

Legal Categories, Women's Lives and the Law Curriculum

OR : Making Gender Examinable[†]

REGINA GRAYCAR AND JENNY MORGAN*

1. Introduction

This article focuses on the approach we have taken in our recently completed project on "Including Gender Issues in the Core Law Curriculum".¹ We outline the project's origins, its conceptual framework, and how our concern about legal categories led to the adoption of an issues based approach. We also give some examples of the approach we have applied and discuss the tensions between using an issues based approach and our commitment to ensuring that the materials can be effectively used in Australian legal education in the 1990s.

In 1993, there was unprecedented public debate in Australia about the "new" phenomenon of "gender bias" in the law, largely "discovered" by the media through the (perhaps insufficiently valued) contribution of the now infamous South Australian Supreme Court Judge, Justice Bollen. His comment that "a measure of rougher than usual handling" may be used by a man to obtain his wife's "consent" to sex became notorious and was the impetus for much of the media debate.² Of course, many women had known for some time that the law was not entirely women-friendly but, in 1993, it became "official". Even former Prime Minister Keating said so in his February 1993 launch of the election campaign, where he almost derailed the entire process by his words "It's back to school for judges and magistrates".

As is now perhaps well known, a number of initiatives followed the rougher than usual handling that the issue received in the media. First, in accordance with 1993 election promises, the Federal Government established an

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* Regina Graycar is a Professor of Law at the University of New South Wales and Jenny Morgan is an Associate Professor of Law at the University of Melbourne. We would like to thank the many contributors to this project for making it possible, and in particular, Jenni Millbank, who worked full time with us for a significant period. Thanks to Margie Cronin for help with this paper.

1 Regina Graycar and Jenny Morgan, *Work and Violence Themes: Including Gender Issues in the Core Law Curriculum* (1996) Department of Employment, Education and Training, Canberra; or <http://uniserve.edu.au/law>

2 See now *Question of Law Reserved on Acquittal Pursuant to Section 351(1A) Criminal Law Consolidation Act (No 1 of 1993)* (1993) 59 SASR 214.

Australian Law Reform Commission inquiry into "Equality Before the Law" with very wide terms of reference (and an almost impossible deadline).³ The former Prime Minister also committed some funds to judicial education on gender issues: programs have since been undertaken by the Family Court of Australia (April 1994); the Australian Institute of Judicial Administration (October 1995); and at the State level, by the West Australian Supreme Court (January 1996). In Western Australia in 1993, a Chief Justice's Taskforce on Gender Bias was established; it reported in June 1994. In New South Wales, the (then) Ministry for the Status and Advancement of Women, with the support of the Law Foundation of New South Wales, established three projects on gender bias and law dealing with the civil justice system, the criminal justice system and women in the legal profession. And the Senate reported on Gender Bias and the Judiciary in May 1994.⁴

Late in 1993, the then Federal Minister for Employment, Education and Training raised concerns with his department about the relationship between the apparent attitudes of the judiciary and legal education. Was there a role for the (then) Department of Employment, Education and Training (DEET) in responding to community concern about the law's gender bias? Several feminist legal academics involved in gender issues were invited to a meeting with bureaucrats from DEET, the Office of the Status of Women, and the Attorney General's Department. It was at that meeting, in September 1993, that the main elements of the project were outlined. Two key decisions were made: first, that the central focus of attention must be the core (generally compulsory) curriculum, rather than its elective components and second, that the structure of the project should be based around themes or issues, rather than traditional subject categories.

2. *Why the Core Curriculum?*

Many law schools now have specialist courses on feminist jurisprudence (or law and gender, women and the law etc). These courses are optional, meaning that students are not required to do them as part of their degree but may choose to do so. While this is an improvement from the time when gender issues were totally absent from law curricula, there are some limits to this approach. First, as optional courses they teach only those students whose interest in these perspectives makes them choose to do the course and they therefore have no impact on those students who do not already have an interest in those issues. There is also an argument that the students doing such courses

3 See Australian Law Reform Commission, *Equality Before the Law*, Discussion Paper No 54 (1993) Australian Law Reform Commission, Sydney; Australian Law Reform Commission, *Equality Before the Law: Women's Access to the Legal System*, Interim Report No 67 (1994) Australian Law Reform Commission, Sydney; Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69, Part I (1994) Australian Law Reform Commission, Sydney; and Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, Part II (1994) Australian Law Reform Commission, Sydney.

4 *Gender Bias and the Judiciary*, Report by the Senate Standing Committee on Legal and Constitutional Affairs (1994) Australian Government Publishing Service, Canberra. A number of non-government initiatives also occurred: for one example, see Law Society of New South Wales, *Getting Through the Door is Not Enough: An Examination of the Equal Employment Opportunity Response of the Legal Profession in the 1990s*, November 1993.

can be marginalised and may experience disadvantage, not least from future employers who have been known to burst out laughing when they see the names of the courses on the students' CVs. What may be more problematic is that the very existence of such courses on the curriculum of a particular law school may lead that school to claim that it has "dealt with" gender. Students who raise gender issues in other courses might be told that they are not relevant there: that they are matters for the optional course.⁵ This is not to suggest that such optional courses should not exist: indeed, we both teach them, but rather, that gender issues are central to the whole of the law curriculum and to all law students.

3. *Why a Thematic Approach? Legal Categories and Women's Lives*

In our 1990 text, *The Hidden Gender of Law*,⁶ we explained our concern that legal categories may not adequately reflect women's lives. This is because, until recently, women played no part in the law: they were not permitted to practise law in Australia until well into this century. Therefore, the doctrines that were developed, and the categories into which they were placed, were constructed by men by reference to their own experiences. As the introduction to a collection of works by feminist legal scholars stated: "The starting point of feminist work must be found in women's lives and not in legal definitions".⁷

Feminist legal scholars are not alone in questioning the categories and definitions used to structure legal problems. Practising lawyers have always known that people's lives did not readily fit into legal categories, yet this has not often been reflected in a legal system that fragments its treatment of people's problems into categories such as tort, crime, family law etc. This fragmentation into narrowly bounded categories is supported by the structure and practice of law, and by the textbooks and law school courses that replicate and reinforce those divisions. While the narrowness of doctrinal categories can serve to exclude a wide range of problems from legal analysis, simply because they do not fall into a recognised cause of action, women's concerns and problems are most likely to suffer this fate, most likely to disappear through the cracks between the hermetically sealed subjects of tort, contract, crime, family law etc. This may occur in one of a number of ways. The experiences at the heart of a potential legal claim may need to be restructured so as to fit into a legal framework and in the process may lose their significance to the person affected. Or, an issue may not previously have been recognised as a problem that could have a legal resolution. For example, as Catharine MacKinnon has pointed out: "Sexual harassment, the event, is not new to women. It is the law

5 See Mary Jane Mossman, "Otherness and the Law School: A Comment on Teaching Gender Equality" (1985) 1 *Canadian J Women and the Law* 213.

6 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990) especially ch1.

7 "Introduction" (1986) 14 *Int'l J Sociology of Law* 233. For an attempt to start an analysis of legal problems from women's lives rather than legal categories, see Tove Stang Dahl, *Women's Law: An Introduction to Feminist Jurisprudence* (1988) where she uses chapters with headings such as "Housewives' Law", "Money Law" and "Birth Law".

of injuries that it is new to."⁸ In cases like this, the only available avenue might be to construct entirely new legal claims.⁹

Even where an issue may be cognisable as having some legal element, it may still not fall within one obvious area of doctrine or have one clear avenue for legal resolution. The phenomenon of violence against women, or the legal valuation of women's work, may cut across a number of different doctrine categories, requiring resort to a variety of them before a legal solution is possible, as may many aspects of women's lives.

Consider the issue of abortion, clearly of significance to women. It is obviously a legal issue, if only because abortion is a frequent matter of litigation and is the subject of regular debates about the appropriate form of legal regulation. But to which category of law does it belong? In Australia, abortion is a criminal law issue since all States and Territories criminalise abortions in certain circumstances. In other jurisdictions, where there are written bills of rights, such as the United States and Canada, legal debates about abortion are also played out as questions of constitutional law.¹⁰ Or, as we saw recently in a case from the Republic of Ireland, the ability of a woman to travel freely to another country in order to secure an abortion may raise an issue of public international law or human rights law (freedom of movement).¹¹ Abortion is a "family law" issue, as demonstrated by attempts by men to prevent women from having an abortion.¹² These actions raise related questions most usually classified as "remedies" issues. And, abortion can be a tort law issue as a case that went to the High Court indicates.¹³ Criminal law texts may tell us about prosecutions of doctors or women, but will not assist in understanding the law's response to men's role in abortion decision making. Remedies texts may tell us about injunctions and how these may be used by men wishing to control women's decision making,¹⁴ but are unlikely to cover the criminal law issues nor concern themselves with the jurisdiction of the Family Court of

8 Catharine A MacKinnon, *Feminism Unmodified* (1987) at 103.

9 This is what MacKinnon proposed in her landmark text, *Sexual Harassment of Working Women* (1979). In that book, she canvassed existing doctrines, in particular, tort and criminal law, and concluded that they were unable to deal adequately with the problem of sexual harassment (see especially at 158-74). What was instead required (and this has since occurred in many parts of the common law world, including Australia) was a statutory right of action based on anti-discrimination law which was able to recognise this issue as arising out of women's inequality, as a group or social injury.

10 See for some US examples: *Roe v Wade* 410 US 113 (1973) and *Webster v Reproductive Health Services* 109 S Ct 3040 (1991); for Canada, see *Morgentaler, Smoling and Scott v The Queen* (1988) 44 DLR (4th) 385.

11 *Attorney General v X and others* (1992) 15 BMLR 104, Supreme Court of Ireland. For a comment, see Ailbhe Smyth, "The 'X' Case: Women and Abortion in the Republic of Ireland, 1992" (1993) 1 *Feminist Leg Studies* 163.

12 See, eg, *In the Marriage of F* (1989) 13 Fam LR 189.

13 See *CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47. The High Court granted special leave to appeal but the case settled prior to hearing. For a discussion of this case, see Kerry Petersen's article in this issue; Reg Graycar and Jenny Morgan "'Unnatural rejection of womanhood and motherhood': Pregnancy, damages and the law — A note on *CES v Superclinics (Aust) Pty Ltd*" (1996) 18 *Syd LR* 323; and Jane Swanton, "Damages for 'wrongful birth' — *CES v Superclinics (Aust) Pty Ltd*" (1996) 4 *Torts LJ* 1.

14 See the discussion by Christine Boyle of two remedies texts, "Book Review" (1985) 63 *Canadian Bar R* 427 and see *Tremblay v Daigle* (1989) 62 DLR (4th) 634.

Australia¹⁵ nor with the role of the medical profession in abortion decision making. None of these texts will tell us about the public funding of abortion, a crucial issue for women.¹⁶ In other words, it is not possible to consult a traditional legal text, look up the topic "abortion", and find gathered together all the relevant legal rules and regulatory practices.

Another illustration is sexual harassment. Nearly twenty years ago, Catharine MacKinnon pointed out in her landmark book, *Sexual Harassment of Working Women*,¹⁷ that sexual harassment could be the subject of regulation by the criminal law, or could give rise to tort remedies. Her argument was that neither of these existing legal actions, while technically available to regulate sexual harassment, was able to take adequate account of the range of harms perpetrated by sexual harassment in the workplace. They failed, in her view, to encompass the harms to women's claims to equality.¹⁸ Largely as a result of her arguments, many jurisdictions have now created statutory remedies, usually within anti-discrimination laws, to respond to sexual harassment. However, this does not mean that these other pre-existing legal doctrines have no role to play. For example, in a recent Tasmanian case (where, at the time of the harassment, there was no available statutory remedy)¹⁹ a woman repeatedly harassed in the workplace successfully relied on a legal claim of trespass to the person and defamation, thereby using tort law in quite creative ways. Similarly, the English Court of Appeal in *Khorasandjian v Bush* used the doctrine of nuisance to support an injunction directed towards a man who had been harassing his former girlfriend.²⁰ It has also been argued that sexual harassment in the workplace could be subject to regulation via occupational health and safety laws²¹ and it is clearly part of employment law more generally through unfair dismissal proceedings. As employment relationships are increasingly seen as matters for contract law, the law of contract also takes a role in the regulation of sexual harassment. This brief discussion is not meant to express a preference for one legal remedy over another, but rather to draw attention to what happens if the starting point is a real legal harm rather than the subject being taught. While it could well be that sexual harassment is raised as a relevant legal harm in a Criminal Law or Tort Law course, it is unlikely that at the

15 See *In the Marriage of F* (1989) 13 Fam LR 189.

16 For the US position, see *Harris v McRae* 448 US 297 (1980) and *Rust v Sullivan* 111 S Ct 1759 (1991). Australian attempts to limit the availability of public funding under the *Health Insurance Act 1973* (Cth) are discussed in *The Hidden Gender of Law*, above n6 at 210-1.

17 Above n9.

18 Id, at 173 and see also Jenny Morgan, "Sexual Harassment and the Public/Private Dichotomy" in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995).

19 *Barker v Lord Mayor, Alderman and Citizens of the City of Hobart, Paul Barrat, Bruno Gentile and James Stacey and Anor.* No. 1501/1990, Hobart Registry, Supreme Court of Tasmania, (unreported jury decision; reported in the *Sunday Tasmanian*, 11 July 1993). See also Sandra S Berns, "The Hobart City Council Case: A Tort of Sexual Harassment for Tasmania?" (1994) 13 *U Tas LR* 412. See now *Sex Discrimination Act 1994* (Tas) (which came into effect from 27 September 1995).

20 [1993] QB 727.

21 See Jan Lucas, "Sexual Harassment, Current Models of Occupational Health and Safety, and Women" (1991) 13 *Australian Feminist Studies* 59 and Therese McDermott "The Duty to Provide a Harassment-Free Work Environment" (1995) 37 *J Industrial Relations* 495.

same time a teacher would draw upon contract law or occupational health and safety law.

These two examples illustrate that the way we generally teach in compartmentalised subject areas is not likely to respond readily to real problems in women's lives:

While [feminist jurisprudence] may be practised in many forms, all forms must start in the same place, ie, by taking women's experience as central, and legal categories or doctrines as merely raw material — to be cut and pasted, stretched, arranged, and sewn together to fit that experience. When legal categories do not match our experience as women, the categories must expand, contract, or move — not us.²²

The invitation from DEET gave us an opportunity to suggest ways of "adding women and stirring" them into the law curriculum; however, a piecemeal approach seemed somewhat inadequate. After a quick trip to the "ladies loo" for the mandatory caucus in the course of the initial meeting with DEET, we all thought that trying to envisage a project that made some connections between legal doctrines was essential. The project was not about transforming the whole of legal education as we know it for all time, but some overarching themes that could connect otherwise separate legal doctrines and were responsive to women's lives would give it some coherence. When asked to nominate three key themes, we agreed on work, violence, and citizenship. Some months later, a tender document was prepared and the Government announced that it would provide \$300,000 for three projects to be undertaken in these areas.

While these three themes may not cover every instance of women's encounters with law, they do encompass many of the most common. For example, the Law Reform Commission in its inquiry into Equality Before the Law received over 600 submissions, a majority of which raised concerns about violence against women and the failure of the legal system to respond effectively to that violence.²³ Women's work, both paid and unpaid, has been a central concern of feminism for many years and campaigns about women's wages continue in 1996, notwithstanding the so-called 1969/72 equal pay decisions.²⁴ Women's unpaid work has also been a significant issue in feminist political activity. It was at the centre of the early 1970s campaign about "wages for housework" but in the late 1990s women are still responsible for the majority of unpaid work in the home, notwithstanding their entry in increasing numbers into the paid workforce.²⁵ Yet that unpaid work continues to be overlooked in legal contexts, for example in disputes over property.²⁶ And, as we move towards the centenary of Federation, there is an increasing recognition

22 Christine Littleton, "Book Review: Feminist Jurisprudence: The Difference Method Makes" (1989) 41 *Stanford LR* 751 at 766 n73.

23 See above n3.

24 Rosemary Hunter, "Representing Gender in Legal Analysis: A Case/Book Study in Labour Law" (1991) 18 *MULR* 305.

25 Michael Bittman, *Juggling Time: How Australian Families Use Time*, (1991) Office of the Status of Women, Department of the Prime Minister and Cabinet.

26 See, eg, *Green v Robinson* (1995) 18 *Fam LR* 594, *MacGregor v Hunter* (1994) DFC 95-150, *The Public Trustee v M Kukula* (1990) 14 *Fam LR* 97 and *Bryson v Bryant and Anor* (1992) 29 *NSWLR* 188, all extracted in Graycar and Morgan, *Work and Violence Themes: Including Gender Issues in the Core Law Curriculum — Property*, above n1.

that traditional models of citizenship are deeply gendered and need reconstruction if we are to have an inclusive polity for the next century.²⁷

4. General Approach

The overall aim was, of course, to incorporate materials about gender within the core law curriculum, using a thematic approach. We kept two basic aims in mind in doing this. We wanted to assist law students to think more laterally about legal problems. To illustrate: we wanted them to understand how violence might be relevant to a legal dispute, for example, over property (by explaining how "undue influence" can be exercised²⁸), and not just relevant to the criminal law, or how women's work in the home could (or should) be valued a different way in the context of a claim against a deceased person's estate (and thus that women's work is relevant in, say, a succession or wills course, and not just in labour law).²⁹ Secondly, and even more basically, we aimed to make women and the multiplicity of women's concerns more visible to law students and to those teaching them.

As described above, these materials are for use in the core, generally compulsory, part of the law curriculum. We took the view that we wanted to create teaching materials that were themselves seen as "core" rather than as optional (and non-examinable) add-ons. However, the materials we have produced are not intended to be comprehensive treatments of either the themes of work and violence or of the parts of the core curriculum to which they are addressed. It was never intended (nor was it feasible) to use this exercise as a means of re-designing the whole of the core law curriculum. Rather, our aim has been to emphasise selected aspects of legal doctrine and link them to issues of gender in cases where work or violence are raised.

The materials carry the labels of contract, property, evidence, civil procedure, torts, criminal law, corporations, succession, family law and legal process. Though they are labelled by reference to these subject areas, some of the materials could be used in other courses. For example, the torts materials on personal injury damages may be used in a remedies course, as could the remedies section from the contract materials. Similarly, parts of the property materials might be used in an equity course in law schools offering distinct courses in equity. So although the materials are not confined to use in the labelled course, we have persisted with the familiar and traditional subject names. Our reasons for doing so are explored below.

27 See, eg, Deborah Cass and Kim Rubenstein, "Representation/s of Women: Towards a Feminist Analysis of the Australian Constitutional System" (1995) 17 *Adel LR* 3; Kim Rubenstein "Citizenship in Australia: Unscrambling its Meaning" (1995) 20 *MULR* 503; Adrian Howe, "The Constitutional Centenary: Absent Feminist Conversationalists" (1995) 20 *MULR* 218; and Margaret Thornton, "Embodying the Citizen" in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995).

28 See Dianne Otto, "A Barren Future? Equity's Conscience and Women's Inequality" (1992) 18 *MULR* 808 discussing *Farmers' Cooperative Executors and Trustees Ltd v Perks* (1989) 52 *SASR* 399 and other cases.

29 See Regina Graycar, "Legal Categories and Women's Work: Explorations for a Cross-Doctrinal Feminist Jurisprudence" (1994) 7 *Canadian J Women and the Law* 34.

The materials vary in approach, in comprehensiveness, and in style. For some subjects, such as contract, extensive segments of the course could be taught from these materials. For others, such as succession, or corporations, the materials provide one or two case studies that can assist teachers in bringing gender issues to the attention of students in relevant ways. In some circumstances, the materials could be issued directly to students as teaching materials. Alternatively, a teacher may prefer to use their own materials, but use some of the questions and approaches from these materials to inform their teaching. There is no prescriptive method of using them. Further, they are available on the internet, via UniServe Law, making them amenable to adaptation by individual users.

We undertook the work on the themes of work and violence.³⁰ In the remaining part of this discussion we elaborate on our approach to our part of the project and give some examples of how we have approached those themes. We also explore the limits of a thematic approach given that we are generally working in a legal education environment that seems wedded to those traditional categories.

5. *Work Theme*

When "work" is discussed in law, it almost invariably refers to "paid work", and is seen as the province of "labour law". But "women's work", while clearly taking place in the paid workforce, is also undertaken extensively in the unpaid workforce. In *The Hidden Gender of Law*, we started the chapter on "work" with a discussion of issues in common law damages cases involving women injured in accidents. We did this in order to avoid the problem of using "work" to mean only those forms of activity for which women are paid, which occur outside the home, and of which our understandings are largely structured by reference to men's lives and men's experience. If we focus solely on the position of women in the paid labour force when we scrutinise "work", we may be (unwittingly) entrenching a false distinction between "work" and "non-work", relegating women's unpaid work to a category of "non-work". It is particularly important to distinguish the concept of women's work from its narrow location within labour law as it has been suggested that "... labour law is a world made up of full-time male breadwinners and the legal rules reflect this conception of the worker".³¹ This is not meant to suggest that the ways in which labour law operates on women's paid work is not a critical area for legal scholars and law students to examine. Nor is it meant to suggest that labour law texts currently adequately address women's participation in the paid labour force.³² Rather, in order to expose the nature of the work women do, and the failure of the law adequately to respond to that work, it seems necessary to examine "work" across a range of legal categories. And,

30 Paula Baron (Tasmania), Sandra Berns (Griffith), and Marcia Neave (Monash) undertook the citizenship part of the project.

31 See Joanne Conaghan, "The Invisibility of Women in Labour Law: Gender-neutrality in Model-building" (1986) 14 *Int'l J Sociology of Law* 377 at 380.

32 See Hunter, above n24, for a review of the failure of labour law and labour law texts to deal adequately with women's concerns.

as much of women's unpaid work is undertaken in the home, by focusing on the valuing of women's work in a variety of legal doctrines, we also break down the dichotomy between the public and the private, which operates in part to keep the domestic sphere unscrutinised by law, whilst regulated by it.

Where might women's unpaid work feature in the core law curriculum? In addition to being central to the assessment of personal injury damages (which we discuss below), it may also be an issue in family property proceedings. Claims based on a woman's contribution as homemaker and parent may be made under the *Family Law Act* 1975 (Cth), or under a State or Territory *De Facto Relationships Act*.³³ In equity, a woman can make a claim for a share in her partner's property if it would be unconscionable, upon the breakdown of a relationship, to disregard her work as a homemaker.³⁴ Similar issues of the undervaluing of women's caring work are also raised when looking at family provision or testator's family maintenance which might be dealt with in a variety of law courses (for example, succession, wills and intestacy, property).³⁵

Other areas that involve women's work include contract law, where work might be examined through employment contracts and surrogacy contracts; equity (or company law/business associations), in the area of women's work in family companies;³⁶ and torts, in the area of sexual harassment.

A. Torts: personal injury damages

To elaborate on just one example, a module we have developed for the compulsory law course in torts deals with the assessment of personal injury damages. There are three main ways in which women can be disadvantaged in that context. First, if they are the accident victims, their damages for loss of earning capacity — that is, their loss of capacity to do paid work — tend to be artificially depressed by gendered assumptions about women's lack of attachment to the paid labour market. A dramatic recent illustration of this is *Wynn's* case where the New South Wales Court of Appeal virtually halved a successful career woman's damages for loss of earning capacity on the basis of speculation that she could not continue working at an executive level until the age of 60: among other reasons given for this view was the fact that to do so would place too many demands on the love and patience of her husband.³⁷ We look at this case in the context of a number of judgments in which women's labour force participation has been treated as something noteworthy, or marginal, rather than as something that adult, gender neutral persons "just do". We provide empirical data about women's labour force participation, and compare this data with

33 NSW and the Northern Territory have such Acts; Victoria has amended its *Property Law Act* to deal with claims by de facto spouses (and compare the approach in the ACT *Domestic Relationships Act* 1994). For more detail, see Graycar and Morgan, *Work and Violence Themes, Including Gender Issues in the Core Law Curriculum — Property*, above n1.

34 See *Baumgartner v Baumgartner* (1987) 164 CLR 137.

35 See Graycar, above n29.

36 See, eg, *Statewide Tobacco Pty Ltd v Morley* (1990) 8 ACLC 827. See our materials on *Contract* and on *Corporations*.

37 *NSW Insurance Ministerial Corporation v Wynn* (1994) Aust Torts Reports 81-304. Compare the decision of the High Court, *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 and see Regina Graycar, "Damaged Awards: The Vicissitudes of Life as a Woman" (1995) 3 *Torts LJ* 160.

comments from judgments in which assumptions are made about these issues. We also note that even where no assumption is made that a woman's primary commitment is to "family responsibilities" rather than paid work outside the home, the disparity in women's and men's earnings might lead to women receiving a lower average award of damages than men for their loss of earning capacity.³⁸

The second part of the materials deals with women's loss of capacity to work in the home. We observe that this has historically been treated either as a loss to someone else, through the action for loss of consortium, or where it is treated as a woman's own loss, as a loss of amenity — a non-economic loss.³⁹ We ask who loses when a woman loses her capacity to work in the home?

Finally, an examination of the case law around *Griffiths v Kerkemeyer* damages — damages for the costs of care — shows that assumptions about gender also affect damages assessment where the accident victim needs considerable amounts of care, often provided by close family members.⁴⁰ But that formulation of the problem is deceptively gender neutral: most of the carers of accident victims are women.⁴¹ Care for children, the aged, the sick, people with disabilities, and people otherwise unable to look after themselves is considered quintessentially women's work⁴² — even where it is done by men⁴³ — and valued (or perhaps more accurately, devalued) accordingly.

38 Women earn about 80% of what men earn if they work full-time; and less than two-thirds overall: see Australian Bureau of Statistics, *Women in Australia* (1993) Australian Bureau of Statistics, Canberra. The marked occupational and industrial sex segmentation of the Australian workforce is in part responsible for this.

39 See Regina Graycar, "Compensation for Loss of Capacity to Work in the Home" (1985) 10 *Syd LR* 528.

40 See *Griffiths v Kerkemeyer* (1977) 139 CLR 161 and *Van Gervan v Fenton* (1992) 175 CLR 327. See also Regina Graycar, "Love's Labour's Cost: The High Court Decision in *Van Gervan v Fenton*" (1993) 1 *Torts LJ* 122 and "Women's Work: Who Cares?" (1992) 14 *Syd LR* 86.

41 See the recognition of this by Stephen J in *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 170-1. Note that "Mothers are ten times more likely than fathers to be carers of a child with severe disabilities; daughters are three times more likely than sons to look after parents with severe disabilities; and most unpaid carers are poorer than the rest of the population and are women. More than 50% depend on social security compared to 27% of the total population": M Smyth, *Women and Work: Issues for the 1990s*, NSW Women's Advisory Council (1991) at 8.

42 For a comprehensive study of the distribution of household work in Australia (which did not, however, specifically focus on caring work), see Bittman, above n25. The findings are based on a 1987 Time Use Pilot study conducted by the Australian Bureau of Statistics. Looking at the analogous area of women caring for their elderly husbands, the report suggests that their unpaid labour "substitutes for the kind of care provided by medical institutions and formal retirement care. The dollar value of this transfer may well be the equal of state health and welfare expenditure on the aged": above n25 at 53.

43 For a graphic illustration of how this work is devalued when undertaken by men, note the description by Connolly J in *Veselinovic v Thorley* of the husband carer as a "grown man who deliberately takes himself out of the work force to provide this type of service": [1988] 1 Qd R 191 at 195. See also *Kovac v Kovac* [1982] 1 NSWLR 656.

6. Violence Theme

The extent of violence against women in Australia is now comparatively well documented⁴⁴ and recent public campaigns and inquiries have shown it to be perhaps the main concern held by Australian women.⁴⁵ Although there is no course in any Australian law school called "violence against women",⁴⁶ it does appear in the law curriculum, but is often hard to identify. In 1990, the New South Wales Domestic Violence Committee contacted all law schools in that State asking for information about their role in teaching about violence. It was the schools' general response that this issue was relevant to criminal law courses, family law and, in those schools that had them, feminist legal theory or law and gender courses.

While it is clear that violence is an essential part of criminal law (and of criminal law courses in Australian legal education),⁴⁷ and is manifest in many family law disputes,⁴⁸ there are a number of other ways in which it could

44 See, for some discussion of the incidence of violence against women in Australia (and the difficulty of accurately documenting its precise extent), National Committee on Violence Against Women, *National Strategy on Violence Against Women* (1992) Australian Government Publishing Service, Canberra; see also Hilary Astor, "Domestic Violence: The Facts", prepared for Family Court of Australia, Gender Awareness Seminar, Kooralbyn, April 1994; and, for community attitudes (and tolerance of violence), see Public Policy Research Centre, *Community Attitudes Towards Domestic Violence in Australia* (commissioned by OSW, 1988) (and compare the Office of the Status of Women's follow up study, "Community Attitudes To Violence Against Women", conducted in 1995). Extensive empirical data on the incidence of violence is provided in Graycar and Morgan, *Work and Violence Themes, Including Gender issues in the Core Law Curriculum — Torts: Part II, Intentional Torts*, above n1.

45 See, eg, Australian Law Reform Commission, *Equality Before the Law: Women's Access to the Legal System*, above n3. A 1994 postcard campaign conducted by the Australian Council of Women found violence to be the main concern of those who responded.

46 There are, however, a number of courses that deal directly and intensively with violence against women: see, eg, "Sex, Crime and Strategies" and "Sex, Violence and Criminality", both offered by the Department of Law and Legal Studies at La Trobe University.

47 However, it is worth emphasising that although a traditional Criminal Law course cannot be taught without mentioning violence against women, it can be done without really noticing and without thereby "teaching" the gendered nature of violence. One obvious example of this, and pursued in our materials, is the leading traditional cases on the provocation doctrine which almost invariably involve violence against women by their male partners when the women are leaving or threatening to leave the relationship. This context often goes unremarked, thereby leaving those students who have noticed it distressed, and all students impoverished in their legal understanding of a central criminal law doctrine.

48 Take the issue of "irretrievable breakdown of marriage", the statutory requirement for dissolution, proved by separation of the parties for twelve months (*Family Law Act* s48), particularly those cases where the parties are separated under the one roof (see s49). In one of the leading cases (*In the Marriage of Pavey* (1976) 10 ALR 259), facts such as the husband broke down the locked bedroom door and raped his wife are dealt with in a curiously dispassionate way. The trial judge had put more weight on his finding that the parties sometimes ate together than the evidence of violence by the husband. Perhaps even more disturbing is the fact that a case like *Pavey* is extracted or referred to frequently for its general discussion about separation under the one roof, but the facts are rarely included, leading students to fail to understand that such challenges to the separation are likely to be associated with the power and control routinely exercised by perpetrators of violence (for examples, see Finlay, H A, Bradbrook, A J and Bailey-Harris, R J, *Family Law: Cases, Materials and Commentary* (1994); Anthony Dickey, *Family Law* (2nd edn, 1990) and compare Parker, S, Parkinson, P and Behrens, J, *Australian Family Law in Context* (1994) at 410.

form a prominent part of other courses if appropriate materials highlighting the issues and which met the pedagogical objectives of those courses were available. The materials we have prepared are designed to make the centrality of violence more visible to other parts of the curriculum where violence has been ignored or not seen as relevant.

For example, as we will elaborate, violence can form a part of a Succession, or Wills and Estates, course. It features in our Torts materials focusing on intentional torts where the issues raised are how tort law might respond to domestic violence, sexual harassment or child sexual abuse. Cases involving the failure of public authorities, such as the police, to protect women from violence (including sexual assault) are included in the materials used to teach negligence law.⁴⁹

Violence could also form part of an Equity course by focusing on the use of equitable doctrines, such as breach of fiduciary duty, to address issues of violence against women.⁵⁰ Violence is also the theme underpinning our treatments of evidence law and civil procedure (the abuse of process as a form of violence or harassment; the role of alternative dispute resolution in cases involving violence), and aspects of contract and property. It is also the issue in our discussions of criminal law defences (provocation and self defence). And, it should be emphasised, this list is by no means exhaustive.

A. Succession Module: The Forfeiture Rule

To give one example of how violence could be integrated into one of these courses, we will outline the materials prepared for a succession/wills and estates course.⁵¹

These materials focus on the forfeiture rule, the rule developed at common law whereby the person responsible for another's death is not permitted to benefit from that death through inheritance. Courts have reconsidered this old rule in the context of women who have killed their male partners after years of violence from them. The materials contain (edited extracts from) some of the relevant cases, some discussions of secondary readings on the issue and a statutory response.⁵²

We start by setting out the classic (English) common law rule for the forfeiture law, which derives from the case of *Cleaver*.⁵³ It is pointed out by one of the secondary commentators that, historically, the rule applied "regardless of the killer's motive or the degree of moral guilt".⁵⁴ However, some judges have taken the view that the rule should not apply to disinherit a woman who

49 See, eg, *Doe v Board of Commissioners of Police of Metropolitan Toronto* (1989) 58 DLR (4th) 396.

50 These issues are touched on briefly in our property materials. See Otto, above n28. The Supreme Court of Canada has used this doctrine in some recent cases: see *Norberg v Wynrib* [1992] 2 SCR 226 and *M(K) v M(H)* [1992] 3 SCR 6. See also Tom Allen, "Civil Liability for Sexual Exploitation in Professional Relationships" (1996) 59 *Mod LR* 56.

51 Prepared for us by Prue Vines.

52 *Public Trustee v Evans* (1985) 2 NSWLR 188, *Re Keitley* [1992] 1 VR 583; *Troja v Troja* (1994) 33 NSWLR 269; *Forfeiture Act* 1991 (ACT); and see also Ken Mackie, "Manslaughter and Succession" (1988) 62 *ALJ* 616 and Jennifer Stuckey-Clarke, "The Forfeiture Rule" in Peter Butt, "The Conveyancer" (1993) 67 *ALJ* 923.

53 *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147.

54 Stuckey-Clarke, above n52 at 923.

killed her husband after he assaulted her six year old daughter, had beaten her and loaded a shotgun (*Evans*);⁵⁵ or to a woman who killed her husband when, after she told him she was leaving him, he then threatened to kill her, and moved towards a knife he had threatened her with previously (*Keitley*).⁵⁶ We also extract a case in which an alternative view was taken (*Troja*).⁵⁷ There, a majority of the New South Wales Court of Appeal supported the continued application of the rule, at least on the facts of that case. The *Forfeiture Act* 1991 (ACT), included in the materials, represents one legislative attempt to ameliorate the impact of the forfeiture rule on women who have killed in response to violence.

Questions attached to the readings ask the students to consider the rationales underlying the rule and provide empirical data on the incidence of spouse killings to challenge some of the judicial assumptions. For example, Young J in *Evans* says (in misleadingly gender neutral language): "My view of the ethos prevailing in this State at this time is that it is commonly recognised that unfortunate situations may occur in family groups whereby a death regrettably occurs because of a situation of domestic violence."⁵⁸ We draw to the attention of students the ways in which gender neutrality is often used in highly gendered contexts. A study of homicide in New South Wales demonstrates that between 1968 and 1981, approximately 25 per cent of all killings in that period were spouse killings, and in 73 per cent of these cases men had killed their wives or de facto wives.⁵⁹ This report also pointed out the very high rate of domestic homicide generally: in the same period, 42.5 per cent of all killings occurred in a domestic context.

We also question whether the recent law reform designed to deal with this problem might more explicitly have recognised the gendered incidence of "spouse" murder.

B. *Women as Victims?*

Violence against women is perhaps the first issue many people think of when asked to identify gender issues. At the level of public activity, it has formed the central focus of feminist campaigns, as well as of a number of government inquiries. However, one concern increasingly raised, and one which we share, is that when focusing on violence we must take care to avoid conceptualising women who are or have been the targets of violence as merely victims, as totally lacking agency. We hope in fact to be able to use this opportunity to focus not only on the ways in which women are harmed, but on their strength, agency and resistance in the context of violence. This probably comes out most clearly in the materials on self-defence prepared for our project by Julie Stubbs. In these, through cases and secondary materials, she throws a critical light on the use of "battered woman syndrome" evidence, focusing particularly on how the concept can obscure ways in which women have exercised

55 *Public Trustee v Evans*, above n52.

56 *Re Keitley*, above n52.

57 *Troja v Troja*, above n52.

58 *Public Trustee v Evans*, above n52.

59 See Alison Wallace, *Homicide: The Social Reality*, Research Study no 5 (1986) Bureau of Crime Statistics and Research, NSW Attorney-General's Department.

agency rather than incapacity, not only in the very action of killing, but also in responding to a situation of violence by, for example, calling on the resources of the state for assistance prior to the fatal violence or leaving (or attempting to leave) the relationship. She also challenges the notion that victimisation and agency can be so readily dichotomised.

A number of authors have tried to develop a framework of analysis that avoids a dichotomised understanding in which women are either always already victims (of male violence etc) or they fully match the idealised image of the male legal actor, the isolated autonomous individual.⁶⁰ For example, the cases in our Corporations Law module (prepared by Peta Spender) concern women who were directors of companies with their husbands.⁶¹ In a series of cases involving the directors' liability for trading while insolvent, courts have tended to expect the women to adopt either the "masculine" model of the company director or to appear as completely incompetent.⁶² Our materials are directed toward getting students to think about alternative ways to characterise these women. As Abrams says: "images, narratives and depictions contribute to the formation of social constructs".⁶³ It is important for students to find "the subtle glosses that courts impose on depictions of victimization; or ... the features or phases of particular social problems on which legal decision-makers choose to focus".⁶⁴

7. *How are the Women Made Central in These Materials?*

In 1985, the late Mary Joe Frug published an innovative article on a Contracts casebook,⁶⁵ focusing on the gendered nature of what we have elsewhere described as one of "the most apparently neutral teaching devices",⁶⁶ the casebook, that is, the materials law students read. Frug engaged in a detailed analysis of one of the leading texts used to teach Contracts in the United States. She noted that women were totally absent as authors of the major part of the book, that is, the cases, either because they were not members of the judiciary

60 See Elizabeth Schneider, "Feminism and the False Dichotomy of Victimization and Agency" (1993) 38 *New York L Sch LR* 387 and Kathryn Abrams, "Sex Wars Redux: Agency and Coercion in Feminist Legal Theory" (1995) 95 *Columbia LR* 304.

61 The Corporations Law formerly required all companies to have at least two directors.

62 See *Metal Manufacturers Ltd v Lewis* (1988) 13 NSWLR 315, *Statewide Tobacco Services v Morley* (1990) 8 ACLC 827 and *Group Four Industries v Brosnan* (1991) 9 ACLC 1181 all extracted in Peta Spender, "Women as Directors of Companies" in Graycar and Morgan, *Work and Violence Themes: Including Gender Issues in the Core Law Curriculum — Corporations Law*, above n1.

63 Above n60 at 353.

64 *Ibid.*

65 Mary Joe Frug, "Re-Reading Contracts: A Feminist Analysis of A Contracts Casebook" (1985) 34 *Am ULR* 1065.

66 *The Hidden Gender of Law*, above n6 at 16. For some other critical treatments of the "gender neutrality" of casebooks, see Mary Becker, "Obscuring the Struggle: Sex Discrimination, Social Security and Stone, Seidman, Sunstein and Tushnet's Constitutional Law" (1989) 89 *Columbia LR* 264; Mary Coombs, "Crime in the Stacks or a Tale of a Text: A Feminist Response to a Criminal Law Textbook" (1988) 38 *J Leg Educ* 117; Rosemary Hunter, "Representing Gender in Legal Analysis: A Case/Book Study in Labour Law" (1991) 18 *MULR* 305; and Carl Tobias, "Gender Issues and the Prosser, Wade and Schwartz Torts Casebook" (1988) 18 *Golden Gate ULR* 495.

due to their historical exclusion from the legal profession, or because none of the judges was ever identified by sex. Because this is also the case in Australia, most of the cases we use are also authored by male judges. Frug goes on to note that almost all the other authoritative speakers in the text, that is, legal commentators, are also identified as male. In our materials, we have tended to refer to a number of women commentators, as there are a number of articles and other secondary materials written by women. We also use full names to ensure that students are made aware of the fact that women also contribute to legal debate, even if in the majority of these cases they are "secondary" authors rather than the primary authors (the judges).

Frug also observed that when considering the parties in the cases, by far the vast majority of cases concerned contract disputes between men. Clearly one of the ways we approached our project was to find cases where women were parties in cases that raised central doctrinal issues, so at this basic representational level, the materials are likely to look very different to a traditional casebook. Frug goes on to note that when women did appear in the reviewed casebook as parties, they were in stereotypical women's work, for example, as nurses or hairdressers or welfare recipients or in "disputes [which] involve contract problems arising from some experience in a family relationship — as wife, mother-in-law, sister-in-law, or niece".⁶⁷ Focusing solely on our Contracts materials, we do at least have cases concerning a novelist and a television presenter⁶⁸ — with not a hairdresser in sight.

The case of the novelist, *Moorhead v Primavera Press*, concerned a dispute between the novelist and her publisher. The prestigious Women's Press in England wanted to republish her book, which had first appeared under the Primavera Press label with a publisher's note by Mr Paul Brennan. The Women's Press had a policy that they only published work by women and would not publish the book with the note. However, the publisher was not prepared to allow Moorhead to take up this option without his preface, which he considered central to the book. The trial judge, tongue firmly planted in his cheek, pointed out that the Women's Press policy "was just the way they do business, and was not a summons to battle on any question of censorship, sexual discrimination, oppression or gender conflict".⁶⁹ He concluded that

it was unreasonable to see the question whether the publisher's note appeared as important, still more unreasonable to tell a British publisher who wanted the book that the note stood [as] the sole surviving witness to a remembered past and hoped-for future of gender detente and peaceable sexual co-existence.⁷⁰ To insist on inclusion of the publisher's note and let a fair commercial opportunity go away on these grounds was not reasonable; it was folly.⁷¹

With some notable exceptions, however, the majority of the cases reproduced in our Contracts materials do concern disputes within family relationships,

⁶⁷ Above n65 at 1078.

⁶⁸ *Finola Moorhead v Paul Brennan (t/as Primavera Press)* (1991) 20 IPR 161 and *Curro & Anor v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337.

⁶⁹ *Moorhead*, id at 172.

⁷⁰ This was the phrase that had been used by the publisher in his letter to the Women's Press.

⁷¹ *Moorhead*, above n68 at 172.

perhaps disproportionately, as did the Contracts casebook Frug reviewed. Frug is critical of this tendency to depict women in their family-based contract disputes, particularly if they are presented unproblematically and draw on historical stereotypes to reinforce traditional views of gender rather than to expand them. However, disputes between family members *are* central to women's involvement with contract law. Rather than ignore them, we have instead chosen to draw attention to ways in which women's family relationships may lead to those disputes and have tried to avoid the mere reinforcement of stereotypes through, for example, the insertion of hypothetical factual scenarios which might reverse traditional gender roles; or by providing factual information questioning traditional gendered assumptions about women's work or the nature of heterosexual relationships (or, indeed, an assumption of heterosexuality). We do not, of course, have any control over how these materials will in fact be used in classrooms and hope that we have provided enough information to allow students to develop their own critical perspectives on traditional legal materials.

8. *The Stories Cases Tell*

One difference between our materials and a traditional text is the frequency with which we have included first instance decisions. We do this for a number of reasons. Appellate judgments tend to focus more on abstract principle, removed from the facts. They often do not deal with the context of the (dis)agreement between the parties, and may disguise rather than reveal issues such as power inequality. To explore gender issues it is often important, therefore, to look at the "stories" in the cases — and this may sometimes be more readily done from trial judgments. Second, traditional materials tend to teach only the landmark decisions, and do not examine the ways that such judgments may later be applied by lower courts. The process of examining later applications of those decisions often reveals much about gendered assumptions. It also illustrates how contract rules formulated in a different historical context (for instance, *Maddison v Alderson*,⁷² or *Lumley v Wagner*⁷³) continue to influence contemporary legal decision making. Third, there is an over representation of wealthy parties and business interests at higher levels of litigation. One possible reason for this is the high cost of litigation, particularly for appeals. It follows that female parties and issues of concern to women appear less frequently in appeal judgments.

Whether we are relying on appeal or trial judgments, there is also an explicit commitment throughout the materials to problematise the process of fact-finding in order to indicate that this process is not independent of the law that is made or found.⁷⁴ For example, in both the Contracts and Evidence materials we discuss the case of *Gough* at various points.⁷⁵ In that case, evidence was given by a bank manager that he must have warned Mrs Gough of her potential

72 (1883) 8 App Cas 467.

73 (1852) 1 DeG, M & G 604; 42 Eng Rep 687 (Ch 1852).

74 For a wonderful illustration of this process, see Lisa Sarmas, "Storytelling and the Law: A Case Study of *Louth v Diprose*" (1994) 19 MULR 701.

75 *Gough v Commonwealth Bank of Australia* (1994) ASC 91 56-270.

liabilities (on a mortgage over her solely owned home given for her husband's business) because, although he had no recollection of the particular occasion, that was what he always did. That this happened was accepted by the trial judge who found his evidence of "invariable practice" persuasive. On the other hand, Mrs Gough's claim that she gave blank returns to their accountant, who then filled in details such as the number of hours she worked in the business, was simply not believed. We ask students to consider why these different findings may have been made and refer them to critical material on the process of fact-finding.⁷⁶

At the broadest level, we have also tried to draw attention to that fact that women are not a uniform group of legal actors all with the same interests. Students are asked, for example, to consider whether a court might have decided a property dispute between lesbians differently from how they might have decided it if the parties were a heterosexual couple.⁷⁷ And cases involving women from non-English speaking backgrounds draw attention to the particular difficulties faced by these women when judged by the objective standard.⁷⁸ However, with the exception of the criminal law materials where intersectionality is a key issue, there are relatively few cases in our materials that explicitly raise those issues. This may reflect the limited access of marginalised groups of women to the legal system, particularly the civil justice system.

9. *The Tension Between Themes and Traditional Doctrine Categories: The Limits of a Thematic Approach*

One way we have tried to respond to the tension between themes and traditional doctrine categories was to ensure that the materials were cross referenced to relevant related issues. For example, in one of the succession cases we use, *Keitley*, Mrs Keitley killed her husband after he had threatened to kill her when she said she was leaving him.⁷⁹ We point out in the materials that it is very common for women to be killed or subject to other violence in these circumstances; for example, in the study undertaken by Wallace, 12 per cent of spouse killings occurred in these circumstances, and they were almost without exception men killing women.⁸⁰ We cross reference this to materials in criminal law courses on provocation as a defence to murder, where the "leading" cases, the traditional cases through which the legal doctrine is taught, overwhelmingly concern men killing their partners who are leaving them or trying to leave them. For example, we ask the students (who would be later year students all of whom will have studied criminal law) to compare

76 See, eg, Kim Lane Scheppele, "Facing Facts in Legal Interpretation" (1990) *Representations* 42 and "Just the Facts, Ma'am: Sexualised Violence, Evidentiary Habits, and the Revision of Truth" (1992) 37 *New York L Sch LR* 123.

77 See *Wilkins v Johnson*, Unreported, NSW Supreme Court, McLelland J, 6 February 1987.

78 See *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

79 *Re Keitley*, above n52.

80 Wallace, above n59 at 100; see also Polk and Ranson, "Patterns of Homicide in Victoria" in Chappell, D, Grabosky, P and Strang, H, *Australian Violence: Contemporary Perspectives* (1991) Australian Institute of Criminology, Canberra. For some more data on the incidence of domestic homicide, see the materials on *Torts: Part II, Intentional Torts*; and *Criminal Law — Defences: Self Defence*, above n1.

the fact situation in *Keitley* with that of well known provocation cases and to consider whether the understanding of violence varies as between the criminal and civil law.

Not only does this approach make the violence more visible, but it also assists the students in making connections with other related areas of law. One important purpose of cross referencing is to remind the students that women (and men) do not experience legal problems in the clean, neat categorised way that traditional law teaching suggests by its divisions into civil and criminal law, public and private law, torts, crime and contract.

Our decision to present the material with labels like Criminal Law or Property might indicate a failure of nerve on our part. After all, if we are concerned that traditional legal categories exclude women, why use them at all? However, we chose to persist with these traditional categories and our decision to do so was very much driven by pragmatism and based on the fact that almost all law schools have courses called contract, tort, criminal law, property etc. We are not aware of any course called work, or violence, or citizenship, or, more specifically, three courses on work, violence and citizenship that purport to teach the core legal knowledge widely accepted as the essential part of an undergraduate law curriculum. So, if the materials are to be used effectively in the current law school climate, we took the view that they had to be responsive to those existing structures, however critical we might be of them. This was because we wanted to be sure that materials we prepared met current course objectives at the same time as they illustrated one of the themes of the project. It was never feasible within the constraints of this project to redo the entire legal curriculum. The themes helped us focus on which issues within a core subject we would target as an example of how gender issues can be raised in run-of-the-mill legal teaching.

It might be suggested that taking legal doctrine "seriously" in the way that we have is really just an "add women and stir approach". In some ways, the project was indeed designed to do just that. So, for example, we have made choices like including cases with women as parties rather than only men to teach, say, unconscionability.⁸¹ However, our method of presenting the materials — the questions asked, the secondary literature included or referred to — was designed to stretch those very categories, to make students think critically about how legal doctrine develops, about the role of "facts" and how that may be affected by gender, and to foreground issues of central importance to women, the valuation of women's work and the way violence against them disappears in traditional legal discourse.

10. Using the Materials

The materials have been sent to universities in hard copy form though numbers of copies are extremely limited. They are also available on the internet, at the UniServe/Law web site.⁸² One clear consequence of the ways in which

81 See *Akins v National Australia Bank* (1994) 34 NSWLR 155, extracted in the *Contracts* materials.

82 <http://uniserve.edu.au/law>

they are being distributed is that, as we mentioned earlier, we have little or no control over how they are to be used (or indeed, whether they are to be used: clearly, there has been no prescription by DEET that they are to be used).⁸³ Academic users are likely to fall into three groups. The first is those who have already made considerable effort to make their materials gender-inclusive. These users will look to the materials for additional ideas and approaches to enhance what they are already committed to doing. The second comprises those who have absolutely no interest in gender issues or are antithetical to the perspectives presented. Members of this group will never open the folder or click on the web site. However, they may not be able to avoid them altogether as, given the availability of the materials on the internet, this group might still find that they are talked about by students in their classrooms. The third and probably most populous group contains those who have an interest in trying to include gender issues in their teaching but lack the confidence or the competence to do so. This is the group that has often asked us, or one of our feminist colleagues, to come and "give the class on gender", thereby reinforcing the vision of gender as an add-on, or "special class" matter, rather than as an integral part of a doctrine area. Those days of the "guest lecture" should now be over.

11. Conclusion

The project we have undertaken should not be seen as (nor was it intended to be) some definitive statement on *the* approach to including gender issues into the law curriculum. Hopefully, it will serve as a guide to future developments and will assist those interested in continuing to work on these issues to do so. It is neither a "complete" nor "completed" project. The fact that it is freely available on the internet means that it can be used in a flexible and dynamic way that best suits any individual law teacher's pedagogical objectives.

It was suggested in a number of submissions to the Law Reform Commission's inquiry into Equality for Women before the Law that law schools are a hostile environment for women. Women students told the Commission that "staff members and students use sexist comments and stereotypes in class examples and examination questions and the experiences and perspectives of women are lacking in course materials and textbooks".⁸⁴ And, while generally the concern was that women were left out of examples and cases used in teaching, there was also concern expressed that often where women *were* included, they were portrayed in demeaning roles. Submissions also recounted instances of women lecturers being treated with disrespect by male students and by their own colleagues; and it was noted that because feminist concerns are not seen as central, lecturers and students who raise them are often attacked by students and sometimes by other staff for not doing "real law", or for being "political". Christine Boyle, a Canadian feminist law professor, describes graphically law's claim to neutrality when relating that she appeared on a conference program under the heading of "Legal Scholarship for a Cause"

83 This is in ironic contrast to the infamous "Priestley 11", the core content that Australian law schools are being asked to teach.

84 Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, above n3 at 137.

while her male tax law colleague was described as speaking under the banner of "Conventional Legal Research".⁸⁵

Materials that treat women as central participants in the legal system, and make their participation "normal" and routine rather than "add-ons"; as bringing a "special" perspective, are essential to making law schools a tolerable environment for women, as well as making the men who will become lawyers realise that women (51 per cent of the population) are legal subjects, legal objects, clients, judges and lawyers. This process will help them to become central participants, rather than the "women" judges and "female" plaintiffs they have always been (compared with the men who need no gendered descriptor). Or, to paraphrase Christine Boyle again, hopefully this project will help us to reveal that "men and the law" has masqueraded as "people and the law" for too long.

85 Christine Boyle, "Sexual Assault and the Feminist Judge" (1985) 1 *Canadian J Women and the Law* 93 at 102 n40.