which characterises some of the acts (eg standing on a performer as he lies in broken glass) clearly fall into the assault category.

47 Above n 7, 137.

48 Above n 28, 28.

serve little or no health purpose to the patient.⁴⁹ In fact, they may even be to the patient's detriment (eg donation of a kidney to another).⁵⁰

These surgical procedures are legally condoned in the respect that surgeons are not prosecuted for performing them. However, the legality of such practices appears, like sport, to rest more upon social norms than clear legal analysis or rules.⁵¹

In the case of cosmetic surgery, the alterations undertaken are of a far more invasive nature than "non-mainstream" body modifications, although they involve many of the same techniques.⁵² Skin is cut, and material inserted beneath it, or tissue sucked out. Cartilage is removed or remoulded; breasts and penises enlarged; lips engorged. The aim of cosmetic surgery is to beautify the body - to alter it to conform to a personally held (even if it is widely shared) vision of human beauty and desirability.⁵³

In principle body alteration and cosmetic surgery achieve the same aim: the altering of one's appearance to one's own tastes and desires. One body alteration artist describes his work as the "exact opposite" of mainstream plastic surgery: while cosmetic surgery alters a person's appearance to conform to the societal norm, the body modifications he performs represent "extreme individuality."⁵⁴ It is submitted that the difference between cosmetic surgery and non-mainstream body alteration is entirely one of personal taste, and is therefore immaterial.

The legal distinction between the two forms of body alteration is the requirement that surgery be performed by a registered medical practitioner. It is not feasible to suggest that body alterations be performed solely by medical practitioners. Such a proposition would push the cost of body alterations well beyond the reach of most people who wish

49 It is acknowledged that sex change operations are performed for the mental and emotional benefit of the patients.

50 J C Smith and B Hogan *Criminal Law* (7 Ed, Butterworths, London, 1992) 408.

51 R Leng "Consent and Offences Against the Person: Law Commission Consultation Paper No. 134" [1994] Crim LR 480, 488.

52 Steve Haworth, body alteration artist, learnt much of his technique from working closely with plastic surgeons while designing instruments. See "Bringing Body Modification into the 21st Century" *In the Flesh*, Art & Ink Enterprises Inc, Hoboken, New Jersey, USA, Vol 1, No 4, 4.

53 Plastic surgery is often reconstructive in nature. That is, the body is being restored to resemble its previous state after a surgical procedure (eg: mastectomy) or other disfigurements (eg: burns, accidents). The benefits of reconstructive surgery are more easily demonstrated as such surgery enables the patients to overcome the emotional distress which results from physical trauma to the body. The cosmetic surgery discussed in this section refers to that undertaken for purely cosmetic purposes, to "enhance" existing features of the body (eg: facelifts, breast implants).

54 Steve Haworth, Body Alteration Artist. Above n 52, 24.

to obtain them. It would remove non-mainstream body alterations from the cultural sphere they currently share with accepted body alterations (tattoos and ear piercing). It would place an unnecessary (and no doubt unwanted) burden on the medical profession. Further, the most popular body alterations, decorations such as piercing and branding, bear little resemblance to surgery. Although more radical alterations (eg implants) may be likened to surgery, these are still not as invasive as surgical procedures. Bodily interference is limited to the skin and cartilage.

The impracticality and inappropriateness of regarding body alterations as surgical procedures would be overcome by the implementation of regulations governing the performance of non-mainstream body alterations. Body alteration artists would be required to register in order to legally perform body alteration procedures. Safety standards could be established and enforced, the medical fraternity would remain undisturbed, and the legal anomaly between surgical body alteration and non-mainstream body alteration would be rectified.

D Sado-Masochism and Consent

Sado-masochism (S-M), is defined by the pressure group Countdown on Spanner⁵⁵ as "obtaining pleasure from a power exchange and/or pain in consensual sex play and/or sexual fantasy."⁵⁶ The practice is not uncommon and is, according to a US study, growing.⁵⁷ Despite its growing acceptance, the practice of S-M has a distinct element of social stigma attached to it. There is much disagreement and confusion over the nature of S-M. This is reflected in the judicial approach to S-M cases.

In the *Brown*⁵⁸ case the House of Lords had to consider whether S-M practices should be included in the list of exceptions whereby consent is a defence to a charge of intentional infliction of bodily harm. It was decided, three to two, that it should not. The concerns listed by the majority judges were numerous, although the distinct overall impression is one of distaste for the activities indulged in by the defendants.

Lord Templeman was concerned that participants were unable to assess the degree of harm which would be inflicted prior to the commencement of the S-M "session".⁵⁹

55 Formed in the UK to support the appellants in the *Brown* case. Refer "Love Hurts" *The Guardian Weekend*, London, UK, 28 November 1992, 6.

56 Above n 55.

57 S S Janus and C L Janus *The Janus Report on Sexual Behaviour* (John Wiley & Sons Inc, New York) 115.

58 Above n 15.

59 Above n 15, 83.

Further, once the session began, the sadist could get carried away and inflict greater harm than that which was consented to. The use of codewords by the "victim" to stop the session was considered an inefficient safeguard.⁶⁰

Similar concerns were articulated by Lord Lowry⁶¹ and Lord Jauncey who noted that "there was no referee present such as there would be in a boxing or football match."⁶² Lord Jauncey also examined S-M activities on a broader policy level and held that while the *Brown* S-M ring was well organised, others may not be. Therefore, other practitioners of S-M would be exposing themselves to a greater risk of serious injury.⁶³

The inability to assess potential injury at the outset, together with the risk of more serious injuries being inflicted in the heat of passion, were significant factors in the majority opinions. The correlation with consent to assault in sport appears to have been largely ignored and distinguished simply by the presence of a referee.

The sexual content of the activities was also considered, and their Lordships disagreed about the nature of S-M. Lord Lowry considered it to be "a perverted and depraved sexual desire",⁶⁴ whereas Lord Templeman was not satisfied that S-M was purely sexual, that it was "also concerned with violence."⁶⁵ He later went on to say that "sex is no excuse for violence"⁶⁶ suggesting that were S-M, in Lord Templeman's opinion, purely sexually motivated, it would be an acceptable exception to the consent to assault rule. The fact that the violence committed was deliberate, rather than incidental, was also a central issue in Lord Templeman's decision. Lord Templeman refused to "invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty."⁶⁷

It appears their Lordships were concerned with the level of violence of the acts committed by Brown and the other appellants, and failed to appreciate the nature of S-M as it is generally practised.

60 Above n 15, 83.

61 Above n 15, 100.

62 Above n 15, 85.

63 Lord Jauncey felt that danger lay in the practice of S-M "by others who are not so controlled or responsible as the appellants are claimed to be." Above n 15, 91.

64 Above n 15, 100.

65 Above n 15, 82.

66 Above n 15, 84.

67 Above n 15, 82. Refer also the comments of Lord Lowry, 100.

The essence of their Lordships' opinions lay in the public interest arguments. The majority judgments held that there could be no good reason for allowing the commission of such acts.⁶⁸ The approach of the majority was unanimously paternalistic. Lord Templeman, obviously highly repelled by the activities of the Brown S-M ring, felt society was "entitled and bound to protect itself against a cult of violence."⁶⁹

The implications of the *Brown* decision for the defence of consent to be available in relation to body alteration are mixed. Although the injuries inflicted in the course of a body alteration are deliberate, they are incidental to the acquisition of the body alteration. The injury is necessary to attain the adornment; pain or hurt are not the motivations for undertaking the alteration. In fact, professional body alteration artists take numerous measures to eliminate or at least reduce the pain suffered.⁷⁰

The good intentions of the body alteration artists do not affect the mens rea requirement of the potential offences.⁷¹ The desire to avoid pain does, however, distinguish body alteration procedures from S-M. This is particularly relevant in respect of the "cult of violence" type arguments advanced by the majority in *Brown*.⁷²

A further distinction from S-M is that the extent of injury is also easily measured prior to the performance of the alteration as it is a single procedure to obtain a pre-determined effect. There is little chance that the body alteration artist will become carried away in the heat of passion and perform additional, uncommissioned alterations.

Greater risks are present if the body alteration is undertaken by an unskilled, uneducated body alteration artist.⁷³ The increased risks arising from the activities of amateur practitioners is aligned with Lord Jauncey's policy concern in *Brown*.⁷⁴ Lord Jauncey's solution was to eliminate the risk by criminalising S-M behaviour. Risk

68 "[It] is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason" Lord Lowry, above n 15, 99. Lord Lowry also quoted Lord Lane CJ, the Judge in the Court below, who stated: "the satisfaction of sado-masochistic libido does not come within the category of good reason".

69 Above n 15, 84.

70 For example, ice is applied to the area prior to piercing, and alterations are performed with maximum speed to minimise the length and extent of discomfort experienced by the recipient of the alteration.

71 "Mens rea is a concept independent of knowledge of illegality of motive, ... it will be sufficient that the accused intended the conduct in question." Above n 7, 36.

72 Refer above n 61, n 62 and n 63.

73 For example, infection may occur, or a piercing may be performed in the wrong place.

74 See above n 63.

disparity for body alterations can be dealt with effectively not by criminalisation but through regulation of body alteration activities. This could be achieved through the implementation of a compulsory registration scheme for body alteration artists.

A sexual element is present within the context of body alterations, as some alterations are carried out with the intention of improving sexual sensitivity.⁷⁵ This is distinguishable from S-M in two respects. The sexual gratification is not achieved at the time a body alteration is performed; the recipient's sexual sensitivity is enhanced later, once healing is complete. Secondly, the sexual aspect of a body alteration does not occur in the relationship between the artist and the recipient. There is no element of sexual gratification present for the artist.⁷⁶

These factors may be argued in favour of the legality of body alteration. It is the public policy arguments in *Brown* which fall squarely against legality. The majority approached the issue from a presumption of illegality and were unable to find good reason why S-M activities should be legalised. From this angle it is not difficult to see why the majority found as they did. Why would the public interest demand that S-M practices be legal? Particularly, as in the *Brown* case, when the activities participated in are repugnant to many people of society, and even to some devotees of S-M.⁷⁷

Some body alterations, such as nose and tongue piercing, would probably be categorised as falling within acknowledged "exceptions" (ie ear piercing) due to their similarity in nature and widespread social acceptance. However, following the reasoning of the majority in *Brown* it is likely that other forms of body alteration would not qualify as "exceptions" owing to a lack of good reason for holding otherwise.

The dissenting judgment of Lord Mustill in *Brown* is more favourable to the legality of body alterations. Lord Mustill took the opposite approach from the majority and addressed the question from the standpoint of a presumption of legality, stating:⁷⁸

[R]epugnance and moral objection, both of which are entirely natural but neither of which are in my opinion grounds upon which the court could properly create a new crime.

75 For example, nipple and genital piercings.

76 The author acknowledges that this is a generalisation. There are instances where the artist performs an alteration which has a sexual nature for both parties. This however is the exception to the majority experience of body alteration.

77 "Many on the S&M scene acknowledge ... that, however consensual, lacerating a penis is perhaps 'dysfunctional'" above n 55.

78 Above n 15, 116.

Lord Mustill also examined the intention of the legislation and submitted that it was intended to capture "brutality, aggression and violence, of a kind far removed from the appellant's behaviour."⁷⁹ The same argument is equally applicable to body alteration which does not involve an "attack" of any sort, but rather an injury incidental to the obtaining a desired body adornment. Section 188 and 193 offences, assault with intent to injury and wounding with intent, are designed to sanction aggressive behaviour and physical attacks upon a person. This definition does not capture body alterations and charges under these sections are therefore inappropriate.⁸⁰

The case of *R v Wilson*⁸¹ was heard some time after *Brown* and concerned injuries inflicted upon a woman, at her request, by her husband; namely the branding of his initials onto her buttocks using a hot knife. The trial judge felt bound by *Brown* and convicted Mr Wilson of assault. Lord Justice Russell in the Court of Appeal distinguished *Brown* on the grounds that it related to sado-masochism and allowed the appeal. The facts that Mrs Wilson instigated the branding and that there was no aggression in the act were decisive.⁸² In these respects the distinction between this case and *Brown* is unclear. The participants in *Brown* were also willing instigators of the activities and the existence of aggression in S-M practices is a matter of interpretation.⁸³

Lord Justice Russell made a comparison between the Wilsons' activities and tattooing.⁸⁴ This analogy is tenuous considering the extent of injury sustained by Mrs Wilson. The injuries received by the participants in the *Brown* S-M group, in terms of scarring, were certainly no worse than Mrs Wilson's.⁸⁵

79 Above n 15, 102. Also see "Consensual Acts and the Limits on Civil Liberties" *The Guardian*, London, UK, 28 November 1992, 24, where the legislation under which the *Brown* defendants were prosecuted is described as being for "people who attacked each other."

80 Public decency and morality "should be separately distinct from the basic laws relating to sexual offences and offences against the person." Mr Justice Brooke, Chairman of the Law Commission, "Law Chiefs Call for a 'Licence' for Perverts", *The Daily Mail*, London, UK 14 December 1995, 13.

81 [1996] 3 WLR 125.

82 Above n 81, 127.

83 Russell LJ would appear to be equating aggression to deliberate cruelty in the same manner as Lords Templeman and Lowry in *Brown*. This is one interpretation of the *Brown* defendants' behaviour but is unlikely to be the interpretation held by the participants themselves; they relate the practices to sexuality, not aggression.

84 Above n 81, 128.

85 Paul Roberts "Consent to Injury: How Far Can You Go?" (1997) 113 LQR 27, 29.

The reasoning in *Wilson* is flawed, and provides an excellent example of a subjective result-driven judgment.⁸⁶ However, the decision does contain a valuable judicial observation relating to body alteration:⁸⁷

[Far] from wishing to cause injury to his wife, the appellant's desire was to assist her in what she regarded as the acquisition of a desirable piece of personal adornment, perhaps in this day and age no less understandable than the piercing of nostrils or even tongues for the purposes of inserting decorative jewellery.

Lord Justice Russell recognised body piercing as a legitimate form of body adornment, without reference to injury inflicted during its acquisition. *Wilson*, therefore, is valuable support for the legality of body alteration generally. Although, as noted above, the precedent value of this judgment is arguably limited, it is a useful indication of judicial attitude towards body alteration.

IV BODY ALTERATION AND CONSENT

As has been noted in the above discussion, arguments in favour of the legality of body alteration can be made in relation to the existing law governing consent and assault in sport, dangerous exhibitions, surgery and S-M. The law is, however, extremely ambiguous when it comes to consent to assault issues, due in part to the difficulty (or even impossibility) of formulating a general rule.⁸⁸ In addition, consensual infliction of injury is the exception, rather than the rule, and requires "special treatment by the law."⁸⁹

The flavour of many judgments on the issue relating to assault in a variety of contexts is distinctly subjective: it is legal (or illegal) because it *just is*, based on value judgments by individual members of the judiciary.⁹⁰ That is, if the judiciary approves of the activity then consent will operate as a defence.⁹¹ For example, the majority decisions in *Brown* reflect their Lordships' inherent distaste for the defendants' practices and provide a

86 Russell LJ did not feel that the Wilsons' activities were "a proper matter for criminal investigation" (above n 81, 128), and the fact that their relationship was a matrimonial one would appear to be particularly relevant (above n 81, 128). The overall impression is that Russell LJ did not believe Mr Wilson should have been charged and his judgment was delivered in accordance with this predisposition.

87 Above n 81, 127.

88 This was recognised by the English Law Commission in their Consultation Paper No 134, above n 29, para 11.23.

89 Above n 15, 103, per Lord Mustill.

90 This was recognised by the dissenting judgment of Lord Mustill in *R v Brown*, above n 15, 108.

91 William Wilson "Is Hurting People Wrong?" [1992] Jnl Soc Welf & Fam Law 388, 389.

textbook display of judicial *de*-activism. The majority placed *Brown* firmly in the judicial too-hard basket and deferred to Parliament.⁹²

The question then remains: what should the law be? Should body alteration be a recognised exception (like sport and tattooing), or should it be illegal? Consideration will be given to the following issues.

- (i) Which approach should be taken on the personal autonomy/public interest dichotomy? That is, the liberalism versus paternalism debate.
- (ii) Where should the legality line be drawn? Would all forms of body alteration fall into a recognised exception category, like tattooing and sport? Would the exception remain limited to ear piercing? Or would a division on legality be made somewhere along the spectrum of body alterations?
- (iii) Other relevant considerations, including health and enforcement issues.

A *Paternalism versus Liberalism*

This argument represents the fundamental conflict between individual autonomy (the freedom to do as one pleases) and the protection of the public interest, a concept which is more difficult to define. Examples of judicial paternalism, the exercise of judicial power ostensibly "in the public interest", can easily be found. Yet a satisfactory description of what exactly is required "in the public interest" is more elusive. It is almost as if the words "public interest" have an inherent quality or meaning which is automatically understood by all yet defies accurate description.⁹³

Lord Lane CJ in *Attorney-General's Reference (No 6 of 1980)*⁹⁴ stated that "it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason". Yet no explanation is given as to *why* such an activity is not in the public interest, which is particularly perplexing when the statement is understood in the context of consensual harm. An understanding of what passes for public interest is even more baffling when exceptions such as surgery and dangerous exhibitions are described by Lord Lane to be "*needed* in the public interest."⁹⁵ Public interest according to Lord Lane therefore encompasses activities which contain entertainment value alone,

92 See for example Lord Jauncey's judgment in *R v Brown*, above n 15, 92: If S-M activities are not injurious to public good "then it is for Parliament with its accumulated wisdom and sources of information to declare them to be lawful."

93 Similar difficulties arise when attempting to define a concept such as "quality".

94 Above n 21, 1059.

95 Above n 21, 1059. Emphasis added.

suggesting that public interest does not necessarily need to be for the public good; something which piques the public curiosity will suffice.

From the most cynical perspective, the use of the term "public interest" is to enable "the state to trump arguments based upon an appeal to rights to moral autonomy by recourse to wider conceptions of the public good."⁹⁶ The approach taken by Lord Lane in *Attorney-General's Reference (No 6 of 1980)* provides support for this proposition.

Despite the vagueness of the term "public interest" the judiciary and commentators frequently rely upon it when ostensibly seeking to protect people from themselves. Paternalism purports to know what is best for members of a society, and even what "kind of society most of us would like to inhabit."⁹⁷ Paternalistic sentiment is captured in statements such as: "Society has to be protected from these things",⁹⁸ and "[it is] the desire to protect the men from themselves ... You know, some people are weak. They're like children."⁹⁹

That is not to say that paternalism is necessarily negative. In fact the criminal law, as a system of prohibitive rules, is inherently paternalistic to a degree,¹⁰⁰ particularly in the protection of the young and the learning disabled.¹⁰¹ In addition, reference to so-called "secondary harms" provides a basis upon which to prohibit activities such as drug use, as an individual's decision to take drugs may impact on society as a whole if (or when) they require medical or rehabilitation treatment. It is accepted that the protection of children, of the learning disabled and of people of society in general against harm is a valid exercise of paternalistic power in the public interest. Therefore, if a measure of paternalism is necessary in the public interest, the question becomes *when* the criminal law should step in.

The libertarian purist values autonomy above all else and believes that every person has the right to do with their body as they please. This is an extreme position which has

96 Above n 91, 391.

97 Above n 84, 395.

98 A Tory backbencher speaking with reference to S-M and *Brown*, as quoted in *The Daily Mail*, above n 80.

99 P C Yeowell of the Obscene Publications Squad, Scotland Yard, who has worked on Operation Spanner (responsible for the discovery and arrest of the *Brown* defendants) since 1987, quoted in "Love Hurts", above n 55. Also see Lord Templeman's judgment in *R v Brown*, above n 15, 84, where he states that society should "protect itself against a cult of violence."

100 *R v Jobidon*, above n 24, 494.

101 L H Leigh "Sado-Masochism, Consent, and the Reform of the Criminal Law"(1976) 38 MLR 130, 130.

no regard for harm potentially resulting from an individual's behaviour. A good description of a balanced liberalist perspective is contained in the dissenting judgment of Lord Mustill in *Brown*:¹⁰²

[The] state should interfere with the rights of an individual to live his or her life as he or she may choose no more than is necessary to ensure a proper balance between the special interests of the individual and the general interests of the individuals who together comprise the populace at large.

In modern New Zealand society autonomy is highly valued. Indications of this are abundant in the social and economic policies of government which make individuals increasingly more responsible for themselves. There has been a shift away from the welfare state and an associated shift in public policy, accompanied by or consequential on changes in public and private morality.¹⁰³ Liberty and privacy are core values. As society becomes increasingly more tolerant of individual differences, justifications for the illegality of activities such as body alteration are few and unconvincing.

In the social climate in which New Zealand functions, the most appropriate way to determine the legality or illegality of an activity is to use the "social disutility model." This model emphasises personal autonomy and places the onus on the prosecution to show that the public interest demands the activity not be legal.¹⁰⁴ The opposing approach is the "social utility" model which begins with a presumption of illegality: The defence must show that there is good reason for the activity to be legal. The social utility test has its basis in paternalism and legal moralism¹⁰⁵ and is significantly more difficult for the defence to satisfy.

Where the judiciary have adopted the social utility approach to resolve an issue, the immense difficulty of the task before the defence is apparent. *Attorney-General's Reference (No 6 of 1980)*,¹⁰⁶ *R v Jobidon*,¹⁰⁷ *R v Welch*¹⁰⁸ and the majority in *Brown* considered the issue from a social utility angle. It is not surprising that S-M could not be found to be in

102 Above n 15, 116.

103 Marianne Giles "Consent in Assault and Wounding Cases" 5 June 1992, Sol Jo 546.

104 David Kell "Consent to Harmful Assaults Under the Queensland Criminal Code: Time for Reappraisal?" (1994) 69 ALJ 363,366.

105 David Kell "Social Disutility and the Law of Consent" (1994) 14 Oxford J Leg St 121,133.

106 Above n 21.

107 *R v Jobidon*, above n 24, 495: "There is precious little utility in fist fights or street brawls."

108 *R v Welch*, above n 27, 238: Consent applies only in the course of a generally approved social purpose.

the public interest. In fact, using the social utility model it is difficult to understand why tattooing, cosmetic surgery and many other recognised exceptions to assault laws are legal activities justified as being in the public interest. However, these exceptions remain lawful, perhaps only because they are so widely practised and socially accepted that it would be almost ridiculous to suggest otherwise.¹⁰⁹ It has also been suggested that the triviality of harm caused by tattooing and ear piercing may be a factor in their legality.¹¹⁰

The court in *Wilson* used a social disutility analysis and subsequently did not find sufficient justification to criminalise Mr Wilson's activities. Had the judge followed the method of the majority in *Brown* he most probably would have found Mr Wilson had acted illegally; that consent was not a defence to Mr Wilson's activities in the absence of a demonstrable social benefit.

Support for the adoption of the social disutility model is articulated in the English Law Commission's Consultation Paper No 134¹¹¹ where "[it] indicates that the law should avoid penalising conduct without convincing justifications for doing so, rather than indulging in fruitless searches for social merit to justify non-criminalisation."¹¹²

It is submitted that in determining public policy in relation to an activity, the social disutility approach should be adopted in order to give primacy to individual autonomy and privacy in a society which assigns these principles significant value.

The social disutility approach would strongly support an argument in favour of legalisation of body alteration. The practices of body alteration recipients of modifying themselves in a socially unusual manner may be considered repulsive or deviant by some members of society. This in itself is insufficient justification for criminalisation of the practice altogether. Body alteration is a form of expression. The meaning and significance of social expression should be derived from those who choose to use it, not from those who do not understand it. This is particularly true of expression with a sexual content, as sexuality is immensely varied between individuals.¹¹³ Many body alterations have an undeniable sexual aspect or relate to the person's sexuality as an expression of self-identity. There is no social utility in suppressing such manifestations of self-expression.

109 Above n 29, para 11.22.

110 Above n 51, 482.

111 Above n 29.

112 Above n 51, 481.

113 N Bamforth, above n 14, 663.

B Drawing the Line

If it is accepted that there is no social utility in criminalising body alteration, and the author submits that this is the case, then is it necessary to draw a line distinguishing between different types of alterations? Those falling on the "wrong" side of the line would be criminalised as activities contrary to the public interest and those on the "right" side would be recognised as legal exceptions to the consent to assault rule. An instinctive response may be Yes: more radical modifications, such as extensive scarification and 3-D implants, should be restricted, whereas piercings, which are fairly mainstream, are acceptable and should be allowed.

It is submitted that such a line drawing exercise is unnecessary. Using the social disutility model there is no social interest or benefit in prohibiting freedom of expression of any kind, provided it is not causing harm to others. A competently performed body alteration poses a minimal health risk to the recipient. There is therefore a low risk of serious harm to the recipient and consequently a low risk of secondary harms in the form of the cost to society of medical treatment.

C Health

Body alterations, as discussed above, involve actual bodily harm. Puncturing of the skin means the presence of blood which automatically indicates a danger of infection and the potential transfer of diseases transferred via blood, such as Hepatitis B, HIV and Tetanus.¹¹⁴ In addition, infections arising from septum piercings can be particularly dangerous due to the piercing's proximity to the brain. There are also indications that nipple rings may lead to milk duct blockages during breast feeding.¹¹⁵

In addition to high safety standards,¹¹⁶ a professional body alteration artist is able to offer technical expertise, experience and advice to recipients. The expertise of the professional artist is invaluable for the completion of quality, low risk and minimally

114 "You Pierced What? Adolescent Body Piercing" *Paediatric Nursing* (Jannetti Publications Inc, 15 May 1996) 236.

115 "Bits and Pierces" *New Zealand Listener*, Auckland, New Zealand, 5 July 1997, 30.

116 To ensure an alteration is completed with the lowest risk possible, professional body alteration artists use surgical grade steel instruments, which are thoroughly sterilised in an autoclave (steam steriliser) after each use. Sterilisation is continued through the use of disposable latex gloves and, where possible, disposable instruments. For example, body piercings may be performed with disposable intravenous drip needles. Piercing guns are not used as the tissue is crushed rather than pierced, resulting in some tissue damage and a greater tendency towards infection. Jewellery inserted into piercings and under the skin for 3-D implants is sterile high grade stainless steel or teflon.

painful body alterations.¹¹⁷ It is also crucial for other aspects of alterations, such as the correct placement of a piercing. Steve Haworth, a body alteration artist in the US, believes that to become a competent body piercer takes around nine months' training, and in order to undertake major alterations such as 3-D implants at least two years' training is required.¹¹⁸

Aside from the technical competence of a professional body alteration artist, the other important aspect of professional body alteration is the quality of advice artists pass to recipients. Care for the alterations during the healing period is crucial as infection can often occur at this time.¹¹⁹

The professional artist's experience with body alteration enables him or her to give valuable advice to people wishing to undertake a body alteration. They may even exercise discretion as to whether or not to perform an alteration on a particular person. Whilst body piercings are popular, particularly due to their potentially temporary nature (jewellery may be removed and the hole will heal with minimal scar tissue), more radical body alterations such as branding and scarification should not be entered into lightly. Professional body alteration artist Steve Haworth refuses to perform branding or 3-D body modifications on a client unless he is satisfied they are committed to the alterations. This is demonstrated to him by extensive existing tattoo and piercing work.¹²⁰ Another US artist who specialises in the more radical end of the body alteration spectrum says: "If I get a hint of self-mutilation, I won't do it."¹²¹

On examination of the advantages of professional body alteration artists, the hazards of amateur alterations become apparent. The wrong equipment may be used, the instruments and jewellery may not be sterile and there is a tendency, in the case of

117 Keith Alexander of Modern American Body Arts, Brooklyn, New York, "strives to make the piercings as painless as possible." See *In the Flesh*, above n 52. Phil Berry, European Professional Piercers Association (EPPA) chair, uses ethyl chloride spray to numb the skin before a piercing, or lignocaine anaesthetic gel for genital piercings. See "The Piercing Cry as a Fashion Statement" *The Herald*, Glasgow, Scotland, 25 July 1992, 9.

118 Above n 52, 5.

119 Piercings need to be sterilised and the jewellery regularly turned. Scarification cuts and brandings similarly require cleaning and covering as they provide ideal entry into the body for pathogens.

120 Above n 52, 5.

121 Keith Alexander of Modern American Body Arts, as quoted in *In the Flesh*, above n 52, 30. In this context, Alexander is referring to self-mutilation in terms of self-destructive behaviour; ie, alterations which are commissioned for reasons other than adornment or sexual purposes.

piercings, to place them incorrectly.¹²² Adequate information on post-alteration care is not so forthcoming from amateur artists. The ethics demonstrated by professional artists in advising against or refusing to perform certain alterations on doubtful recipients is far less likely.

Health issues highlight the risks associated with body alterations performed by amateurs. Where the alterations are undertaken by a professional artist, the risks are minimal.

D Enforcement

A factor which weighs heavily against the illegality of body piercing is the difficulties arising from enforcement. This issue has been extensively addressed in relation to other areas of consent to assault, particularly S-M which has its own unique difficulties such as potential for extortion and blackmail.¹²³

If body alteration were illegal such a law would be extremely difficult to enforce. Initially there would be problems with detection. A great deal of body alteration is performed on parts of the body usually concealed by clothing. Body alteration recipients would be even less likely to put their adornments on prominent display if police attention is likely to ensue. Further, detection of the artists themselves would be complicated by the fact that they would probably also be performing legal body alterations (such as tattooing and ear piercing). They would therefore be in possession of instruments and equipment common to both legal and illegal alterations.

In order to catch an artist in the commission of the crime, police would have to raid premises where illicit body alteration was suspected to be taking place, or conduct covert operations into such places, perhaps attempting to procure an illegal adornment.¹²⁴ Such activities would be a drain on police time and resources.

The net result would be a law that is rarely enforced and which is constantly blatantly breached. Laws such as these do little to engender public confidence in the police and bring the legal system itself into disrepute.¹²⁵

The maximum sanctions available against body alteration offenders under sections 188 and 193 of the Crimes Act are severe. The imposition of prison sentences for the

122 Above n 114.

123 Above n 101, 137; Mr Justice Brooke quoted in *The Daily Mail*, above n 80.

124 Is the catch-cry of police undercover agents to change from "I didn't inhale!" to "It's only a clip-on!"?

125 Above n 103.

performance of a body alteration is unlikely to gain public support.¹²⁶ Yet a legal system which convicts people and imposes minimal sentences risks undermining the public's faith in the law. Consistently lenient sentencing indicates to the public that the judiciary do not regard the charges as serious. Parliament, however, obviously views the offence with more gravity, evidenced by the severity of the sanctions available within the legislation. This conflict shows divergence in the legal system.

Ultimately the criminalisation of body alteration would merely serve to drive the activities underground, away from regulation. Safety advice would be virtually impossible to publish. The health risks associated with body alteration would increase immensely. Rather than eliminating the practice, criminalisation would spawn an underground industry and a raft of subsequent health problems.

V CONCLUSION

The legal status of non-mainstream body alteration is undetermined. Reference to other activities where consent is available as a defence to assault are of limited assistance. The indeterminacy of type and extent of injury sustained in sport makes it a poor analogy for body alteration. Moreover, justification for sport's status as a legally recognised exception to assault laws rests on its perceived social value. Similar arguments are not easily made for body alteration.¹²⁷

Some dangerous exhibitions are similar to sport in the respect that they may involve an undetermined degree of risk.¹²⁸ There are other forms of dangerous exhibitions which are closely related to body alteration,¹²⁹ and persuasive arguments in support of the legality of body alteration may be advanced on this basis. However, the current status of dangerous exhibitions as a legally recognised exception to assault laws is uncertain, therefore the strength of such arguments is dubious.

The analogy between cosmetic surgery and body alteration is clear once subjective judgments on physical beauty and desirability are disregarded. Cosmetic surgery therefore provides useful arguments in favour of body alteration, although it may be distinguished on the basis that such surgery is performed by a registered medical practitioner.

126 Imprisonment is a severe penalty, an inappropriate sanction to impose upon someone for one's personal disgust at their appearance.

127 Refer to discussion in Part III. Unlike sport, body alteration could not be considered an "integral part" of our society.

128 For example, the performance of stunts.

129 Refer to discussion of the Jim Rose Circus Sideshow in Part III.

S-M was not recognised as an exception to assault laws when it was examined by the House of Lords in *Brown*. This is not fatal to arguments for body alteration¹³⁰ although the approach of the majority in *Brown* is not favourable to its legality. The subsequent case of *R v Wilson* is more supportive of body alteration.

In summary, arguments in support of non-mainstream body alterations being included in the list of recognised legal exceptions to assault laws may be advanced based on existing exception categories. The result of such arguments is ambiguous. It is proposed that non-mainstream body alterations should be recognised as a further, separate category of legal "exceptions" whereby consent is a defence to assault.

However, it is submitted that recognition of legality is not enough. Body alteration does not have to be dangerous, but unprofessional operators may be. The US and the UK both have self-regulated associations¹³¹ although there is nothing to prevent amateur operators from performing body alterations. Whilst body alteration literature advises interested people to seek out professional piercers,¹³² amateurs and non-association members continue to operate. These amateur artists often attract clients by offering cheaper rates which are made possible by compromising on safety standards. It is these amateur artists who need to be controlled.

No regulation and self-regulation are both untenable options. In order that body alterations be made as safe as possible, government regulation is required. A possible framework would require body alteration artists to register before they could legally perform body modifications. Licensing criteria would include a minimum level of experience and training, and licence conditions would require adherence to strict health standards concerning equipment and sterilisation.¹³³ Such a scheme would not be difficult to establish or administer. Costs of the scheme would not be excessive owing to the relatively small number of people undertaking the highly specialised practice of performing body alterations.

130 Body alteration is distinguishable from S-M on a variety of grounds. For example, body alteration is not performed for immediate sexual gratification and the risk of sustaining more injury than anticipated is slight. Refer to discussion in Part III.

131 For example, the European Professional Piercers Association (EPPA).

132 Above n 52, 44.

133 A scheme could be operated in a similar fashion to the food hygiene safety standards. Body alteration artists' credentials, equipment and practices would be subject to inspection and certification. Studios not possessing and displaying their inspection certificate would be operating illegally and the operators subject to prosecution.

The current legal status of body alteration is unsatisfactory. Body alteration artists should not be left to practice under a shadow of legal uncertainty. Body alteration recipients should be offered the protection of adequate health and safety regulation. Body alteration is an increasingly popular form of expression in modern western culture. It is a reality in New Zealand society. The law must recognise, reflect and regulate these changing social values and practices.

APPENDIX

Body Piercing

Piercings can be performed almost anywhere on the body.¹³⁴ Most piercings are done through the ears, not only the lobes but also up through the cartilage of the ear and the tragus (the small cartilage adjacent to the cheekbone); the nose (through the nostril or septum - the wall between the nostrils); eyebrows; cheeks; tongue; nipples; navel; and genitals. A genital piercing popular with men is a ring worn through a piercing in the penis gland and urethra known as the "Prince Albert", so called because of its popularity in Victorian times. However, there are many piercings possible through the penis and scrotum.¹³⁵ For women, piercing may be done to the inner or outer labia, the clitoral hood, or through the clitoris itself.

Over and above a simple piercing, holes may be continually stretched by placing incrementally larger gauge jewellery into the piercing. This is usually performed on ear lobes and septums to accommodate the insertion of large adornments.

Branding

Branding is the burning of skin in order to leave a scar. It may be performed with any heated metal instrument, although professional branding artists may use a cauterizing scalpel.¹³⁶ For prominent scarring, regular scab picking is recommended during healing time, although the brands must be kept very clean and covered as a guard against infection. Brandings can be performed practically anywhere on the body, from tribal marks across the face or penis to intricate designs on the torso or limbs.

Scarification

Patterns are cut into the skin with a scalpel, generally to approximately a quarter of an inch deep. Once complete, wine or ink may be rubbed into the cuts to achieve a coloured effect, and alcohol is often poured over the cuts and lit to cauterise them.¹³⁷ Like branding, the cuts are made to a design, with circular and Celtic patterns being popular choices. Once the cuts have healed tattooing may be performed around the scars, lending the tattoos a 3-D effect.

134 "Anywhere you can pinch the flesh, you can pierce." Phil Berry, chair of the European Professional Piercers Association. Above n 117.

135 Male genital piercings have intriguing names such as the "guiche", the "frenum", the "hasada", and the "dydoe". Above n 117.

136 Body alteration artist, Steve Haworth, of HTC Body Adornment, Phoenix, USA, prefers the cauterizing scalpel to heat branding. He says the cauterizing scalpel has a laser-like effect in that "it vaporizes only the area you've touched" and does not spread to surrounding tissue, as is the tendency of heat branding.

137 "Futuresex: The Final Frontier", *The Observer*, San Francisco, USA, 22 October 1995, 30.

3-D Implants

This is a more recent form of body alteration which is attaining popularity in the US and the UK. Specifically designed surgical grade stainless steel or teflon is inserted under the skin to give a 3-D effect to the selected area or enhance existing tattoo work.¹³⁸ Implants are not confined to reside beneath the skin: in one instance, metal rods were inserted along the crest of a man's head to produce a "metal mohawk" effect.¹³⁹

Other Non-Mainstream Body Modifications

The most radical forms of body alteration originated from the US. They include bi-fibulation¹⁴⁰ and the removal of ear lobes coupled with ear cartilage modification to give a "Vulcan" like appearance.¹⁴¹

The theories behind the upsurge in body alteration are varied, as are the reasons given for their commission by recipients. Formerly prevalent only in counter-culture, body piercing is gaining mainstream acceptance, much like ear piercing several decades ago. Davey Thompson, an EPPA (European Professional Piercers Association) piercer based in Edinburgh, noticed an "explosion" in body piercing in 1991, and observed that: "It's the yuppie type who tend to want genital piercing ... Mr and Mrs Average go for nipples."¹⁴² A factual article on body piercing published recently by mainstream magazine "The Listener" demonstrates the more widespread public acceptance of such practices in New Zealand.¹⁴³

Motivations for piercing include beautification, shock value, fashion and, particularly for genital piercings, heightening of sexual sensitivity.¹⁴⁴ Other advocates of body alteration take its meaning to another level, and believe that "humans have an in-built desire to scar and mutilate themselves."¹⁴⁵ In fact the "movement" even has a name, "Modern Primitives", referred to frequently throughout the literature.¹⁴⁶

138 "Thenigma", a performer from the US Jim Rose Circus, has "horn" implants in his forehead which have been progressively increased in size as his scalp stretches to accommodate them. Above n 52, 7.

139 Above n 52, 3.

140 The splitting of the end of the penis, through the urethra. As Body Alteration Artist Phil Berry put it, "kind of split ends." Above n 117.

141 Katzen, tattoo artist and wife of "Thenigma" (see above n 139). Above n 52, 8.

142 Above n 117.

143 The article described popular piercing sites, costs, associated risks and motivations for piercings. Above n 115.

144 Above n 18, 361; above nn 114 and 117.

145 Phil Berry, founder of the EPPA, above n 117.

146 Particularly in the US literature. Refer above nn 11, 37, 52.

The followers of the Modern Primitive movement claim to be reclaiming power over their bodies by scarring and piercing themselves. Sexuality and eroticism feature frequently in their language, and any suggestion of self-mutilation or self-abuse is hotly denied. Cuttings are considered "tribal", "a sacrifice toward 'spiritual transformation'"¹⁴⁷ and a test of endurance; one woman compared her scars to a bungy jumping certificate.¹⁴⁸

147 Raelina Gallina, San Francisco "skin-artist", above n 11.

148 Kivi, San Franciscan scarification recipient, above n 11.