Body modification and consent: prejudice in the higher courts?

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Biography

I am a part time PhD student in College of Arts and Law and a full time barrister practising in criminal and civil law. My undergraduate degree was in History and Politics from the University of Newcastle, and I have a Master of Studies in Modern British and European History from St Hugh’s College, Oxford University.

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Title:

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Keywords:

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Abstract (492 words):

What we can and cannot do, or have done, to our bodies has been addressed by the higher courts in England and Wales in a series of decisions since the 1990s. Actions which have caused similar degrees of modification/injury to a body have been treated separately, depending on the perpetrator and the context.

For example:

* Gay men engaged in consensual sado-masochist acts, namely putting nailing through their foreskins **R v Brown (A) [1994] 1 A.C. 212, HL**, was deemed illegal; a man with his wife’s consent, branded her with his initials on her buttocks **R v Wilson (A.) [1996] 2 Cr. App.R. 241, CA** was not deemed illegal. In the latter case, the Court of Appeal decided that it was *not in the public interest* that such activity be prosecuted. There is no legal reason for a distinction to be made; is innate prejudice the reason for the distinction?
* When it comes to sports that cause serious, sometimes fatal injuries, the higher courts are content to allow the participants significant self-regulation. Behaviour is rarely to be taken as criminal even when it results in death or permanent injury. In **R v Barnes [2004] EWCA 3246** the Court of Appeal emphasised that in highly competitive sports behaviour that was outside the rules and caused injury may well have happened *in the heat of the moment* and that this prevents it being criminal. Contrast this with the very recent case of **R v BM [2018] EWCA Crim 560.** In this case a man had his ear removed, tongue split and nipple removed, all intentionally. His tattooist was prosecuted for causing grievous bodily harm, and the Court of Appeal held that this was correct, even though the customer had given considerable thought to the operations that he wanted. Why is there this distinction made?
* What is the distinction in law between someone piercing their own foreskin, or that of another, and someone receiving the Prince Albert piercing? There is no reported case of a tattooist being prosecuted for performing a Prince Albert. Can it be the purported royal origins of this piercing that mean it gets the courts’ protection?

The paper, if selected, will show the inconsistencies in the law, as it is applied to the same level of body modification, and point out where these may be considered to be homophobic, or classist. For example, Royal Air Force officers, prosecuted for causing grievous bodily harm, had their convictions overturned as the Court of Appeal considered these merely to be *mess games*; the same cultural understanding was not extended to the man who performed the tongue splitting as mentioned above. **R v Atkin 95, Cr.App.R 304.**

Further, the paper would apply a critical realist approach to the distinctions, arguing that the higher judges have both the structure of the domestic law and the European Convention of Human Rights to consider, as well as confronting their own prejudices, when determining what body modification they will allow.