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**Abstract** This article examines the continuing use of problematic sexual stereotypes at appellate level in the English and Welsh legal system. Using five cases as illustrations, it argues that, notwithstanding professional training and guidance on sexual equality matters, certain senior judges in this jurisdiction still at least sometimes openly employ crude and problematic sexual stereotypes in their judgments or fail to deal appropriately with the use of these stereotypes by trial judges. The central point is that there is still a significant problem with the open use of crude sexual stereotypes in legal reasoning at a senior level in this jurisdiction, despite the pressure on all members of the legal system to appear to be ‘politically correct’.

**Keywords** Appellate level, England and Wales, sexual stereotypes

## **Introduction**

There are at least two reasons why one might expect that no senior judge in England and Wales would openly use crude sexual stereotypes in his or her legal decision-making. First, there is the fact that members of the legal system reportedly feel under pressure to behave in a ‘politically correct’ manner (see e.g. Temkin 2000, p. 232), which would include avoiding the use of contentious sexual stereotypes. English and Welsh judges know that public scrutiny of their work has increased in the last thirty years, and that they enjoy a lesser degree of public confidence than they did in the past (Malleon 1998, p. 166). As Kate Malleon put it in 2004, the lack of diversity in the composition of the judiciary “has become its Achilles’ heel. Almost the only fact that many people know about judges in England and Wales is that they are generally

elderly, white, male barristers educated at private schools and at Oxbridge” (Malleon 2004, p. 105).<sup>1</sup> This judicial concern about public scrutiny of their work is partly why they have increasingly accepted the need for formal training for judges; “[t]he introduction of training has provided the judiciary with a means of responding to ... [media] criticism, and of being seen to do so” (Malleon 1998, p. 166). Secondly, then, the training and guidance provided by the Judicial Studies Board (JSB), the body responsible for the development and delivery of training to judges in England and Wales, explicitly warns against the use of sexual stereotypes. This training includes guidance on sexual equality issues, first introduced in the form of four 90 minute sessions on ‘human awareness’ in the mid 1990s.<sup>2</sup> Among other things, the JSB now advises judges that “[d]iscrimination is often unconscious and based on a person’s own experience and perceptions; it is important to be aware of the wide diversity of women’s experiences” (JSB 2009, ch. 6.1).

On the other hand, there are four main reasons why it is arguable that the continued use of sexual stereotypes in judicial decision-making would not be surprising. First, pressure to behave in a ‘politically correct’ manner can result in nothing more than ‘doublespeak’ whereby the person concerned pays lip service to ‘correct’ forms of behaviour or use of language while not accepting that such forms or

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<sup>1</sup> This point about lack of diversity is still valid: in 2010, the Advisory Panel on Judicial Diversity Reported that Baroness Hale was the only female Supreme Court Justice, and that only three of 37 Court of Appeal judges were women (The Report of the Advisory Panel on Judicial Diversity. <http://www.justice.gov.uk/publications/docs/advisory-panel-judicial-diversity-2010.pdf>. Accessed 27 April 2010).

<sup>2</sup> See Derek Hill, secretary to the Judicial Studies Board, stating in a letter to *The Times* published on July 16 1996: “The four 90-minute sessions on human awareness we have held to date aimed to show how to avoid preconceptions about individuals because of race or gender”.

language have any valid basis. Thus, if the only reason that some judges avoid sexual stereotyping is in order to appear ‘politically correct’, it is inevitable that stereotypes will surface in their speech or writing from time to time, since they will have no genuine commitment to eliminating them (even those who sincerely want to avoid using stereotypes find it difficult to do so: see Bodenhausen and Macrae 1996). Secondly, against a long history of entrenched male domination of the legal system, it is arguable that the efforts of the JSB are unlikely to achieve complete success in such a short period of time, particularly since any judges who think the JSB is an emanation of ‘political correctness’ will presumably be resistant to its guidance in this respect. Thirdly, appellate judges may take the view that the work of the JSB is largely directed at lower level judicial officers and less relevant to them, and thus overlook, or pay insufficient attention to, the JSB guidance on sexual stereotyping. Finally, all members of the appellate judiciary attended law school long before feminism made any significant inroads into legal education, and their practising careers at the Bar and on the bench have occurred in heavily male-dominated environments. There is only one member of the appellate judiciary (Baroness Hale) who openly identifies as a feminist, and who explicitly sees it as part of her role to try to change the way her male colleagues think and behave.<sup>3</sup> Consequently, perhaps it would not be at all surprising if senior judges continued to deploy sexual stereotypes in their judgments and speeches.

This article argues that certain senior judges in England and Wales do indeed still at least sometimes employ crude and problematic sexual stereotypes in their judgments or overlook the use of such stereotypes by trial judges, and that this matter deserves attention from a critical perspective. This issue is important: if some senior

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<sup>3</sup> See e.g. Hale and Hunter 2008.

judges are still willing to openly employ questionable sexual stereotypes in their decision-making, this is significant not only because of its direct impact on the legal system and the fact that it reinforces these sexual stereotypes rather than challenges them, but also because it may indicate that these sexual stereotypes are seen as unproblematic at a wider level within at least certain leading elements of the legal profession in England and Wales. This article begins by defining what is meant by ‘sexual stereotyping’ and by considering why it is problematic at a general level; this beginning provides a theoretical framework within which to discuss the specific operation of sexual stereotypes in the case law. The article then discusses the overt use of sexual stereotypes in several significant recent English and Welsh cases and a Privy Council decision which represents the law on the provocation defence in this jurisdiction, and explains why the use of the particular sexual stereotypes in question is problematic.<sup>4</sup> Lastly, it concludes that the use of these sexual stereotypes may indicate that feminism has indeed made only limited progress in the English and Welsh legal system, and makes some suggestions as to how this progress may be accelerated.

The cases in question have been selected because they were all decided at appellate level since the turn of the millennium. They are meant to be illustrative; the point here is not that they are necessarily typical cases, but that they are significant: they cannot be sidelined or explained away as unrepresentative, since they have

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<sup>4</sup> Sections 54-56 of the Coroners and Justice Act 2009 will abolish the provocation defence and replace it with a new defence of loss of self-control when they are brought into force. However, this is irrelevant for the purposes of this article, which focuses on the problematic use of sexual stereotypes in judicial decision-making at appellate level; the cases will remain significant in this respect even if they no longer represent the current law.

practical or symbolic importance, or both. The sexual stereotypes employed in them deserve scrutiny from a critical perspective even if they do not indicate that there is a wider problem in this respect within the legal system; a stereotype does not need to be widespread in order for it to be important if the person wielding it is in a position of power over others, and appellate judges are clearly in this position.

### **The liberal feminist objection to the use of sexual stereotypes**

There is no single, agreed definition of the term ‘stereotype’ (see Cava 2008, pp. 28-34, for a summary of the development of the concept of ‘stereotyping’). One view is that a stereotype denotes an oversimplified and standardised conception of a thing, a situation, person or a group of things or persons (see e.g. English and English 1958, p. 253). An alternative view is that a stereotype is “a cognitive structure containing the perceiver’s knowledge, beliefs, and expectancies about some human social group” (Mackie, Hamilton, Susskind, and Roseelli 1996, p. 42). There is debate about whether stereotypes are by definition false universalisms or oversimplified conceptions, but agreement that they involve generalisations, and many commentators have observed that their use (‘stereotyping’) may be problematic. The use of stereotypes may lead to unfair outcomes in individual cases. Moreover, they may preserve an inappropriate hierarchical ordering of groups at a societal level: “stereotypic beliefs about groups often function to provide a rationale for and justification of status disparities, especially differences favoring the in-group” (Mackie, Hamilton, Susskind, and Roseslli 1996, p. 58). The precise definition of a ‘stereotype’ is unimportant for the purposes of this article: the central point is that the

open use of crude generalisations about men and women as groups is still a significant problem at appellate level in the English and Welsh legal system.

Feminism is the advocacy or pursuit of women's rights, interests and equality with men. In this sense, there are numerous types of feminist approaches to law, since there are numerous ideas about the appropriate way to pursue women's interests in relation to the law and numerous conceptions of equality, rights, and justice. One problem in discussing types of feminist approaches to law is that the labels used, such as 'liberal feminism', frequently mean different things to different people. However, at the risk of some over-simplification, it can be said that there are different feminist schools of thought. It is necessary to realise that these schools are models. It should not be thought that it is possible to pigeonhole all feminists in relation to these classifications, or that there are always sharp differences between the various schools in relation to particular issues. Nonetheless, the categories are useful as a resource for interpreting certain underlying premises and thus for understanding more clearly what is often going on when feminists discuss the best way to approach certain issues. The most relevant school of feminism for the purposes of this article is liberal feminism. Liberal feminists want the liberal State to live up to its own ideals (see e.g. Lacey 1998, p. 190). From at least the nineteenth century onwards, liberal feminists have campaigned against "practices and laws which ... relegate women to the 'private sphere' of the home and family" (Barnett 1998, p. 124; see too Frazer and Lacey 1993, p. 79). In the words of Hilaire Barnett, the liberal feminist view is that "by historically and traditionally excluding women from civic life, men not only seized for themselves the high ground of policy and law making, but also subordinated and silenced women, denying women a voice in civic affairs" (Barnett 1998, p. 124). As Barnett notes, the concept of rationality originally carried with it the notion that



women are less rational than men. Ideas about biology ultimately restricted women's role, confining them to a separate but purportedly equal domestic role where they were supposedly perfectly suited for roles as carers and nurturers; "David Hume, Jean-Jacques Rousseau, Immanuel Kant and Georg Wilhelm Friedrich Hegel all questioned women's rationality" (Barnett 1998, p. 97). Hegel, for example, thought that "the difference between men and women is like that between animals and plants" (Hegel 1952, para. 166, p. 264) because the development of women and plants is supposedly more 'placid' than the development of men and animals. Moreover, according to Hegel, "[w]hen women hold the helm of government, the State is at once in jeopardy, because women regulate their actions not by the demands of universality but by arbitrary inclinations and opinions" (Hegel 1952, para. 166, p. 264).

Liberal feminists have long argued that women should have equal roles in the public realm because they are equal, rational persons. Liberal feminist campaigns have addressed numerous aspects of life and society (see e.g. Atkins and Hoggett 1984). In the UK, they have achieved notable reforms such as the right to the vote and the right to equal pay and terms and conditions of work. Liberal feminists expect formal equality. The liberal feminist position is that biology should be irrelevant where employment is concerned "other than where physical attributes render women unable to fulfil the responsibilities entailed in that employment" (Barnett 1998, p. 125). Thus, the liberal feminist view is that it may be reasonable for an employer who requires a worker to be able to lift heavy weights to employ a man rather than a woman. However, should a particular woman be able to satisfy the weight lifting requirement, there is no legitimate reason to exclude her from employment unless another candidate (male or female) is better suited to the position (see Barnett 1998, p. 125). A central liberal feminist tenet is that women generally have the physical and

intellectual capacity to operate in the public sphere under the same conditions as men (see e.g. Lacey 1998, p. 190). They do not need the ‘protection’ of restrictive laws based on sexual stereotypes, as opposed to a proper understanding of the range of women’s capacities, that limit the type of jobs that they might do. The liberal feminist position is that women should enter the workplace under the same norms and conditions as men (see e.g. Levit 1998, pp. 189-190). The result of *United States v Virginia*, for example, is arguably contentious from a liberal feminist outlook.<sup>5</sup> This United States case concerned the constitutionality of the exclusion of women from a military institute (‘VMI’); US women won the right to military education at the same college as men on the ground that their categorical exclusion would deny equal protection to women, but it was uncontested that “admitting women ... would undoubtedly require alterations ... to adjust aspects of the physical training programs”.<sup>6</sup> It is admirable from a liberal feminist perspective that the Supreme Court took the view in this case that “generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description”.<sup>7</sup> However, it is dubious from a liberal feminist perspective that the decision ultimately required adjustments to aspects of the physical training programmes used by the military college in question, since this meant that the institution was restructured to accommodate perceived differences between men and women as groups, although the

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<sup>5</sup> 518 U.S. 515 (1996).

<sup>6</sup> *Ibid*, 550.

<sup>7</sup> *Ibid*.

parties agreed that “*some* women can meet the physical standards [VMI] now impose[s] on men”.<sup>8</sup>

Opposition to the use of sexual stereotypes is a central aspect of liberal feminism. Liberal feminists object to sexual stereotyping on the basis that it judges women in terms of ascribed group characteristics rather than on individual merits.<sup>9</sup> This is the underpinning, for example, of the liberal feminist campaign against sex discrimination in employment: the liberal feminist argument in this context is that women should be considered according to their individual characteristics rather than according to generalisations about what ‘women’ or ‘mothers of young children’ are like. Early twentieth century liberal feminist scholarship on the law challenged the use of sexual stereotypes by judges from the so-called ‘Persons Cases’ onwards. The Persons Cases were cases in which women argued that they were ‘persons’ for the purposes of the law in various respects, such as in relation to the holding of public political office, to which only a ‘person’ could be elected (see Hale 2005). The decisions in many of these cases reflected, and perpetuated, sexual stereotypes; for example, the US Supreme Court decided in *Bradwell v Illinois* that women did not have the right to practice law, stating: “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother”.<sup>10</sup>

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<sup>8</sup> *Ibid*, 541 (emphasis in original).

<sup>9</sup> I am grateful to an anonymous reviewer of this article for this phrase and for the example used in the following sentence.

<sup>10</sup> (1873) 83 US 130, 141.

Stereotypes can be problematic in various ways. They can lead to discrimination against people who are perceived as failing to conform to them,<sup>11</sup> to inappropriate leniency to defendants in rape and other sexual offences trials,<sup>12</sup> and to other major problems such as restrictions caused by views about appropriate sex roles. For instance, Lord Denning MR notoriously asserted in *Ministry of Defence v Jeremiah*: “[a] woman’s hair is her crowning glory, so it is said. She does not like it disturbed: especially when she has just had a ‘hair-do’”.<sup>13</sup> This assertion is obviously problematic because it can be seen as suggesting that, unlike men, all women are obsessed with their physical appearance, or at least their hair when they have just had a ‘hair do’. It would be problematic even if there were empirical evidence that women tend to be more concerned than men are about the state of their hair. Lord Denning’s assertion about women’s hair suggests that all women are the same, and that they are all different from men, in this respect. In *Jeremiah*, a case which concerned an allegation of sex discrimination by a male applicant, Lord Denning MR discussed the women who worked at a particular factory, and stated that, like all women, they do not want to undertake work “which ruins their hair do”.<sup>14</sup> This sends a negative message about women because it suggests that, unlike men, they are so vain that they do not like to undertake certain kinds of work. Furthermore, it reinforces the view that certain workplace roles are not appropriate for women. This type of stereotyping may have material as well as symbolic effects on women: it does not just affect what

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<sup>11</sup> See e.g. Glick and Fiske 2007, 172-174 on “non-traditional” women in the workplace.

<sup>12</sup> See e.g. Ellison and Munro 2009, discussed below, on the use of sexual stereotypes by jury members in rape trials

<sup>13</sup> [1980] QB 87, 96.

<sup>14</sup> *Ibid.*

people think about them; it also potentially affects what kinds of work they are allowed to do and how much pay they can earn.<sup>15</sup>

Sexual stereotypes sometimes pose strategic dilemmas for feminists. They may operate to the benefit of a particular woman claimant or defendant, but they often have an overall negative effect in terms of the rights and interests of women as a group. Feminists have commented on the issue of female claimants appealing to negative stereotypes in a variety of legal settings. Claire de Than noted in 2001 that “the field of equitable remedies contains false universalisms and explicit stereotypes of women which, although not always overtly negative in perspective, are backward-thinking” (2001, p. 197), and observed that claimants “may participate in their own stereotyping in order to win a remedy for their own personal injustices” (2001, p. 198). Likewise, in the context of criminal law, Donald Nicolson has pointed out that “[f]emale specific criminal law defences [such as infanticide]... raise important strategic and ethical dilemmas for feminists in general and for feminist lawyers representing female defendants in particular” (2000, p. 159). These defences might ensure justice for individual female defendants, but Nicolson argues that they are problematic because “[they] reinforce notions of female inferiority, passivity and weakness” (Nicolson 2000, p. 170). Similar strategic and ethical dilemmas also exist in the context of sexual offences cases. Ellison and Munro have commented on evidence suggesting “that jurors may be influenced in their deliberations by a number of extra-legal stereotypes about ‘appropriate’ socio-sexual behaviour” (Ellison and

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<sup>15</sup> See e.g. *Hurley v Mustoe* [1981] IRLR 208, where an employer contravened the Sex Discrimination Act 1975 by not employing women with young children because he believed that women with child care obligations are unreliable in their attendance at work. I am grateful to the editor for this point about the material effect of sexual stereotyping.

Munro 2009, p. 202). As Ellison and Munro put it, there is a vast amount of socio-legal research about this issue:

Factors such as the behaviour of the complainant in the lead-up to the incident ... the level and fact of her intoxication ... the style of her dress ... or the existence of any previous flirtation or intimacy with the defendant have all been shown to influence public (and thus, it has been extrapolated, juror) attributions of responsibility for a sexual assault (Ellison and Munro 2009, pp. 202-203).

The problem here is that individual female complainants may be able to convince jurors that they are making a genuine allegation by at least appearing to conform to extra-legal stereotypes about appropriate behaviour, but, in doing so, they reinforce these stereotypes by confirming their legitimacy. This has a negative effect overall for a variety of reasons: for example, because it allows “defence lawyers to portray the normal behaviour of women as ‘unusual’ or inconsistent with a genuine complaint” (Ellison and Munro 2009, p. 203) and thus has a detrimental effect on the handling of complaints by women who do not conform to extra-legal stereotypes about appropriate behaviour.

### **The Continuing Use of Sexual Stereotypes**

The JSB rightly states that “[s]tereotypes and assumptions about women’s lives can lead to unlawful discrimination” (2009, ch. 6.1.3), and that “assumptions should not be made that all women’s experiences are the same” (2009, ch. 6.1.3). Unfortunately,

notwithstanding the JSB guidance about stereotyping, there is a substantial amount of evidence that at least certain senior members of the judiciary in this jurisdiction need to take greater care in this respect. This article will look at four recent criminal law cases and a civil law case in order to demonstrate that there is still a significant problem in terms of the open use of crude sexual stereotypes at appellate level. These cases have been selected for examination because they were decided by senior judges, and illustrate the point that this article makes about the problematic judicial use of sexual stereotypes. The argument is not that the use of sexual stereotypes in these cases has necessarily already caused demonstrable harm to women, but that it has created a significant risk of such harm occurring or failed to enhance the rights and interests of women. The focus on the cases studied in this article should not be taken to imply that they are the only recent cases where judges in this jurisdiction have openly employed dubious sexual stereotypes in their legal reasoning: these cases are simply used as examples to illustrate the point about the use of sexual stereotypes. For ease of understanding, they are discussed thematically rather than chronologically, starting with two leading cases on homicide. Although some of the cases discussed in this article might be thought to employ sexual stereotypes which are particularly problematic, they are all important.

The first case focused on here, *R v Smith (Morgan)*,<sup>16</sup> is both the oldest and one which has received a significant amount of attention from a feminist perspective. It concerns provocation, a partial defence to murder, which, if successful, reduces

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<sup>16</sup> [2001] 1 AC 146.

what would otherwise be murder to manslaughter.<sup>17</sup> Section 3 of the Homicide Act 1957 partially defines the scope of this defence. It states:

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question, the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

A major issue with provocation is therefore whether the provocation was enough to make a 'reasonable man' do as the defendant did, but the correct interpretation of section 3 has been the subject of numerous appellate cases.<sup>18</sup> The precise operation of the provocation defence and even the very matter of its existence have received extensive critical analysis, much of it feminist.<sup>19</sup> However, one potentially important aspect of the law in this area has received little attention from a feminist perspective: namely, the ruling in a series of cases dating back to Lord Diplock's speech in *R v Camplin* in 1978 that the defendant's sex is potentially relevant to the standard of self-

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<sup>17</sup> As mentioned above, sections 54-56 of the Coroners and Justice Act 2009 will abolish the provocation defence and replace it with a new defence of loss of self-control when they are brought into force.

<sup>18</sup> For an overview of the case law, see the discussion of it in *R v James and Karimi* [2006] EWCA Crim 14; [2006] 1 All ER 759, [5]-[35].

<sup>19</sup> See e.g. Burton 2003; Edwards 2007; Reddy 2008; and Wells 2000.



control to be expected of him or her in the context of the provocation defence.<sup>20</sup> The issue in *R v Smith (Morgan)* was whether characteristics of the defendant other than age and sex may be relevant to the expected standard of control, or whether age and sex are the only potentially relevant characteristics of the defendant in this respect. The majority of the House of Lords decided that the test was whether “the circumstances were such as to make the loss of self-control sufficiently *excusable* to reduce the gravity of the offence from murder to manslaughter”,<sup>21</sup> that this was entirely a matter for the jury, and that members of the jury could accordingly take account of any “characteristic of the accused, whether temporary or permanent, which affected the degree of control which society could reasonably have expected of *him* and which it would be unjust not to take into account”.<sup>22</sup> Understandably, critical analysis of this case has focused on this ratio (see e.g. Burton 2001). However, it is Lord Hoffmann’s observations about the sex of the defendant which are important for the purposes of this article. Although aspects of Lord Hoffmann’s speech may be conducive to the interests of women, it is problematic in certain significant respects (on both points, see Burton 2001, pp. 250-1 and pp. 253-256). In the context of this article, the central problem with Lord Hoffmann’s speech is his reference to the potential relevance of the sex of the defendant. Having noted that “[a] number of writers and judges have thought that Lord Diplock was wrong to include the sex of the defendant” in the relevant test,<sup>23</sup> he concluded that Lord Diplock had in fact been correct, since he “was only drawing attention to the fact that the hormonal

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<sup>20</sup> [1978] AC 705.

<sup>21</sup> *Supra* n 16 at 173, per Lord Hoffmann.

<sup>22</sup> *Ibid* at 173-174.

<sup>23</sup> *Supra* n 16 at 166.

development of male adolescents is different from that of females”.<sup>24</sup> The problem with this statement about hormonal development is that it is a sweeping generalisation about a supposed distinction between male and female adolescents which holds that a lesser standard of self-control applies to either boys or girls in the context of the provocation defence. This aspect of Lord Hoffmann’s speech seems to draw upon the popular idea that girls develop emotional maturity faster than boys do, and brings to mind Lois Bibbings’ claim that, “if, in some contexts, judges and magistrates view male violence as normal and expected, if not wholly acceptable, they may be inclined to impose low sentences for some such behaviour” (2000, p. 239, not specifically commenting on *Smith (Morgan)*). Although English courts no longer follow the ratio in *Smith (Morgan)*, this aspect of Lord Hoffmann’s speech still represents the law. It may in fact be supported by certain scientific studies,<sup>25</sup> but the matter is not clear-cut and Lord Hoffmann does not appear to see anything problematic about making a sweeping assertion about hormonal differences between boys and girls.

It is important to clarify the nature of the problem here. The point is not that the outcome of the case was unfair to a female defendant (the defendant was in fact a man), that it resulted in an inappropriate acquittal, that the use of a sexual stereotype affected the outcome of the case, or that Lord Hoffmann should have cited scientific studies because they can definitively establish the existence of sex differences (see e.g. Creager, Lunbeck, and Schiebinger 2002 on the issue of gender bias in science). Nor is the point that an appellate judge would normally be expected to cite scientific

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<sup>24</sup> *Ibid.*

<sup>25</sup> As Nicole Hess and Edward Hagen tentatively put it, “[m]any studies have found differences in the types of aggression used by males and females, at least in children and adolescents. Boys tend to use direct physical or verbal aggression, whereas girls tend to use more indirect forms of aggression that prominently feature gossip” (2006, 231).

or sociological empirical evidence to support an assertion about the correct interpretation of the law. Judges almost never cite scientific or sociological empirical evidence to support their interpretations of the law, and are not generally encouraged to do so. The point is that Lord Hoffmann's reference to the potential relevance of the sex of the defendant seems to be based upon the sexual stereotype that girls always develop emotional maturity faster than boys do because of hormonal differences, and that this aspect of his Lordship's approach is potentially seriously prejudicial to the interests of young female defendants and arguably too generous to young male defendants, since it apparently applies a higher standard of self-control to girls than to boys.

It might be thought that *Smith (Morgan)* is simply an isolated example of a case featuring a dubious obiter dictum. However, the majority judgment in *Attorney General for Jersey v Holley*, the current leading case on the law on provocation, also raises the issue of prejudice against female defendants because of sexual stereotyping.<sup>26</sup> In this case, a majority of the Privy Council declined to follow *Smith (Morgan)* and held that “[w]hether the provocative act or words and the defendant's response met the ‘ordinary person’ standard prescribed by the statute is the question the jury must consider, not the altogether looser question of whether, having regard to all the circumstances, the jury consider the loss of self-control was sufficiently excusable”.<sup>27</sup> Delivering the judgment of the majority, Lord Nicholls stated:

Taking into account the age and sex of a defendant ... is not an exception to this uniform approach. The powers of self-control

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<sup>26</sup> [2005] UKPC 23; [2005] 2 AC 580.

<sup>27</sup> *Ibid* at [22], per Lord Nicholls.

possessed by *ordinary* people vary according to their age and, more doubtfully, their sex. These features are to be contrasted with abnormalities, that is, features not found in a person having ordinary powers of self-control. The former are relevant when identifying and applying the objective standard of self-control, the latter are not.<sup>28</sup>

As the present author has pointed out elsewhere (Elvin, 2006), this tentative reference to the powers of self-control possessed by ordinary people varying according to their sex is contentious. However, *Holley* is now accepted as the definitive statement of the current English and Welsh law on provocation.<sup>29</sup> It thus appears that the jury can currently apply a different test to be met by female as opposed to male defendants in at least certain cases, but it is difficult to know in what way the sex of the defendant is supposed to be potentially relevant in relation to the standard of self-control to be expected of this defendant. Lord Nicholls did not make it clear in what way the sex of the defendant could be important, nor did he explain why he thought that it might be significant. He did not cite any empirical evidence about sex differences to explain why he concluded that “[t]he statutory reasonable man has the power of self-control to be expected of an ordinary person of like sex and age”.<sup>30</sup> Having at first doubted that the powers of self-control of ordinary people vary according to their sex, he simply stated that they do in characterising the expected standard of self-control as varying according to the sex and age of the defendant. Thus, *Holley*, and hence the English and Welsh law on provocation, is premised on the notion that there are

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<sup>28</sup> *Ibid* at [13].

<sup>29</sup> See *James and Karimi*, *supra* n 18.

<sup>30</sup> *Supra* n 26 at [14].

significant differences between males and females as groups in terms of their powers of self-control. This reference to the sex of the defendant is problematic because it is an invitation to the jury to apply any preconceptions they might have in this respect; it allows them to employ any sexual stereotypes they feel appropriate about the powers of self-control to be expected of female as opposed to male defendants, and makes it possible for those sexual stereotypes to determine whether the defendant is convicted of manslaughter as opposed to murder.<sup>31</sup> The situation brings to mind Jennifer Temkin and Andrew Ashworth's criticism of the test of reasonable belief in consent used in relation to certain serious sexual offences under the Sexual Offences Act 2003. The 2003 Act states that "whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents" (see e.g. s. 1(2)). Temkin and Ashworth have pointed out that the reference to "all the circumstances" is objectionable because it provides insufficient guidance to the jury:

The broad reference to "all the circumstances" is an invitation to the jury to scrutinise the complainant's behaviour to determine whether there was anything about it which could have induced a reasonable belief in consent. In this respect the Act contains no real challenge to society's norms and stereotypes about either the relationship between men and women or other sexual situations, and leaves open the

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<sup>31</sup> The Coroners and Justice Act 2009 will abolish the provocation defence and replace it with a new defence of loss of control, but this does not undermine the central point here: that the reference to the sex of the defendant in *Holley* is an invitation to the jury to apply any prejudicial preconceptions that they might have in this context, and thus an example of a problematic use of a sexual stereotype at appellate level.

possibility that those stereotypes will determine assessments of reasonableness (Temkin and Ashworth 2004, p. 342).

It is possible to criticise Lord Nicholl’s broad reference to the sex of the defendant as being relevant when identifying and applying the objective standard of self-control in similar terms. His broad statement that “[t]he statutory reasonable man has the power of self-control to be expected of an ordinary person of like sex and age” contains no real challenge to society’s norms and stereotypes about typical male and female powers of self control and leaves open the possibility that these stereotypes will determine assessments of ‘reasonableness’ in the context of the law on provocation: indeed, it appears to *require* members of the jury to make their decisions by reference to these stereotypes.

The continuing use of crude sexual stereotypes can be seen in a second area in *Bonser v UK Coal Mining Ltd*:<sup>32</sup> the tort law on liability for workplace stress. In this case, the claimant sued her employer for psychiatric injury arising from her employment as a technical support and training manager. Referring to the claimant’s three areas of responsibility as a manager, the trial judge declared in paragraph 33 of his judgment, “[b]earing in mind that the Claimant had three disciplines and the rest had two, *that she was a woman and the rest men*, I would expect the reasonable man to have said: ‘If this continues she will crack up’”.<sup>33</sup> The emphasised text suggests that the judge assumed that women are more likely to “crack up”, and that a reasonable employer would realise this. It is true that the judge also concluded that unrealistic expectations had been imposed on the one woman manager by reason of

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<sup>32</sup> [2003] EWCA Civ 1296.

<sup>33</sup> Quoted *ibid* at [20] (emphasis added).

the fact that she was made responsible for three disciplines whereas the male managers were only responsible for two. In other words, it is true that the judge was concerned to highlight that the claimant had been treated differently from her male colleagues. However, the judge's specific reference to the fact that the claimant "was a woman and the rest men" plainly suggests that this differential treatment was only part of the reason for his conclusion, and that he assumed that women are more vulnerable to "cracking up", all other factors being equal. This case concerned a claimant who suffered from pre-menstrual stress; the judge concluded that this stress made her vulnerable, and that her workplace problems had aggravated her pre-existing condition.<sup>34</sup> The judge may have been correct to conclude that unrealistic expectations had been placed upon the claimant, and that her psychiatric injury had been reasonably foreseeable to the employer at the relevant time, taking into account her pre-menstrual stress. However, his reference to the fact that the claimant was a woman, as if this were an additional relevant factor, indicates that he partially reached his decision upon the basis of a perceived inherent biological difference between men and women. There is no suggestion anywhere in his judgment that he was doing anything but referring to a supposed biological difference between men and women as groups when he referred to the claimant being a woman rather than a man: for instance, nothing elsewhere in the report of his judgment indicates that his reference to the claimant's sex was intended to highlight a problem arising from power differentials between men and women in the particular workplace concerned which might make women in that environment more likely to develop personal injury because of workplace stress.

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<sup>34</sup> *Ibid.*

The Court of Appeal overturned the judge’s finding of liability, holding that it had not been reasonably foreseeable that pressure would cause the claimant to “crack up”. Ward LJ stated that the trial judge “did not express his conclusion in paragraph 33 as happily as he might have done. There is probably no justification for drawing a distinction between the claimant, a woman with responsibility, and the other male members of the team”.<sup>35</sup> Ward LJ therefore questioned the significance of a distinction between male and female claimants, but he did not rule out the possibility that such a distinction could be relevant, although the *Equal Treatment Bench Book* repeatedly warns against the dangers of sexual stereotyping and the accompanying summary of the *Bench Book* specifically states that judges should not “use words that imply an evaluation of the sexes, however subtle” (JSB 2007, p. 7). Furthermore, he did not point out that the trial judge seemed to have at least partially based his conclusion on a sexual stereotype and that he used the term ‘reasonable man’ rather than ‘reasonable employer’, notwithstanding the fact that the JSB specifically advises judges that they should not “overlook the use – unconscious or otherwise – of gender-based ... stereotyping as an evidential shortcut” (2007, p. 7) and that “we cannot underestimate the importance of using correct terms” (2007, p. 8).<sup>36</sup> Although this case is significant in terms of the rights and interests of women since it deals with the suggestion that women are particularly vulnerable to mental illness caused by

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<sup>35</sup> *Ibid* at [25].

<sup>36</sup> Judges cannot help using this term in certain contexts; for example, in relation to the provocation defence, since it is used in the relevant statute. However, they can, and arguably should, avoid using it in the context of workplace stress claims.



workplace stress, it has received little, if any, in depth academic attention in general, let alone feminist analysis in particular.<sup>37</sup>

Would a reasonable employer assume that women are more vulnerable to stress-related injury, all other factors being equal? This question is, rightly, controversial. Any suggestion that women are more vulnerable to psychiatric injury because of workplace stress would have obvious implications for the interests of women. It could lead to discrimination against women as a group: it could help individual female claimants win cases, but it could disadvantage women in general by reinforcing negative sexual stereotyping. It is unclear whether there are significant inherent biological differences between men and women as groups in respect of their ability to cope with occupational stress.<sup>38</sup> Linda Sagrestrano concludes that there are differences between men and women as groups in terms of workplace stress, but that “it is likely that gender differences emerge from a complex interaction of individual-level factors in the context of specific situations, such as power differentials and unequal access to resources, rather than resulting from inherent biological differences between men and women” (2003, p. 124). It is clear that the suggestion by the legal system that women are inherently more vulnerable to personal injury because of workplace stress could have fundamental negative implications for them. Given these potentially negative implications and the state of the scientific evidence, it would seem that the law should conclude that a reasonable employer would assume that there are no inherent biological differences between men and women as groups in

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<sup>37</sup> See e.g. Eklund 2004, p. 277, simply stating that the decision establishes that “what has to be foreseen is that *illness* might reasonably follow the stress, not just that there would be stress. The claimant must prove that the employer knew that the claimant was vulnerable to a stress induced illness”.

<sup>38</sup> On this point, see e.g. Cooper and Bright 2001.

terms of their ability to cope with occupational stress. However, this does not mean that the employer should assume that there are no distinctions between employees in terms of their vulnerability to the effects of workplace stress. As Lord Simons put it in *Paris v Stepney Borough Council*, “an employer owes a particular duty to each of his employees. His liability in tort arises from his failure to take reasonable care in regard to the particular employee and it is clear that ... all the circumstances relevant to that employee must be taken into consideration”.<sup>39</sup> Thus, a reasonable employer should arguably be aware that factors such as power differentials can have a disproportionate impact upon female employees, and take appropriate steps to deal with any such issues. In other words, a reasonable employer should reason from context, focusing on the reality of employees’ lives in each situation to the extent that the employer is or should be aware of them, and act accordingly (see Hunter 2008, pp. 12-13, discussing the importance of contextualisation in considering women’s interests).

A significant problem with Ward LJ’s judgment in *Bonser* is that it does not deal firmly enough with the trial judge’s apparent assumption that women are inherently particularly vulnerable to mental illness caused by workplace stress (see Hunter 2008, pp. 11-12, arguing that it is important for judges to criticise the decisions of other judges that adopt myths and stereotypes about women). Similarly contentious judicial assumptions about women and mental illness are evident in another context in *R v Kai-Whitewind*, a recent leading case concerning infanticide.<sup>40</sup> The Law Commission aptly describes infanticide as “a ‘concealed’ partial defence, created by legislation as a specific offence” (2006, para. [1.45]). In England and Wales, it is both a substantive offence and a defence. As the Commission states, “[a]

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<sup>39</sup> [1951] AC 367, 377.

<sup>40</sup> [2005] EWCA Crim 1092; [2005] 2 Cr App R 31.

mother may be charged with this offence. Alternatively, she may be charged with murder and plead infanticide as a partial defence to murder” (2006, [1.45]). The Infanticide Act 1938 governs this area of the law. Section 1(1) of this Act creates a substantive offence.<sup>41</sup> It states:

Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding ... that but for this Act the offence would have amounted to murder, she shall be guilty of ... infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

A mother charged with murder in the circumstances specified in section 1(1) can raise infanticide as a partial defence to murder, reducing what would otherwise be murder to infanticide.<sup>42</sup> It is difficult to add anything new to a feminist analysis of the law on infanticide, since so much has been written about it already from this perspective:<sup>43</sup> as a female-specific offence/defence, its mere existence arguably reinforces “the notion that all women are uncontrollably subject to their ‘raging hormones’” (Nicolson 2000,

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<sup>41</sup> S. 57 of the Coroners and Justice Act 2009 will make minor amendments to the wording of s. 1 of the 1938 Act when s. 57 comes into force, but these amendments are not significant for the purposes of this article.

<sup>42</sup> S 1(2).

<sup>43</sup> See e.g. Wilczynski and Morris 1993; Wilczynski 1997; and Cain 2009, pp. 134-135.

p. 170; cf. Cain 2009, p. 135), which is particularly problematic when the scientific rationale for the law on infanticide is questionable (Nicolson 2000, p. 166).<sup>44</sup> Nonetheless, a few remarks about *R v Kai-Whitewind* are appropriate here. In this case, the defendant, a mother of three, was charged with murdering her youngest child, B. Before B's death, she claimed that B had been conceived in the course of a rape, and told a health visitor that there had been "a fleeting moment when, for no particular reason, she felt like killing ... [him]".<sup>45</sup> B died at twelve weeks old while in the defendant's sole care. At the trial, the defendant simply claimed that he had died of natural causes, and was convicted of murder. The primary issue upon appeal was whether her conviction was safe in the light of expert evidence about the cause of death. The Court of Appeal dismissed her appeal on the facts. Although it noted that there was no evidence to support a finding of infanticide and that the issue had not even arisen for consideration at either the trial or the appeal, the Court nevertheless made contentious observations about the law on infanticide. One particular area of concern for the Court was "a problem when the mother who has in fact killed her infant is unable to admit it".<sup>46</sup> Commenting on this supposed problem, Judge LJ stated:

This may be because she is too unwell to do so, or too emotionally disturbed by what she has in fact done, or too deeply troubled by the consequences of an admission of guilt on her ability to care for any

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<sup>44</sup> For more recent discussion of the medical evidence, see Law Commission 2006, para. [8.24]-[8.26], and Cain 2009, pp. 134-135.

<sup>45</sup> *Supra* n 40 at [11], per Judge LJ (as he then was), summarising the evidence.

<sup>46</sup> *Ibid* at [139].

surviving children. When this happens, it is sometimes difficult to produce psychiatric evidence relating to the balance of the mother's mind. Yet, of itself, it does not automatically follow from denial that the balance of her mind was not disturbed: in some cases it may indeed help to confirm that it was.<sup>47</sup>

A significant difficulty with this statement in terms of the interests of women in general is that the reference to a mother who is “too unwell ... or emotionally disturbed” to admit that she has killed her infant seems to draw upon, and reinforce, deep-rooted sexual stereotypes about motherhood and violence. It not only suggests that a mother who kills her infant may well be so mentally ill that she cannot admit what she has done but that, even in cases where there is no psychiatric evidence suggesting that the balance of the mother's mind was disturbed, a denial may “help to confirm that it was” rather than indicate that the mother is lying. Judge LJ did not refer to any psychiatric evidence to support his conclusion about cases “when the mother who has in fact killed is unable to admit it”; rather, he *assumed* that a denial may in fact confirm that the balance of the mother's mind was disturbed.<sup>48</sup> This is a clear case of sexual stereotyping, and brings to mind Ania Wilczynski's claim in her 1995 study of cases of parents who killed their children: “when a woman kills her own child, she offends not only against the criminal law, but also against the sanctity

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<sup>47</sup> *Ibid.*

<sup>48</sup> The Government subsequently concluded that there is no evidence to support Judge LJ's conclusion about this type of case (MOJ 2008, para. [125]).

of stereotypical femininity; it is, therefore, assumed that she must have been ‘mad’” (1995, p. 178).<sup>49</sup>

It might be true that the regime under the Infanticide Act 1938 “compares very favourably to that in the US, where only a hard-to-prove insanity defence is available to mothers who kill” (Cain 2009, p. 135), and that infanticide law “is the only legal acknowledgment we have of the social and bodily difficulties of birth and childrearing” (Cain 2009, p. 135). Nonetheless, Judge LJ’s judgment in *Kai-Whitewind* is seriously lacking in nuance in places. It is important to bear in mind his characterisation of the defendant’s situation, which draws upon deeply problematic assumptions about motherhood: “[t]he appellant was a woman of good character with two children. She had apparently given them *natural maternal love and affection* before she gave birth to ... [B]”.<sup>50</sup> The emphasised text characterises mothers as naturally loving and affectionate; there is no recognition here of maternal ambivalence or that women might regularly suppress filicidal feelings (see Cain 2009, p. 135 on maternal ambivalence and the suppression of filicidal feelings in women). Considered in conjunction with Judge LJ’s remark that mothers who kill may be “too unwell ... or emotionally disturbed” to admit what they have done, it suggests that mothers who kill are pathological. *Kai-Whitewind* was decided shortly after the Home Office announced a comprehensive review of the law on homicide in 2004; i.e. at a time when any judicial pronouncements on infanticide could have been particularly influential in terms of the development of this area of the law. Although Judge LJ acknowledged that there are major problems with the law on infanticide and

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<sup>49</sup> However, see e.g. Raitt and Zeedyk 2004, making it clear that the criminal law does not inevitably classify mothers who kill their children as ‘mad’ rather than ‘bad’.

<sup>50</sup> *Supra* n 40 at [133].

called for reform in his judgment,<sup>51</sup> he could have done far more to recognise the socio-economic pressures on parents of new babies and the importance of emotional and social support for mothers of young children (see Cain 2009, p. 135 on the relevance of the latter two factors in this context). The JSB guidance on sexual equality issues requires judges to avoid the use of stereotypes, and warns them that assumptions about women's lives can undermine equality (JSB 2009). This guidance implicitly requires judges to consider any relevant scientific or sociological empirical evidence relating to the matter at hand;<sup>52</sup> thus, they should not simply make contentious assumptions about mothers who kill their children but do not admit it, otherwise they may be making assumptions which may undermine sexual equality. Those assumptions may benefit individual defendants, but they may draw upon, and reinforce, objectionable notions of stereotypical femininity and pay insufficient attention to economic, emotional and social factors that contribute to the difficulty of child-rearing and that could ultimately contribute to infanticide: thus, they may act against the interests of women as a whole even if they act in favour of individual female defendants.

*DPP v Smith* is the last case examined here.<sup>53</sup> Although the JSB's *Equal Treatment Bench Book* specifically instructs judges that "[s]tereotypes and assumptions about women's lives can lead to unlawful discrimination" (2009, ch. 6.1.3), a concern about stereotyping is not evident in Creswell J's judgment in this 2006 High Court case on the correct interpretation of section 47 of the Offences

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<sup>51</sup> *Ibid* at [140].

<sup>52</sup> The point here is that scientific or sociological evidence should be taken into account where it is relevant, not that such evidence should be regarded as 'neutral' and above question.

<sup>53</sup> [2006] EWHC 94, [2006] 1 WLR 1571.

Against the Person Act 1861. The defendant physically restrained the complainant, his former partner, and cut off her pony tail and some other hair on the top of her head without her consent. The disputed issue was whether he had caused actual bodily harm.<sup>54</sup> At the trial, the defendant argued that cutting someone's hair off without their consent did not necessarily constitute actual bodily harm, and that he had not caused actual bodily harm on the facts. He accepted that "that the loss of the hair changed one's appearance" and that it might cause distress,<sup>55</sup> but claimed that there was no evidence that he had caused actual bodily harm. His point was that that the victim was upset, but that "[t]his was a matter of emotion and ordinary distress, and could not amount to actual bodily harm as there was nothing to support any suggestion that she suffered psychiatric or psychological harm",<sup>56</sup> since the shaft of the hair as opposed to the root is simply dead tissue. Sir Igor Judge P and Creswell J rejected the defendant's submission, and allowed the prosecution's appeal. However, the ratio of this case is not clear. The law report headnote states that the decision establishes that "the cutting off of a substantial part of a person's hair, without that person's consent, in the course of an assault ... [is] capable of amounting to an assault occasioning actual bodily harm".<sup>57</sup> While there is authority for this view, which may be called the wide interpretation of *Smith*, there is also authority for a second, narrower interpretation of the decision in this case.

The confusion arises because of slight but significant differences in the wording of the two judgments in *Smith*. Sir Igor Judge P delivered his judgment in

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<sup>54</sup> It was clear that the defendant had committed assault and battery.

<sup>55</sup> *Supra* n 53 at [5], per Sir Igor Judge (as he then was), summarising the defendant's contention.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Supra* n 53.



gender neutral terminology, and avoided the use of sexual stereotypes. He stated: “whether it is alive beneath the surface of the skin or dead tissue above the surface of the skin, the hair is an attribute and part of the human body. It is intrinsic to each individual and to the identity of each individual”.<sup>58</sup> Noting that “an individual’s hair is relevant to his or her autonomy”,<sup>59</sup> he observed that “[s]ome regard it as their crowning glory”.<sup>60</sup> This reference to hair being a person’s “crowning glory” is reminiscent of Lord Denning MR’s earlier judgment in *Jeremiah*, but it is notable that Sir Igor Judge P avoided making stereotypical remarks about women’s hair; that is, that he said that *some people*, as opposed to all women, regard hair as their crowning glory. Sir Igor Judge P concluded that a defendant who cuts off a “substantial amount” of another person’s hair without their consent may deserve to be convicted of an offence that carries a maximum sentence of five years’ imprisonment. Regardless of the merits of this conclusion as a matter of strict statutory interpretation, it has the virtue of not being cast in gender-specific terms; for instance, the sex of the victim appears to be irrelevant in his judgment, the law providing equal protection to men and women in this context. Sir Igor Judge P’s judgment supports the wide interpretation of *Smith*. In contrast, Creswell J’s judgment uses a sexual stereotype, and supports a narrower interpretation. While purporting to “fully agree with the analysis and reasoning of Sir Igor Judge P”,<sup>61</sup> Creswell J delivered a judgment that in fact invokes the notion that women are obsessed with their hair. Notwithstanding the fact that Sir Igor Judge P did not even imply let alone explicitly state that women as

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<sup>58</sup> *Ibid* at [18].

<sup>59</sup> *Ibid*.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid* at [20].

opposed to men regard their hair as vitally important, Creswell J asserted: “[a]s Sir Igor Judge P has said, to a woman her hair is a vitally important part of her body. Where a significant portion of a woman’s hair is cut off without her consent, this is a serious matter amounting to actual (not trivial or insignificant) bodily harm”.<sup>62</sup> This double reference to “a woman” in Creswell J’s judgment implies that cutting off a significant amount of a woman’s hair without her consent is always a serious matter, but that this is not necessarily the case with male victims, who may not suffer actual bodily harm in this respect. The premise underpinning Creswell J’s judgment is that, unlike men, all women regard their hair as “a vitally important part of ... [their] body”. This premise is clearly false, since, for example, some women shave their head for aesthetic reasons. Taken to its logical extreme, it should arguably lead to the conclusion that cutting off a significant amount of a woman’s hair without her consent may amount to grievous bodily harm contrary to sections 20 and 18 of the Offences Against the Person Act 1861, since the losing of a vitally important part of the body would by definition amount to grievous bodily harm. It is notable that Creswell J did not feel the needs to qualify his remarks (for example, by referring to ‘some’ or ‘many’ women), and that he was confident enough to make a sweeping generalisation about women, as if the matter were unproblematic from his perspective notwithstanding the fact that the *Equal Treatment Bench Book* states that we should not assume “that all women’s experiences are the same” (2009, ch. 6.1).

Cresswell J’s use of a sexual stereotype did not necessarily affect the outcome of the case: the outcome would have been the same had he adopted Judge P’s gender-neutral approach to the correct interpretation of section 47. Furthermore, the specific outcome – that the defendant had a case to answer under section 47 – is not

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<sup>62</sup> *Ibid* at [21].

prejudicial to the interests of women. The problem in terms of the interests of women is that Creswell J's implicit assumption that they are obsessed with their hair sends a negative message about them. For instance, like Lord Denning MR's judgment in *Jeremiah*, Creswell J's approach can easily be interpreted as lending support to the idea that women are not suitable for certain types of work where their hair might be "disturbed". The point here is that Creswell J's judgment is premised upon a dangerous sexual stereotype.<sup>63</sup>

## **Conclusions**

This article has used five case studies to show that there is still a significant problem within the English and Welsh legal system in terms of the open use of crude sexual stereotypes at appellate court level, or, in the case of Ward LJ's judgment in *Bonser*, that some senior judges need to go further to challenge the apparent use of such sexual stereotypes. This is not to say that feminism has not influenced the development of the English and Welsh legal system, that the majority of judges in this legal system routinely use problematic sexual stereotypes in their legal decision-making, or even that the judges discussed here typically do so; rather, it is to point out that there is still a significant problem with the open use of sexual stereotypes in

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<sup>63</sup> It is worth noting that the use of this sexual stereotype is not just dangerous to women but also potentially disadvantageous to certain men. As mentioned earlier, the double reference to "a woman" in Creswell J's judgment implies that cutting off an amount of a significant amount of a man's hair does not necessarily amount to actual bodily harm. In this sense, his judgment is potentially disadvantageous to those men who nurture and take great pride in their hair or who grow it long for cultural or religious reasons; e.g. Sikhs and Rastafarians . I am grateful to the editor for this point.

judicial reasoning at a senior level in this jurisdiction, despite the pressure on all members of the legal system to at least appear to be ‘politically correct’. It is instructive in this context to consider Temkin’s study on prosecuting and defending rape in England and Wales, published in 2000. For her study, Temkin interviewed “ten highly experienced barristers who between them had prosecuted and defended in hundreds of rape trials” (Temkin 2000, p. 219). Their attitudes showed that rape trials were still conducted in an extremely prejudicial manner. The view of one barrister quoted in Temkin’s study is particularly revealing:

I know that we’re all terribly careful to be politically correct about this and say, “Well, surely women are allowed to go to people’s houses and take lifts in strangers’ cars without expecting to have to give them sex”. But, I mean, people being what they are, I think a jury is always going to say, “She said she didn’t consent, but I think she might have done and obviously he thought she might have consented because of the way she behaved”. So the woman’s behaviour at the time makes it difficult to get a conviction (Temkin 2000, p. 232).

This quotation shows that the barrister in question believed that there was at least a need to appear to be ‘politically correct’ while in the courtroom, but nonetheless still held traditional assumptions about rape and believed that they can be successfully utilised on the defendant’s behalf.<sup>64</sup> Other barristers interviewed by Temkin shared these traditional assumptions; thus, one took a flexible approach in rape cases

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<sup>64</sup> For evidence that jurors do in fact rely on traditional assumptions in this context, see e.g. Finch and Munro 2006, p. 318.

depending on the type of complainant, being firm with “a tarty little number with a mini-skirt around her neck who’s brassy and will give as good as she gets” (2000, p. 230) and sympathetic and gentle with “some little mouse ... because you’ll get more out of her” (2000, p. 230). Most, if not all, members of the English and Welsh legal system are aware that they might be criticised if they do not at least appear to be ‘politically correct’, but the barristers in Temkin’s study still felt that they could pursue ‘politically incorrect’ courtroom tactics.<sup>65</sup> This article has argued that, like the barristers in Temkin’s study, certain senior judges in this jurisdiction are still willing to openly employ questionable sexual stereotypes in their judgments notwithstanding the pressure on them to at least appear to be ‘politically correct’ and the guidance on this issue from the JSB. The open use of these sexual stereotypes may indicate that feminism still needs to make more progress in the English and Welsh legal system: if certain senior judges are still willing to openly employ questionable sexual stereotypes in their judgments or reluctant to challenge the use of these stereotypes, there may be many more judges who are willing to covertly use these sexual stereotypes in their legal decision-making. It would be a mistake to assume that English and Welsh law no longer features the use of obvious sexual stereotypes except in certain isolated areas, such as rape cases: as this article has shown, the judicial use of such stereotypes still occurs in a variety of areas, such as the law on section 47 of the Offences against the Person Act 1861 and the law dealing with claims arising from workplace stress. Unfortunately, the solution to this problem is not straightforward: employing more women as senior judges is not necessarily the

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<sup>65</sup> See too *R v Grant (Marcia)* [2006] EWCA Crim 1545, [37], where a barrister appealed against the length of his client’s sentence on the ground that “[s]he was a timid, utterly charming woman ... [who] was swept up in a 2-minute incident”.

answer, since it might be a mistake to assume that women judges are instrumental in terms of addressing the use of dubious sexual stereotyping in legal reasoning.<sup>66</sup>

The best way to promote feminism within the judiciary, and hence to eliminate sexual stereotyping, may in fact be to promote feminists as judges. Hunter convincingly argues that “*feminist* judges both can and ought to make a difference” (2008, p. 30). Hunter suggests that it would be reasonable to expect that feminist judging would contribute to the eliminating sexual stereotypes because, amongst other things, such judging involves “not relying on stereotypical or gender-biased assumptions about sexual difference or behaviour, challenging myths and stereotypes about women, and critiquing previous judgments or the decisions of ‘brother’ judges that adopt such myths and stereotypes” (2008, p. 12). As Hunter points out, “there is an identifiable body of feminist judicial theory and praxis upon which ... [feminist judges] can draw ... and further ... adopting a feminist approach and applying a feminist philosophy has been shown to be entirely permissible within the bounds of judicial propriety” (2008, p. 30). The former Labour Government created an Advisory Panel on Judicial Diversity “to make recommendations to the Lord Chancellor on how to make speedier and sustained progress to a more diverse judiciary at every level and in all courts in England and Wales” (Advisory Panel on Judicial Diversity 2010, p. 12). The Panel “considered all aspects of diversity, but ... focused particularly on gender, ethnic origin, disability, sexual orientation, geographical location, socioeconomic background, and the implications of being a solicitor rather than a barrister” (2010, p. 14). It made 53 specific recommendations. There is no space to examine these recommendations here, but it is notable that the Panel did not

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<sup>66</sup> There is a vast amount of research on whether women judges make a difference in this respect; for a useful overview, see Feenan 2009, pp. 3-7.

recommend the appointment of feminist judges. This may be a mistake as far as the interests of women are concerned; feminist judges would by definition be committed to eliminating the use of problematic stereotypes about women.

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