*Dr Charles Sampford**

RETHINKING THE CORE CURRICULUM

David Wood and I have previously argued[1] that one of the most serious problems of the law curriculum is the absence of theoretical concerns that should distinguish a University law course and are a necessary part of training for legal practice in a changing world. We suggested that part of the answer lay in re-introducing the kind of questioning and theorising provided by 'Jurisprudence' into the core of the curriculum. We suggested the re-introduction of a legal theory component into the first year introductory subject and a full legal theory subject into the penultimate year of the law course. From the first, students would be familiar with the range of general questions that Jurisprudence poses about law and the currently more plausible theoretical solutions. This would make it easier for those staff who wished to ask the more specific versions of those questions about the material covered in their own courses and test the theories that were of most interest to them.

But there are many other problems with the compulsory subjects at the core of the curriculum. One problem that arises from the discussion in the previous article is how best to incorporate this questioning and theorising into the non-Jurisprudence subjects. Although this problem is not confined to compulsory subjects, it is sometimes made more acute because these subjects have been taught for many years, they do not have to attract students, and they may suffer from the view that their supposed centrality to law and practice makes tampering with them unwise.

The second problem is the size of the compulsory core. Where it is still large, it is often criticized for limiting the possibilities for specialisation and tailoring the degree to suit the increasing uses to which law degrees are put.[2] Where the compulsory core was cut back in the 1970s, there was growing pressure to increase the number of subjects that students must do. This may occur formally, through additions to the list of compulsory subjects (eg Jurisprudence as at Melbourne and ANU or a compulsory Honours thesis which Pearce recommends for those faculties which do not as yet require it[3]). More often, it occurs informally because students have to do certain 'optional' subjects in order to gain admission to practice (eg Procedure in Victoria and South Australia, and a total of eight subjects in Tasmania[4]) or selection for articles (eg Company Law and Tax in Victoria). These are often called 'quasi-compulsories'. This

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1 In a paper delivered to a joint seminar of the Monash and Melbourne faculties of law, later published (with David Wood) under the title 'Legal Theory and the Law Curriculum - a response to Pearce' 62 *Australian Law Journal* Jan 1988.

2 Dennis Pearce, Enid Campbell, and Don Harding *Australian Law Schools: a discipline assessment for the Commonwealth Tertiary Education Commission*, AGPS, Canberra, 1987 (hereinafter referred to as 'Pearce Report'), vol 1, pp 20-1.

3 Pearce Report, ibid, vol 1, p 84. When Melbourne University Law School attempted to adopt this recommendation, the pressure on the compulsory curriculum was cited as a major reason for its rejection.

4 Pearce Report, ibid, vol 1, p 90.

puts great pressure on the optional programmes, as the existence of quasi-compulsories severely limits the number of effective choices the student can exercise and reduces the class sizes of other optional subjects.[5] In some cases, the latter pressure is compounded by other largely unrelated moves such as the change to post first year entry in Victoria which would involve small reductions in the length of courses.[6]

Third, and underlying all, is the problem of uncertainty and variation in the purposes of having compulsory subjects at all.

The first of these problems will not be tackled directly as it is the subject of another article.[7] The third problem will be discussed in the next section. However, this article will concentrate on the second problem - outlining a different approach to designing compulsory subjects that deals with the third problem and helps address the first. Finally, I will provide an example of a curriculum built along these lines.

THE AIMS AND NATURE OF CORE SUBJECTS

What is the purpose of having compulsory subjects and what should we aim to do in them? Are they subjects that are necessary for the study of all other ones? Are they introductory subjects that lead on to more specialised ones? Do they offer minimal coverage for those who specialize in other areas? Do they contain materials essential to a University legal education? If so, what *is* a 'university legal education' intended to be? Before attempting an answer, let us engage in the annoying but instructive philosophical habit of looking at some of the mistakes we can fall into in attempting to answer the question.

The first mistake that is made in designing core curricula is the failure to distinguish between what should be compulsory for a university law degree and what is compulsory for practice.[8] Until very recently, it was common to make the 'trade school'[9] assumption that the core subjects were simply those that are required for practice. For example, in 1987 the Melbourne Law School's Aims and Objectives still referred to the core subjects as 'those subjects adjudged by the profession to be necessary for the practice of law'.[10] This has subsequently been changed to read

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5 The Pearce Report saw this as a problem in all law schools whose most severe manifestations appeared in Queensland and Tasmania, vol 1, p 92.

6 This problem may be distorted by the context in which it is discussed and the interests of those involved. Sometimes the discussion of the problem centres on the introduction of a compulsory Jurisprudence course even though this is only one of the subjects that provide the pressure. The problem is wider than Jurisprudence and so the answer must be likewise addressed to the wider causes. In any case as Wood and I pointed out in the above-mentioned article, if it is the view of the Faculty that every well advised student should do Jurisprudence, then making it compulsory does not cut down the choices of the student who takes that good advice!

7 'Legal Theory and Legal Education - the Next Step', Forthcoming, 1 *Legal Education Review*, 1989.

8 'The significance of a subject to professional practice should not in itself be a basis for making it available in a course' Pearce Report, vol 1, p 94.

9 Sir David Derham distinguished 'university' and 'trade school' approaches to legal education an often quoted address published as 'An overview of legal education in Australia' in Legal Education in Australia: Proceedings of National Conference Sydney, 15-20 August, 1976, pp 7, 14.

10 This was despite the McGarvie Committee's emphasis on the distinction and the fact that it was implicitly recognized by the inclusion of Litigation (which was necessary for practice) in the optional curriculum.

'the subjects adjudged by *Faculty* to be necessary for the study of law in a *University*' (emphasis added). This is not to say that Faculty should ignore the profession in determining its curriculum - that would be as academically stupid as a Fine Arts Department ignoring modern art or an English Department ignoring contemporary novels. The point is that we should always remember what the issue is, because we rarely get the right answer from the wrong question!

The second mistake in designing core subjects is to think of their subject matter as 'building blocks' for later subjects. This smacks of traditional views of law as some kind of logical construct - a seamless web made up of consistent and coherent propositions.[11] The very metaphor suggests a single builder and subjects that are so tightly unified that they can be viewed as wholes and put in their place in a single edifice.[12] Few self-respecting legal academics would subscribe to such a view today and any that did would lose that self-respect after thirty minutes in a Jurisprudence class. But when we decide what the core of the law course is to be, it is common for otherwise progressive academics to talk like latter day Langdells.[13]

The third mistake is to think of the core of the legal curriculum as fixed and unchanging. The core is not a core of all law courses past, present and future to which contemporary aberrations like statutes are added as optional extras. The compulsory subjects should be the core of the contemporary curriculum. As that curriculum and its aims change, so should those of its core.[14]

The fourth mistake is to think that the only issue is what the 'subject matter' of the compulsory courses is to be (or as Pearce puts it, the 'area to be covered'[15]). This assumes that the only question on the law school agenda is: 'what is the legal rule about...' As I have argued before, there is much more to a University education than that, indeed there is much more to a *professional* education than that (as I argue elsewhere in this article, practitioners do not practice pure law but law in the context of the conflicts in which their clients are involved and from the point

11 This sometimes even sees the subjects as arranged around single organising principles such as 'promise-keeping' in Contract and 'compensation of harm' in Torts (see discussion below in note 30).

12 As Goodrich suggests, it is the academic who traditionally had this conceit rather than the practitioners and judges who had more practical and less grandiose aims and whose pragmatism ruins any grand scheme in which the law could be so ordered. See Goodrich, P *Reading the Law*, Basil Blackwell, Oxford, 1986, and Sampford, CJG, *The Disorder of Law*, Basil Blackwell, Oxford, 1989.

13 There is, it must be admitted, a more defensible version of this view. Even though the law is not a consistent and coherent body of rules built on and from them, there are certain concepts, propositions and ideas that recur throughout law. These will be used by competing litigants and generate much of the dynamic conflicts in law. The appearance of coherence is often achieved by ignoring those conflicts in particular areas of law. In a sense, they are the building blocks but they are the buildings blocks for the kind of law that we have - a law that is characterized by internal conflict within the legal texts which is generated by external conflicts within society. See Sampford, C, *The Disorder of Law*, Basil Blackwell, Oxford, 1989, Chs 7-9.

14 Some would seem to merely contract the core as it becomes less and less relevant to today. But the whole point of having a compulsory core is that it should be the centre of today's course, rather than paying ever decreasing homage to past ones. Even in reduced form, the compulsory curriculum sets the tone, the agenda and the priorities of the rest of the course at least in the minds of students.

15 Pearce Report, supra n 3, vol 1, p 94.

of view of their clients' interests). In fact there are a range of questions that academics ask about law and they should be reflected in the compulsory curriculum. Thus the issue with which we should be concerned is: 'what questions should we be asking in the core curriculum?'

There is also a general problem in that the selection of material may unintentionally convey impressions and transmit assumptions that we would never endorse in propositional form. In offering an example from my own law school, I do not want to take the relevant draftsmen to task but illustrate how easily we can fall into this mistake. The areas to be covered include: 'the basic concepts of property law, the basic laws relating to contractual and non-contractual obligations, the role of equity and its relationship to the common law, the concept of legal personality, the basic concepts and institutions of public law and the basic workings of the criminal law.'[16] By referring to both contractual and non-contractual obligations, this avoids offering the impression that the classic contractual relations are the only ones in law (see discussion of the suggested subject 'Interpersonal obligation' infra) although this recognition has not yet been translated into changes in the actual subjects in that law school's core curriculum. However, it does convey the equally misleading impression that law is essentially about the relationships between single individuals and that the only institutions with which law is involved are those of the state. What is missing is any discussion of non-government institutions. This is an amazing omission. Corporations, partnerships (and some trusts which duplicate their activity) and unions are central institutions for society and the law. It is through them that most of the productive activities are carried out and it is around them that the economy is structured. Some of them approach (some would say surpass) the government in power and influence. They are the creatures of law, they are the most lucrative clients for lawyers and generate some of the most important issues with which lawyers must deal. Yet they are only mentioned under the heading 'the concept of legal personality'. Thus the core of the law course does not deal with these institutions or the issues concerning them *per se*, but only with the legal image of them as *quasi*-natural persons.[17] This is not only a poor attempt to understand the important socio-legal phenomenon that they represent but does not deal with the substantive *legal* provisions and issues involved. But most of all, it would help to perpetuate the distorted way in which the law has traditionally viewed these institutions - as if they were natural persons with Human (sic) Rights such as privacy. It is also consistent with the way Torts and Contracts were discussed, as if they dealt principally with the activities of single individuals.[18]

Having identified some of the possible errors in designing compulsory curricula, what can be said positively about the aims they should seek to fulfil? First, it is clear that there are several such aims - we should

16 Interim Report of the Curriculum Review Committee, October 1988.

17 In so doing, this is a classically unreflexive way of approaching the issue. What we are told is the way they are viewed by law, not the fascinating story of how and why they are viewed as such in law, a story that involves a practical issue in legal history and ideology.

18 See Hedley, infra n 29 at p 170 'Writers still discuss the moral basis of liability in Tort and Contract, for all the world as if it were an unusual case where litigation resulted from the activities of companies and as if liability were borne by individuals rather than companies and insurers'.

expect as much of anything which takes such a large percentage of our resources and whose importance we emphasise by making it compulsory. The law course has several aims and its core might be expected to share several of them (though not all - the aims of providing choice, specialisation and a variety of law degrees is, of its nature, not realisable through the core curriculum).

The choice of subject matter should serve several purposes. It should cover legal material that is pivotal in the sense that it contains propositions, concepts and ideas that *recur* throughout law. For example, some principles resolve issues in a pivotal area and is built on in other areas. In other cases, the rules, principles and concepts are generated by outside conflicts and are carried through to other areas in which the same or similar conflicts are carried on over a different battleground (and often with a different result).

The subject matter should also reflect the variety of laws in several related senses and for several reasons. First, it should cover the variety of what Summers calls 'legal techniques'[19] (the ways in which laws affect society) - dispute resolution, punishment, guidance, regulation and distribution. A law course whose graduates did not understand, nor had experience with, the various ways that law operates would ill serve those who came to study and/or practise it. Secondly, it should cover the kinds of effects (some would say 'functions'[20]) that law has on the society it regulates (such as the control of undesired behaviour, the redistribution of wealth, the regulation of the economy, the creation and regulation of institutions). Finally, it should provide a basic introduction to, and understanding of, subject areas covered in the law course (such as public law and commercial law). This allows students to make informed choices about the subject areas in which they will do their optional subjects and hence the kind of law degree they will make for themselves. For those who do options in the subject area covered by a compulsory subject, it provides an introduction and a framework that can be assumed by teachers converting later year options into advanced subjects. For those who do not do options in the subject area, it provides a basic minimum of understanding without which we would be unhappy for them to graduate in law from a university. It should be emphasised that law, like the social life it attempts to regulate, is not neatly segregated, packaged and labelled. There will be many possible divisions and any such division is bound to be a rough one. The important issue is not that we attempt to find the perfect way of carving up law but that, when the division is complete, we are not moved to say: 'but you simply cannot leave out...' By way of illustration, I could suggest the following list of subject areas: public law, the law of non-government organisations (corporations, unions, trusts and partnerships), the laws of interpersonal obligation, property law, commercial law (including economic regulation), law and the citizen (including tax and welfare law), international and comparative

19 Summers, RS, 'Naive Instrumentalism and the Law' in PM Hacker and J Raz, *Law Morality and Society: Essays in Honour of HLA Hart*, Oxford, 1977.

20 A term I disavow for reasons discussed in Ch 5 of *The Disorder of Law* supra n 14 - any institution, and especially an institution as all encompassing as law, will be established for a multitude of reasons and will be put to a multitude of further ones; accordingly when we talk of function, we are referring either to the purpose to which we think that law should be put or to an assumption of the effect that law usually has or an assumption of the most common purpose to which the law is put.

law (including legal history which compares law over time rather than space).[21]

However, as argued above, the choice of subject matter is not the only issue. I would suggest that the aims of the compulsory curriculum should include posing the full range of questions that Jurisprudence asks of law and using the full range of methodologies that are needed to answer them. As Wood and I argued in our earlier paper, this does not mean asking all the questions about every area of law dealt with in the compulsory curriculum: it means ensuring that they are asked of *some* area in one of the compulsories. Which questions are asked of which subjects depends to some extent on the interests of the teachers involved. It is a matter of determining what questions are regarded as important by the Faculty and the teachers in the core subjects allocating them among themselves. If a question is regarded as sufficiently important by the Faculty as a whole, then several staff will be interested in it and it is highly likely that one of them will be teaching in one of the core subjects. If not, one of them should be persuaded to take part in teaching one of the subjects.[22]

Jurisprudes should be able to provide special assistance in this matter. They are likely to be at the forefront of the process of asking and answering these general questions about law. As Wood and I suggested in our earlier article, the questions addressed in Jurisprudence should be those of interest to the rest of the Faculty plus any that they think are important because of their own deliberations and from their reading of the Jurisprudential literature. They should be able to propose that questions be put on the agenda for the compulsory curriculum, though it may be a reasonable requirement that they teach it themselves.

ANALYSIS

Discussion of aims and objectives can degenerate into a useless exercise in discursive banality or pious drafting unless it is used to help us analyse and resolve issues before us. So let us now return to the problem to which this article is directed: the pressure imposed on the optional curriculum by the 'quasi-compulsories' (those supposedly optional subjects that students perceive they must do).

The optional programme has borne too much of the responsibility for dealing with changes in the law and new aims for legal education. First, it seems to have been assumed that all new developments in subject matter should take place in the optional curriculum.[23] Tax has become increasingly important, corporations loom ever larger in our economy, and commercial law becomes increasingly important to the operation of the law and law firms. If these areas move to centre stage in modern legal practice, the subjects which teach them become 'quasi-compulsory'. Even developments within traditional core subjects, such as the growing importance of intellectual over other forms of property in a post industrial society, are expected to be dealt with in the optional curriculum. Where new developments are covered by the optional curriculum, the subjects which

21 Jurisprudence and Legal Theory subjects do not deal with an area of law but with questions about law as a whole.

22 It would be reasonable to assume that such a person would be given some choice as s/he is doing the Faculty a favour by changing subjects.

23 Even the Pearce Report seems to make this assumption, supra n 3, vol 1, p 102.

teach them are seen as 'advanced' subjects. But often the material is not so much advanced as merely new.

The optional curriculum has also been expected to bear the burden of asking new questions about law and providing the 'critical and theoretical dimensions'[24] that, after Pearce,[25] are regarded as the largely missing ingredient of Australian legal education. Some of this has been alleviated by the introduction of Jurisprudence into some compulsory curricula, but the subjects that apply these perspectives are still expected to come from the optional curriculum rather than a part of the core.

At the same time as it has had to bear these new burdens, it has been required to achieve the other aims of an optional programme: to cater for the diverse uses to which a law degree can and will be put in the late 20th century, to provide specialist courses, and to provide vital links between research and teaching (by allowing staff to teach in their areas of expertise their research is facilitated and students are brought to the very edge of legal knowledge and have closer contact with high powered legal research than would otherwise be possible).[26]

The corollary of this is that the compulsory subjects have been required to do too little. They have not been fulfilling the kinds of aims outlined in the previous section as appropriate for a contemporary law school. This was not always the case. These subjects and the form in which they were taught constituted an appropriate core and posited a potent agenda for a legal education in mid-century. They represented the principles, techniques and materials that lawyers used to deal with the social problems that most often came before them (ie those of their clients). Torts looked at how lawyers dealt with the risks of communal life in an increasingly interconnected world. Contracts dealt with the then predominant way that the law regulated interpersonal relations. Real property, with an occasional sprinkling of personal property, covered the most valuable and economically important assets. Today, the first is not only dealt with by statutory schemes but by the provision of safety net welfare provisions. In today's world, real property is important but securities and intellectual property are more central to the workings of the law and an economy built on technology and finance. Finally, companies are now much more important economic players and legal clients than trusts or individuals. As the areas that these subjects dealt with have diminished in importance, these subjects have not been reduced or required to take on more - not even those areas of the core subjects that were left out of the subjects as originally designed that have grown in importance and become vital parts of the optional programme.

The compulsory subjects have not incorporated the subject areas that have moved to centre stage in the law and legal practice. They have

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24 Including a range of contextual, perspective and interdisciplinary subjects that are now expected as a vital part of a university legal education.

25 Pearce et al, Report of the Inquiry into the discipline of law for the Commonwealth Tertiary Education Commission, AGPS, Canberra, 1987.

26 In putting it this way, I hope to emphasise that optional subjects can serve important pedagogical goals as well as serve the interests of law teachers (although even the latter should not be ignored - if top law graduates forgo the extremely lucrative careers to become legal academics they do it for a reason (generally the opportunity to research and to an extent teach wherever their minds take them). Universities should be extremely careful not to invalidate that reason.

not even been required to deal with new developments in their own area (apart from the regular updating of the cases used). The compulsory subjects have generally not been required to pursue the new aims of the law schools. Nor have they been significantly revised when the significance of material they covered diminished in importance or when the 'trade school' assumptions that underlay their construction were rejected.

In general, the optional program has been required to do too much and the compulsory programme has been required to do too little.[27] It is not hard to see why this occurs - there is little pressure on a compulsory subject to change and the idea that something is at the core of something breeds a reluctance to change it. Like so many other bad habits, it is easier to explain than justify and hardest of all to change!

THE SUGGESTED ANSWER

The remedy suggested for these problems involves three steps. First, all the topics addressed in the compulsory and quasi compulsory curriculum should be listed.

Secondly, we should look for those areas that have been rendered less central by changes in the law, in legal practice and in the nature of legal education, as well as our students and the kinds of careers they pursue. Conversely, we should also look for those areas that have been rendered more crucial by such changes and move those areas of law into the core curriculum.

Thirdly, we should reconstruct compulsory subjects to combine what is still vital in the traditional compulsory subjects with those areas of law covered by the 'quasis' that have made them indispensable. If there are any materials, questions or issues in the optional program that the Faculty believes every student should do then they must, as a matter of logic, be included in the compulsory curriculum. The preferred way is to increase the scope rather than the number of compulsory subjects. A full programme is summarised in the next section and discussed in the section after. For the moment, two examples will suffice: (a) rather than adding company and labour law to the core curriculum, a new subject could deal with non-government institutions and would take in much of the existing subject of Trusts; (b) rather than adding tax to the compulsory curriculum, it could be included within a 'Tax, Transfer and Compensation' subject which also covered much of the existing Torts subject and provide its replacement.

Each subject would cover a larger area of law and within those areas, more emphasis would be given to those parts that are more important in the 1990s. The material would be dealt with in less detail, but this would be no loss. The core subjects should not be designed as subjects that take the student to the frontiers of legal knowledge. That kind of subject is wasted on students in their early years. Not only are they unable to take in the detail, but attempting to learn an enormous mass of detailed rules makes it just that much harder to see the areas of law studied in their broader perspective and context. The students find it hard enough to keep their heads above water - let alone take a broad and unhurried view of the ocean!

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27 A corollary is that if the optional curriculum is to be reduced in size, it should be required to do less and the compulsory programme should do its fair share.

The rearrangement of subjects should cause neither surprise nor indignation. There are no natural divisions in the subject matter of law over whose boundaries these new categories trespass. The subjects, with which we have become so familiar, owe more to the way that they were initially conceived for the purposes of exposition by nineteenth century legal academics than to any such putative division.[28] The attempt to find doctrinal unity in these subjects has often tended to be denied or appeared forced.[29] The attempt to combine subjects on the basis of their source (as was done at some Universities in the 1960s in their 'Common Law' subjects[30]) is also doomed to failure because every area of law is now characterised by a combination of texts from different sources.[31] However, there are other ways of constructing and differentiating subjects: according to the various roles it plays within society, according to the kind of purposes to which it is regularly put, according to the kind of phenomena it regulates, and according to the interests clients have in the law.[32]

The removal or downgrading of some areas within traditional subjects should not surprise either. If the new subjects represent new emphasis, it would not be surprising that some aspects of the more traditional subjects were less important. Furthermore, it would be surprising if new developments did not arise out of the more traditional subjects. Nothing should be more natural than reviews, revisions and redirection of the compulsory programme.

Subjects which have attempted something similar to that advocated here are to be found in several Australian law schools. The University of New South Wales Law School incorporates two traditional major and separate subjects in 'Property and Equity'. Melbourne combines Constitutional and Administrative Law in the same way. South Australia, and Macquarie have core subjects dealing with the range of business associations ('Associations'[33] and 'Business Organisations' respectively[34]). Melbourne and NSW combine Procedure and Evidence in 'Litigation'. Finally, Macquarie combines Torts and Criminal Law in 'Standards of Legal Responsibility'.[35]

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28 Hedley, S, 'Contract, Tort and Restitution; or, in cutting the legal system down to size' 8 *Legal Studies* 137-8 (1988).

29 See for instance the debate between Winfield on the one hand, and Pollock and Salmond on the other as to whether there was a unifying feature in Tort law; a question that was always asked in terms of whether there was a single unifying principle rather than some other 'functional', operational or contextual feature (including the kinds of interests that clients had). See also the debate between PS Atiyah, PBH Birks and AS Burrows discussed in Hedley ibid where Hedley and Atiyah argue very forcefully that the subjects Torts, Contract and Restitution have single histories, single philosophies, single justifications or single policies. In particular they cannot be organised around the principles of 'promise-keeping', 'compensating harms' and 'unjust enrichment'. As Hedley and Atiyah argue, all three principles, and others, recur throughout the whole area of obligations (Hedley, ibid at p 138ff).

30 Eg Monash and the University of New South Wales.

31 Even if there are such areas, they are the exception rather than the norm and they should be taught as areas of historical curiosity and potential reform rather than a model of how the law should be. On the contrary, I would argue that each of the compulsory subjects and especially the introductory one, should include both statutory and common law material to give a better picture of the law and the kinds of techniques that are necessary to understand and use it.

32 The one 'contextual' issue that even practising lawyers must consider!

33 NSWIT also has a course on Associations.

34 Although 'Business Organisations' is an alternate (with Commercial Law) core subject.

35 Although, as students do a follow up course on 'Personal Injury' they still do a full two core subject.

Of all these efforts, those 'Property and Equity' and 'Constitutional and Administrative Law' come closest in scope to those envisaged in this article.

In effect, this article proposes that such efforts should be repeated for the rest of the core curriculum, adding the parts of the optional curriculum that are too important to be omitted from a law degree in the 1990s whether the graduate intends to practice or not. I am not necessarily advocating that these particular subjects and their approaches to teaching should be adopted. Issues of teaching style, the allocation of teaching resources and, most basic of all, the questions the teacher seeks to pose (other than the standard 'what is the legal rule that...?') and the theories used to answer those questions[36] are matters for debate and legitimate differences of opinion between consenting academics. What is most valuable and worthy of repetition is the basic strategy for a core subject: compress two related areas of law, teach them as a core subject with an emphasis on understanding the recurring issues and the principles most commonly used to deal with them, and intentionally facilitate the possibility of introducing critical and theoretical issues (with all the variety of meanings that some apply to the term) into the subject.[37] That goal may not always be realised - indeed it is intended neither to threaten those who wish to teach in a more traditional way nor to prevent them from doing so. However, it is a structural approach to curriculum design that has real possibilities and provides what I call a 'defeasible imperative' to ask the questions that are necessary to our claim that legal education is an academic pursuit.

These reorganised subjects also achieve the goal of collectively representing the variety of legal doctrine, institutions, techniques (and whatever are considered the most significant variables within law). When subjects are reorganised in this way, it is also more likely that that variety will be represented in a single subject. This facilitates comparative work. For example, it is both easy and natural to consider how similar purposes are fulfilled by different sets of rules and institutions (eg Trading Trusts, Partnerships, and Corporations), and how similar issues are confronted or avoided in the different areas of law.

By covering a wider area, these subjects can also offer a better overview of the subject area, whether as an introduction that helps students to make informed choices about the kind of degree they do and leads on to specialised subjects in the area, or as a broad view that suffices for those who specialise in other areas. In this sense, these subjects are 'basic' in that they are necessary to understand further work - or, as I would suggest, they constitute 'the one subject in the relevant group that every law student should do if they only do one and the one they should do first if they go on to do others'.[38]

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36 See Sampford, CJG and Wood, DAR, 'Legal Theory and the Law Curriculum - a response to Pearce' 62 *Australian Law Journal* (January, 1988) and 'Legal Theory and Legal Education - the Next Step' 1 *Legal Education Review*, 1989 forthcoming.

37 Because these subjects are differentiated according to the kind of purposes to which they are regularly put and the kind of phenomena and interests they regulate, it is easier to ask the questions that are of primary interest to academics - about a key institution within our society - before being absorbed into the fascinating world of legal doctrine.

38 I see the curriculum as divided into groups from which students may choose to give their degrees varying flavours, but which include a central subject that is the one they should do if they only do one and the one they should do first if they decide to do others.

The thrust of this solution is to ensure that the core of the curriculum bears its share of the burden in terms of material covered and the range of questions it asks about it. The idea is to create a curriculum that can form the core of a law course in the 1990s rather than the 1950s or even the 1970s.

GENERAL OUTLINE

The rest of the article will offer ideas on how some of the important areas outside the compulsories might be incorporated into the existing compulsory subjects. In doing so, I am naturally circumspect. Just as non-Jurisprudes expect Jurisprudes to plan the best way to teach and organize the Jurisprudential parts of the curriculum in which they are involved and to put those plans to the Faculty, it is up to the staff in those areas to plan for theirs. Furthermore, there are so many ways of combining the relevant subject matters that there are bound to be differences of opinion that are generally best resolved along the lines favoured by those who will actually teach it.

What I perceive to be important is the method of simultaneously providing more room for optionals and updating the core curriculum by incorporating important elements of the quasi-compulsories. The scheme below is nothing more than an indication of the sort of thing that could be achieved.

However, Jurisprudes may be able to make some specific contributions to the process. Jurisprudes may apply their characteristic way of thinking - about the general, about the purposes which people attempt to use law in our society.[39] Jurisprudes may also have more to contribute because they are used to looking at the law as a whole. It is a natural extension to think about the law school as a whole, about what it does and how it relates to the society from which it draws its funds and into which their students are propelled. It is accordingly natural for Jurisprudes to think about how the law is and hence how it should be presented to our students on their way to their various destinations in society.

Table of Proposed Core Subjects:

NEW	HRS[40]	INCORPORATING THE BASIC ELEMENTS OF:[41]
Intro to the Study of Law	3	Legal Process
Interpersonal Obligation	3	Contracts Torts (part) Labour Law (part) Family Law (part)
Criminal Law	2	Criminal Law
Constitutional & Administrative Law	3	Constitutional Law Administrative Law

39 Other people use the term 'function' for this idea but I eschew the term for reasons I detail in *The Disorder of Law* (Basil Blackwell, Oxford, 1988).

40 Lecture hours per week throughout the whole year (or double the hours for one semester).

41 The subject titles are taken from Melbourne University, but there would be little difficulty translating the scheme for other law schools.

Law of Non government Organisations	3	Trusts Company Law Partnership & Unincorporated Associations (Agency would be briefly covered in the 'contract' part of Interpersonal Obligation) Labour Law (part) Family Law (part)
Tax Transfer & Compensation	3	Tax Welfare Law Torts (compensation schemes)
Property	3	Property Trusts (part) Securities (part) Intellectual Property (part)
Jurisprudence	2	Jurisprudence

This set of subjects involves (generally slight) increases in the size of some compulsory curricula (eg Tasmania, Melbourne, Monash, Adelaide) and a reduction in the size of others (eg NSWIT, QIT, Western Australia, Queensland, Sydney, ANU, Macquarie[42]). However, students' real choice would be increased because the pressure from the 'quasi-compulsories' would be removed (with the exception of Evidence and Procedure which seem to be appropriate *quasis* in that a student who was not planning to practice really does not need to do them). In addition, some of the material from the true optionals would be included in the compulsories so that students are not being forced to make a choice whether to do subjects like welfare and labour law or give them up because they are afraid that they will not score sufficient points from their prospective employers. This curriculum is intended to give real choice by incorporating the quasis and leaving only the real options.

Preliminary Objections

First, it is possible that a total reorganisation along these lines would prove too ambitious for some law schools. Nevertheless, the approach can be applied more or less a subject at a time, thereby providing at least some of the benefits of the overall project. In particular, every subject in which this is achieved gives the students more choice and frees more resources for the teaching of optional subjects.

Secondly, many teachers of these subjects will insist that they cannot possibly teach the existing subjects in any less time than they have at present and that the addition of the suggested material would place an intolerable burden. One answer is that other Universities teach the same subject matter in less time. In this respect, it is interesting that Sydney University has decided to reduce the length of its compulsory subjects to two lecture hours a week despite the fact that they required the subjects to include more policy, evaluation, and discussion of the social, economic,

42 Details of the current curricula are drawn from the Pearce Report, supra n 3, vol 1, pp 138-53 and from more up to date handbooks.

and/or philosophical context.[43] Such objectors will hardly regard the fact that some other University does things differently as a knock-down argument - they will generally argue that their courses are the best and the lesser time devoted to the subject in the other law school amounts to a major weakness.[44]

The answer to this objection must lie in the objectives of a core subject and the way it is taught. If a core subject is seen as providing an overview of the law involved, then this will be aided by a shortened treatment that concentrates on the key principles and the historical, ideological, social, and political context in which they arise. This is appropriate for a subject that occurs early on in a course that is designed to cater for the diverse uses to which a law course is put. If it is taught alongside related areas of law, it will be all the easier to concentrate on the key principles in each of those areas and the differences between the contexts that help to explain how and why the different principles involved - these will be the natural points of departure and comparison between the different areas. If it is taught merely as a series of relatively unrelated rules, it will take a very long time. But if it is taught as a series of rule-based responses to a set of related issues, then not only will it be possible to put the subject in a wider context but it can also be taught more economically.

In some Universities, there may also be scope to use tutorials more productively as an integral part of the teaching programme. This may allow subjects to handle more material but more pertinently, it enables them to handle more difficult subject matter and explore the critical, theoretical and contextual aspects of the broader subjects. This should not be seen as involving more reading but more thinking and discussion of what is read.

Another objection might be that the introduction of the quasi-compulsories into the core subjects will not eliminate the optional tax and company law subjects; the latter will become advanced subjects and the same combination of student perception and employer pressure will mean that students will do these advanced courses as well. Although quite a few students would take advanced tax and company law (without that, there would be little point in offering them), the numbers would be much smaller than the current *quasi*-compulsories. Indeed, the numbers would more closely approximate the needs of the profession for such specialists.

DETAILED SUGGESTIONS FOR RECONSTITUTED SUBJECTS

Introduction to the study of law

This provides an introduction to the range of questions and the various kinds of answers (theories) with which students will be confronted during their law course. These include questions about what the law is, the techniques of legal argument (by which lawyers argue for different answers

43 See 'Report of the Curriculum Review Committee to the Faculty of Law' 1987 and the article by Sampford and Wood in the Bulletin of the Australian Society of Legal Philosophy, June 1987.

44 If anything it will be regarded as a knock down argument against the other law school! It is interesting to note that even where they were arguing that the length of compulsory subjects should be reduced, a recent curriculum review paper at Monash argued that Melbourne's example of combining Constitutional and Administrative Law be merged into one subject should not be adopted because the full year courses in both Constitutional and Administrative law were one of Monash's strengths!

to the first question), the institutions in which those arguments are made, the history that tells us how we got there, and the 'jurisprudential' questions about the nature of law, its justification and the social, political, ideological and philosophical context in which those arguments are made.

Some call this a 'skills' course but it is important that a narrow view is not taken of the skills needed to study law and hence to be taught in a skills course. These skills are not limited to the traditional ones of finding legal materials; deriving a *ratio*; applying the rules of statutory interpretation to real or contrived cases; and the drafting of documents, letters and pleadings. It is important to avoid giving students the impression that those are the only skills that they are expected to acquire, the only skills on which they will be examined, and the only skills on which they will depend in practice.[45] The full range of skills that students need to study law in a university, and practise law reflexively afterwards, includes critical and theoretical skills along with communication skills. Students should start to learn and apply all of them in the first year introductory subject.

All this should be attached to the study of a carefully chosen part of the compulsory curriculum that is not repeated elsewhere (this simultaneously saves time and resources, and means that the students will take it seriously).

There are many requirements that the chosen area should meet.
(1) The area should be an interesting area of law and hopefully one that most students would either have knowledge or empathy.
(2) It should deal with a serious problem within society.
(3) It should not be so difficult that the students cannot get on top of it and deal with the many questions you can ask about law other than 'what is the legal rule that...'
(4) It should demonstrate the range of techniques by which law influences society (dispute resolution, punishment, guidance, regulation, and distribution[46]).
(5) It should raise all the questions on the agenda of the law school.
(6) It should involve sensible alternatives so that students do not 'learn' to expect a single right answer but should be able to argue the alternatives. Likewise, there should be competing policy goals present. These policy goals should be referable to the underlying conflicts between individuals, groups or institutions that fund the litigation and provide the raison d'etre of the legal practice in that area. This should allow us to tease out the uncertainty and the tensions in law.[47]

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45 The Pearce Report emphasises this point (supra n 3, vol 1, pp 113-4) although the broader skills to which they refer are described only as 'intellectual skills' and the specific skills to which they refer are all of the more practical and professional kind and add only negotiation and general communication skills to the above traditional list.

46 I have taken Summers five 'techniques' from his 'Naive Instrumentalism and the Law' in Hacker and Raz *Law Morality and Society: Essays in honour of HLA Hart*, Oxford, Oxford University Press, 1977.

47 I argue elsewhere that our teaching of law should concentrate on these tensions and uncertainties, and show how the conflicts within and about law produce the conflicts in the texts themselves. See *The Disorder of Law*, Ch 9, and 'Legal Theory and Legal Education - the Next Step' 1 *Legal Education Review*, 1989 forthcoming.

(7) It would be useful if it clearly raised the limits of law, or rather the competing ideas of the limits of law.[48]
(8) It should deal with an area in which there are difficulties of compliance/enforcement.
(9) It should include a strong common law element with some cases that help develop interpretative skills and cases, the facts of which students can master and argue from.
(10) It must include a statute that is a relatively 'easy read'. The statutory material should involve substantive legislation that sets the framework of the relevant law and does not merely reform the common law interstitially. We should avoid an area in which the legislation was merely remedying a defect in the common law - this is a traditional view of the role of legislation that is entirely inconsistent to the centrality of legislation in the modern law and the view that the politicians and population have of the law. (This traditional view is not widespread in academia but it is a trap into which we can all too easily fall - dragging our students down with us.)
(11) It should deal with an area in which ideas have been borrowed from other areas of law and applied with the usual mixed success that such attempts enjoy.

Selecting such an area is not an easy task and should involve all legal academics. They should ask themselves if the current choice is the most suitable and if any of the areas they teach would be more suitable. We should also be prepared to accept that the best area might vary from generation to generation as the law changes and the questions that legal educators ask about it change.

One obvious possibility would be the traditional topic of negligence which has been used in some courses for more than a generation. Perhaps the most interesting suggestion was made by Richard Johnstone:[49] Accidents and Compensation including Workers Compensation with or without Traffic Accidents. This certainly seems to have everything: powerful groups and institutions in conflict; the economic effects of the accidents; clear policy alternatives and common law principles (no fault, negligence and all of the problems of proving the latter); the use of penal and tortious remedies, regulation (for safe work-places and regular inspections); and the actual transfer of resources from the government, the insurance companies and the employers themselves etc.

Whatever the choice of area, there is a very strong case for this to be the only law subject taught in the student's first year as suggested at Sydney. If a law school were to proceed to post first year selection, it would be a very good subject to offer to all-comers. It would be a very useful subject for Arts and Commerce students who were not admitted to law courses or who did not want to do a law degree. It would provide useful additional data for selection (though not the only one). To offer such a subject to that wider audience would require more resources, but these might well be provided by other disciplines whose students would be enrolled in it. There are certainly plenty of philosophers,

48 I make this qualification because the limits of law is rarely uncontentious. The argument that something is beyond the limits of law is usually raised by those who do not want to be bound by rules against those whose interest it is to do so.
49 Then a senior tutor at Monash University and convener of the legal education interest group but now a lecturer at Melbourne.

political scientists, historians and sociologists interested in law who could not only provide the extra personnel but could enrich the subject and the law course as a whole.

Interpersonal Obligation (OR Legal Regulation of Inter-personal Relationships)

This subject would include traditional Contract law but would extend to include the full range of inter-personal legal obligations that are recognized and facilitated by law. The list is considerable: obligations created by tortious concepts of proximity etc;[50] obligations created by statute (whether as additions to contractual and tortious obligations or independently of common law); obligations created by group negotiation; and the relations within the family.

Note that these obligations are created by different processes and for different purposes; it is a distortion to think that all obligations are created by the classic forms of contract and it is a distortion that we inadvertently pass on to our students by giving classic contracts pride of place in the core curriculum.[51] There is a view that these are the only justifiable obligations and that society should be founded on such obligations. That is a particular Jurisprudential theory with which I happen to disagree but it is a theory to which I believe that all students should be exposed to form their own opinion. But I would hope that it would be taught as a Jurisprudential theory and not transmitted unconsciously or uncritically. Having a subject that deals with the range of obligations recognized and regulated by law, not only covers an important range of related legal phenomena, but in teaching them together, it makes it easy, even natural, to ask questions about the different social, historical and philosophical contexts in which the law has been invoked to create, protect or regulate them.[52]

Criminal Law

The traditional subject of Criminal law should be expanded to include a discussion of the position of the citizen vis-a-vis the state. There is a strong case for the inclusion of a discussion of civil liberties, regulatory offences, and torts against the person.

The subject should certainly include some issues about prosecution, sentencing and criminal procedure - at the very least because that is the context in which the texts studied in Criminal law operate and, in any

50 If this is dealt with in either the introductory subject or in the Tax Transfer and Compensation subject, this will not be dealt with in depth but will be referred to and used for comparative purposes.

51 See Hedley's comments supra n 29 p 170.

52 Hedley suggests that there should be a single course on 'Obligations' including Torts, Contracts and Restitution as the law that deals with the protection and transfer of assets that an individual may own. I am not much taken by subjects set up on purely doctrinal grounds or by attempts to discuss obligations in terms of assets and would tend to see assets in terms of obligations (see Sampford, *The Disorder of Law*, Ch 8). However the views of Atiyah and Hedley as well as those of Birks and Burrows could both be discussed in such a subject. Indeed it is difficult to discuss whether there is a single principle that controls each of Torts, Contracts and Obligations or whether these three principles compete throughout the law of obligations without teaching them all together.

case, it is impossible to understand the criminal law without dealing with these issues.

Constitutional and Administrative Law

These two subjects are a natural combination as has been largely demonstrated at Melbourne. They are both part of public law as traditionally conceived and there are many links that can be made, both in theme[53] and content.[54]

Property

This emphasis in this subject should be shifted away from the traditional one on real property which was once the most important form of property[55] towards Intellectual Property and Securities which are more crucial now.[56] Some might suggest that Charles Reich's 'new property' (in welfare claims) should be included.[57] My preference would be to merely mention it in this subject and deal with its substance in Tax Transfer and Compensation. However, some property torts could be usefully incorporated.

The equitable elements in this subject should be expanded to make up for the more limited treatment of Trusts in the Law of Non-government Organisations. This follows the approach taken at UNSW and impliedly possible at Monash where the course that satisfies the Council of Legal Education's requirements for the area of 'Trusts' is called 'Property 2'.

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53 It is common to see both Constitutional and Administrative Law as essentially concerned with the limitation of state power.
Others see such views as conditioned by the perspective of their more numerous wealthy private clients who see the state as primarily a hindrance rather than an aid (those who benefit are either too poor to seek the services of a lawyer or do not have any dispute with their benefactor) and bolstered by the myths of English constitutional history (which take as given the once legal omnipotence of the Crown). A more balanced view would acknowledge that there is no power to limit unless it is first recognized by the constitution and that the closure rule of public law is: 'whatever is not authorized is not permitted' rather than the private law rule ('whatever is not prohibited is permitted'). Thus both constitutional and administrative law are about the creation, distribution and regulation of state power. This involves boundaries which are disputed by competing interests and institutions who, by taking their conflicts to law, shape the law. From the perspective of powerful non state institutions and individuals, the state should be limited because a powerful state tends to take resources from them and because, while power is not a zero-sum game, the power of one tends to limit the power of the other. From the perspective of state institutions and those who have hopes for them, the limitation of the state and the deregulation of society do not simply eliminate state power but transfer it. Occasionally, the transfer is effected to every individual in more or less equal measure, but more often the power flows to those 'private' institutions and individuals which are already the most powerful. Whenever a law course deals with boundaries, it should not look at them from a single side but from both as a way of understanding how the non legal conflict generates the legal one, why it is sustained, and the tensions within legal texts that the partial and limited victories of each side produce.

54 Especially as the remedies in constitutional law are to be found in administrative law.

55 When the existing courses on property are examined, one would think that law schools are populated by faded aristocrats, farmers or card-carrying members of the Henry George League.

56 This builds on a trend that is apparent in both Macquarie and UNSW. Note however that as the separate subject of 'Land Law' is still compulsory at Macquarie, this leads to an increase not a decrease in the size of the compulsory core.

57 As is done in Macquarie's 'The notion of property'.

Tax Transfer and Compensation

This subject replaces Tort in the traditional curriculum and incorporates Tax and Social Security. It includes compensation for the interpersonal harm - something that is inevitably an important feature of modern society in which the actions of any individual can affect so many others - from classic Torts to modern compensation schemes. It shows that the law involves, requires and regulates transfers to the individual who suffers harm from several sources - the individual who caused the harm, the harmer's insurers, the harmed's insurers, and/or from the state either through some compulsory scheme or from government revenue (partially funded schemes are a mixture of the last two).

In one sense this leads on, from the amelioration of the effects of the specific harm that one individual or other legal person does to another, to the way the law deals with the overall result of the social and economic milieu and the differential outcomes of wealth and income.[58]

The Tax/transfer apparatus[59] deals with the transfers of wealth that are legally required (as opposed to those that are merely legally regulated in the sense that they are facilitated by the law and certain procedures are laid down for effective transfer[60]). Again, transfers between individuals

58 Some would see this as a matter of 'harm' that has been done to individuals concerned (perhaps even deliberately if someone attempts to maintain a capitalist 'system'). This is not a view I take. The concept of harm done by one person to another is difficult enough in Torts and may have to be superseded or at least broadened there. In a sense, the traditional torts deal with the results of interaction in a complex interdependent society. The concept of harm is dependent on a concept of what the person would be like if the other harming party had not acted. But the question is also a matter of what would have happened if the plaintiff had not acted as he did. Take the classic road accident. What if the car passenger had not entered the car? What if all the other drivers had not gone onto the roads that day? The traditional approach is to say that the defendant must take the plaintiff as he finds her. What this really means is that the law and the court and the parties must take the society as they find it. However, it is often the case that the major reason why the harm occurred is because the society is as it is. In such a case, there is no 'harm' in the sense that the individual is worse off than he would have been otherwise unless the proposition is about what he would be like in the absence of society. Such Roussevian questions are unanswerable and in any case irrelevant. What the court has to deal with is the different way the luck of social interaction affects different individuals and to determine how those who have fared relatively badly are to be treated - will they have to 'wear it', will they be compensated by some other person in their proximity whose actions were at least partly involved, will some insurance company or scheme pay for it, or is it the responsibility of the community as a whole? When it is put in these terms, it is easy to see the connection between the two parts of the subject. In both 'torts' and the tax transfer system, there are many cases where the cause can be put down to an individual whose actions and duties make him a prime candidate for the one who is to pay. For example, trespassers are required to pay for the property they damage and the law may require that the assets of a dying or departing spouse be distributed to their widowed or deserted partner. In both cases, there are cases in which it is very hard to sheet home the blame on any individual, and the 'cause' of the plaintiff's or welfare beneficiaries' complaint and relative deprivation lie in the way that the road traffic or the economy works. In both, there are those who will suggest that the individual should bear the cost and others that the society should.

59 Some may refer to the tax/transfer 'system' but that implies a degree of order that is profoundly misleading and the author finds that in general, the discussion of law in terms of system more of a hindrance (see *The Disorder of Law*, passim).

60 It would be possible to argue that the transfer of wealth by gift and testament should also be included as the legally regulated and facilitated (and in the case of Testators Family maintenance, specific transfers are legally required). These laws are not only important in legal practice but have always been an important aspect of the economic structure of society and the distribution of wealth and life chances.

are partly direct where individuals are required to maintain their partners during their relationship and after their separation or death, partly through private insurance and it is particularly provided by the state that requires general transfers from those with more to those with less.[61]

But, in addition, the tax/transfer apparatus provides for transfers by direct provision, full funding, subsidy, and/or tax expenditure between 'private' purposes and irreducibly 'public' purposes (such as defence) and mixed private/public purposes (eg education, child care, investment in export industries).

Some might prefer a slightly different subject to fill this spot - Tax Transfer and Economic Management. The argument for the latter is that it emphasises the more general effects of tax law. These encompass more than the transfer of wealth between individuals: they also include the transfer of funds to public purposes and the regulation of economic activity by differential rates of taxation and allow the subject to naturally extend to other forms of regulation. This would mean that the compensation issues would be covered elsewhere - perhaps as the subject area dealt with in 'Introduction to the Study of Law'.

Law of Non-government Organisations

Whereas 'Constitutional and Administration Law' deals with government organisations, this subject would provide an introduction into the institutions by which the other 75% of our society is organised, what is often rather misleadingly called the 'private sector'.[62]

The only such institution that is currently covered in most Australian curricula is the Trust. These are important in the organisation of the finances of some living people and for the transfer of the property of dead ones. They have achieved temporary popularity as tax minimisation devices. Nevertheless, the inclusion of these in the core of the legal

61 In one sense, this course is about the 'legal management of risk'. The torts and compulsory insurance schemes regulate the risk of interpersonal harm. The Tax Transfer also serves to deal with the 'risk' of poverty, of turning out to be a member of the most disadvantaged group who has claims under Rawls' maximum principle. But it is much wider than that; it is about the use of the law to redistribute among individuals and between public and private goods. It is where the democracy of the ballot comes face to face with the democracy of the market and where the different principles by which the relevant votes are calculated (one vote one value and one dollar one value) interact. It is important that every student has some understanding of the different forms and purposes of economic law subjects. It is very important that this is considered to be an 'economic' subject and not just a 'commercial' one - the difference is crucial because the 'commercial' paradigm is much narrower than the economic, incorporating, as it does, a particular vision of the economy and concentrating on a particular part of the economy (the tradeable goods and services sector).

62 This is misleading because it implies that the production of goods and services is somehow a private matter rather than being social, organised and, in all complex societies, a group activity. It also smacks of the much criticized 'public/private' distinction and the assumptions behind it - most notably that the state is 'the root of all evil', and must be restrained wherever possible (Hedley, supra n 29 p 170) whereas non state organisations are to be given free reign (spelling intended). Why it should be assumed that the only institutions, over which democratic control should be so assumed, are bad and those, over which there is no such control, are assumed to be good is hard to fathom without assuming that such views are propagated by those who are not much concerned with democracy but are much concerned about freedom of action for the powerful individuals who head the corporations that pay them.

curriculum in the absence of Company law must be seen as a historical curiosity. The Victorian Council of Legal Education currently requires the teaching of: 'the creation of trusts; the objects of trusts; the limitation on the creation of trusts; the duties, rights and powers of trustees; and the variation of trusts.' But there are no requirements that students study the creation of companies, the regulations that govern them, the duties of directors; the rights of shareholders, the article of association and their variation; not to mention the wider contextual issues of the place of these institutions in society and the law.

Companies are the most powerful and significant institutions in society outside the government. They are creatures of law in that they are in a form of organisation that is facilitated by law and to an extent regulated by law. This makes the study of them vital for a University course that seeks to study law as a phenomenon within society.

But companies and trusts are not the only socially significant institutions created, facilitated and regulated by law. Partnerships are also used for smaller enterprises or where there are legal prohibitions on incorporation. In being taught with Trusts and Companies, we can see how the law provides alternative means to achieve substantially similar purposes, how they achieve these in different ways, why the law provides these alternatives and why different vehicles are used.

Whether you curse them or praise them, unions are among the most important institutions within society and these are, again, regulated by law. Again, comparisons about the way the law treats them are of great interest.

Unincorporated associations are not as crucial to the working of the economy but the rationale of this subject means that they should be included - they are a form of institution that is provided, and regulated, by law to facilitate the pursuit of more or less shared goals by groups of people.

All these arguments provide reasons why a student who wants to study law without any interest in practice should be required to grasp the basics of the law in relation to each and the part they play within law in its social context. These arguments are made without referring to the fact that practising lawyers are constantly involved with such institutions on behalf of their clients and as their legal representatives.

Some may wonder why I suggest separate subjects for government and non-government organisations, given that my justification for studying the latter is their social, economic and public importance.[63] There is much to be learnt from comparisons between government and non-government organisations and the different approaches to them by lawyers. One of my long term projects is to consider company law as the constitutional and administrative law of non-government organisation and to consider whether the principles of administrative law are appropriate for companies and if not, whether their applicability for the government institutions is

63 See previous footnote. Note that I am not basing the division of subject matter on the shaky public/private distinction but on the categories of institutions covered. There is no clear distinction but there is clearly a continuum based on the degree of government funding, the existence of government control over the personnel of the institutions and their actions.

affected. Their combined treatment in a single subject would certainly facilitate that end. However, it is so strongly suggested by the way that the two subjects are set up that it is natural to ask the question. I would prefer to leave the asking of that question to those students and teachers so inclined rather than attempt a further merger that would make the subject unmanageable.

Jurisprudence

The introduction of a theoretical component in the first year introductory subject relieves Jurisprudence of some of the tasks it traditionally had to fill. But despite the need to introduce students to mainstream theories of law, that was never the most important part of Jurisprudence. Jurisprudence must pose a number of important questions about law as a whole and compare the answers provided by several theories and applied to several areas of law. It can ask a number of questions about the process of asking the questions themselves; about the relationship between the questions and their answers (eg the relationship between questions about the nature of law and about the nature of adjudication - are they the same question as Dworkin would assert or are they different questions and how are their answers to be related, if at all).

The most important aim of the subject and the most justification for its inclusion in the compulsory core is to encourage students to think globally about law, its place within society and their place within it. Jurisprudence should encourage students to engage in the kind of questioning and theorising that is the heart of Jurisprudence, to reach tentative conclusions about the best answers to those questions (eg what is law, what is justice), and to argue for those conclusions. This should be a life long process, and although we cannot guarantee that it continues after law school, we should at least show them how it is done and implant an expectation that it should be done. We, as lawyers, have a duty to ourselves and our university training to reach conclusions on these questions: we also have a duty to ensure that those conclusions are never final.

International and Comparative Law

There is a very strong case for a subject that incorporates Public and Private International Law, and Comparative Law to be included within the compulsory curriculum. It is important to appreciate that it is not the same case as the one for Jurisprudence, legal theory, 'perspective' or 'overview' subjects. The Pearce Report at one stage suggested that an alternative to having a compulsory Legal Theory subject was to require students to choose from a grab-bag of 'perspective' subjects and lumped Conflict of Laws, International Law, and Comparative Law with Jurisprudence as possiblities.[64] Wood and I have argued very strongly against that notion[65] for several reasons (the implication that as none were necessary all were dispensable, the tokenism, the tendency to include very challenging and interesting subjects in this list and the implication that subjects were somehow the exception). But one point that we did

64 Pearce Report, supra n 3, vol 1, p 106, 107.

65 'Legal Theory and the Law Curriculum - a response to Pearce' 62 *Australian Law Journal* Jan 1988.

not mention was that the listings confused two different reasons for doing the kinds of subjects listed.

The reason why all students should do a legal theory subject is to ensure that they all engage in asking general questions about the whole of law and apply theories to answer them.

International and Comparative Law is important as a substantive area of increasing importance and which is likely to have implications for many areas of practice. However, that is not by itself a sufficient reason to require all students to do it - including those who do not intend to practice or who will practice in areas of law that have few, if any, international implications. The reason why even these students should do it is because it confronts students with the non-inevitability of the law of their own country. By offering a comparison over space, time and/or culture, students are confronted with the contingency of our own law and the ways of dealing with the overlaps and interactions between the laws of different states.[66]

QUASI-COMPULSORY SUBJECTS

Litigation

A knowledge of Evidence and Procedure is required for admission to most jurisdictions and is hence a '*quasi*-compulsory' subject, even where it is not part of the formal core. The Law Schools at Melbourne and New South Wales have incorporated these into a single subject and it would be possible to follow the latter in introducing it into the compulsory course. As the law course and its compulsory core is intended to be of use to those who will not practice as well as those who do, it is better to leave this as a *quasi*-compulsory subject which is done by the majority who *do* go into practice. In this area, the compulsory core should make students aware of the institutional and procedural basis of law, which is one of the four aims of the introductory legal subject.[67] If there is a case for more extensive treatment of this area in the compulsory curriculum, I would suggest that the details of procedure and evidence could be encompassed within a subject more generally directed towards lawyers, their institutions and procedures, and the way that they interact with society such as 'Law, Lawyers and Society' (NSW).

TRANSITION ISSUES

There are two approaches to the introduction of such a curriculum. One way would be to throw the compatible teachers of the various subjects together and tell them to teach the new subject. The linkages would become obvious and, eventually, natural to them and a new more integrated course would evolve. Alternatively, each course could be planned and appropriate materials collected by staff members who are given time

66 Although the rationale of requiring students to do International and Comparative Law is distinct and severable from the reasons for requiring them to do a legal theory subject, there is a synergy between the two requirements. The former helps students to ask Jurisprudential questions about the relationship of law to the society of which it is a part and to question the justice of laws. On the other hand, Jurisprudence has traditionally provided International and Comparative Law with the tools to handle its peculiar problems from the days of Austin to Stone and Gottlieb.

67 This is the approach taken in Sydney where some evidence is done in the introductory 'Legal Institutions' course.

to do so. Law schools have tended to develop subjects in the formal way. The latter places a greater premium on curriculum development than is common in most law schools (indeed, one of the most notable successes of such an approach in recent years, Greta Bird's work on a course on 'Intercultural Perspectives on Law',[68] depended on outside funding). Unfortunately, notions of curriculum development in law schools have tended to run up against the strongly entrenched notions that: (a) every academic could teach without any assistance, (b) each academic's course was unique so that general curriculum work would be unsuitable, (c) the law was developing so fast that any curriculum work would be out of date before it was introduced. Thus it was normal for a law teacher to be thrown into the deep end and expected to teach the subject and might, if particularly successful, put his/her material into a case book. Of course, the reality is different. We ae not all natural teachers. Our courses are not so unique - and are made less so because the enormous pressure under which most of us commence teaching leads us to reach for the nearest case book, and to be influenced for years by the approaches and course structures we thereby internalise. We have certainly 'got by' (whatever that involves) with such an approach, and new courses would not be any worse if they were developed along these lines. However, I would argue that there is a very strong case in general, and for new subjects like these in particular, for individuals or small working parties to be given time off to develop new subjects. Because new subjects have traditionally involved the optional programme, this has been thought to be a luxury. But the importance of the compulsory programme puts an entirely different complexion on such assumptions. I would advocate the provision of time to a group of academics from two or three universities to develop each course and the associated case book. If this took too many resources away from the law schools and no outside funding could be found (and I would have thought that it would be an eminently supportable project for government or law foundation funding), then the programme for the introduction of the new compulsory subjects could be staggered over several years.

I earlier suggested that it would be very valuable for jurisprudes to get involved in the teaching of mainstream subjects. In general, it is a good thing for Jurisprudes to put their theories to work by asking of specific subjects the questions their theories attempt to answer for the whole of law. It is good if these subjects are in the core curriculum but it is not necessary.

Some might say that it is better to try these out in the optional subjects. However, I think that it is valuable to have legal theorists involved in teaching mainstream law subjects and especially the broad subjects envisaged in the core curriculum outlined here. It requires jurisprudes to 'road-test' their theories and fine tune them in the light of that experience. It adds to the number of teachers who are able to apply current theories to these subjects (something that will be at a premium until this way of teaching becomes commonplace). Even if this way of teaching becomes the norm, it would always be valuable for teachers to discuss theory not only in general but also when they are applied to the particular issues that arise in the course. If Jurisprudes have to test

68 G Bird, *Intercultural Perspectives on Law*, Butterworths, Sydney, 1988.

drive their theories in the optionals, then there will be no room for them to play the above-mentioned role in the core subjects.

This whole process is not going to be easy - either for jurisprudes or for those who have taught mainstream law subjects. The former may feel threatened. It may be some time since they did any subjects from the core curriculum and Jurisprudes may feel a little apprehensive at going back into the mainstream. More importantly, they may wonder how their theory will stand up when it is applied to the material in Torts or Company Law. First, there is comfort for each in the discomfort of all. Second, Jurisprudes should teach in the subjects in which they feel most familiar, and others should ask the questions and teach the theories in which they feel most interested. Finally, there is great virtue in voluntarism. Those who do not wish to take part should not be forced - although I would hope that the prospect is sufficiently exciting to interest most. The newer staff should be interested because it is by and large what they are most interested in, the longer serving staff because it offers a fresh approach to subjects that may have become all too stale.

CONCLUSION

This article has looked at one of the problems that all faculties seem to face - the growing pressure on our curricula. This occurs because of the well grounded view that students need to do subjects like company and tax and (to a lesser extent) the equally well grounded view that they ought to do a compulsory legal theory subject. This is turning the former into 'quasi compulsories' and the latter is leading enlightened faculties to make Jurisprudence a formal compulsory.

The diagnosis is essentially that the traditional compulsory subjects are not pulling their weight in meeting the aims of a law school in the 1980s. In particular, they are not covering the material that has become central to an understanding of law and legal practice, and are not asking the full range of critical, theoretical and contextual questions that are now firmly part of the agenda of a university law school. Nor is there much pressure to make them do so. This leaves the optional curriculum to shoulder far too much of the burden.

The suggested solution would incorporate the parts of the compulsory curriculum that no student should miss into revamped and extended compulsory subjects - shedding those parts that are no longer so crucial and condensing the rest. These broader subjects make it easier for the subjects to play a truly introductory role to the areas of law they serve and to ask the kinds of critical and theoretical questions that are now seen as central to a university law course.

The details of the way that one academic would organize the subjects are given. This is partly by way of illustration and, it is hoped, partly by way of inspiration. It is the strategy that is emphasised rather than the details. It is my hope that others will be moved to disagree and to come up with their own curricula and that faculties will heed the debate and make up their collective minds as to which direction they will take their reforms. The one thing I hope will not happen is that the core of the Australian university law course will remain as it is - the centre-piece of a traditional law degree marooned in the midst of a 1990s course, or worse still, at home in the midst of a 1950s course marooning the academic study of law as a whole.

I hope that some of the ideas will be perceived to be radical. I only hope that they will not still seem radical in ten years time.

If Australian law schools are to impress as dynamic institutions attuned to the needs of our time, we should be looking very carefully at the subjects that provide the central thrust of what we do and constitute a statement of what the core of a legal education should be. My previous efforts have been directed to emphasising a glaring omission and to suggest the remedy of 'structuring legal theory into the law course'. But dynamic institutions must do more than remedy defects, we must design teaching programmes for the 1990s and not be satisfied with the subjects and the orientation of earlier times. It is not as easy as standing still. But it is more exciting - and ultimately less dangerous!