

# Transnationalizing the Legal Curriculum: How to Teach What We Live

Rosalie Jukier

## Introduction

In January 2006, the Association of American Law Schools (AALS) devoted an entire day of its annual conference to the theme of “Integrating Transnational Perspectives into the First Year Curriculum.”<sup>1</sup> The discussion that day was not focused on *whether* American law schools ought to be moving in that direction, or why doing so would be a laudable objective. Most participants accepted the fact that contemporary legal reality supports, and even compels, such a move.<sup>2</sup> As Elizabeth Rindskopf Parker, Dean of the University of the Pacific McGeorge School of Law, stated recently:

I doubt there is much of an issue in gaining support for internationalizing the law school from our alumni. They are practicing law in the “real world” and they understand that today, legal matters with an international aspect are growing exponentially.<sup>3</sup>

Nor was much time spent at this AALS conference on the *what*—the somewhat tired and trite theme of globalization or the reality of cross-border transactions. These were accepted as givens. Rather, the focus of that day was on the *how*.

In the concurrent break-out sessions that took place throughout the day, divided by subject matter such as Civil Procedure, Contracts, or Property Law, a common refrain emerged from many of the commentators, all professors from illustrious U.S. law schools. Several asserted that they understood the importance of

**Rosalie Jukier** is associate professor, Faculty of Law, at McGill University and Senior Advisor, National Judicial Institute, Ottawa, Canada.

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1. Association of American Law Schools, Annual Meeting in Wash., D.C. (Jan. 2-7, 2006).
2. These included, at the Conference, Dean Harold Hongju Koh of Yale Law School and Professor Peter Strauss of Columbia University.
3. Elizabeth Rindskopf Parker, *Globalizing the Law School Curriculum: Affirming the Ends and Recognizing the Need for Divergent Action*, 23 Penn State Int'l L. R. 753, 754 (2005). Dean Parker was also a panelist at the AALS conference.

adopting a more transnational approach to teaching, for example, Contract Law by including consideration of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and even possibly references to French or German law on certain contract topics. The problem was not the theoretical attraction of this approach, but rather the practical obstacles that stood in the way of such a pedagogical move. Professor Ruth Gordon of Villanova University summarized these obstacles.<sup>4</sup> She listed time constraints (and many others echoed her view that there are already insufficient credit hours devoted to Contracts in the curriculum, leaving barely enough time to cover the local U.S. law of contracts), too much complexity for students in an already complex curriculum, and lack of professors' familiarity or expertise in attempting to incorporate such transnational elements into their courses.

At the end of the day, I was heartened by the positive response to the topic but also discouraged by the realization that the practical challenges perceived by those present might lead many to inaction.

The AALS conference organizers anticipated this dilemma and asked several speakers to address how law faculties and law professors can overcome some of these challenges, and what institutional supports can be put in place to ensure that transnational law is actually introduced into the core of the legal curriculum. My contribution was to present the unique way that the Faculty of Law of McGill University has chosen to approach integrating transnational perspectives into its curriculum. I consider the program itself, the challenges we confronted, and some of the support mechanisms that were employed during the transition stage of this pedagogical adventure. I conclude optimistically, with my personal assessment of the rewards of actually "teaching what we live."

### Learning from Others—The McGill Program

The McGill program of legal study has been described as "one of the most unusual curriculum experiments in the annals of legal education"<sup>5</sup> and has been touted by Professor Peter Strauss of Columbia Law School as "among the most important developments in legal education in the last century, if not the most important."<sup>6</sup>

4. For a summary of her comments, see Teaching the CISG in Contracts: The Challenges of Adding the International to First Year Contracts in 2006 AALS Conference Workshop Materials 141-44 (Jan. 2006). Note that not all commentators shared this view. See David Snyder, Transnational Perspectives on Specific Performance in 2006 AALS Conference Workshop Materials 65-71 (Jan. 2006).
5. Harry W. Arthurs, Madly Off in One Direction, 50 McGill L. J. 707 (2005).
6. Letter from Peter Strauss, Professor of Law, Columbia University School of Law, to the Canadian Bureau of International Education (May 11, 2006) (recommending McGill's transsystemic program for the Outstanding Program Award) (on file with the author). See also Peter Strauss, Transsystemia—Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?, 56 J. of Legal Educ. 161 (2006).

How the Faculty of Law of McGill University integrates transnational legal perspectives into its curriculum has been the subject of many thoughtful scholarly articles<sup>7</sup> and, on the occasion of the fiftieth anniversary of the McGill Law Journal in 2005, an entire edition was devoted to the theme of “Navigating the Transsystemic.”<sup>8</sup> The term transsystemia, although omitted from the official title of the program, is the nomenclature most often used to describe McGill’s course of legal study, which seeks to incorporate transnationalism into the curriculum by freeing the study of law from jurisdictional or systemic boundaries. While at a formal level, all McGill law students graduate with both a civil law (B.C.L.) and a common law (LL.B.) degree, the goal of the program is to do much more than simply open the doors to worldwide legal practice. Rather, the ambition is to create cosmopolitan jurists.<sup>9</sup> The curriculum is designed to expand the perspectives on legal education so as to develop more agile legal minds in our students, and more outward-looking and more broadly-trained lawyers and legal professionals in our graduates.

It is no accident that this innovative curricular experiment has taken root at McGill. The University is located in downtown Montreal, a culturally and economically vibrant and bilingual city.<sup>10</sup> The Law Faculty is thus in the province of

7. See generally Yves-Marie Morissette, McGill’s Integrated Civil and Common Law Program, 52 J. Legal Educ. 12 (2002); Nicholas Kasirer, Bijuralism in Law’s Empire and in Law’s Cosmos, 52 J. Legal Educ. 29 (2002); Daniel Jutras, Two Arguments for Cross-Cultural Legal Education, in Heinz Deiter, Gert Brüggemeier, and Rolf Sethe eds., *Different Legal Cultures—Convergence of Legal Reasoning: Grundfragen und Schwerpunkte des Privatechets in Europäischer Perspektive* 75 (Baden-Baden: Nomos Verlagsgesellschaft, 2001); Armand de Mestral, Guest Editorial: Bisystemic Law-Teaching—The McGill Programme and the Concept of Law in the EU, 40 C.M. L. Rev. 799 (2003); David Howes, Maladroit or Not? Learning to Be of Two Minds in the New Bijural Law Curricula, 52 J. Legal Educ. 55 (2002); Julie Bédard, Transsystemic Teaching of Law at McGill: Radical Changes, Old and New Hats, 27 Queen’s L. J. 237 (2001); Nicholas Kasirer, Legal Education as *Métissage*, 78 Tul. L. Rev. 481 (2003); Daniel Jutras, Énoncé l’indicible: le droit entre langues et traditions, 4 R.I.D.C. 781 (2002); Roderick A. Macdonald, Still “Law” and Still “Learning”?/ Quel “droit” et quel “savoir,” 18 C.J.L.S. 5, 17 (2003); Pierre Larouche, L’intégration, les systèmes juridique et la formation juridique, 46 McGill L. J. 1011 (2001).
8. In that edition, articles that focused primarily on McGill’s program include: Arthurs, Madly Off in One Direction, *supra* note 5; Roderick A. Macdonald and Jason MacLean, No Toilets in Park, McGill L. J. 745 (2005), and Rosalie Jukier, Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom, McGill L.J. 789 (2005). The articles by McGill professors H. Patrick Glenn, Doin’ the Transsystemic: Legal Systems and Legal Traditions, McGill L. J. 863 (2005), and Richard Janda, Toward Cosmopolitan Law, McGill L. J. 967 (2005) were also greatly influenced by the McGill program.
9. As Dean Nicholas Kasirer states in A Message from the Dean, “[o]ne might say that the destiny of McGill graduates reflects the ideals of this cosmopolitan jurisprudence that underlies the curriculum, their training advancing an ability to think, to understand and to act wherever their careers might take them,” available at <[http://www.law.mcgill.ca/welcome/dean\\_message-en.htm](http://www.law.mcgill.ca/welcome/dean_message-en.htm)> (last visited Sept. 21, 2006).
10. As will be discussed later, language is an important factor in moving towards transnationalism and the ability to read both English and French has played a large role in enabling

Quebec which, by virtue of the Quebec Act of 1774, was permitted to maintain the civil law tradition in its private law sphere. Quebec law has since followed, in principle, the French civil law tradition.<sup>11</sup> Yet McGill also finds itself in Canada, which adheres to the English common law tradition. Within the Canadian federal system, Quebec has operated as a “mixed jurisdiction.”<sup>12</sup> While remaining civilian in orientation in the private law sphere, Quebec has the peculiar feature of having the common law apply in basic commercial domains of, for example, Banking, Negotiable Instruments, Bankruptcy, and Intellectual Property, as well as a regime of public law built on the English model. Add to this interesting mix of features the strong role that Montreal has historically played in the Canadian economy and as a point of entry for immigration, the basis of Canada’s diverse and multi-cultural population, and one sees how the legal extroversion of the McGill program fits well within the historical, legal, and economic contexts of the Faculty’s physical location in Montreal, Quebec, Canada.

McGill’s Law Faculty chose to embrace the various aspects of this complex juridical, political, and economic reality when it created a multi-dimensional program of legal study that is uniquely comparative, bilingual, multi-systemic, pluralistic, outwardly-looking, academically-oriented, and, by its very nature, transnational: in a word, a program that is “transsystemic.”

Later I canvass various challenges involved in creating such a daring program of legal study, and offer some thoughts about overcoming those challenges. For readers who may already be discouraged, a word of caution is warranted. Transnationalization is not an overnight process. McGill has been grappling with incorporating transnational dimensions of law for almost a century and in 1916, experimented with a common law program in its then civil law faculty, an initiative that lasted for seven years.<sup>13</sup> In 1968, the Faculty inaugurated the National Programme, a four-year program of study that enabled

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students and professors at McGill to access materials from a variety of North American and European legal traditions.

11. The Civil Code of Lower Canada (C.C.L.C.) of 1866 followed the structural model of the Code Napoleon of 1804. See John E.C. Brierley, *Quebec’s Civil Law Codification*, 14 McGill L. J. 521 (1968). The Civil Code of Québec (C.C.Q.), which came into force in 1994, continues to be based on the principles of French civil law but is, understandably, much more of an autonomous Code since the C.C.Q. is a Code that was reformed for a more mature society and is based on Quebec’s own needs. See John E.C. Brierley, *The Renewal of Quebec’s Distinct Legal Culture: The New Civil Code of Québec*, 42 U.T. L. J. 484 (1992).
12. “Quebec law has assumed the characteristics of a bijural legal system.” *Quebec Civil Law: An Introduction to Quebec Private Law* (John E.C. Brierley and Roderick A. Macdonald eds., Toronto, 1993). See generally William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 La. L. Rev. 677 (2000); H. Patrick Glenn, *Quebec: Mixité and Monism*, in *Studies in Legal Systems: Mixed and Mixing 1* (E. Örücü et al, eds., The Hague, 1996).
13. This was under Dean Robert Warden Lee. For a more detailed explanation, see Roderick A. Macdonald, *The National Programme at McGill: Origins, Establishments, Prospects*, 13 Dalhousie L. J. 211, 250-60 (1990).

students to graduate with both civil law and common law degrees.<sup>14</sup> It aspired to introduce comparative teaching of these two legal traditions from the outset of the program. In reality, however, the program taught mainly Quebec civil law and Canadian common law and did so in a sequential, and not explicitly comparative, manner.

The National Programme's accomplishments should not, however, be understated. For thirty years, McGill students graduated with an understanding of the western world's two major legal traditions. The program's main limitation was that students attained this understanding as if they had attended two law schools sequentially and received two law degrees one after the other. While that description may be slightly exaggerated, it is fair to say that, with rare exceptions, legal education under the former National Programme presented the civil law and common law in two extremely well-taught silos. What was missing was a comprehensive integration of the two modes of legal thought.<sup>15</sup> This recognition prompted a series of piecemeal refinements to the program and ultimately, the creation of a new program of transsystemic legal study that was launched in 1999.<sup>16</sup>

While it would be redundant simply to restate what has been eloquently written about McGill's transsystemic program, a schematic summary is necessary to explain how this program differs from more conventional forms of comparative law. In my view, the difference may be encapsulated by focusing on two central themes: (1) the move from the sequential to the integrated and (2) the link between perspectives and legal traditions.<sup>17</sup>

The move from the sequential to the integrated was prompted by the realization that it is inadequate to teach, no matter how well, distinct traditions of legal thought as separate bodies of knowledge. What is needed is a program of study that can stimulate minds to become so agile and creative that they can

14. Students were not obligated to pursue both degrees and were permitted to opt for only one three-year degree, either in the civil law or the common law. However, even within a single-degree program, students were exposed to some obligatory courses in the other tradition.
15. While students took classes in both civil and common law, professors teaching those classes often taught them in the same manner they were being taught in unisystemic law faculties. As de Mestral points out, this meant that students carried the sole burden of comparative analysis as they were being taught various legal perspectives by professors whose perspectives were each unisystemic. de Mestral, Guest Editorial, *supra* note 7, at 806.
16. One such refinement within the National Programme consisted of offering so-called "cross-over" courses to students in their second year of law studies. For example, if a student began his or her studies in the civil law stream, in second year, this student would take the core common law courses of Contracts, Torts, and Property. But instead of following these courses as would a first-year common law student, this student would take courses geared specifically for second-year students where repetition of material would be avoided and some comparisons with the civil law would be undertaken. The same would occur with students who began in the common law stream and who would take these cross-over courses in the civil law in second year.
17. These two ideas are developed more fully by this author in *Where Law and Pedagogy Meet*, *supra* note 8, at 794-801.

think open-mindedly within alternative systems of thought, nimbly moving across and, as need be, transcending the boundaries of these systems.<sup>18</sup> This innovative form of legal education has been termed “dialogic jurisprudence” where legal education is seen as “involving a cross-cultural dialogue in law rather than merely as training for experts in a particular place or set of places” and where “law teaching would place the encounter between legal traditions at the center of legal education.”<sup>19</sup>

The model adopted by some law faculties, characterized by isolated comparative courses sprinkled throughout the typically upper-year program, has been categorically rejected at McGill in favor of a fully integrated approach, beginning in first year, exemplified by “blended” or “transsystemic” courses. There are, for example, no longer separate first-year courses on Common Law Contracts and Civil Law Contractual Obligations or Torts and Extra-Contractual Obligations. This integration continues in upper years where the Faculty offers transsystemic courses in such areas as Civil Procedure, Evidence, Business Law, Family Law and Matrimonial Property, Labour Law, Sales and Secured Transactions.<sup>20</sup> The goal within these transsystemic courses is not, however, simply to graft conventional comparative law that used to take place within two courses into a single course. The new program enabled the Faculty to adopt an entirely new approach to teaching. By working with different legal traditions having distinct historical and methodological underpinnings, students are exposed to a variety of perspectives and a contextual analysis of legal problems.<sup>21</sup> The goal is to hone the students’ skills of imaginative insight, all the while undermining the fallacious notion that there is one structure of reality.

Transsystemic teaching required McGill professors to take creative approaches to course outlines, teaching plans, and student evaluations. One quickly recognizes that the nomenclature in different legal traditions does not correspond neatly, and doctrines in one system do not necessarily relate to

18. This description is taken from a presentation by McGill professor Jean-Guy Belley on McGill’s Approach to Teaching Comparative Law, organized for Vietnamese Senior Comparative Law Research Personnel under the auspices of the Vietnam Legal Reform Assistance Project, Faculty of Law, McGill University, Nov. 2, 2004 (unpublished)(on file with author).
19. Kasirer, Legal Education, *supra* note 7, at 483, 500. See also David Howes, Dialogical Jurisprudence, in *Canadian Perspectives on Law and Society: Issues in Legal History* 71 (W. Wesley Pue and Barr Wright eds., Ottawa, 1988).
20. It should be pointed out that currently, as the list of courses demonstrates, the primary focus of the transsystemic approach to legal education occurs in the private law sphere. The Faculty recognizes that the next challenge is to adopt a similar approach in its public law curriculum.
21. Contextual analysis is not meant to be construed only in the sense of “social context” as this term is often used in judicial education programs. Rather, the term is meant to embrace a multitude of dimensions (such as feminist, economic, historical, methodological, sociological, philosophical, and the like).

those in the other.<sup>22</sup> The complexity of teaching plans is also readily apparent when one realizes that classes at McGill move back and forth among primary and secondary materials from a variety of jurisdictions and from a variety of perspectives. Students are regularly exposed to legislative, jurisprudential, and doctrinal materials from, as one would expect, Quebec, Canada, and England but increasingly from France, the United States, Australia, Germany, and many unifying European codification projects.<sup>23</sup> However, as McGill professor Richard Janda has pointed out, merely presenting legal materials from a variety of jurisdictions is not sufficient if one wants to engage fully in the transsystemic experience: “[t]ranssystemic law is much more than comparative law. Its most important and difficult task is to move beyond the confines of received, conventional forms and link up with a philosophic inquiry into the justice of the relationships that are expressed within those legal forms.”<sup>24</sup>

It is perhaps appropriate at this stage to respond to the allegation that this integrated approach creates too much complexity for students and leads to confusion rather than higher levels of elucidation. Admittedly, students are somewhat confused in the beginning of their legal education but ultimately, this form of legal inquiry creates in students the dexterity of mind absent in mono-judicial training where only one structure of reality is presented.<sup>25</sup> Perhaps the best analogy may be found in the area of linguistics. Some studies by linguists have shown that exposing young children to two languages simultaneously leads them to become more fluently bilingual than would be the case if the children had been exposed to the two languages sequentially, first mastering one and then moving to the other.<sup>26</sup> Similarly, the philosophy of legal education at McGill posits that the best way to learn multiple modes of legal perspectives is to integrate their study right from the outset.

22. For example, the term “Consideration” means little in Civil Law and the term “Intensity of Obligations” means little in the Common Law. Furthermore, even where there appears to be mirror-image counterpart doctrines, such as Mistake and Erreur, a deeper analysis demonstrates that this is not entirely the case. In this example, we can often see Erreur in the Civil Law performing the function that Unconscionability often plays in the Common Law. For a more detailed explanation of this, see, Jukier, *Where Law and Pedagogy Meet*, *supra* note 8, at 798-99. See also Nicholas Kasirer, “K” as a Structure of Anglo-American Legal Knowledge, 22 *Canadian Law Libraries* 159 (1997), where he points out that the Library of Congress classification system is based on an Anglo-American predisposition that is insufficiently elastic to accommodate civilian legal concepts which have a distinctive internal order.
23. Such as *Principles of International Commercial Contracts* (Rome, 1994), and *Principles of European Contract Law* (Ole Lando and Hugh Beale eds., The Hague, 2003).
24. Janda, *Toward Cosmopolitan Law*, *supra* note 8.
25. It is also fair to say that most law students are confused in the beginning of their law studies wherever they take place and that confusion is not limited to transsystemic legal studies.
26. See generally Juergen Meisel, *The Bilingual Child in The Handbook of Bilingualism* 91 (Tej K. Bhatia and William C. Ritchie eds., Oxford, 2004), for a discussion of how research involving young children supports the simultaneous acquisition of two languages as being superior to sequential language acquisition.

The second key element that exemplifies the move to transsystemia, and distinguishes it from more traditional forms of comparative law, is the attempt to link the various perspectives offered to students to the distinct mentalities and historical and intellectual traditions of the legal systems themselves. The McGill program is predicated on the belief that legal systems have distinctive structures of thought, transcendent values and principles, and intellectual traditions.<sup>27</sup> This is one of the reasons that McGill's curriculum offers two compulsory upper-year courses in Advanced Civil Law and Advanced Common Law so as to examine more deeply and critically the understandings of the overall mentalities and methodologies of the two great occidental legal traditions. It is, therefore, not just that there is a multiplicity of perspectives that is key to operating in a transsystemic world but rather, that these perspectives are linked to global systems of thought.

Apart from being intellectually stimulating and interesting, this vision of legal education carries with it two important advantages. The first is that by studying law from the perspective of a legal tradition, rather than from the vantage point of legal rules, students gain the ability to work through a foreign legal system that they have never before encountered because they understand its basic underlying structure and elements. However multi-systemic legal education may become, it is impossible to expose students to every jurisdiction in the world. But while the Italian Civil Code may be different from the French or the Quebec Civil Code to which students have been exposed, learning generally about codes and civil law methodology and tradition would enable McGill students to work their way through the Italian Civil Code, even though they have not studied that particular Code in any detail.

Moreover, by linking perspectives to legal traditions, students are sensitized to the dangers of comparative law that consist merely in side-by-side comparisons of different doctrines and principles. The danger lies precisely in that this survey is disconnected from the respective legal traditions creating the potential for problematic instances of legal transplantation.<sup>28</sup> Mr. Justice Charles Gonthier, former justice of the Supreme Court of Canada stated that "we must be mindful of the dangers of comparative law unequipped with full information and understanding of other legal systems."<sup>29</sup> William Bishop has made this point as well, emphasizing that "any legal system is a complex interlocking balance [and that] it is not prudent to consider one difference in isolation from the others." He went on to assert that "casual comparisons across very different legal systems may not only mislead, but mislead systematically."<sup>30</sup>

This is a crucial lesson for our future jurists. McGill's integrated approach to transnational perspectives eschews straight comparisons of legal doctrines in

27. Kasirer, *Bijuralism in Law's Empire*, *supra* note 7, at 37-39.

28. See generally *Adapting Legal Cultures* (David Nelken and Johannes Feest eds., Oxford, 2001).

29. *Laferrière v. Lawson* [1991] 1 S.C.R. 541 at 601.

30. William Bishop, *The Choice of Remedy for Breach of Contracts*, 14 J. Legal Stud. 299, 318 (1985).



different legal traditions. To be truly transsystemic is to examine the similarities and differences that do exist throughout legal traditions and then to question and seek to understand them in light of historical, methodological, societal, philosophical, economic, and any other perspectives that lend themselves to that particular issue. Moreover, to be transsystemic is to frame and analyze legal issues within the larger concepts of the traditions in question.<sup>31</sup>

### Challenges

There is no doubt that this more complex way of teaching and living the law involves considerable challenges, many of which go beyond those inherent in any attempt to reform the law school curriculum in a substantial way. These challenges are both methodological (how can the Faculty offer such a program in practical terms?), as well as philosophical (is this the priority to which the Faculty should direct its intellectual and financial capital?). What follows is a list, necessarily incomplete, of some challenges involved in truly integrating transnational perspectives into the curriculum. Former Dean of the Faculty, Professor Roderick Macdonald, aptly entitled a presentation on McGill's trans-systemic program: "If it's not impossible, it's not worth doing!"<sup>32</sup>

### *Language*

It goes without saying that linguistic ability, and in particular the ability to read several languages, greatly facilitates access to foreign legal materials, a *sine qua non* for integrating transnational perspectives into the curriculum. McGill professors and students are required to have at least passive language skills (the ability to understand written and oral information) in English and French.<sup>33</sup> These skills enable access to most North American materials, as well as a wide array of European ones, but we recognize that knowledge of German and Spanish, not to mention Mandarin, would be increasingly helpful in this regard. The question is how realistic is that aspiration?

31. An attempt to explain this process using Specific Performance as a particular application may be found in Jukier, *Where Law and Pedagogy Meet*, *supra* note 8, at 801-08. A discussion of how the comparative approach to Specific Performance relates to the larger concept of remedies generally in the civil and common law may be found at pages 807-08.
32. Roderick A. Macdonald, Professor of Law, McGill Faculty of Law, *If It's Not Impossible, It's Not Worth Doing: The Challenges of Trans-systemic Legal Education*, Presentation at Harvard University Law School (Nov. 23, 2004).
33. It should be noted that McGill University offers excellent language courses to help overcome this challenge. For a discussion of the implications of bilingualism on legal pedagogy, see, Roderick A. Macdonald, *Legal Bilingualism*, 42 McGill L. J. 119 (1997), and Roderick A. Macdonald, *Orchestrating Legal Multilingualism*, in Jean-Claude G  mar and Nicholas Kasirer eds., *Jurilinguistique: entre langues et droits/Jurilinguistique: Between Law and Language* (Brussels/Montreal, 2005).

*Faculty Expertise*

Professors' lack of familiarity with or expertise in legal systems other than their own is often cited as a major impediment to this type of curricular reform. True, professors engaged in this endeavor need to have knowledge of more than one legal tradition. One way to accomplish this is to hire professors who have been trained in both civil and common law, an approach that has been used at McGill University. However, at McGill, we have also hired many professors who have been trained in a single legal tradition, as long as they were willing to undertake the commitment, and invest the time, energy, and hard work, to learn another.

*Teaching Materials*

When McGill launched this innovative program, it found itself with a dearth of relevant teaching materials on the market. While there is an excellent casebook series entitled the *Ius Commune Casebooks of the Common Law of Europe*, it presents a sequential and comparative approach to the law of Contracts, Torts, and Unjustified Enrichment in three discrete jurisdictions of England, France, and Germany.<sup>34</sup> No doubt, these are helpful resource materials for those engaged in the teaching of transsystemic courses, but as they present a sequentially comparative doctrinal approach, and as they are limited to only European jurisdictions, they cannot be assigned as primary course materials, but merely as supplementary resources. Not having the luxury of ready-made pedagogical materials available on the market necessitated the immediate creation of such materials by McGill's teaching staff.

*Course Organization*

Most course outlines and teaching plans, no matter how imaginative and creative, remain rooted in doctrinally orthodox legal concepts that are tradition-specific. Transsystemic course outlines cannot, however, be organized in that way because civilian and common law doctrines do not neatly match up. McGill professors are thus required to conceive their courses around broad themes and large questions. While traditional doctrines, concepts, and understandings are certainly canvassed, as are extra-legal concepts such as feminist, economic, sociological, and critical perspectives on law, they are examined not for the sake of their being an established legal doctrine, but rather as an illustration of a particular perspective on a larger and, most often, common legal issue.

*Evaluation of Student Performance*

Reconceived courses and course outlines bring with them the challenge of reorganizing methods of evaluation. Many law faculties are already in the

34. Walter Van Gervan, Jeremy Lever, and Pierre Larouche, *Tort Law* (Oxford, 2000); Hugh Beale, Arthur Hartkamp, Hein Kötz, and Dennis Tallon, *Contract Law* (Oxford, 2002), and Jack Beatson and Eltjo J.H. Schrage, *Unjustified Enrichment* (Oxford, 2005).

process of rethinking modes of evaluation, in particular the caricatured law school exam exemplified by the lengthy fact pattern, with everything but the kitchen sink thrown in, followed by the simple question requiring the student to advise an unfortunate party of all his or her legal rights.<sup>35</sup> In addition to grappling with the inadequacy of this standard examination method, McGill professors had the additional challenge of adapting their examinations and evaluations to courses that do not operate within a discrete jurisdiction.

The solutions McGill professors have found vary from individual to individual. Some have moved towards take-home examinations, where students have considerably more time to discuss legal issues in more detail. Others have made greater use of research-based evaluations, favoring student essays to examinations. However, most professors who teach first-year building block courses still adhere to end-of-term examinations for at least part of the evaluation. The challenge becomes constructing questions that reflect the unique legal education that has been offered. One technique I have employed with some success is to use a fictitious place called "Transania" where much of what happens in my exams occurs, whether the questions are essay-type or take the form of fact patterns. This precludes students from being able simply to provide an answer out of the Quebec Civil Code, the Uniform Commercial Code, or a line of cases from England. Rather, they are forced to answer the exam questions in the way McGill professors, teaching transsystemic courses, have taught them to think. They are more compellingly confronted with the questions we all aspire to pose: "what is the underlying problem, wherever this question takes place?"; "what legal issues arise?"; "how should a jurist go about trying to solve these issues?", and "what are the perspectives, legal and contextual, that can be brought to the discussion of these issues taken from the panoply of resources, across various jurisdictions and legal traditions seen throughout their course?"

#### *Internal and External "Buy-in"*

In addition to methodological challenges, or those linked to practical implementation, one needs to achieve "buy-in" to the philosophy of a transnational law program. Internally, the professorial and administrative staff must agree to the principle of such wholesale change and to the modalities involved in achieving it. McGill's Faculty of Law underwent a lengthy and complex process in creating what has ultimately become the McGill Programme. It is hard to pinpoint with any accuracy the precise moment this process of tough self-reflection began but in 1994, an integrated comparative curriculum was the subject for discussion at an off-site Faculty retreat. What followed, over a period of many

35. Annie Rochette, an assistant professor of the Faculty of Law of the University of British Columbia, is currently a doctoral student in the Faculty of Law at McGill University writing a thesis on teaching and learning in Canadian law faculties. Part of the thesis involved a qualitative research study, the purpose of which was to identify learning objectives in Canadian law programs and create an inventory of the teaching and evaluation methods used to achieve those objectives.

years, under the leadership of Dean Stephen Toope, was the creation of various ad hoc committees whose mandates ranged from settling the broad contours of this form of legal education, to working out the more complex modalities of its implementation. Discussions and debates were not limited to these committees but extended to focus groups of various constituencies including alumni, and to the crucial input and collaboration of students and faculty. This process ultimately led, four and half years later, to debate and final approval at faculty and university governance levels.

Professor Shauna Van Praagh has recently reflected upon the process of curricular reform at McGill as follows:

Conceptualizing programme change is extremely difficult; agreeing on the details and then figuring out resources to make it work may be even more challenging. But the three components of the process highlighted here—*inclusion, institutional identity, and intellect*—make it a community-building exercise and an opportunity to share ideas and commitments with each other.<sup>36</sup>

Change of such magnitude rarely, if ever, happens with unanimity and it is thus unrealistic to hope to achieve universal buy-in. A process involving such extensive change takes careful monitoring and proper leadership to avoid the creation of a divided faculty. Individual professors surely continue to question McGill's version of a transnational curriculum, and the Faculty as a whole continues to question the modalities of the current program.<sup>37</sup> Furthermore, not all McGill professors have had to confront transsystemic teaching to the same degree since the transsystemic program is more fully integrated into the private law side of the curriculum and has yet to be fully extended across the curriculum into areas of public law. It is fair to say, however, that the Faculty remains a cohesive and collegial one, which is essential to its continued well-being, as well as to the success of its new program.

We also all know that law faculties do not exist in a vacuum. As intellectually and academically oriented as many law programs may be, and McGill's Faculty of Law counts itself as one with such a vocation, the reality is that law faculties prepare students for professional careers within the legal community. This community needs to be kept abreast of a curricular change of this magnitude and educated as to the objectives and merits of such a move. Here I mean to include not only the provincial and state bars and law societies that accredit our graduates, but also the law firms who hire our graduates and who help, through their generous endowments and donations, to maintain the viability of some programs, prizes and scholarships, and general excellence of the Faculty. Moreover, this different conception of legal education needs to be

36. Shauna Van Praagh, *Rethinking What and How We Teach—Curriculum Reform at McGill's Faculty of Law*, *Can. Ass'n of L. Teachers Bull.* 13, 14 (Jan. 2006) (emphasis added).

37. The Faculty continues to examine such issues as the number of credits required to graduate, the number of years students should be required to pursue their legal studies before obtaining the two degrees, as well as the compulsory components of the program, both academic and extra-curricular, such as community service.

properly communicated to alumni, potential applicants, and to academics the institution wishes to recruit as Faculty members.<sup>38</sup>

Such external public relations take a myriad of forms, both formal and informal. Formal vehicles include faculty publications distributed to alumni, law firms, and potential student and faculty applicants. It also entails such actions as the creation of Faculty Advisory Boards that allow members of law firms and the legal community to stay involved in the life and governance of the Faculty. Formal outreach is done primarily by the Dean and Associate Deans, but informal outreach also occurs every time a member of the legal community comes into contact with a member of the law faculty. In this way, external buy-in becomes the role of every faculty member.

#### *Financial Challenges*

Finally, while much can be done through hard work, commitment, and ingenuity there is no doubt that financial challenges become more acute when offering such a program of legal study. Operating a curriculum in two languages and in multiple legal systems, where students graduate with two law degrees, is more expensive than simply offering a single, unilingual, three-year degree program. There needs to be a conscious decision taken to devote resources, which are particularly limited in publicly-funded universities such as McGill, to the priorities of the new transnational focus of the Faculty and to rely more heavily on fund-raising initiatives to support the research and pedagogical vocations of the Faculty as a whole.

#### **Overcoming Challenges**

The foregoing list of challenges may appear to be overwhelming. However, with strong leadership and vision, a will to make change happen, and institutional support, many of these challenges may be mitigated and overcome, with, as will be discussed shortly, great rewards. There is, of course, no magic bullet. What follows are some reflections on the types of support mechanisms that proved helpful to McGill's Faculty of Law.

The first task of faculty leaders is to inculcate an atmosphere of collegiality and collaboration amongst the professors who are, be they a junior or senior member of staff, equally at sea in a new program. Colleagues must be encouraged to share knowledge, materials, ideas, and time with each other, inside as well as outside the classroom. One way this was promoted at McGill was through the organization and support of team-teaching. In the early days of the new program, the Faculty devoted two professors to each transsystemic course, pairing one professor more versed in the civil law tradition with another

38. For example, see, McGill's Law Faculty's on-line publicity for academic positions, available at <<http://www.law.mcgill.ca/faculty/positions-en.htm#top>> (last visited Oct. 3, 2006), which states: "The Faculty's research programs, pedagogical initiatives, and academic priorities all reflect a central commitment to legal traditions, comparative law and legal pluralism...The core of the undergraduate curriculum is taught transsystemically, across borders shaped by legal traditions and systems notably those of the common and civil law."

professor more expert in the common law. They would both teach from their own perspective, while learning from each other. This helped prepare them to offer the course on their own at a later time. As Professor Van Praagh has aptly pointed out, how better to create collegiality than to support the recreation of professors as transsystemic teachers as a venture “to be taken hand-in-hand with other colleagues”?<sup>39</sup>

Collaboration in teaching was further promoted through regular meetings with professors teaching transsystemic courses where course outlines, examinations, and teaching methods were shared. Joint teaching initiatives were coupled with the support of jointly prepared teaching materials where colleagues, with the financial support of the Faculty for research assistance, would collaborate on the creation of transsystemic course materials for their students.

An important aspect of institutional support that may be offered to professors engaged in a challenging new program of transnational legal study is realism about their scholarship. Publication records, as measured by the traditional indices of externally published articles and books, will necessarily slow down in the short run as faculty members embark on the venture of learning a new way to teach and to live the law. The professors’ research and writing will of necessity be redirected to the creation of internal faculty documents, committee reports on curricular reform, and reorganized course outlines and teaching materials. The institution must interpret this as short-term pain for long-term gain that comes with the confidence that ultimately the publishable research will be of a deeper and more interesting quality.

In the meantime, however, it is crucial for faculty members to keep up-to-date with publications, both for the purposes of their teaching as well as their ultimate research. McGill’s Faculty of Law helped to achieve this via institutional support for the creation and publication of a “Transsystemic Bulletin.”<sup>40</sup> Under professorial direction and with help from student research assistants, an in-house publication appears four to five times a year with short synopses of recent scholarly articles and books of interest to transsystemic teaching and research. The works featured include articles and books on comparative and transnational law, as well as those that deal with theoretical, interdisciplinary, critical, methodological, and pedagogical perspectives.

Once research of a transsystemic nature begins to occur, the collaboration that was inculcated in teaching must also be encouraged to continue into research. At McGill, an example of a significant joint research project currently being undertaken by many in the Law Faculty is the *Transsystemic Publication Project*. With the support of a major McGill University research grant, teams of professors are researching and creating, with a view to publication, unique transsystemic legal

39. Van Praagh, Rethinking What and How, *supra* note 36.

40. Further information and examples of Transsystemic Bulletins may be found on the Faculty’s website, available at <<http://www.law.mcgill.ca/research/publications-en.htm#tb>> (last visited Sept. 14, 2006).

materials which reflect McGill's innovative vision for the discipline of law. The project currently involves work on two volumes on the major building-block legal topics of Contractual Obligations and Extra-Contractual Obligations but it is envisaged that subsequent phases will involve volumes of subjects such as Property Law, the law of Evidence, and Secured Transactions.

Encouraging and supporting the participation by professors in international consortia, as well as welcoming foreign law students through exchange programs and as graduate students, are also invaluable tools that can assist in the successful implementation of a more transnational curriculum. At McGill, we believe that the goal of transsystemia is not to become more *like* the other, but to learn more *about* the other, and, in the process learn more about oneself.<sup>41</sup> Exposure to others at both the student and professorial levels becomes a crucial component in this endeavour.

In this regard, many professors at McGill have participated in a variety of international consortia with groups of academics and institutions that are similarly engaged in, or devoted to, the transnationalization of teaching and research. Involvement in, for example, the Trento Common Core project in Italy, NACLE, and the International Consortium on Legal Education at the American University, Washington College of Law, has certainly been enriching to those engaged in the transsystemic program at McGill.<sup>42</sup>

On the student side, McGill participates in a wide array of student exchange programs at both the faculty and university levels. Not only does this allow McGill students the opportunity to study abroad, but it enables McGill to welcome foreign students, of different legal backgrounds, from around the world to its classrooms. In the academic year of 2006-07, McGill's Faculty of Law will receive over forty exchange students to its undergraduate law program from North America, Latin America, South America, Europe, and Asia. In addition, McGill's Faculty of Law has one of the most international graduate student cohorts: almost half of its graduate students come from outside of Canada.<sup>43</sup> These international students, both undergraduate and graduate, bring much to the faculty, and to the professors engaged in the transsystemic program, through their interactions in the classroom as well as through the research papers and theses they write under professorial supervision.<sup>44</sup>

41. As former Dean of the Faculty, and now a Justice of the Quebec Court of Appeal, Yves-Marie Morissette stated, "[McGill] has always been habited by the conviction that a great deal can be gained...from a sustained and humble dialog with *otherness*." Morissette, McGill's Integrated Civil and Common Law Program, *supra* note 7, at 22 (emphasis added).

42. The Common Core of European Private Law (Mauro Bussani, Ugo Mattei, Rodolfo Sacco, and Rudolf B. Schlesinger eds., The Hague, 2003). NACLE is the North American Consortium on Legal Education, an organization that promotes not only student exchange but faculty exchange as well.

43. For the 2006-07 academic year, 58 of the 129 graduate students are international students.

44. Drawing on an example from my own experience, my supervision of a graduate student, Henriette Van Hedel from the Netherlands, who wrote a thesis entitled, Towards a European Ius Commune: What Lessons Can We Learn from Quebec's Mixed Legal System,

Prioritizing student exchange programs and the recruitment and support of international graduate students are important elements of institutional support that can help attain a transnationalized curriculum. At McGill, we are fortunate that local and international students alike have embarked on our transsystemic project with enthusiasm as they challenge us to it develop further.

### **Assessing the Rewards of a Transnational Curriculum**

The Faculty of Law at McGill University has just completed its seventh year of a transsystemic program of law studies. As such, the program is still very much in its infancy and will certainly undergo refinements and expansion as time goes on. However, seven years is not too short a time period to begin to gauge the benefits of having moved in this transnational direction.

Many of the rewards of this new way of approaching legal education and research are intangible and impossible to measure with any objectivity. Nevertheless, some quantitative data is available. To begin, one might measure a law program's success from the student perspective. In McGill's case, the endorsement by students of this transnational mode of learning law is evident from its admissions statistics. There has been a steady rise in the number of applicants on an annual basis and overall, the applicant pool has increased by an impressive 64 percent since the inception of the program in 1999.

It is, of course, impossible to attribute this increase solely to the new law program as other factors, such as demographics, economics, and politics as well as levels of tuition fees are certainly relevant in painting the admissions picture.<sup>45</sup> Notwithstanding these other factors, it seems fair to say that the unique transnational program has added considerable allure to McGill's Faculty of Law in the eyes of prospective students. Moreover, many colleges and universities measure admissions success not merely through the number of applicants but rather through what is termed the yield ratio—the percentage of accepted students who take up the offer of admissions and register in the institution. McGill's yield ratio is comparatively high at 77 percent.<sup>46</sup>

The success of a law program is also often measured by how students fare in the market place after graduation. In the case of McGill graduates, not only are they coveted by legal employers who come to recruit at the Faculty with great enthusiasm, but McGill law graduates disperse geographically across Canada, the United States, and beyond, and benefit from an impressive diversity of legal employment opportunities. Of possible interest to American readers is the fact that even though McGill is a Canadian law

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enlarged my perspectives of European sources of law that I have since incorporated into my courses. This thesis was submitted in partial fulfillment of an LL.M degree at McGill University (Institute of Comparative Law), which was granted February 2005.

45. Generally, levels of tuition fees at all Quebec universities are lower than in the rest of Canada.

46. The latest data on the yield ratio is from the 2005-06 academic year.



faculty without American Bar Association accreditation, approximately 11 percent of the graduating class (or twelve to fifteen students) are hired to work in major New York law firms every year. Furthermore, an endorsement of the high quality of the law program, as well as the merits of its transnational focus, may be found in the fact that McGill sends more graduates to clerk in the Supreme Court of Canada than other Canadian law faculties. For the 2007-08 year, eight of the twenty-seven clerks to the Supreme Court judges will be McGill graduates.

In terms of more intangible measurements, student satisfaction seems quite high if you gauge the engagement of McGill students in research, curricular, and extra-curricular activities. Many head off to graduate school with the aim of becoming legal academics themselves. Furthermore, there is no lack of extremely interesting and qualified aspiring professors who wish to obtain teaching positions at McGill, despite the fact that we publicize the need for knowledge of two languages and the fact that their professorial career will involve teaching in more than one legal tradition. Anecdotal evidence also suggests that among the professors, job satisfaction is up. Speaking personally, teaching at the transsystemic level gives me much more enjoyment from my classes and from my interactions with students and I feel that the transnational focus of the new program has enabled me to teach at a deeper and more intellectual level than I have ever done before.

### Conclusion

The purpose of this paper has not been to convince U.S. law schools to emulate McGill's transsystemic program in its entirety. By virtue of its location in Quebec, Canada, McGill's Faculty of Law has a set of complex and unique juridical and political circumstances that are not readily transposable either to the United States or to orthodox legal education in America. Kasirer has stated, "[t]he epistemology of McGill's law school is largely a product of a uniquely Canadian brand of legal pluralism rooted in its Quebec location and identity."<sup>47</sup>

Notwithstanding the fact that American legal reality is indeed distinct from its bilingual and bijural counterpart in Canada, it is clear from academic meetings, such as the AALS Conference, that an increasing number of U.S. law schools are serious about bringing transnational perspectives into their curricula. The relevance of *the other* in today's world is simply inescapable.

On the evidence presented about McGill's experience, I would hope that the model of *integrated* transnational teaching is retained as the preferred method of *how* to incorporate perspectives of others into the law school curriculum. If one learns anything from the McGill program, it is that internationalization as an add-on, rather than as an integral focus, would be a misplaced attempt at curricular reform.

47. Kasirer, "K" as a Structure of Anglo-American Legal Knowledge, *supra* note 22, at 159.

McGill's ambitious odyssey can also teach, however, that transnationalizing the legal curriculum is not only relevant to those law faculties producing graduates who will congregate in large international law firms and whose legal practice will involve complex trans-border commercial transactions. While a practical reality for those graduates, transnationalism is relevant for all law students and all legal academics. As one abandons the concept of legal study as merely an exposition of the national law of the State, one gains the opportunity to think about law as a richer intellectual endeavour. Law faculties engaged in legal theory, law and economics, as well as those that have incorporated critical legal studies, literary, and feminist perspectives into their curricula, have already discovered this.

Transnationalism is yet another perspective to incorporate into legal education. As Proust has said, "the real voyage of discovery consists not in seeking new landscapes, but in having new eyes." That is the true meaning of transnationalism. The great reward is that by incorporating new eyes from different cultures, different jurisdictions, and different legal traditions into your curricula, you will see how learning about the other ultimately teaches you more about yourself.