No Toilets in Park

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The undergraduate law curriculum adopted at McGill University in 1998—the transsystemic programme—was born of the unique political, social, and intellectual histories of its Faculty of Law. This essay reviews these contexts and characterizes the programme as an ongoing conversation about law, language, and knowledge that has animated the teaching programme since the faculty's founding, 150 years ago.

The essay begins by juxtaposing the phrases "No Vehicles in Park" and "No Toilets in Park" to suggest that law and legal education are hermeneutic endeavours embedded in social experience. At McGill, this interpretive practice may be described as "constitutive polyjurality"—a term the authors coin to capture the theoretical ground of transsystemic teaching, an epistemological and pedagogical practice at once pluralist, polycentric, non-positivist, and interactive.

Using the first-year introductory course Foundations of Canadian Law as an illustration, the authors suggest new directions for the programme. They argue that one of the key goals of the transsystemic programme is to increase opportunities for students to become the agents of their own education and, concomitantly, to participate in the reconstruction of law and legal knowledge.

The transsystemic programme challenges orthodox practices and established categories of knowledge. Curricular configurations, however, cannot be frozen: even constitutive polyjurality may one day lose its privileged place as an interpretive theme at McGill.

Le cursus de premier cycle en droit adopté par l'Université McGill en 1998 — le programme transsystémique — est issu du passé politique, social et intellectuel propre à sa Faculté de droit. Ce texte dresse le bilan de ces contextes et caractérise le programme comme un entretien portant sur le droit, le langage et la connaissance qui n'a cessé d'alimenter le programme d'enseignement depuis la fondation de la faculté, il y a 150 ans.

Le texte débute en juxtaposant les expressions «No Vehicles in Park» et «No Toilets in Park», suggérant que le droit et l'éducation juridique sont des tentatives herméneutiques fermement ancrées dans l'expérience sociale. À McGill, une telle méthode d'interprétation peut être décrite comme une «polyjuralité constitutive» — un terme proposé par les auteurs afin de rendre ce qui constitue les fondements théorique de l'enseignement transsystémique, une pratique épistémologique et pédagogique à la fois pluraliste, polycentrique, non positiviste et interactive.

Prenant l'exemple du cours de première année de Fondements du droit canadien, les auteurs suggèrent de nouvelles avenues pour le programme. Ils soutiennent que l'un des objectifs clés du programme transsystémique est d'accroître les opportunités qu'ont les étudiants de devenir les agents de leur propre éducation et concurremment de participer dans la reconstruction du droit et de la connaissance juridique.

Le programme transsystémique défie les pratiques orthodoxes et les catégories préétablies de connaissance. Les configurations du cursus, toutefois, ne sauraient être figées : même la polyjuralité constitutive pourra, un jour, perdre sa place privilégiée à McGill en tant que méthode d'interprétation.

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Epilogue:[1] **No Vehicles in Park**[2]

This meditation upon McGill's "transsystemic" programme of legal education has revisited one of the legal academy's favourite heuristics. How are we to understand a sign stating "No Vehicles in Park"?[3] The usual tack is to deploy this example to bring into relief contrasting approaches to statutory interpretation; to show, moreover, that statutory interpretation, and by implication all legal interpretation, is fundamentally a matter of textual analysis. In the standard model of law, the question reduces to how we should make sense of the words "vehicle" and "park": By their letter, as comprising a core of settled, uncontroversial meaning and a penumbra of uncertainty? Or by their spirit, as necessarily finding their meaning in terms of the surrounding context and underlying purpose? But the example is richer than this.

Here is why. Whatever we may decide about (1) the meaning of "vehicle" (say, as a conveyance like an automobile, or as the occasion for an aspiring actress to display her talents, or as the syrup or tablet through which a medically active agent is administered), (2) particular *examples* of vehicles understood as conveyances (such as

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[1] The *Oxford English Dictionary* ("*OED*") considers an epilogue to be "[t]he concluding part of a literary work; an appendix." Only conventions of language, literature, reading, and book publishing require that an epilogue physically appear at the end of a work. In keeping with the general logic of the new McGill Programme, we specifically challenge such conventions throughout this essay. Indeed, if "past is prologue", it is equally the case that "future is epilogue". Our references to the *OED* at the outset of each chapter are not meant to constrain reflection. We do not ascribe any authority to these definitions beyond that which is necessary to suggest the general directions of the chapter. Indeed, the references are meant to show how complex the usages of even simple words can be and to make explicit their polysemic character. Like other key words we deploy in this essay, the words introducing each chapter are meant primarily as sites of interpretation

Before proceeding, we wish to explain the use of footnotes in this essay. The second footnote of each section, labelled *THEME,* is intended to offer a *mise en scène*, while the last footnote of each section, labelled *CODA,* is meant to suggest further lines of inquiry only touched on in the text. The longer footnotes within each section provide complementary perspectives on the main text and can be read seriatum as a parallel narrative. Most have been added in response to queries and objections raised by readers of earlier drafts, and need not be read at the same time as the text itself.

[2] *THEME:* The different sections of this essay operate at several levels. Each highlights a different facet of the transsystemic programme (a pedagogy), presents a different element of legal knowledge (an epistemology), and critiques a different component of the legal theory upon which contemporary curricula in North American law faculties are typically based (an ontology). In this introductory Epilogue the phrase "No Vehicles in Park" serves to suggest the hermeneutic vision of legal education that we see as animating the new programme. Thereafter, each of the four words in the phrase serves to reveal the theoretical underpinnings of the new programme—pluralist, polycentric, non-positivist, and interactional. For further development of these four ideas, see Roderick A. Macdonald, "Here, There ... and Everywhere: Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden" in Nicholas Kasirer, ed., *Mélanges Jacques Vanderlinden* (Cowansville, Qc.: Yvon Blais) [forthcoming in 2006] [Macdonald, "Here, There, and Everywhere"].

[3] The example was famously raised in the Hart-Fuller debate of 1958: see H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 593; Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart" (1958) 71 Harv. L. Rev. 630.

baby carriages, skateboards, bicycles, wheel chairs), (3) the definition of "park" (as a physical space, as a gear in an automatic transmission, as a multivalent transitive verb), (4) the different *instances* of a park understood as a physical space (such as playgrounds, gardens, nature preserves), (5) the *purpose* of a park (for example, as a place of repose, or a site of vehicular worship like a car park), and (6) the *underlying rationale* of the sign, (as not including such occurrences as ambulances speeding heart-attack victims toward emergency care or traffic swerving into the park to avoid striking a young child on the street), we are making critical assumptions about the character of language, the practice of interpretation, and the acquisition of legal knowledge.

Were the sign presented as a pictogram (imagine a red circle at the centre of which is an automobile or bicycle overlain by a red diagonal line, or alternatively, a red circle at the centre of which is a depiction of a car's transmission gears with the indicator at Park overlain by a red diagonal line), a different set of interpretative conventions and practices would have to be engaged. In these cases we know that the location of the pictogram (for example, on the boundaries of an open space, or at the entrance to a carwash) provides at least some of the context necessary for interpretation to proceed. Yet even this reflection is incomplete, for in both pictograms there is an imported assumption of normativity. We assume that the pictogram is meant to command or prohibit action. Where do these normative assumptions come from?

Contrast the first of the signs considered above (comprising the text "No Vehicles in Park") to the at once grammatically and syntactically equivalent sign "No Toilets in Park". It appears that the red circle and diagonal line in the pictogram convey what grammar, syntax, and other semantic conventions in the cases of the written signs cannot. And yet, here also we assume too much. When we confront, say in the washroom of a public campground, a similar red circle with a diagonal slash superimposed upon a water faucet issuing drips into a cup, we read "The Water is Not Potable" (or perhaps an implicit normative caution such as "You Are Advised Not to Drink the Water"), but not a prohibition. No theory of legal interpretation that rests only upon words, grammar, and syntax, and no general theories of authorial intent, the temper of the times, or the technical capacities of natural languages, can alone answer why in Montreal in 2005 "No Toilets in Park" will typically be understood as descriptive and "No Vehicles in Park" will usually be read as prohibitive.[4]

This said, all is not lost. Communication happens, and most often we do make perfect sense of signs like these. The puzzle invites us to consider how it is possible to maintain skepticism about rules as normative in and of themselves but still remain committed to seeking an explanation of the relationship between artifacts and our conduct. Neither the signified referents nor the normative consequences of the signs

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[4] A similar point may be made about the three pictograms. Whether the red circle and the diagonal red line conveys a prohibition, a mere caution, or a description cannot be determined simply by looking at the sign itself. Normativity, if normativity there is, comes from somewhere else, and from attending to other, non-pictorial considerations.

are to be found within their formulation and presentation.[5] In just looking at the sign, why do we sometimes find law? Recall Wittgenstein's observation that misunderstanding in interpretation can be a source of new understanding.[6] Moving beyond the initial terms of the Hart-Fuller debate, we can see that interpretation is neither just there (in Hart's positivist perspective, external to the sign or pre-set) nor simply here (in Fuller's contextual view, internal to the sign or immanent).[7] Rather, as Fuller later came to argue, the sense of signs like "No Vehicles in Park" is bound up with and constitutive of the matrix of social relations through which they are generated and read.[8]

Discovering and engaging with legal rules and, more generally, with law as a whole, is interpretive practice. The interpreter of the sign "No Vehicles in Park" is not

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[5] More than this, even our everyday intuitions can be misleading. Interpretive possibilities abound. Perhaps "No Toilets in Park" has normative content after all, as suggested by six-year-old Daniel Van Praagh Provost, who questioned the wisdom of a rule that would prohibit parents from bringing children's potties into a park. Likewise, perhaps "No Vehicles in Park" is just a caution to users that no bicycles or motorized golf carts are available for rental. Consider also the possibility that toilets are themselves vehicles in the various senses already canvassed: for example, a commode, or Duchamp's notorious urinal.

A secondary point of these examples is to signal that interpretation is more than practice; it is play. While the constitution of meaning demands considerable energy and seriousness—and can result in significant consequences for the interpreter—, it nonetheless invites us to have fun. Communicative indeterminacy in life as in law and legal education demands nothing less. See Johan Huizinga, *Homo Ludens: A Study of the Play Element in Culture* (New York: Harper & Row, 1970).

[6] The insight may be generalized. Error is often the source of inspiration; confusion can lead us to uncover how what we presume often controls what we are able to apprehend; and wrong answers are the first step to real learning. On these points see John Holt, *How Children Fail* (New York: Dell, 1971). In adapting Wittgenstein for this discussion, we conceive interpretative practices broadly so as to include not only language but all media of communication, particularly embodied communication. The point is not new to philosophy. See *e.g.* David Bloor, "Left and Right Wittgensteinians" in Andrew Pickering, ed., *Science as Practice and Culture* (Chicago: University of Chicago Press, 1992) 266 and Michael Lynch, "Extending Wittgenstein: The Pivotal Move from Epistemology to the Sociology of Science" in *ibid.*, 215. Cultural and linguistic anthropologists have arrived at similar conclusions. See *e.g.* Sally Falk Moore's classic, *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978); John L. Comaroff & Simon Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago: University of Chicago Press, 1981); and Jack Sidnell, "An Ethnographic Consideration of Rule-Following" (2003) 9 Journal of the Royal Anthropological Institute 429 at 436.

[7] For subsequent iterations of the Hart-Fuller debate, and the shifting positions of the protagonists as they came to elaborate the range of interpretive issues raised by the example, see William R. Bishin & Christopher D. Stone, *Law, Language and Ethics: An Introduction to Law and Legal Method* (Mineola, N.Y.: Foundation Press, 1972) at 987-1014.

[8] Lon L. Fuller, "A Reply to Critics" in his *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) c. 5. Fuller's matured views on interpretation are further elaborated in David Dyzenhaus, "Fuller's Novelty", Paul Cliteur, "Fuller's Faith", and Frederick Shauer, "Fuller on the Ontological Status of Law", all in Willem J. Witteveen & Wibren van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Instituional Design* (Amsterdam: University of Amsterdam Press, 1999) 78, 100, and 124, respectively.

merely an exegete of some prior jurisgenerative activity. Rather, the interpreter is an agent engaged in constituting both the meaning of the sign and his or her own relationship to it. Interpretation is, in this sense, an embedded and embodied practice by which interpreters also discover and project their identity.[9]

This paper takes the position that the study of law is also an interpretive practice.[10] It traces out the implications of such a position for the meaning and shape of legal education today and, in particular, asks what does taking this kind of hermeneutic stance tell about the assumptions and aspirations of the new McGill Programme. We have chosen as the specific focus of inquiry a first-year course that has existed in one form or another since the establishment of the faculty, and that since the creation of the National Programme in 1968, has borne the title "Foundations of Canadian Law". One of us has taught the course in three decades with three different self-described orientations: Foundations of Canadian Law (1982-1988); Foundations of Law (1990-1995); and Foundations (2003-2005).[11] Under these three informal labels and the different understandings of law, language, and knowledge that they imply, the course has been a metonym for modern legal education at McGill.

Our central claims are three. First, a particular interpretive practice to law—what might be called constitutive polyjurality[12]—has been one of the animating themes of legal education at McGill since its origins. Given this history, there are identifiable

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[9] The *locus classicus* for understanding law as hermeneutics is Robert M. Cover, "Foreword: 1982 Term, *Nomos* and *Narrative*" (1983) 97 Harv. L. Rev. 4. While we generally agree with Cover, our project is this essay is broader and is also part of an effort toward understanding how human beings find, invent, create, and especially teach and learn about social artefacts such as law. See Roderick A. Macdonald, "In Search of Law" (orientation document prepared for the Law Commission of Canada, 2 October 1998) [unpublished]. For discussions of the turn to interpretation as an intellectual movement, see Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985) and Michael T. Taussig, *Mimesis and Alterity: A Particular History of the Senses* (New York: Routledge, 1993).

[10] While engaging with the sign as a user of the park and engaging with it as an exercise in a law faculty are both interpretive practices, the central inquiries need not be identical. The everyday interpretive practices of sign readers, or of lawyers and judges engaged in discerning the meaning of a sign, or of law professors and law students reflecting on the sense of the sign operate at different levels: the first interpreter need focus only on immediate action; the second set of interpreters must address the meaning of the sign as well as institutional considerations, and the obligation to provide an explanation for the interpretation reached; and the professor and student must, as an inescapable part of studying law, consider the meaning of the very idea of normativity, institutional practices, and systemic coherence in interpreting the sign.

[11] While these three unofficial labels reflect the orientations given to the course over the past quarter-century, officially the course title remains Foundations of Canadian Law. Consequently, in the remainder of this essay, unless the context requires otherwise, we will use the title Foundations of Canadian Law to refer to the course.

[12] The notion of, and variations upon, constitutive polyjurality are central background motifs of this paper. We discuss various understandings of this concept and their implications for legal education *infra*, in notes 21 and 22 and the text to which these notes relate.

curricular aspirations that inform the transsystemic programme. Second, the course Foundations of Canadian Law can be a privileged site for embodying and navigating these aspirations, providing both an epistemological map and an ontological compass for transsystemic education.[13] Third, these aspirations for the transsystemic programme and for the design and delivery of the first-year introductory course Foundations of Canadian Law need not be specific to McGill, but could well inform practices of contemporary legal education generally.[14]

I.   No:[15] A History without a Past[16]

It is difficult to understand any particular programme of legal education without reference to the aims and objectives established for it. And it is difficult to know what exactly are the aims and objectives of a particular programme without also knowing what the programme is not (comparatively), or is no longer (historically).[17]

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[13] We use the expressions "map" and "compass" guardedly. By "map" we do not mean an instrument that fixes a location, but rather a gaze that is conscious of its own position. By "compass" we do not mean an instrument that necessarily points a direction, but rather a set of protocols and inquiries through which different intellectual orientations may be recognized and explored.

[14] *CODA:* In a nutshell, these aspirations involve, first, approaches to law—the development of the curriculum from a focus on a single state legal system (unijuralism), to consideration of both civil law and common law traditions (bijuralism), and ultimately to an open-ended exploration of multiple sites of legal normativity (plurijuralism). They also involve the development of a curriculum taught initially in one language, to a bilingual pedagogy, to an open-ended exploration of multiple forms of human communication. Finally, these aspirations involve the move from a single disciplinary focus, to interdisciplinary studies, to a transdisciplinary orientation.

Part of our objective in this paper is to illustrate by example what a plurijural, multilingual, and transdisciplinary curriculum would look like, and how its pedagogy would be organized. For this reason we do not spell out in advance what each of these approaches to learning law would entail, but leave them to be iterated as the essay unfolds. The intellectual interconnections among the different approaches to law, language, and knowledge are, however, elaborated in the concluding Prologue. The organization of this essay thus stands in counterpoint to normalized, passive techniques of reading and invites the type of interpretive practice that we argue is actually required of those who teach and learn in the transsystemic programme.

[15] The *Oxford English Dictionary* defines the word "no" as a determiner, as in "[n]ot any"; "no" is also used to indicate, *inter alia*, that something is the opposite of what is being specified. Each of these meanings—both negation and opposition—is operative in the present section. Its objective is to consider the oppositions that have informed the narrative tradition that is the history, the present, and the future of legal education at McGill.

[16] *THEME:* The history and contexts of the McGill Faculty of Law are not offered to suggest the inevitability or necessity of the transsystemic programme. Rather, in looking backwards the goal is to show that from the faculty's founding, there have been professors who have challenged the monist assumptions that ground much thinking about legal education in North America. We suggest that in various earlier versions, the programme at McGill has reflected a pluralist perspective that finds and creates law in multiple contexts and locations and that imagines legal education as attending to these multiple sites.

[17] For a discussion of these contrasting approaches to situating the new McGill Programme, see Florence Dagicour, "Le programme transsystémique de McGill: un modèle à exporter?"

Many who have reflected on the key innovations of the transsystemic programme adopt the first or comparativist approach.[18] They contrast the transsystemic approach with two other models of contemporary legal education: (1) the national legal system model predominant in Europe, the Americas, and Australasia; and (2) the conventional model of comparative legal education which treats the Other as external and in opposition to its own perspective. The specific comparativist approach taken by McGill scholars has the added advantage of signalling the distinctiveness of both the formal features and the ambitions of the programme, especially when viewed in relation to other endeavours of transnational legal education now being pursued, most notably in Europe.[19]

The current McGill Programme may also be assessed against its earlier versions so as to suggest its possible future directions.[20] In this historical perspective, the programme can be interpreted as the continuation of a conversation about law that began with the founding of the Law Faculty in the 1850s. We believe that the main

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(B.C.L./LL.B. Term Paper, McGill University, Faculty of Law, 2004) [unpublished], and Simon Chamberland, "La 'globalisation de la pensée': ses implications pour la théorie du droit et son enseignement" (B.C.L./LL.B. Senior Essay, McGill University, Faculty of Law, 2004) [unpublished].

[18] Excellent papers on the programme include: Yves-Marie Morissette, "McGill's Integrated Civil and Common Law Program" (2002) 52 J. Legal Educ. 12; Armand de Mestral, "Guest Editorial: Bisystemic Law-Teaching—The McGill Programme and the Concept of Law in the EU" (2003) 40 C.M.L. Rev. 799; Daniel Jutras, "Two Arguments for Cross-cultural Legal Education" in Heinz-Dieter Assmann, Gert Brüggemeier & Rolf Sethe, eds., *Different Legal Cultures—Convergence of Legal Reasoning: Grundlagen und Schwerpunkte des Privatrechts in europäischer Perspektive*, vol. 3 (Baden-Baden: Nomos Verlagsgesellschaft, 2001) 75 [Jutras, "Two Arguments"]; Daniel Jutras, "Énoncer l'indicible: le droit entre langues et traditions" [2000] R.I.D.C. 781 [Jutras, "Énoncer l'indicible"]; Nicholas Kasirer, "Legal Education as *Métissage*" (2003) 78 Tul. L. Rev. 481 [Kasirer, "*Métissage*"]; Nicholas Kasirer, "Bijuralism in Law's Empire and in Law's Cosmos" (2002) 52 J. Legal Educ. 29 [Kasirer, "Bijuralism"]; Julie Bédard, "Transsystemic Teaching of Law at McGill: 'Radical Changes, Old and New Hats'", (2001) 27 Queen's L.J. 237; H. Patrick Glenn, "Mixing It Up" (2003) 78 Tul. L. Rev. 79; and David Howes, "*Maladroit* or Not? Learning to Be of Two Minds in the New Bi-jural Law Curricula" (2002) 52 J. Legal Educ. 55 [Howes, "*Maladroit* or Not?"].

[19] See especially Daniel Jutras, "Énoncer l'indicible", *ibid.*, and Nicholas Kasirer, "*Métissage*", *ibid.* For analogous reflections in Europe, see Pierre Larouche, "L'intégration, les systèmes juridiques et la formation juridique" (2001) 46 McGill L.J. 1011; Mauro Bussani & Ugo Mattei, "Le fonds commun du droit privé européen" [2000] R.I.D.C. 29; Ewoud Hondius, "The Common Core of European Private Law: Trento 15-17 July 1999" (2000) 8 E.R.P.L. 249; Ole Lando, "The Common Core of European Private Law and the Principles of European Contract Law" (1998) 21 Hastings Int'l & Comp. L. Rev. 809; and Nicholas Kasirer, "The Common Core of European Private Law in Boxes and Bundles" (2002) 10 E.R.P.L. 417. Esin Örücü attempts to trace a new vocation for comparative law that bears a resemblance to the transsystemic approach in *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Leiden: Martinus Nijhoff, 2004).

[20] To date, however, no author has explicitly sought to locate the transsystemic programme by reference to earlier versions of the undergraduate curriculum at McGill. For intimations of what such an endeavour would entail, see Bédard, *supra* note 18; Howes, "*Maladroit* or Not?", *supra* note 18. A general overview of the undergraduate curriculum until 1989, with suggestions of what its then future orientations might be, is set out in Roderick A. Macdonald, "The National Law Programme at McGill: Origins, Establishment, Prospects" (1990) 13 Dal. L.J. 211 [Macdonald, "National Law Programme"].

themes in this 150-year narrative are situated at the level of aspiration more than at the level of specific curricular structures, course offerings, or pedagogical styles. That is, these themes and ideas can be explored most deeply if legal education at McGill is conceived as a legal tradition.

What is a legal *tradition*? For some, a legal tradition is much like an institution. It consists of "frozen answers to frozen questions."[21] This conception is advanced by, among others, John Henry Merryman, who defines a legal tradition as

> a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught.[22]

So understood, a legal tradition comprises distinctive answers to a constellation of questions about the core features of the social institution called law. These core features are said to include the material sources and types of legal rules, foundational concepts, practices, and techniques for expressing and interpreting law, official institutions, the manner of teaching and learning law and reproducing the legal professions, and the fundamental socio-economic and political values that any particular legal system within that tradition is intended to nurture, reflect, and advance.[23]

Now consider the perspective of Patrick Glenn, for whom a legal tradition is best conceived as an inheritance, a projection of the past into the future. A tradition is not a static, let alone stable, assemblage of formal elements. Rather, a legal tradition is "the changing presence of the past."[24] Glenn goes on to argue that tradition is inherently fragile. Certainty is unavailable. Only leading variations may ever be ascertained, while others lurk in their shadow, awaiting their chance. The key question of a tradition, then, is to ask how the conversation has gone so far: what has been said, and what has been left unsaid?

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[21] Mary Douglas, *How Institutions Think* (Syracuse, N.Y.: Syracuse University Press, 1986).

[22] John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe*, 2d ed. (Stanford: Stanford University Press, 1985) at 2.

[23] For present purposes, a distinction is being taken between a legal system as a specific instance of law (for example, the legal system of Quebec) and a legal tradition as a generic concept (for example, the civil law tradition). This usage is not universal. See *e.g.* René David & John E.C. Brierley, *Major Legal Systems in the World Today*, 3d ed. (London: Stevens, 1985) at 11-17, who use the word "system" the way tradition is deployed here, even though in the body of their work they speak rather of "families" of law to regroup particular systems. Compare also the usages in Jean-Gabriel Castel, *The Civil Law System of the Province of Quebec: Notes, Cases, and Materials (*Toronto: Butterworths, 1962), who uses the word "system" in its more usual sense to refer to the official law of a particular political state (*ibid.* at 1), with John E.C. Brierley & Roderick A. Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993), who eschew the word "system" entirely in identifying and discussing the same body of knowledge.

[24] H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 2d ed. (New York: Oxford University Press, 2004) at 23 [Glenn, *Legal Traditions*]. The thought is also nicely developed by Gerald J. Postema in "On the Moral Presence of Our Past" (1991) 36 McGill L.J. 1153.

At this juncture, the goal is not to pick between these different approaches to conceiving of a tradition, although it will become obvious that Glenn's perspective is more congenial and more illuminating of the topics we address in this essay. We would, rather, like to signal three overarching ideas that both address. First, while neither Merryman nor Glenn insists that a legal tradition be associated with any given political project, almost all of the examples given by the former relate either to the nation-state or its surrogates. Second, neither conception commands that the idea of legal tradition be grounded in particular examples found in the contemporary world. That is, functional, structural, and deontological (rather than descriptive) taxonomies of different traditions are possible, but neither author explicitly seeks to trace them out. Merryman considers as archetypes only civil law, common law, and socialist law; Glenn, by contrast, offers a larger and richer inventory that also includes, but is not limited to, chthonic traditions and religious traditions.[25] And third, while neither Merryman nor, especially, Glenn requires that the notion of legal tradition be confined to the visible, institutional, artifactual, and usually written deposit of law, in his discussion Merryman does just that. He assumes, in contradistinction to Glenn, that a legal tradition exists apart and in abstraction from those who consider themselves participants in it.

Why this preliminary concern with tradition in reflecting upon the McGill Programme? There are two reasons. As already noted and in line with Glenn's analysis, we claim that legal education at McGill, up to and including its current incarnation, is an *open-ended conversation* about law through time and should be examined in that light. Second, and extrapolating somewhat from Merryman's inventory, we argue that by attending to the formal plurality of law projected through *time* and *place*, the McGill Programme invites attention to the key questions, processes, and commitments through which a legal education serves to constitute legal knowledge and law.[26]

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[25] David & Brierley, *supra* note 23, describe four families of law, adding to Merryman's inventory a heterodox fourth category: religious and traditional (including African and Oceanic tribal) systems. Merryman (*supra* note 22, c. 1 at 1-5) briefly alludes to non-European and historical traditions, but focuses on the dominant traditions found in Europe at the time he was writing (1985). Glenn, *Legal Traditions*, *supra* note 24, also does not set out analytical categories of traditions. Nonetheless he does offer a thick and textured description of several different traditions as they are found in the world today. He also does not implicitly denigrate "traditional" systems. Rather, he sets out the features he sees as characteristic of *chthonic* traditions and, in the introductory paragraphs to chapter three of his monograph, offers a rationale for his choice of the label chthonic to regroup these traditions (*ibid.* at 59ff.).

[26] On the importance of the practice of legal education for constituting law, see Emannuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism" (2004) 13 Soc. & Legal Stud. 57. See also Peter Goodrich, "Twining's Tower: Metaphors of Distance and Histories of the English Law School" (1995) 45 Miami L. Rev. 901; and Cover, *supra*, note 9.

A. A Conversation about a Legal Tradition

As a legal tradition, the McGill Programme traces its institutional origins to the mid-nineteenth century, when the university began offering courses in law.[27] Throughout its history, the "McGill conversation", as carried on by professors and students, has been self-consciously reflexive. One sees a remarkable continuity of expression in the manner in which the aspirations are framed. Both official documents and commentaries on the programme describe legal education as a process of discovering, creating, constituting, maintaining, and critiquing its objects and practices.[28]

Between 1843 and 1853 the officers of the university sought to find, first within its Faculty of Arts and subsequently by creating a separate Faculty of Law, a response to various social and political conflicts vexing Montreal and more broadly, what was then Canada. The belief that law and the legal profession were the foundation of civilization offered many leaders of the English-speaking community in Montreal both solace for uncertainty and a recipe for institutional renovation in this period of what has been called a "great social construction".[29] Notwithstanding the desire of the university governors to use the faculty primarily to train a local legal elite capable of managing an imminent responsible government,[30] the initial curriculum reflected broader ambitions. Through the inheritance of Roman law, interwoven with pre-revolutionary French law, the common law, the *lex mercatoria,* local practice, and international law, an eclectic tuition was created, in which each of these antecedents, along with legal bibliography of England, France, and Canada were offered as the topics of lectures.

To say much more than this, however, is difficult, not only because of the sparse historical record, but because many of the legal distinctions that we today routinely deploy cannot be readily transposed to the law as then practised and taught. At the faculty's founding, and contrary to views expressed by those promoting codification

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[27] See Stanley B. Frost, "The Early Days of Law Teaching at McGill" (1984) 9 Dal. L.J. 150.

[28] For one interpretation of the intellectual history of law teaching at McGill from the 1840s through to 1989, with a focus on its animating themes and pedagogical assumptions and drawing on archival records, see Macdonald, "National Law Programme", *supra* note 20. The following seven paragraphs are distilled from this essay. The introductory notes to that article provide a comprehensive bibliography of books and articles on Quebec legal education, with references to complementary perspectives on themes, institutions, and assumptions, authored notably by Sylvio Normand, Jean-Guy Belley, David Howes, and J.E.C. Brierley.

[29] On the legal features of this period immediately following the rebellions of 1837-38 and the *Act of Union, 1841*, see Brierley & Macdonald, *supra* note 23 at paras. 16-20. The expression "great social construction" is taken from the subtitle of para. 16.

[30] This theme in the faculty's early ambitions is carefully canvassed in G. Blaine Baker, "Law Practice and Statecraft in Mid-Nineteenth-Century Montreal: The Torrance-Morris Firm, 1848 to 1868" in Carol Wilton, ed., *Beyond the Law: Lawyers and Business in Canada, 1830 to 1930* (Toronto: Butterworths, 1990) 45, vol. 4 of David H. Flaherty, ed., *Essays in the History of Canadian Law* (Toronto: University of Toronto Press).

of the law of Lower Canada,[31] many professors viewed the diversity of sources making up the law of what was then Lower Canada not as an inconvenience for law teaching but rather as an opportunity to begin fashioning a new Canadian legal order. By the late 1850s, the basic terms of McGill's legal conversation were established through a bilingual curriculum that has recently been characterized as polyjural (signalling a wide array of sources of legal *knowledge*)[32] and constitutive (signalling a scepticism about the *existence* or desirability of proclaiming a single form of legal knowledge)[33] in its aspirations.[34]

During the next half-century, however, various political, social, and legal events worked against the realization of this curricular ambition. First among these were Confederation in 1867, which brought about the formal separation of the civil and

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[31] For discussion of the motivations for codification and the view that codification would rationalize the "confounding body of disparate sources" of the law of Lower Canada, see J.E.C. Brierley, "Quebec's Civil Law Codification: Viewed and Reviewed" (1968) 14 McGill L.J. 521.

[32] We consciously use the expression "polyjural" (in preference to "multijural" or "plurijural"), which combines both Greek (poly) and Latin (jural) to highlight the scope of diversity of materials canvassed in the initial programme. In this usage, polyjurality can be seen as an epistemological claim. The term was coined by David Howes, who also wrote a pioneering discussion of the idea in "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929" (1987) 32 McGill L.J. 523. Howes (*ibid.* at 525) derives the idea of polyjurality from Clifford Geertz, "The Uses of Diversity" (1986) 25 Mich. Q. Rev. 105, and observes: "What is meant by 'polyjurality' is a tendency to regard other legal traditions (or cultures) as presenting 'alternatives for us' as opposed to 'alternatives to us'."

[33] The term "constitutive" is ours. Others, including one of us, have heretofore used the adjective "universalist" to describe the orientation of the curriculum we note here. But "universalism" can easily lead to confusion since today it is typically used in reference to unity or singularity—as a Kantian ideal. Historically at McGill, those who adopted the Kantian vision were seen as pursuing a project of legal unification—as seeking the "one true legal order" for all times and all places. By contrast, those who sought a constitutive vocation for legal education did not aim at establishing an ideal-type legal system to transcend particular, typically reified, legal orders and systems. Rather, they saw their object as deploying a polyjural inquiry for the purposes of imagining different conceptions of the institutions, processes, and rules of law with which they were engaged. That is, the word constitutive refers to an ontological claim about the nature of law.

[34] The university's "Law Announcement for 1857" (i.e., what would be known today as the "course calendar") proclaimed these aspirations in the following language:

> The Educational Officers of this Faculty have felt that the Law of Lower Canada, though in many of its details purely local, retains, as its leading characteristics, the noble and imposing features of the civil law, and that the principles established in the Roman jurisprudence, still form the groundwork of many of its departments. The lectures, therefore, though prepared with especial reference to the law of Lower Canada, have been as far as consistent with their primary object, divested of any purely sectional character, and are made to inculcate such comprehensive principles as form, to a great extent, the basis of every system of jurisprudence.

In our view, much of the history of the faculty's curriculum since can be written as competing glosses on the meaning of this paragraph. For a more detailed elaboration of the idea of a constitutive conception of polyjurality and its reflections over time in the McGill curriculum, see Macdonald, "National Law Programme", *supra* note 20 at 211-16 and 347-63.

common law traditions, and the codification of the civil law of Lower Canada in 1866. Technical exercises of Code-parsing and exegetical pedagogy became predominant within the curriculum, as professors and students comforted themselves with the belief that the document comprehensively presented "the law in force". Moreover, the ideology of late-nineteenth-century legal science lionized the Code as a bulwark against the common law and cast the McGill Programme as an intellectual Trojan horse threatening the integrity of Quebec civil law.[35]

In 1915, Robert Warden Lee was appointed dean and given a mandate to reinvigorate the faculty's curricular and scholarly vocation. Almost immediately, he injected a common law stream into the B.C.L. programme in parallel to the civil law curriculum. Soon after that, he embarked on the university's first "interdisciplinary" venture with the establishment of a four-year LL.B. programme as a joint Arts-Law course of study. Lee's efforts to re-establish a polyjural (encompassing at least the civil law and common law) and constitutive (embracing a view that law is not a top-down hierarchical projection of state authority) curriculum did not, however, long survive his departure from the faculty in 1920. Nonetheless, in retrospect his tenure can be seen as laying the groundwork for later developments in all these directions.[36]

The primary intellectual mode in the faculty during the following four decades mirrored that of the late nineteenth century. While halting steps to advance the teaching of international law, public administration, government regulation, and comparative law were taken throughout the 1940s and 1950s, it was not until the mid-1960s, following the appointment of Maxwell Cohen as dean, that efforts were mounted to revive Lee's curricular ideas. Although the creation of a bilingual and bijural National Programme in 1968 was a significant innovation, it did not really constitute a radical break with the faculty's intellectual history. Rather, the National Programme was conceived as a third attempt to reconfigure the approach to law teaching that was thought to have animated the faculty first in the mid-nineteenth and

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[35] In these counterpoints to the dominant curricular and intellectual orientations expressed by the initial professorial cohort of the faculty, one sees a recurring theme in the "McGill conversation". The participants in this conversation have always included those who conceive the mission of the faculty as training students for local legal practice as well as those who would locate its aspirations on a broader plane. Seen in this light, one can interpret different curricular innovations over the decades as reflecting the ongoing negotiation of the terms of their coexistence among participants in the McGill legal tradition. For discussion, see J.E.C. Brierley, "Quebec Legal Education Since 1945: Cultural Paradoxes and Traditional Ambiguities" (1986) 10 Dal. L.J. 5.

[36] For a discussion of Lee's curriculum, the manner in which he sought to find a compromise between the state positivism that was then the dominant ideology in Quebec's legal community and the aspirations of the founders of the faculty, and the circumstances of its demise, see R.A. Macdonald, "Implicit Civil Codes" in D. Guth, ed., *Proceedings of the Conference on Legal History* (Winnipeg, 1998) [unpublished]. The key socio-economic and political conflicts of the first forty years of the twentieth century are reviewed in Jean-Guy Belley, Sylvio Normand, and David Howes, *supra* note 28.

then in the early twentieth centuries.[37] Its centrepiece was the establishment of an English-language LL.B. (common law) programme alongside and in parallel to the existing bilingual B.C.L. (civil law) programme. Although students were offered the possibility of acquiring both degrees by adding an extra year of study onto either of the regular three-year courses, the two tracks co-existed more as largely independent curricula than as streams within a single programme of study.

Over the next quarter-century, many professors who were among the strongest proponents of what has become the transsystemic curriculum came to see that the National Programme embodied commitments that were at once ontological and epistemological.[38] These professors also believed that the National Programme as then organized was in an unstable state. It would either have to be developed into a fully integrated, bilingual, and bijural curriculum adapted to the late twentieth century or it would resolve into a stable monojural programme focused on the "law in force" in Quebec as did the initial McGill curriculum after the 1860s and Lee's programme in the 1920s.[39] Confronted with the prospect that the National Programme might collapse, during the 1990s these professors made options for reconfiguring the National Programme the focal point of faculty planning.[40]

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[37] Again, the National Programme was a sophisticated compromise between the demands of professional legal education of the mid-1960s, the politics of university-based law faculties, and the manner in which its promoters understood the initial ambitions of the faculty. For discussion of the process by which the programme was implanted, see Roderick A. Macdonald, "Dreaming the Impossible Dream: Maxwell Cohen and McGill's National Law Programme" in William Kaplan and Donald McRae, eds., *Law, Policy and International Justice: Essays in Honour of Maxwell Cohen* (Montreal: McGill-Queen's University Press, 1993) 409.

[38] That is, the belief arose among many professors most involved in teaching basic private law courses that the pedagogy of the National Programme required them to rethink the answers they would give to the questions: What is the nature or essence of law? And what are the materials from which we build what we think we know about law?

[39] The various configurations of the undergraduate National Programme between 1968 and 1989 are discussed in detail in Macdonald, "National Law Programme", *supra* note 20 at 296-346. These iterations reflect the progressive development of the McGill curriculum within the National Programme from a monojural and unilingual enterprise through to a bijural and bilingual endeavour and ultimately, on the eve of the adoption of the transsystemic programme, to a polyjural and multilingual aspiration.

[40] At this moment in the faculty's history, the term "universalist" (in this essay, "constitutive") polyjurality was coined largely for rhetorical purposes. The strategy of those professors who sought to enhance the undergraduate curriculum in the direction of an integrated teaching programme was to show how the creation and subsequent development of the National Programme were not "foreign" to the traditions of legal education at McGill. That is, the expression served as an argument against those professors of the faculty, and several powerful lobbies outside the university, who wished to see McGill abandon the teaching of the common law. For a review of the politics of the National Programme from the 1960s through the 1980s, and the role that the appeal to history played in sustaining a commitment to pedagogical themes that were thought to have been dominant at several earlier moments in the faculty's history, see Macdonald, "National Law Programme", *ibid.* at 317-23.

Four considerations were at the forefront of this planning process. First, while preferable to the qualifier "Canadian" by which the programme was originally conceived in the 1960s, the label "National" increasingly seemed misplaced. It suggested a preoccupation with a single political state (Canada), and indirectly with a particular conception of a social field (the nation)—both ideas being at odds with the faculty's pedagogical ambitions. Second, the separate designation and teaching of B.C.L. and LL.B. courses was seen to inappropriately reinforce the idea that legal knowledge was discrete and spatially singular. That is, the streaming of first-year students into legal tradition-specific courses struck many as incompatible with the dexterity of mind that the curriculum was meant to foster. Third, the mainstream pedagogy of North American legal education that prized scientism, a priori rationality, and rights adjudication in courts appeared inadequate to the intellectual aspirations of the programme. Moreover, the demands of a more heterodox, better educated, and increasingly cosmopolitan professorial and student population argued for changing both the manner and content of teaching. Finally, developments in legal theory and changes in the environment of legal practice provided additional rationales for building the core of the undergraduate curriculum around ideas of hermeneutics, legal pluralism, empirical as well as doctrinal scholarship, and interdisciplinarity. [41]

B. The Conversation Continues

The current curriculum at McGill can be seen as a direct response not just to these foregoing considerations, but also to other more pragmatic challenges confronting the faculty at that time.[42] All undergraduate[43] students are now admitted

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[41] The development of the transsystemic programme has to be seen in light of the foment in legal education generally from the 1960s onwards. The Social Sciences and Humanities Research Council of Canada ("SSHRC") document *Law and Learning* (Ottawa: Social Sciences and Humanities Research Council of Canada, 1983) (Chair: Harry W. Arthurs) [*Arthurs Report*] sets out the curricular and scholarly terrain of Canadian legal education in the early 1980s. Its diagnosis, although not its prescription, were the ground upon which the reconstitution of the National Programme during the 1980s and 1990s was built. The long-term impact of the *Arthurs Report*, and its relevance to changes in the environment of legal practice, is discussed in Roderick A. Macdonald, "Still 'Law' and Still 'Learning'? / Quel 'droit' et quel 'savoir'?" (2003) 18 C.J.L.S. 5.

[42] These challenges related to issues such as funding, student and professorial recruitment, the need to refurbish the faculty's physical plant, upgrading and wiring the library, and so on. They are discussed in the document authored by the faculty's then dean, Stephen Toope, and entitled *Faculty Planning Report* (Montreal: Faculty of Law, McGill University, September 1995).

[43] Over the past decade, and following the implementation of the new undergraduate programme, the graduate curriculum of the faculty has also been partially recast to reflect these themes. For example, a non-thesis Masters programme, in which students take specialized courses building on the transsystemic pedagogies of the undergraduate curriculum, has been created. In addition, Ph.D. "comprehensives" that will include reflections on constitutive polyjurality as part of the obligatory syllabus are in the works. See *Report of the Ad Hoc Committee on Graduate Studies* (Montreal: Faculty of Law, McGill University, 2002). These complementary modifications to the graduate programme will not, however, be considered further here.

into a single programme leading to the joint award of the B.C.L. and LL.B. degrees.[44] The total number of credits required for graduation was reduced from 125 to 105, thereby allowing for the concurrent implementation of interdisciplinary and specialist programmes organized through joint degrees, majors, minors, and honours thesis options.[45]

Most commentators see, with good reason, the core of the new programme as located in another innovation—what has come to be known as "transsystemic" pedagogy.[46] The theory of transsystemic teaching is that private law courses are, in general, to be taught in an integrated fashion, without a pedigree designation as civil law or common law courses. At present, the practice is that in the first year, Extra-Contractual Obligations/Torts and Contractual Obligations/Contracts, and in upper years, Family Law, Family Property Law, Judicial Institutions and Civil Procedure, Secured Transactions, Sale, and Lease carry no systemic designation. Most other compulsory courses of the first year, notably Civil Law Property, Constitutional Law, Introductory Legal Research and Writing,[47] as well as second-year courses entitled Common Law Property, Advanced Common Law Obligations, and Advanced Civil Law Obligations, which focus on method, conceptual structure, and legal culture, nonetheless retain the label and logic of jurisdictional law.[48]

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[44] Notwithstanding the integration of all students into a single programme, the faculty still awards two diplomas upon graduation, rather than a single diploma on which are embossed two degrees. Nor, more radically, does it plan to award one degree with a single denomination. The impact of maintaining two diplomas with two degrees on the manner in which students perceive the programme is uncertain, although most professors acknowledge that this continuance does keep the idea of separate civil law and common law traditions visible, and privileges them as objects of inquiry within the *imaginaire* of students.

[45] The rationale for and the details of these curricular options are set out in *Final Report of the Ad Hoc Curriculum Review Committee* (11 April 1996) at 17. A full picture of the development of the new programme may be gleaned from the following faculty documents: *Report of the Ad Hoc Curriculum Implementation Committee* (15 March 1997); *Final Report of the Working Group on Private Law Foundations* (16 June 1997); *Consultation Report of the Ad Hoc Curriculum Review Committee* (7 November 1997); *Status Report on the Curriculum Revision in the Faculty of Law 1997-1998 as at February 23, 1998* (3 March 1998); *Report on Upper-Year Curricular Reform Implementation* (16 March 1999). While many professors contributed to the elaboration of the new progamme, two successive chairs of the Curriculum Committee—Professors Jeremy Webber and Daniel Jutras—carried the burden of moving the agenda forward.

[46] See *e.g.* Morissette, *supra* note 18; de Mestral, *supra* note 18; Jutras, "Two Arguments", *supra* note 18; Jutras, "Énoncer l'indicible", *supra* note 18; Bédard, *supra* note 18; Glenn, "Mixing It Up", *supra* note 18; Howes, "*Maladroit* or Not?", *supra* note 18; Kasirer, "*Métissage*", *supra* note 18.

[47] We briefly consider the rationale for and content of the faculty's remaining obligatory first-year course, Foundations of Canadian Law, later in this section. The following sections of this essay elaborate more fully upon the role we imagine for that course, and the manner in which we believe it should be conceived, taught, and learned.

[48] This said, while the courses Common Law Property, Advanced Civil Law Obligations, and Advanced Common Law Obligations situate the "jurisdiction" in a particular legal tradition, they are meant to be taught in a comparative manner. Common Law Property, ideally, makes comparative recourse to concepts introduced in the first-year course on Civil Law Property. Similarly, the advanced

These features evidence that, as a whole, the present McGill Programme is distinctive for much the same reasons that marked as novel its earlier iterations. Yet there remains a considerable, and we believe beneficial, uncertainty as to what exactly is, or should be, transcended (if indeed anything should be transcended)[49] in transsystemic legal education.[50] On one view, there is the notion, familiar throughout the faculty's history, that as a matter of intellectual ambition no single jurisdiction and no particular epoch ought to be favoured over others in organizing the pedagogy.[51]

Because the National Programme shifted teaching only from mid-twentieth-century monojurality to a bijurality in which Quebec civil law and anglo-Canadian common law were to be privileged, a first transcending move signalled by the new programme was a renewed commitment to polyjurality. That is, transsystemic teaching announced a return to the idea of considering multiple civil law and common law traditions, an ambition to explore chthonic and religious legal traditions, and concern with myriad *supra-* and *infra-*state legal orders.[52]

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obligations courses, which are also meant to explore and question the distinction between contract and tort as categories of legal knowledge, are taught ideally as if in conversation with one another. Introductory Legal Research and Writing is taught as a Canadian comparative law course in which both jurisdictional and non-jurisdictional approaches to legal bibliography are canvassed. Only Constitutional Law takes a single legal order (Canada) as its jurisdictional focus.

[49] The use of the word "transcended" requires clarification in the present context since it suggests an "idealist" tradition in philosophy that is contrary to what many argue should be the ontology of the new programme. Nonetheless, if understood descriptively—that is, as a verb derived from the prefix "trans"—and not prescriptively, it captures the uncertainty meant to be signalled in the text. For the purposes of this essay we use the word in two senses given by the *Oxford English Dictionary*: (1) to pass over or go beyond (a physical obstacle or limit); and (2) to pass or extend beyond or above (a non-physical limit), to go beyond the limits of (something immaterial), to exceed.

[50] So, for example, in contradistinction to the view we take in this paper, some professors give what they characterize as a "minimalist" reading to the aspirations and mandate of transsystemic teaching. The minimalist view sees the programme as enabling, encouraging, even requiring professors to teach the law of more than one legal system, but as implying no other pedagogical commitments. See *e.g.* memorandum from Stephen Smith to the authors (24 March 2005) and entitled "Comments on 'No Toilets in Park'".

[51] Of course, this intellectual ambition does not mean, as a matter of practice, that the curriculum would not have both temporal and geographic foci. Temporally, all pedagogy, and not just the teaching of legal history, involves the relation of the past to the present. Different professors will conceive the relevant past differently. The aspiration of the programme is to enable individual professors to make the choices they consider most appropriate by providing a justification for diversity of epoch and geography in these selections. In a like manner, all pedagogy, and not just explicitly comparative pedagogy, involves the relation of oneself to the Other. Different professors will conceive that Other differently—as involving the law of some other state, or some other legal tradition apart from common law and civil law, or as involving local law, the law of organizations, or transnational law. Again, the scope of the programme is conceived non-dogmatically so as to provide a justification for the different choices that individual professors will make.

[52] The listing of legal orders in the text should not be taken as a claim that polyjurality is simply a matter of increasing the number of legal traditions or legal systems being examined. Today, a scan of course tables would indicate that most law faculties attend in their own way to multiple state-like legal

The second transcending move, revitalizing the constitutive ambition, is equally important. The notion of any legal system comprising a determinate "law in force" has been replaced by a conception that brings into relief a wide array of institutions, processes, instruments, and aspirations generated by personal and social relationships and by normative communities (and the processes through which these relationships and communities are themselves generated).[53] In brief, this view of the idea of a transsystemic programme means re-adopting an approach to law teaching that attends not just to abstract, generic conceptions of a legal order, but also to the local and to the particular, or to what some call microlegal systems.[54] It means pluralizing legal epistemologies, or ways of knowing.[55]

Such a programme of legal education can, of course, never be fully realized. Today, judging from the list of courses on offer, constitutive and polyjural teaching at McGill seeks to engage different strands of Roman law, the civil and common law traditions, Aboriginal legal orders, international law, the law of discrete geographies such as the Beauce, as well as Islamic, Talmudic, and canon law. But tomorrow it may also embrace the law of myriad local communities, of the Roma

orders, through courses like international law, Aboriginal law, and Talmudic law, or to various non-state like legal orders in courses like the administrative practice and process of NGOs, collective agreement administration, social diversity and the law. Polyjurality means teaching the different legal orders at the same time, not as the foreign or the exotic, but as the domestic and the familiar. In one sense, this intimates that polyjurality is indistinguishable from a bijuralism that teaches common law and civil law together in the same course. But transsystemic teaching has a further aspiration in that it invites professors and students to see that they are not limited in the choice of legal orders to consider as part of the normative material of any course.

[53] Ultimately, the constitutive self-perception is that there are no a priori limits on the legal traditions and orders than can be considered, that each professor is authorized to make the choices he or she wishes about these traditions, that these choices are constitutive of law, and that there is, in consequence, no right or best answer to any question of rule, concept, institution, procedure, or justificatory structure that will hold across time and space. The quest is not to seek uniformity or to derive particular outcomes that present themselves as necessary, whether for a particular legal order (say, Quebec) or for any imaginable combination of legal orders.

[54] The expression "microlegal system" comes from W. Michael Reisman, *Law in Brief Encounters* (New Haven, Conn.: Yale University Press, 1999) at 11-15.

[55] In so pluralizing legal epistemologies, a constitutive polyjural pedagogy also opens to examination the meaning of the epithet "transsystemic" by which the programme is now colloquially described. Labels matter. One of us was among those professors who were never comfortable with the expression "National" Programme—Why a nation? Why not a nominate state (for example, Canada)? And what nation at that? And why either nation or state? The term "transsystemic" potentially raises similar issues. First, is the noun "system" sufficiently open-ended to characterize the legal normativity in view—What system? And why a system? Second, the prefix "trans" suggests that there is some criterion for distinguishing, or perhaps even some essence that characterizes, the items (the systems) to which the prefix attaches: What is this criterion? What is this essence? Third, what does the "trans" refer to: A new way of talking about law? Another level at which legal systems are organized? A legal space between systems? Still, the expression has much merit, and is on balance probably worth retaining. After all, words do not have fixed meanings. Just as Darwin turned the meaning of the word "species" on its head, it may be that the success of the "transsystemic programme" will be to turn the notion of legal "system" on its head.

peoples, of a new global *lex mercatoria,* and of international human rights as an emerging transnational legal order. And some years down the road, who can predict its components? What matters is not what particular legal orders are taught, but how they are imagined and taught.[56]

Similarly, if English and French are now the privileged natural languages for law teaching at McGill, this is no guarantee that Spanish, Mandarin, Russian, Japanese, and Inuktitut (conceivably even expressive languages like music, dance, and mime) will not also claim a place in the future. And still again, if today the programme is substantively already more than just a conceptual endeavour in which law is apprehended and studied in abstraction from the economic, technological, and political realities of the modern world,[57] this is no reason to presume that professors and students will not in the future aspire to expand the programme's constituency beyond the traditional *clientèles* of law faculties.[58] That is, to the extent transsystemic teaching implies that legal orders under consideration can include those of everyday law, the programme ought to aim at broadening the range of people who are enabled to learn how to seize, wield, and critique law's institutions, normative structures, processes, and rhetorical discourses.[59]

The curricular possibilities as just sketched, however attractive as rationales for the faculty's new approach to law teaching, are only part of the reason why it should commit itself to fully developing the transsystemic programme. Recall the puzzles of legal interpretation discussed in the opening Epilogue. All interpretation involves practices that are inseparable from our embedded experience as social beings.[60] If this is so, then the McGill Programme may be justified not simply because it offers one preferred alternative to current practices of legal education; ultimately, the programme is justified because determining how we acquire legal

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[56] Indeed, it will probably be the case that when these different legal orders are well integrated into the transsystemic programme, there will no longer be courses with tradition-specific titles like Roman Law, Talmudic Law, and International Law that claim a defined and determinable body of knowledge as their exclusive object.

[57] This we take to be the central message of Kasirer, "Bijuralism", *supra* note 18.

[58] This aspiration to broadening the constituencies for legal education raises a further point. Might not actually realizing the programme's ambitions ultimately lead the faculty beyond itself—to legal education in primary and secondary schools, in CEGEPs, in community centres, and to other opportunities to advance public legal education? We discuss this point further at the end of the section "In".

[59] On such an ambition for legal education, see Roderick A. Macdonald, "Access to Justice in Canada Today: Scope, Scale, Ambitions" in Julia Bass, W.A. Bogart & Frederick H. Zemans, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19 [Macdonald, "Access to Justice"]. On the possibilities for pluralizing law's rhetoric, see Desmond Manderson, "Where the Wild Things Really Are: Children's Literature and Law" in Michael D.A. Freeman, ed., *Law and Popular Culture* (New York: Oxford University Press, 2005) 47.

[60] In other words, we see interpretive activity as a relational and social activity that implicitly involves several elements—some cognitive and some related to personal commitments. For development of this theme, see R.A. Macdonald, "Academic Questions" (1992) 3 Legal Educ. Rev. 61.

knowledge is the inescapable response to the inquiry whether a single source of legal knowledge exists.

With this interpretation of the history, orientations, and ambitions of legal education at McGill as background, it is now possible to begin an inquiry into what the first-year course Foundations of Canadian Law might look like if it were to serve the aspirations and pedagogical practices of the transsystemic programme. This inquiry entails a prior question, namely, would a first-year course entitled Foundations of Canadian Law have any role at all in such a programme? In a transsystemic curriculum, might any type of Introduction to Law course not be superfluous?

To the extent that Introduction to Law courses have usually been conceived in North American law faculties as only providing a complement or counterpoint to the largely monist, statist, and positivist pedagogy dominant in first-year undergraduate legal education, Foundations of Canadian Law would no longer be needed at McGill. All transsystemic courses would be foundations courses. Indeed, insofar as the tuition of the new programme could be imagined as questioning a priori categories as a way of organizing legal knowledge, some might even be tempted to make an argument that individually labelled courses based on doctrinal categories—constitutional law, contracts, civil responsibility, property—would be inappropriate or inconsistent with the programme's goals.[61]

Whether or not an approach to pedagogy that eschews organizing the curriculum by reference to *ex ante* classification of topics according to established legal concepts is possible in theory, experience teaches that it is not realistic in practice.[62] After all, as we claim, if law is about interpretation, it must also be

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[61] We do not discuss whether this argument about legal categories would also apply to courses carrying thematic labels like Streets, Work, Poverty, Risk, or Love. Ultimately, the question is whether *any* organizing framework has an unassailable position in a law faculty curriculum.

[62] One need only look to the fate of the programme proposed by Harold D. Lasswell and Myers S. McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest" (1943) 52 Yale L.J. 203 for an example of the difficulty of changing the substance of legal education by changing the labels of the courses and abandoning the traditional concepts by which law, legal experience, and legal knowledge are given expression. Consider that what is now know as the *Yale Journal of International Law* was founded in 1974 as *Yale Studies in World Public Order*. The new journal was dedicated to professors McDougal and Lasswell: "The Reasons for Yale Studies in World Public Order" (1974) 1 Yale Stud. World Public Order i at ii. Ten years later, the editors decided to adopt a more conventional name, despite noting that the journal had nonetheless maintained a close association with the New Haven School proponents: "As the intellectual compass of these scholars broadened, the *Journal* also extended its reach, becoming increasingly catholic in its choice of material. Inevitably, while retaining at its core the distinctive character bequeathed by its founders, the *Journal* became in every sense a journal of international law. It is this development which the *Journal* formally acknowledges in adopting its new name" (Mark David Agrast, "Preface: Entering Our Second Decade" (1984) 10 Yale J. Int'l L. i). We discuss why inherited "interpretive frames" like property and contract cannot be lightly dismissed given their importance to legal subjects in the section titled "In".

centrally about communication. This implies that a law faculty today must teach students the well-understood subject-matter topics that permit them to begin a conversation with others such as lawyers, officials, and judges who also claim to know about law and about how society is organized. In doing so it must also equip them to discern and deploy concepts like "offer and acceptance", "causation", and "ownership", around which repositories of information such as databases, indices, digests, treatises, case citators, and encyclopedias are now organized.[63]

The challenge for the McGill Programme is to imagine how it is possible to teach these topics and concepts transsystemically in a way that does not depend on reifying categories and classifications. Conceiving legal education as interpretative practice suggests an answer: reified, compartmentalized categorization can be avoided by requiring that all courses, and especially those carrying a familiar label like Contracts, Torts, and Property, interrogate themselves reflexively. A course in Contracts, for example, would seek to critique its own organization and self-presentation as a way of understanding the legal and social practices of contracting. Put otherwise, an internal or reflexive critique of a course is not just a teaching strategy designed for students; it is also a model for learning how the discipline (law) or field (contracts) is actually understood by those who practise it.[64] The nominal categories may be viewed as occasions for discovery and revelation, the identity or content of which varies with each student-interpreter, and not just as warehouses of pre-existing knowledge.

The idea of interpretative practice, it follows, is a useful way of explaining why transsystemic pedagogy means continuing to teach courses labelled by doctrinal categories and what this pedagogy entails in specific courses so labelled.[65] But it is more: it also points to the curricular niche that an apparently non-doctrinal course

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[63] On these central questions of characterization, see Nicholas Kasirer, "'K' as a Structure of Anglo-American Legal Knowledge" (1997) 22 Canadian Law Libraries 159.

[64] Of course, a well-taught Contracts course at any law faculty would share these ambitions. For an example of how to organize a common law Contracts course so as to keep its own scope and purpose open to question, see Lon L. Fuller, *Basic Contract Law* (St. Paul, Minn.: West, 1947). By commencing with the study of remedies, Fuller postpones discussion of the "essence of contract"—offer, acceptance, consideration—until students have first confronted what the purposes of imagining a system of knowledge like contracts might be. See also Lon L. Fuller, "Some Observations on the Course in Contracts" (1968) 20 J. Legal Ed. 482, and "The Role of Contract in the Ordering Processes of Society Generally" in L. Fuller & M. Eisenberg, *Basic Contract Law*, 3d ed. (St. Paul, Minn.: West, 1973) 93.

[65] What would distinguish a transsystemic Contracts course from, say, Fuller's Contracts course, is that in a regular programme, the reflexivity would take place at only two levels: What is distinctive about contracts as a legal concept (as compared, say, with restitution)? And how does contracts as a legal concept relate to the social practices of promising, inducing reliance, agreeing, defecting, and otherwise seeking to manage the future? In a transsystemic pedagogy, the legal concept is tested against various other ways of imagining its scope and context, both as found in organized legal systems, and in, for example, chthonic traditions where distinctions between the social practices of contracting and the legal regime of contract are greatly, if not fully, attenuated.

like Foundations of Canadian Law might occupy, and what its syllabus might look like, in actual application.

First, the course would no longer have a predetermined informational role to play. Because every first-year course would be a *Foundations* course, the course labelled Foundations of Canadian Law would not have to introduce the idea of constitutive polyjurality. Rather, it would focus on probing, questioning, understanding, and contesting this approach and contrasting it with other approaches. Neither would the scope of the course be restricted to artifacts of *Canadian* law, whether or not these are part of the official legal system. In attending to the interpretive practice demanded by the new programme, the course would, paradoxically, more fully engage with the distinctive features of multiple sites of law in Canada.[66] Third, the course would no longer be tied to conventional views of *Law* as a manifested fact of state power. It would explore questions about the intersection of law and human behaviour. Among these, presumably, is the question whether the relationship is even conceived as an intersection—that is, whether law and society are considered as separate phenomena or as aspects of a single reality.[67]

One might summarize these ideas by framing the question that a Foundations of Canadian Law course would ask: that question would be neither structural ("What comprises law?"), nor functional ("What is law good for?"), nor ontological ("What is law?"), but rather epistemological: "How do we know what we think we know about law?"[68] What distinguishes the Foundations course from other courses is that it can be organized so as to address this last question without the constraints imposed by any predetermined framing device, whether in the form of a standard doctrinal category (property, wills, family law), legal tradition

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[66] In other words, because Canadian law would be studied for what it can teach and not because it is presumed to be "in force", these distinctive features of Canadian legal experience—to take only two of many examples, official bijuralism and official bilingualism—would serve as a living laboratory of law. The point is developed in Nicholas Kasirer, "Is the Canadian Jurilinguist—living *entre langues et droits*—a Middle Power?" in Jean-Claude Gémar & Nicholas Kasirer, eds., *Jurilinguistics: Between Law and Language* (Montreal: Thémis, 2005) at 79 [Kasirer, "Canadian Jurilinguist"]. See also, Roderick A. Macdonald, "Regards sur les rapports juridiques informels entre langues et droit" (2000) 3 R.C.L.F. 137 [Macdonald, "Rapports juridiques informels"].

[67] In this ambition, the course, like the entire McGill Programme, would recall the ambition of Mortimer J. Adler & Peter Wolff, *A General Introduction to the Great Books and to a Liberal Education* (Chicago: Encyclopedia Britannica, 1959). We discuss these goals below in the section "In".

[68] Of course, from a constitutive perspective these are ultimately the same questions. But the first three are familiar formulations that beget stock answers. For an example of where reflection about law (and by implication legal education) may go when one no longer feels obliged specifically to address the questions "what comprises law", "what is law good for?", and "what is law?", see Nicholas Kasirer, "Le droit robinsonien" in Nicholas Kasirer, ed., *La solitude en droit privé* (Montreal: Thémis, 2002) 1 at 3. See also Desmond Manderson, *Proximity: Levinas and the Soul of Law* (Montreal: McGill-Queens University Press, 2005) [Manderson, *Proximity*]; "In the *Tout Court* of Shakespeare: Interdisciplinary Pedagogy in Law" (2004) 54 J. Legal Educ. 283 [Manderson, "In the *Tout Court*"]; and "Apocryphal Jurisprudence" (2001) Austl. J. Legal Phil. 27.

(Aboriginal law, Roman law, Talmudic law), institution (business associations, judicial institutions, NGOs), or process (civil procedure, commercial arbitration, ADR, contract). In the remaining sections of this essay, we attempt to show how it would be possible within the framework of the transsystemic programme for the course Foundations of Canadian Law to enhance students' understanding of and engagement with multiple modes and sites for experiencing, practicing, interpreting and, in so doing, making law.[69]

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[69] *CODA:* Three caveats should be entered here. First, we do not believe that the "end of history" has been reached and that contemporary curricular configurations at McGill should be frozen. We see the transsystemic programme today as a current version of the tradition, of the conversation, that began in the mid-nineteenth century. While "anti-foundationalism" may now characterize legal education at the faculty, it (as much as the epistemologies that preceded it) is fragile. Indeed, we can even imagine that constitutive polyjurality may one day lose its place as the leading theme or ontology from which multiple variations will be developed. In brief, as much as we know about how the conversation has gone so far, we do not know how much has been left unsaid, and how this unsaid will make itself explicit in future conversations. On these points, see Susan Haack, *Evidence and Inquiry: Towards Reconstruction in Epistemology* (Oxford: Blackwell, 1993).

A second caveat is this. It is true that some aspects of the new programme as we will develop it throughout this essay (notably the conception of law and legal education as interpretive practice) are found elsewhere and that, as a matter of logic, the McGill Programme could have been adopted in several other faculties. But the point is: (1) it has not been adopted elsewhere; and (2) that it was adopted at McGill has everything to do with the history and the location (the ongoing conversation) of the McGill Faculty of Law. Much of the discussion to follow implicitly addresses the question "why?".

A final caution concerns the relationship of this essay to any particular Foundations of Canadian Law course that has ever been taught at McGill. We are, quite obviously, tracing out an aspiration for the course that far exceeds what is possible to achieve in the conceivable future. Moreover, we are mindful that, like many Introduction to Law courses, this course has often been a repository for themes and topics that professors wish to extirpate from other first-year courses. And we are mindful that, over the years, many students have also viewed the course as little more than a "barrier to market entry" that must be endured rather than relished. Nonetheless, we also believe that as the transsystemic programme takes root over the years, the aspirations for the course we present here will prove to be within reach.

II. Vehicles:[70] Means and Ends[71]

The use of the word "vehicles" as a title to this section intimates that legal education is, at least in part, instrumental to one or more purposes. What these purposes might be is considered more fully in the next section of this paper. For the moment, we wish to push the instrumental inquiry further by asking not only "how is legal education instrumental?" but, more pertinently, "what are the instruments of a legal education?" Our aim is, first, to canvass the different ways in which legal education as interpretative practices can embed and embody the commitments of constitutive polyjurality. After that, we ask how these elements can be deployed in a Foundations of Canadian Law course appropriate for the current McGill Programme.[72]

Almost all aspects of law teaching in North American law faculties today, however the pedagogy is actually being delivered, are conceived as if there were a "normal" in legal education. Hence, by characterizing the transsystemic programme as "novel", the faculty is making both a descriptive and a prescriptive

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[70] The *Oxford English Dictionary* suggests the following usages and meanings of "vehicle": (1) an inert medium (as a syrup) in which a medicinally active agent is administered; (2) any of various media acting usually as solvents, carriers, or binders for active ingredients or pigments; (3) an agent of transmission; (4) a medium through which something is expressed, achieved, or displayed; (5) a means of carrying or transporting something. The theme here is to signal and critique the instrumental character of law's traditional ontology. For further discussion of this mainstream position, see Robert S. Summers, "Pragmatic Instrumentalism and American Legal Theory" (1982) 13 Rechtstheorie 257. See also Robert Samuel Summers, *Instrumentalism in American Legal Theory* (Ithaca, N.Y.: Cornell University Press, 1982).

[71] *THEME:* This section presents legal education as more than a vehicle for learning law. Each of the various formal and informal modes and sites of pedagogy are means-ends complexes. On the character of the relationship of means and ends as conceived here, see Lon L. Fuller, "Means and Ends" in Kenneth I. Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller*, rev. ed. (Oxford: Hart, 2001) 61. Interactive, alternative pedagogies that deny the possibility of law as an object apart from its interpretive contexts and interpreters also reveal that the locus of law does not reside exclusively with the state, but implies a polycentric legal universe.

[72] Parts of this section are derived from a paper entitled "Designing a Syllabus: A Nine-Yards Template" presented by one of us at the Conference Professing to Educate: Educating to Profess, sponsored by the Canada Research Chair in Law and Discourse and held at McGill University, July 2003 [unpublished]. The specific examples are adapted from a memo entitled "The Logic and Limits of Alternatives in Legal Education" prepared for the Research Seminar on Legal Education taught by one of the co-authors in 2003 and 2004. More remotely, this and the next two sections are inspired by various articles on creativity in legal thought and in legal education. See *e.g.* Kristin Gerdy, "Law Student Plagiarism: Why it Happens, Where It's Found and How to Find it" [2004] B.Y.U. Educ. & L.J. 431; Alfred C. Aman, Jr., "Protecting a Space for Creativity: The Role of a Law School Dean in a Research University" (2000) 31 U. Tol. L. Rev. 557; Carrie Menkel-Meadow, "Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?" (2001) 6 Harv. Negot. L. Rev. 97; Jennifer Gerarda Brown, "Creativity and Problem-Solving" (2004) 87 Marq. L. Rev. 697; and Jack A. Hiller & Bernhard Grossfeld, "Comparative Legal Semiotics and the Divided Brain: Are We Producing Half-Brained Lawyers?" (2002) 50 Am. J. Comp. L. 175.

claim. The notions of novelty (and its frequent surrogate "alternative")[73] serve a key function here, allowing us to see and to point out how classifications, concepts, and conclusions that present themselves as normal, logical, objective, or inevitable actually conceal agency, subjectivity, and choice.[74] That is, while normal can be understood as a claim that power makes about itself, it also serves as focus for resistance.[75]

A critique of the normal is, of course, an everyday exercise in most courses and in most legal research. Professors (most often explicitly) and students (most often implicitly), adhere to and advance different critical perspectives about the forms and substance of mainstream legal doctrine and predominant legal artifacts such as judgments, legislation, contracts, and so on.[76] But as participants in an educational endeavour, we often find it difficult at the same time to hold our own actions and practices up to the same scrutiny. It is hard, if not stressful, work to apply the insight that law is not just a given, is not just "out there", to the design of our courses and the configuration of our individual programmes of study, to our manner of teaching and learning, to our modes of interacting with each other, and to our choice and manner of preparing for assessments.

To see why, consider the common sites and modes of legal pedagogy. How might the vehicles like large classes, small classes, seminars, and tutorials through which formal tuition is delivered in a first-year course like Foundations of Canadian Law be recast so that the medium track the message? And how might other interactions between professor and student, whether institutionally mediated or unmediated,[77] be imagined so as to complement that formalized tuition?[78]

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[73] We acknowledge the difficulties of using the word "alternative". Do we mean "the" alternative as a single counterpoint to the "one" as in "what is your alternative?" Do we mean alternative as one of two equally appropriate outcomes as in "you have these alternatives?" Our problem arises in part because the word suggests only two options while we mean to signal many possibilities—there being no word in English derived from the Latin "alius". But there is a more important difficulty. Because the word "alternative" typically implies a predicate "to what?" where the "what" is conceived as a preferred "normal", we will avoid the expression wherever possible. We do not wish to imply that the "normal" has, or should have, a preferred status in thinking about legal education. As a substitute for "alternative" we use the expressions "radical decentring" and "non-standard" to express the affirmative dimension of acting as if there were no predetermined "normal" or "centre".

[74] The usual normalizing moves in legal theory and legal education are reviewed in Alan Hyde, "The Concept of Legitimation in the Sociology of Law" (1983) Wis. L. Rev. 379.

[75] In reference to categories of knowledge, the point about resistence is dervied from Georg Lukács, *History and Class Consciousness: Studies in Marxist Dialectics*, trans. by Rodney Livingstone (Cambridge, Mass.: Massachusetts Institute of Technology Press, 1971) [Lukács, *History*] and from Antonio Gramsci, *Prison Notebooks* (New York: Columbia University Press, 1992).

[76] For an interesting reformulation and reassessment of the diverse "exogenous critiques" of law and legal education that emerged in the 1970s and 1980s, see D. Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (New York: NYU Press, 2004).

[77] By institutionally mediated we mean to signal non-classroom, and typically graded, opportunities such as essay supervision, electronic or virtual discussion groups, clinic supervision, and moots. By

The teaching and learning vehicles proper to the Foundations of Canadian Law course and the goals set for it ought to embody the aspirations of the transsystemic programme. So, and first, if the course is meant to situate the presumed normal in legal education and law, its pedagogy must not only reflect that normal, but also its critique. And it must do both in a manner that does not imply that the normal exists independently from the ascriptions that others have made.[79] Second, if the course is designed to illustrate pluralism, not monism, its tuition must do that as well. To show polycentricity and contingency in legal traditions, its learning will also have to reflect the assumptions of myriad non-Western legal traditions. Third, if the course seeks to explore the complexity of authority, rationality, and legal subjectivity, then the teaching cannot privilege left-hemisphere knowledge and deny the importance of the practices and experiences of legal subjects. Fourth, if the course is committed to hermeneutics in legal analysis, then *ex ante* limitations on the forms and occasions of engagement between professor and student are not sustainable. Every encounter in the law faculty is a moment of pedagogy.

To put the matter slightly differently, the point of structuring the course so that its form and delivery instantiates the substance of the new programme is to open up possibilities and to encourage students to take a greater role in the process of their learning. The course should aim at helping students to recognize that they are the agents of their own education by helping them see the study of law as interpretive practice.[80] How, then, might the pedagogy of the Foundations of Canadian Law course be conceived so as to achieve these goals?

A. Modes and Sites of Formal Pedagogy in a Foundations Class

We begin by considering the usual modes of teaching as they are found in the regularly scheduled sites of learning within the law faculty—the magisterial lecture or Socratic dialogue in the large classroom, the show-and-tell presentation in the small seminar room, and the repeat-after-me catechism of the tutorial—before turning to other pedagogical occasions.

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unmediated interactions we point to occasions such as informal reading groups, movie clubs, office appointments, corridor conversations, encounters in social settings, and so on.

[78] Although only these two dimensions of teaching and learning frame this section, we do not suggest that they are the only vehicles of legal education. Other activities, such as the crafting and marking of assessments and the deployment of diverse modes of symbolic communication, are also forms of and occasions for pedagogy, and hence fundamental to the lives of professors and students in a law faculty. They are considered below under the title "Park".

[79] The various ways in which the ideas of normal and critique can be presented, inappropriately reified, and ultimately overcome in a law faculty curriculum are discussed further in the section "Park".

[80] The point is made eloquently in Lon L. Fuller, "Letter to Thomas Reed Powell" in Winston, *supra* note 71, 331. See also Lon L. Fuller, "On Legal Education" in Winston, ed., *ibid*., 293 [Fuller, "On Legal Education"].

Take the large classroom and its standard form—the magisterial lecture. There are many forms of magisterial teaching and not all carry the same assumptions and ambitions. Consider first the assumptions about knowledge and learning that underlie what can sometimes resemble a "Hollywood performance" (especially when dynamic sound-bite Powerpoint pyrotechnics, overheads, and other accoutrements are simply used in a "technology for technology's sake" manner) focused on covering the material for that day. In this form of presentation, the pretence that the law and the information being transmitted is simply out there enables the professor to escape (or disclaim) responsibility for designing a course, choosing materials, and planning assessments in a given manner as opposed to others. The professor can pretend not to be making a pedagogical (and by implication ontological) choice. Moreover, this pretence reassures students who desire to believe that education is passive and that any given course is simply about learning the rules falling within a naturally occurring subject-matter. In our view, this type of magisterial lecture is a failure, because the lecture is organized as a passive teaching-learning device and the associated technologies serve to do the student's critical thinking.

But magisterial lectures are not predestined to fail, or fail in this manner. If learning law is also about learning a critical diagnostic, everyday classroom teaching, whatever the form, should be devoted to developing and deploying diagnostic skills.[81] These diagnostic capacities would be directed to modes by which jurists apply legal doctrine, test and contest law's categories, law's formulae. They are best learned actively, and can be taught using a variety of methodologies, including magisterial lectures. Yet much North American legal education has been transfixed by a single technique and a single object for engaging students in large classes. This is the often-caricatured Socratic method as applied to the parsing of cases.[82]

At its best, the Socratic method presumes an interactive, contingent engagement between professors and students. Today, however, it rarely reaches its potential. Professors are seldom prepared to invest (nor are they rewarded for investing) the time and effort required to prepare a Socratic class with multiple alternative lines of open-ended inquiry; students are sceptical of learning

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[81] The paradox is, of course, that both professors and students know the importance of learning diagnostic capacities. After examinations involving a "hypothetical", many students will say "I don't understand why I did so poorly. I knew all the rules." They then recite the litany of "formulae" that they have derived from codes, statutes, cases, law review articles, lecture notes, and summaries. When it is explained that the examination was also meant to test for their ability to apply this knowledge to the solution of hypothetical problems, many claim not to have been "taught" how to apply the rules— still another paradox in view of their resistance to various interactive, problem-solving pedagogies designed expressly to develop their capacity for practical reasoning.

[82] The Socratic method still enjoys widespread use in American law schools but has fallen out of favour in most Canadian faculties of law. One of the best discussions of the uses and abuses of the Socratic method and defences of its deployment in law teaching may be found in Phillip E. Areeda, "The Socratic Method (Lecture at Puget Sound, 1/31/90)" (1996) 109 Harv. L. Rev. 911.

diagnostic skills by doing and prefer the professor who is quick to circumscribe learning with the rejoinder "interesting question, but beyond the scope of this course." Professors rarely explain what they are trying to accomplish in parsing a case so that students conditioned by prior education to expect rewards feel humiliated if ever they should give a "wrong" answer; because some students refuse, or do not know how, to participate vicariously in the learning experience of their classmate actually being questioned, they see this dialogue as wasting their time.[83]

One can respond to these problems with the Socratic method in its popular incarnation by seeking other possibilities for active learning in large classes that confront students with uncertainty, with their responsibility as students, and consequently, with their vulnerability.[84] Each time a professor presents unorthodox material such as poems, pictures, theatre, or film, or plunges into a discussion of what a problem, practice, or text might presume, mean, or obscure or hide, asks questions to which there is no obvious canned answer, and prompts discussion to regenerate a student's past and invites the narrative to go wherever it might, one is moving onto the uncertain terrain unmapped by a set curriculum.[85] Each time a professor modifies the class structure—for example, team-teaching, dividing it into smaller discussion groups, alternating the language from English to French, sitting in the middle of the class rather than standing at a podium—, one confronts all the vulnerabilities attending any live performance.[86] Changing the sites of pedagogy

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[83] The fate of the Socratic method as pedagogy need not, however, be that of other modes of active learning, problem solving, iteration, positioning, and critique suitable for the large class. Indeed, if vicarious learning is central to the Socratic pedagogy for students not actually being questioned, there is no reason why students cannot equally learn vicariously from a magisterial lecture in which the professor conducts a Socratic dialogue with himself or herself. There are other possibilities. An ostensibly magisterial professorial dialogue can often induce questions from students, which then can be carefully reconstructed as a continuing Socratic dialogue with the student who asked the question. It follows that a magisterial lecture need not just be monologic; and it can be easily transformed into an interactive engagement between professor and student.

[84] Professors also feel vulnerability flowing from uncertainty and personal responsibility. The point is nicely captured in Paul N. Savoy, "Toward a New Politics of Legal Education" (1970) 79 Yale L.J. 444 at 456: "The only time that anything really happens in my classes is when I start being the person I really am—with feelings, doubts, expectations, fears—and not the incarnation of some professional or academic role."

[85] The point here again is like that made with respect to magisterial teaching. The problem is not with the various accoutrements to large-class teaching, including electronic technologies, as such. The failure of pedagogy only arises when they are used as a substitute for engaged teaching, or simply to buttress lectures as one-way projections of information.

[86] Consider the following examples of "performance" activities in a large-class setting: asking two students to make sushi from a recipe—one who has previously done so, and one who has not—as an exercise in interpretation; asking students to present a martial arts combat contrasting judo and tae-kwon-do as examples of different systems of thought; asking students to design four different pictograms conveying the substance of a by-law requiring dog owners to pick up canine faeces. All this is to say that while the Socratic method imagines interaction and interpretive construction

(making and remaking legal education as one makes and remakes law), and destabilizing taken-for-granted modes of law teaching, can be key strategies for interactive learning. In such a perspective, the professor's role shifts from that of a knowing sage imparting knowledge to that of more experienced partner in an open-ended conversation. Teaching and learning as inquiry becomes the necessary and dominant feature of the pedagogy in the large Foundations of Canadian Law classroom.

The point is broader still. While the large-classroom experience should be part of every heavy-enrolment course,[87] this form of pedagogy should be complemented by variable seminar and tutorial formats. Nonetheless, these other teaching formats meant to explore and encourage creative engagement in a course are equally difficult for professors to manage. Various assumptions of normality also afflict small-group teaching. As to content, because undergraduate seminars are often theme-oriented, students tend to have pre-set understandings of and opinions about the subject matter to be dealt with in that teaching setting. They imagine that small seminars run by the professor of a large class should have a similar orientation.

Normality also afflicts reactions to method. The standard view of seminars requires the professor to devote the first few weeks to introducing the subject and framing the theoretical perspective. Thereafter, student presentations of their term essays-in-progress predominate: "I have the paper I want to write, and I'm going to write it my way regardless of what the professor says and what the non-doctrinal objectives of the seminar might be." Moreover, because professors typically fail to help the student think about pedagogy and delivery, the student presentation part of the seminar is frequently a lost opportunity: the student thinks the object is to deliver content; or the student spends three-fourths of the time on the introduction or the first point; or the student simply hectors other members of the class as if the format were a public lecture followed by a question period.[88] The result is no

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primarily in relation to doctrine and legal texts, these other pedagogical variations aim at all facets of teaching and learning—including the structure of classroom authority itself.

[87] It follows that we believe the large-classroom experience is a valuable part of the Foundations of Canadian Law course. Indeed, the course is one location where the entire first-year cohort can profitably share the same educational experience. That is, even if resources enabled the faculty to section the course in the manner of other first-year courses, we see advantages—the development of class solidarity, the exchange of diverse experiences of the teaching and learning of other first-year courses, the fostering of active bilingualism among students—to maintaining the course as a single class, however many professors are ultimately called upon to lecture or otherwise participate in the pedagogy of the course, and however many other forms of teaching are adopted at various occasions throughout the year. More to the point, a first-year class that at once comes together and temporarily splits apart for smaller tutorials in various formats is a formal embodiment of the transsystemic programme.

[88] These failings are the same as those that afflict other occasions for teaching: misunderstandings or lack of clarity about the aim of the exercise; difficulties in managing the interactive moment; lack of practice; problems in organizing the material; inattention to key messages; confusion between the content of a paper and the content of a seminar paper; etc.

different when the seminar format is an occasional method for presenting the pedagogy of a large class. Once more, the presupposition that there is a law existing totally apart from the learner undermines the learning.

What other possibilities for small group teaching can be imagined? Substantively, a professor could identify several critical themes or topics of a course, and pursue these in small groups serially throughout the year by explicitly adopting different theoretical approaches[89] and various pedagogical methods.[90] Classes taught in such formats will invariably involve some type of more intense interactive pedagogy such as role-playing, small group break-outs, formal debates, talking circles, press conferences.[91]

Tutorials taught by upper-year students are a third option. But they too can also degenerate into the pedagogy of normality. This is especially the case where the readings and themes for the tutorial are the same as or directly complementary to those covered in the course. But where they are given a wide latitude and support to create their own materials, their own assignments, and their own pedagogies, tutors are able to make the tutorial programme into a parallel pedagogy. They can transform student desire for either a positive reinforcement of the lecture or a general bull-session that does not address the assigned readings for that day into a

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[89] For example, the professor could select five or six transversal topics—say, justification, authority, legalism, tradition—, spacing them at strategic points throughout the course. Initially, each would be addressed by adopting and then critiquing a different theoretical approach to legal knowledge—for example, law and society, law and the economy, law and morality, law and identity, law and discourse. The point, of course, is not to give any priority to any given approach, nor even to suggest that such approaches are necessarily external to law. Rather, the goal is to illustrate how commitments about theory inform pedagogy and to begin to engage students in thinking about their own commitments.

[90] At the same time, the approach and materials of each small group session could be designed to highlight a different approach to learning and understanding. For example, in different contexts and in relation to different material, people apprehend a task differently. To the extent that a course is about the way in which interpretation is learning, helping students develop a self-consciousness about how they learn is also to help them perceive how others learn as well. For one example of how students and professors can gain such insight, see the tool developed by David A. Kolb, known as the "Kolb Learning Style Inventory", available online: Experience-Based Learning Systems <http://www.learningfromexperience.com>. This tool identifies four general types of "learning style"—abstract conceptualization, concrete experience, active experimentation, and reflective observation—that can be juxtaposed to reveal the complexity of communicating, teaching, and learning.

[91] As the examples given illustrate, participation in each of these formats is not foreordained and may vary according to the dynamic of the group: the professor may call on students to participate; different students may be assigned to present the readings or to lead the discussion for a particular week; students may be invited to designate the person who will speak after them in a discussion; a negotiation may be designed; the seminar may be broken down into even smaller units to achieve these goals. Some believe that such formats are unfair, because they inevitably privilege certain students with certain learning capacities. However, such a conclusion begs two questions: First, is that not true of all pedagogy? Are not lectures and standard form pedagogies unfair for the same reason? Second, isn't unfairness the result of a professor's attitude towards students who are having trouble with a particular pedagogy? Doesn't unfairness flow (in any teaching situation) less from the design of a pedagogy, than from the manner of its performance?

genuine complement to the course.[92] In this experimental context, every tutorial develops its own interactive dynamic—mediating the given form and content (the course and assigned tutorial readings) with the always-contingent diversity, creativity, and agency of the group.

The unconsciously adopted modes of pedagogy and the expectations visited upon traditional sites of pedagogy are programmed to do the students' and professors' thinking for them. Unless the manner and place of formal tuition are continually challenged and inverted, and unless students are confronted with their latent assumptions about how knowledge is acquired, these standardized structures of passive learning will inevitably undermine the larger aspirations of the transsystemic programme.

B. The Informal Tuition of a Foundations Class

Any course, but especially a first-year Foundations of Canadian Law course offered as part of a constitutive polyjural curriculum, ought also to be projected into a wide range of non-classroom pedagogical sites, whether formally mediated through familiar devices, practices, and techniques, or cast as informal, unmediated interactions. The former encounters can often be an initial experience with curricular opportunities that arise later in the undergraduate programme. For example, a visit to a small claims court may be a precursor to a clerkship, or participation in dialogue strings on a course discussion board may lead to an interest in the law journal.

These other, non-classroom occasions for tuition, especially if they privilege legal research, writing, and oral advocacy, are fundamental to the vocation of the new McGill Programme. Regrettably, when not undertaken as part of the Legal Methodology programme, they are often consigned to the margins of the curriculum.[93] In such cases, they are typically detached from substantive courses,

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[92] Under the former hypothesis, students simply quiz the tutor on the course lecture material and tutors are not expected to provide more than a recap of what the professor has already said; under the latter hypothesis, a desire by the tutor to have every student participate quickly turns into an unstructured ramble because "any opinion is as good as any other." Both pathologies are common when tutors are not afforded a genuine opportunity to take responsibility for the tuition and pedagogy of their tutorial.

[93] In the following discussion of research and writing, there is no implication that the various legal writing opportunities outside the framework of a course should be abandoned. The point is rather that options offered at McGill, such as one-credit practical writing course add-ons, factum-writing for competitive moots, three-credit term essays, six-credit senior essays, and fifteen-credit honours theses, are not typically conceived as occasions for intensive teaching and learning by students and professors. Rather, they are seen as an added service that professors (often begrudgingly) offer to students. A similar perception afflicts other extramural activities, such as judicial clerkships, competitive moots, and legal clinic placements. Frequently, their possibilities are marred by the professorial supervisor's lack of advance preparation of the pedagogy, and by a failure to provide meaningful feedback.

focused on technique organized as a protocol of required steps, sometimes not accompanied by adequate instruction, provide little opportunity for practice in a non-evaluated setting, and generate little or no meaningful feedback.

Similar difficulties attend to other mediated non-classroom experiences such as term papers and in-course essays. These activities can be key occasions to teach about the design of an argument, the practice of doctrinal research, the engagement with one or more sets of theoretical literatures, and the forms and limits of diverse types of empirical research methodology. Unfortunately, however, they often originate in a student's preconceived desire to write about the legal rules relating to a topic of interest and rarely accomplish more than the rationalization of legislation, cases, and textbook literature. As such, they amount to little more than a self-selected 100% final take-home examination that tests for doctrinal competence.[94]

There are, of course, many other structured—although not extensively used—forms of non-classroom pedagogy that permit continuations of the teacher-student conversation. The point of tools like electronic or virtual discussion forums and online chat rooms is to carry the class discussion forward and to enable students who did not have a chance to speak in class to pursue themes with their classmates and with the professor. Inviting contributions to the faculty's weekly student newspaper, setting up a film festival or a reading group, and creating a public posting board in the form of a "Democracy Wall" are still other occasions for both students and professors to develop and contest course themes in an interactive, but non-classroom, setting.[95]

What is more, structured extra-classroom teaching occurs in the everyday professorial activity of student appointments, scheduled office hours, and responding to e-mails and telephone calls. For some professors, these are simply opportunities to pass on more substantive knowledge by answering the precise questions being asked. In the context of a Foundations of Canadian Law class for

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[94] In light of its role in the transsystemic curriculum, the Foundations of Canadian Law course should be a primary vehicle for a student's mediated interaction with a professor outside the classroom. Learning how to write effectively in different registers, in different languages, and for different audiences entails learning how to read and evaluate materials produced in equally diverse contexts. The range of possibilities for this type of interaction between students and professors is developed in greater detail in the section "Park".

[95] The idea of a self-policing "Democracy Wall", with postings ranging from text, to art, to design, to photography, constitutes an invitation to explore, in an anonymous but public forum, ideas and observations emanating from students as active participants in constituting and critiquing their own education. It is an occasion to learn how to use a different vehicle to communicate with an undifferentiated public. In theory, an anonymous feedback forum on the course web page should achieve similar objectives; experience suggests, however, that some students see such a forum simply as a license to rant about the course, the faculty, the professor, their classmates, or other postings, rather than as an opportunity to learn how the crafting and presentation of feedback can be itself a pedagogical exercise.

the McGill Programme, by contrast, they are valued moments to advance the understanding and learning of students (and professors), by addressing underlying issues and even bringing to light queries that questioners (and by implication respondents) may not have known that they had.

Meeting with students after class for coffee, organizing a class committee, lunching informally, or attending weekly social events are privileged places where students come to recognize that they are already the creators of their legal education and, by implication, of law. Though fostered in class, these encounters extend beyond the classroom and beyond the course. Collaboration between professor and student and between students themselves such as, for example, when one is working in a team of research assistants, embodies performance, interaction, and agency in the creation of a tuition. Again, the point is not that informal pedagogy of this kind is absent from other law faculties or other courses at McGill; the idea, rather, is that because the course is meant to embody the new programme, these occasions are not just haphazard or totally optional. They are consciously understood as part of the pluralist, informal, interactive pedagogy implied by the substantive commitments of a curriculum that rests on a constitutive polyjural foundation.[96]

There are also multiple occasions for implicit pedagogy that do not actually describe themselves as such. Some are adjunct to institutional roles: for example, being the faculty adviser to the Law Journal, to the Legal Methodology programme, or to the voluntary Legal Clinic programme;[97] coaching or judging competitive moots. Others less so: participating in and attending conferences, invited speakers' series, and other student-led activities. To follow up on these endeavours by e-mail or in casual conversation is to draw these informal practices

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[96] These kinds of informal pedagogy are both most rewarding and most risky because they may encourage, over time, the development of a high level of informality in everyday contact. Nonetheless, both institutional and power differentials continue to frame all contact in a professional relationship. For this reason, the professor must always remain a professor. This point suggests that no matter the extent to which law and law teaching may become decentred, education still requires that there be certain points of reference, even if these are acknowledged to be only provisional. Indeed, as students come to graduate, or to become graduate students, or perhaps even to become colleagues, the character of the interaction and the self-consciousness that one acquires of the relationship inevitably changes. However, close personal non-professional relationships always remain inappropriate. As much as a student-professor relationship might be fluid and change over time, boundaries, however shifting, will always exist. We consider the extent to which this observation about fluidity and boundaries also applies to the content of a law faculty curriculum in the first part of the section "In".

[97] The clinical and related placement opportunities are an under-exploited feature of many law faculty programmes, including that at McGill. When conducted properly, such opportunities enable students to acquire experience with various sites of law, such as soup kitchens, youth shelters, and hostels, that they would not otherwise encounter. They also permit students to learn diverse forms of advocacy, besides that associated with trial or appellate practice. Furthermore, such undertakings also oblige the supervising professor to step outside the classroom and the faculty buildings. These possibilities are explored further in the sections "In" and "Park".

of professing into the pedagogy of the law faculty generally, and the Foundations of Canadian Law course at McGill in particular. What is more, these continuing conversations are pursued in every engagement between professor and student— from signing passport applications, to writing letters of reference, to lending books, to offering advice about course selection and summer jobs, as well as general career counselling.

Asking the question "on what basis and by deploying what resources do students learn to learn?" points to a crucial but underappreciated form of implicit pedagogy: the way a professor embodies learning in other official roles within the faculty. The character of a performance at Faculty Council, or on one of its committees, teaches about the conduct of meetings, the management of an agenda, the drafting and presentation of letters, reports and minutes, the marshalling of coalitions, the weighing and assessment of opinions, and various other abilities relating to the design and operation of processes of social ordering. Embarrassing performances in such settings, or at a public lecture, or in a media interview, and slap-dash scholarship convey more than classroom lectures about the real lessons of law internalized and embodied by that professor. The more students and professors come to see that all interactions involve pedagogy, the more one confronts the paradox of all learning: there can never be "just social interaction" between a professor and a student, or between anyone involved with the faculty's pedagogical mission.[98]

The observations lead to still another dimension of informal pedagogy in a first-year course like Foundations of Canadian Law. This is the dimension of time. Formally, a course ends when the examinations have been corrected and the period for students to obtain feedback on their performance has elapsed. But once one accepts that relationships between teacher and student may have different sites with different rhythms, it follows that a student's learning in a course as a whole may have different rhythms. The informal pedagogy of a class, especially a first-year class, often extends throughout a student's law faculty career, and sometimes for many years later. Any further interaction with students and former students, be this as professor, essay supervisor, referee, summer employer, or even co-author, will be shaped by the pedagogical encounter in first year.

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[98] Admittedly, the above observations will appear as self-evident to most professors. After all, what serious law teacher would fundamentally disagree? Yet, they are seldom put into practice. In addition, as occasions for pedagogy, these informal interactions carry the paradox of all good teaching: that which is most important is first learned implicitly, and discussed explicitly and in detail only when raised by students at a later time. We mention these points about informal teaching at this stage neither because we see these sites of pedagogy as obligatory for every professor, nor because we believe that tacit practices must always be transformed into explicit ones. Rather, because our aim is aspirational, the exploration of these possibilities is meant primarily to signal the opportunities they present for active teaching and learning and to show the manner in which they are congruent with the overall ambitions of the new McGill Programme.

The active, constitutive performance of legal interpretation—as education and as law—requires that professors of the Foundations of Canadian Law course deploy a plurality of pedagogical vehicles within the class or seminar room to embody the aspirations of the transsystemic programme. More than this, the idea of conceiving law as interpretative practice is embedded especially in the informal pedagogy of professor-student interaction unmediated by traditional modes and settings. Students and professors whose first interactions occur in Foundations of Canadian Law will come to see themselves as active, not passive, as reconstitutive, not regurgitative, as continual, not episodic, interpreters. They will, one imagines, eventually bring that agency and the plurality of performance that it requires to the tuition of every other course and every other site of legal education within the faculty. And in so doing, they will come to recognize that they, and not any particular course, are the real vehicles of their education.[99]

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[99] *CODA:* This last observation calls forth two further observations about the ways in which teaching and learning law can invite students to become agents of their own education, and about the limitations on such aspirations for legal education. First, the ambition may merely be wishful thinking, if there is a disjuncture between what goes on in the Foundations of Canadian Law course and in other first-year courses. Since students are generally rewarded for being strategic in their course choices, they may adopt the role of agent in Foundations of Canadian Law, and only in that course, as part of their strategic planning. Put slightly differently, just as courses taught transsystemically can only really succeed when they are the dominant pedagogy of the faculty, and when they are not undermined by counter-arguments of systemic purity propagated in other courses, the Foundations of Canadian Law course imagined here can only succeed when first-year transsystemic courses are also taught as Foundations courses.

A second point is that the possibilities for teaching and learning that foster creativity, uncertainty and vulnerability are also constrained by the current educational context. Where students have been previously taught to pursue their studies in a manner that is aggressive, confrontational and hyper-competitive, it is not sufficient for a particular professor or a particular course to adopt a different approach. Certain students will not feel comfortable speaking authentically when placed in a high-testosterone environment, and others will not engage other than passively in classes of more than twenty. Even in instances in which the substantive content of a course is responsive to non-hierarchical learning, the assignments, assumptions and materials match that substantive content, and the framework of the pedagogy is coherent with content and form, it may be that other participants in the classroom make "safe learning" impossible. These considerations are addressed further at the end of the section "In".

III. In:[100] Outside In / Inside Out[101]

To acknowledge that teaching and learning vehicles within a curriculum are means-ends complexes is to invite reflection about the ends or purposes being pursued through them in individual courses. It is also to invite reflection about the ends being pursued in a faculty of law and by legal education more generally. In the Epilogue, we argued that the Foundations of Canadian Law course should be a privileged occasion for addressing the question: what pedagogy ought to animate the McGill Programme in order for it to most effectively achieve its aspirations?

This question is not as easy as it might appear, in large measure because of a necessary uncertainty about the ambitions, rationales, and scope for transsystemic teaching.[102] Consider two possibilities. First, one might say that the basic purpose of the programme is to change the manner in which certain doctrinal features of law are apprehended, taught, and learned so as to provide a legal education better attuned to the demands of legal practice in the years ahead. This is a powerful instrumental rationale for the programme because it rests on a considered assessment of the emerging character of law and legal practice, and the opportunities that law faculties must make for themselves in order to meet these

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[100] The *Oxford English Dictionary* defines "in" as expressing the position or location of something that is or appears to be enclosed or surrounded by something else. The term is also used to express the situation, condition, state, occupation, action, manner, form, material, and other circumstances and attributes of a given thing. These two usages confront us with one of the key cartographic questions of all legal education: on what basis do we determine the boundaries, if indeed there are boundaries, of what we consider to be the subject of our knowledge?

[101] *THEME:* By considering what it means to say that law can be viewed from the inside-out and from the outside-in, we inquire into the manner in which the interpretive practices of law professors and law students as to the scope of law also constitute the goals and values they ascribe to law. In examining diverse forms and processes of social ordering and the multiple logics of instrument choice, the programme denies the sharp distinction between inside and outside interpretation and recognizes identity and empowerment as defining goals of the curriculum. For further reflection on what a non-positivist conception of the location of law entails, see Robert A. Samek, *The Meta Phenomenon* (New York: Philosophical Library, 1985).

[102] As the programme is conceived today, only selected private law courses are taught in a transsystemic way. Thus many rules, concepts and doctrines of contractual obligations (such as rules of contract formation and excuses for non-performance), along with many principles of extracontractual liability or torts (such as causation and vicarious responsibility) are taught in this manner. In the future, this approach to pedagogy could be extended to other first-year private law courses (such as Property), to public law courses (such as Modes of Judicial Control of Administrative Action and Practices of Criminal Punishment), or to courses with a topical focus (such as Law and Economics or Law and Literature). The important point is that the scope of the programme be not limited to pre-fixed boundaries. More than this, its organization need not take conventional course labels (and their attendant content) as definitive. Just as the incorporation of public law accident compensation schemes into courses on torts, or consumer protection regimes into contracts courses, pushes on the ontology of a course taught in any law faculty, so too these moves could inform courses taught transsystemically. The main difference is that transsystemic teaching pushes on boundaries of courses and organizing concepts in multiple temporal and territorial as well as categorical dimensions.

challenges.[103] A second, complementary rationale is this: if the transsystemic programme is to justify its challenge to orthodoxy, and to do so in the specific context of legal education at McGill, it will have to do so on non-utilitarian grounds. The question is: what makes legal knowledge of the kind sought out by the programme worthy of pursuit?[104]

When juxtaposed, both types of rationale reveal their importance. For answering the question "will this be useful in practice?" with the answer "very much so" opens for discussion exactly what content one can or could give to a constitutive, polyjural conception of law in an undergraduate programme today. The specific tuition of the McGill Programme would have to deliver on the kinds of curricular promises that many faculties make, but find difficult both to theorize and to put into practice. Such promises are that courses would consider not just the content of particular legal rules, but their sources; not just the operative structure of doctrine, but its foundational concepts; not just specific methodologies for expressing and interpreting legal rules, but the idea of legal methodology itself; not just official institutions, but what assumptions we see as underpinning any legal institution; not just current socio-economic-political values, but the interaction of socio-economic and political values and the idea of law.[105]

Pursuing these ambitions does not mean that the curriculum should be framed merely to pose everyday legal questions at a higher, more encompassing, level of abstraction, although in some measure a transsystemic programme does achieve this goal.[106] It also means that the interpretive practice it embodies must include both the process of decoding law and the process of devising and designing law.

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[103] For further explanation of these types of reasons and their limits, see Jutras, "Two Arguments", *supra* note 18 and de Mestral, *supra* note 18. These ideas have a noble pedigree at McGill. The original mission of the faculty as outlined in 1853, and the arguments advanced by both Lee in 1915 and Cohen in 1968, were couched in similar language. More than this, framing the justification for the programme in such terms invites the faculty to reflect on the diverse legal careers—such as community clinic work, government service, small-town practice, non-governmental organizations involvement, corporate-commercial practice and employment with international agencies—that its graduates might choose to pursue.

[104] For two discussions of how justifications of this character may be framed, neither of which, however, directly addresses the new McGill Programme, see Daniel Jutras, "The Legal Dimensions of Everyday Life" (2001) 16 C.J.L.S. 45 and Roderick A. Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queen's University Press, 2002) [Macdonald, *Lessons*]. See also Kasirer, "*Métissage*", *supra* note 18 and Kasirer, "Bijuralism", *supra* note 18.

[105] Our claim is that while many faculties aspire to teaching that is framed in this manner, and encourage the development of courses and programmes to achieve such ambitions, the goal is not inherent in the curricular structure of contemporary legal education itself. By contrast, we believe that the transsystemic programme at McGill makes this conception of the law teaching enterprise inevitable.

[106] At least in one of its dimensions, the new curriculum is meant to involve the transposition of "level-of-analysis" doctrine and its insights to the teaching of law. Compare, in this respect, J. David Singer, "The Level-of-Analysis Problem in International Relations" (1961) 14 World Politics 77, and

If this is an appropriate ambition for the programme, the Foundations of Canadian Law course would have two main facets. First, it should seek to explore the relationship of law as social symbolism to other social processes and social symbolisms: How does looking at life through the lens of law differ from looking at life through, for example, the lenses of economics, of theology, of psychology? And can these different lenses be really dissociated from each other? Second, it should examine the ways in which the legal regimes of the state interact with each other and with other legal orders, whether operating in the trans, *supra-* and inter-state dimensions, or in *infra-* and sub-state spheres and whether these spheres are geographically, ethno-culturally, or interest determined. The course would aim especially to explore the ways in which all these legal orders interact with each other.[107]

Puzzling through this latter set of issues sets the course to examining a number of complementary themes. An initial step may be characterized as institutional design. How do different forms and processes for facilitating human interaction and achieving social order such as adjudication, elections, and contract allocate individual and collective agency? Does doing law mean that we are obliged to conceive of all our relationships with each other in terms of rules of duty and entitlement adjudicated before courts? Thereafter, the course has to examine the different mechanisms by which public policy (whether within the political state or within any other legal order) is developed, shaped, reconceived, and stated through legal categories, legal forms, and the curricular course-labels one finds in a law faculty. This means mapping the ways in which these various forms and processes of law and the notions of justice that they promote at once reflect and constitute particular conceptions of agency, identity, and power.[108]

Leopold Pospíšil, "Legal Levels and Multiplicity of Legal Systems" in Leopold Pospíšil, ed., *Anthropology of Law: A Comparative Theory* (New York: Harper & Row, 1971) 97, with J.E.C. Brierley, "Quebec's 'Common Laws' (*droits communs*): How Many Are There?" in E. Caparros, ed., *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur, 1991).

[107] The second of these inquiries—the discovery and constitution of normative orders and their interaction with the law of the state—is the subject of this section. In pursuing this topic, one enters onto the multiple terrains of legal pluralism: on state legal pluralism, see H.W. Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985); on social-scientific legal pluralism, see Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995); and on noumenal legal pluralism, see Melissaris, *supra* note 26. The first inquiry—the relation of law to other social symbolisms—is considered further in the section "Park".

[108] The image of law as cartography is helpful in assessing the extent to which legal education serves its orientation function, and in identifying what orientations contemporary legal education embodies. See Boaventura de Sousa Santos, "Law: A Map of Misreading—Toward a Postmodern Conception of Law" (1987) 14 J.L. & Soc'y 279 and Roderick A. Macdonald, "Triangulating Social Law Reform" in Ysolde Gendreau, ed., *Mapping Society Through Law* (Montreal: Thémis, 2004) 117.

A. The Forms and Processes of Human Interaction

Those with a legal training are usually thought to have acquired an expertise in solving problems of social organization or interpersonal relationships. But legal expertise goes not only in the direction of solving problems but also in *framing* problems. Jurists are supposed to understand the institutions, processes, and instruments through which human beings are able to discover and shape their beliefs, interests, and aspirations, to communicate these to others, and turn them into accomplishments. Conceiving a jurist as an "architect of social structures"[109] captures the domains of law, of legal education, and of a Foundations of Canadian Law course as understood here.[110]

Currently, the obligatory curriculum of the typical law faculty is built around doctrinal categories, principally inherited from late Roman law.[111] The fact that the origin and structure of these categories remain largely implicit does not, however, prevent the contemporary courses through which these categories are projected from assuming their own necessity and truth of their content.[112] In consequence, courses typically shy away from addressing the conception of human agency that underlies them, the political logic that drives their organizing frame, the social issues that their subject-matter addresses, and the forms of decision making that are

[109] Lon L. Fuller, "The Lawyer as an Architect of Social Structures" in Winston, *supra* note 71 at 285. It is important to note, however, that Fuller does not conceive the jurist as a "social engineer" in the modes of classical sociological jurisprudence and legal realism. On this point, see Kenneth I. Winston, "Three Models for the Study of Law" and Peter R. Teachout, "'Uncreated Conscience': The Civilizing Force of Fuller's Jurisprudence", both in Witteveen & van der Burg, *supra* note 8 at 51 and 229 respectively.

[110] In other words, the course must address these processes of social ordering as means by which education may be conceived. The objective of our previous examination of vehicles is that the structure and pedagogy of a course has to embody its goals. The present point is that goals have to be embedded in the intellectual structures through which the course content is delivered. For a discussion of these interconnections, see Roderick A. Macdonald, "The Swiss Army Knife of Governance" in Pearl Eliadis, Margaret M. Hill & Michael Howlett, eds., *Designing Government: From Instruments to Governance* (Montreal: McGill-Queen's University Press, 2005) 203.

[111] Peter Birks is the leading proponent of recovering the Romanist foundations of the common law tradition: see Peter Birks, ed., *English Private Law* (New York: Oxford University Press, 2000) and the review by Nicholas Kasirer, "English Private Law, *Outside In*" (2003) 3 Oxford U. Commonwealth L.J. 249. Reinhard Zimmermann has taken on a similar role for expounding the logic of the civil law tradition: see Reinhard Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town: Juta, 1992).

[112] The point is hardly unique to law. All branches of knowledge have first-order conceptual structures that are deployed to organize pedagogy and research. They are usually so ingrained that their contingency has been forgotten by those who do not carefully attend to them. The subdivisions of classical Western philosophy, the categories of sociological analysis, the division of literature into prose and poetry, or drama into comedy and tragedy, may be cited as examples of such ingrained conceptual structures. Even attempts to explore concepts through comparative or historical exercises frequently assume, rather than argue for, the categories of comparison. The notion of human rights is a good example of how even recently invented legal categories can quickly assume a character of false necessity.

best suited to achieving the goals these doctrinal categories were meant to achieve.[113]

Imagine that each first year course were to be assigned several pedagogical roles in addition to the task of covering a predetermined set of doctrinal concepts derived from encyclopaedias, digests, and textbooks.[114] One of these might be the teaching of one of the classical branches of philosophy: metaphysics, epistemology, semantics, ethics, aesthetics, logic, and so on.[115] Another might be teaching about a different social ordering process: adjudication, legislation, voting, contract, markets, and so on.[116] Another, the different modes of justification: rules, precedents, customary practices, authority, expediency, justice, and so on.[117] And still another about different registers for engaging with others: emotion, analysis, aesthetics, music, conversation, sport and recreation, and so on.[118]

The point of integrating these considerations into all first-year courses is to illustrate that each is not external to the tuition in any subject. To think of the curriculum simply as a warehouse of boxes within which a stipulated inventory of legal rules are taught is to assume that these rules—say, the articles of a Civil Code or statute, a body of judicial decisions—are the primary, if not exclusive, objects of a legal education. Few law professors actually believe this, and in consequence devote considerable effort in their courses to methodology, to teaching forms and processes of legal reasoning, to addressing ethical concerns and issues of legitimacy in judicial decision-making. Yet in our collective decisions about the

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[113] In this sense, one has to congratulate Ernest J. Weinrib (*The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995) for trying to make this explicit. For Weinrib, private law (and the law of torts in particular) can be understood as an instantiation of corrective justice (*ibid.*, c. 8 at 204ff.). Likewise, monographs, such as Joanne Conaghan and Wade Mansell's *The Wrongs of Torts* (London: Pluto Press, 1993) seek to address this issue. In contrast to Weinrib, Conaghan and Mansell hold the failure of tort law to its inability to address problems of distributive justice (*ibid.*, c. 8 at 148ff.). In both cases, the texts consider and critique doctrinal formulae like "autonomy of the will" and dichotomies like "compensation" versus "loss shifting".

[114] The reference to doctrinal literature is intentional. It is sometimes thought that these doctrinal categories are derived from "primary" legal sources such as legislation and cases. However, few courses with a given title treat only material so labelled in a statute or a code, and courts themselves rarely, if ever, announce general doctrinal constructions. The synthesizing task is the work of the treatise writers. For examples of other dimensions of knowledge that the standard first-year tuition in a law faculty might address and of how these might be allocated among the different courses, see Roderick A. Macdonald, "Curricular Development in the 1980s: A Perspective" (1982) 32 J. Legal Educ. 569.

[115] For an illustration of how this could be pursued, see Manderson, *Proximity*, *supra* note 68.

[116] This is the project that preoccupied Lon L. Fuller for the last decade of his life. See especially Lon L. Fuller, "The Role of Contract in the Ordering Processes of Society Generally" in Winston, *supra* note 71 at 187ff.

[117] There is an enormous philosophical literature on this theme. For an allegorical treatment relating specifically to legal practice, see Roderick A. Macdonald, "Office Politics" (1990) 40 U.T.L.J. 419.

[118] See Nicholas Kasirer, *The Seven Deadly Sins* (Montreal: Thémis) [forthcoming], in which these sins are taken as organizing features of private law regulation.

design of the undergraduate curriculum, we typically take conventional course labels as the only way to organize the study of law.[119]

Even the McGill Programme today takes as its organizing logic a catalogue of courses much like that found at every other faculty of law in Canada. Obviously, in terms of either the titles announced in the course calendar or the substance of the courses themselves, no faculty today could consciously embark on a reiteration of the project for recasting legal education imagined by Lasswell and McDougal sixty years ago. It could not, that is, reinvent the vocabulary and concepts of law and organize a teaching curriculum labelled by reference to any of the other pedagogical taxonomies just suggested.[120] Moreover, procedurally, no faculty today could simply pretend that courses and structures of teaching and learning are unnecessary.[121] There is little pedagogical advantage to trying to replicate within a faculty of law the kind of holistic learning of a practice that could be gained through an apprenticeship system in which learning is entirely organized around non-categorical, practice-driven problem-solving. But law faculties can be explicit about what they want courses to provide for students, and can in consequence reimagine currently labelled courses as frames through which legal experience is

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[119] In considering this question, two additional points are worth remembering. First, until the mid-nineteenth century, most doctrinal writing was organized not around legal concepts like torts or contracts, but around facts—the law of forests, the law of beaches, the law of highways. See A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) U. Chicago L. Rev. 632. Second, apart from the first-year curriculum, the content and labels of law faculty courses is in constant movement. Consider how courses typically evolve, such as from "Law and Public Administration" to "The Law of Public Administration", to "Administrative Law", to "Administrative Process". A similar point could be made about the evolution from "Law and the Family" through to "Family Law" and beyond. On these progressions, see Roderick A. Macdonald, "Legal Education on the Threshold of the 1980s: Whatever Happened to the Great Ideas of the 60s?" (1979) 43 Sask. L. Rev. 39.

[120] See *supra* note 62. For one courageous (but ultimately unsuccessful) attempt to apply the Lasswell-McDougal analysis to the internal organization of a single course, see J. Noel Lyon & Ronald G. Atkey, eds., *Canadian Constitutional Law in a Modern Perspective* (Toronto: University of Toronto Press, 1970). It is noteworthy, however, that these authors maintained the conventional label "Constitutional Law" for their radically reconfigured course.

[121] There are several reasons for this inability, not least of which is the fact that the resources for such a labour-intensive endeavour are not available to post-secondary institutions. For an example of how such a move can fail, even when significant resources are invested, one need look no further than the recasting of the curriculum of Ontario elementary schools following upon the Hall-Dennis Report. See Ontario, Department of Education, *Living and Learning: The Report of the Provincial Committee on Aims and Objectives of Education in the Schools of Ontario* (Toronto: Newton, 1968) (Co-chairs: Mr. Justice E.M. Hall & L.A. Dennis). Of course, there is a difference between organizing an entire curriculum without any kind of doctrinal centre, and making space for individual courses that challenge the presumed centre. Many "law and…" courses first saw light as challenges to the orthodox curriculum. For a self-conscious example, see the syllabus of the student-organized "Radical Law Seminar" offered at McGill during the 2004-2005 academic year.

interpreted, while still leaving the content of legal experience open to contestation.[122]

If the McGill Faculty of Law were explicit in this manner about the relationship between the aspirations of the programme and the curriculum through which these aspirations were pursued, then the Foundations of Canadian Law course could be specifically conceived and executed to address the framework by which all the other first-year courses (and ultimately all the other courses in the programme) were organized. The course would serve multiple cartographic functions, mapping law and its categories through society and its practices, and vice versa. As part of this exercise, the course would present complex problems demanding that students canvass and make choices among the different processes of social ordering elaborated in greater detail by other first-year courses.

In such a manner, the Foundations of Canadian Law course would, to paraphrase Hart and Sacks, compel students to puzzle through "basic problems in the making and application of law."[123] Among the kinds of questions students would confront could be, for example: How do contracts function to generate a framework of rules? How do markets? And how do implicit practices, usages, understandings, and settled expectations create the conditions within which explicit rules, institutions, and rule-governed behaviour can take root?[124]

The course would also pursue more pragmatic and instrumental inquiries: How might governance institutions (in particular the governance institutions of the state) deploy different policy levers to achieve social purposes?[125] In what ways do, for example, taxation, subsidy, the criminal law, education, or the allocation of a tort claim, for example, structure belief and behaviour so as to create the conditions under which cooperative and productive social relationships may be furthered?[126] The Foundations of Canadian Law course (and for that matter, all courses) would

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[122] For a general discussion of frame analysis, see Erving Goffman, *The Presentation of Self in Everyday Life* (Edinburgh: University of Edinburgh Social Sciences Research Centre, 1956).

[123] Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury, N.Y.: Foundation Press, 1994) at 9-10, prepared from the 1958 tentative edition by William N. Eskridge, Jr. & Philip P. Frickey. The publication editors' introduction to the volume provides a wonderful overview of the aims and the limitations of the legal process approach (*ibid.* at li-cxxxvi). A similar endeavour was pursued by Lon L. Fuller under the progammatic label "eunomics". See Winston, *supra* note 71.

[124] The questions to address are not simply "what are the procedural features of each of these institutions that conduce to 'due process'?", but also involve asking "upon what conception of interpersonal and social justice does each of these institutions rest?" and "what conception of human agency and freedom is assumed by each of these processes?" For various reflections on these questions, see the essays in Witteveen & van der Burg, *supra* note 8.

[125] For an excellent contemporary text, see Lester M. Salamon, ed., *The Tools of Government: A Guide to the New Governance* (New York: Oxford University Press, 2002), where some sixteen different public regulatory instruments are reviewed.

[126] For a recent collection that is organized around this transition in understanding, see Eliadis, Hill & Howlett, *supra* note 110.

take contemporary problems in public governance—say, the regulation of recreational drugs, the regulation of close personal adult relationships, the establishment of healing and reconciliation processes to deal with institutional child abuse, the reprivatization of public space—as occasions to explore how law apprehends, interprets, creates, and disparages patterns of human interaction.[127]

A final set of substantive inquiries for a Foundations of Canadian Law course adequate to the challenges of the McGill Programme involves exploring different presuppositions about human collaboration. Here there are two separate issues. The first involves the question of collective action and the mechanisms by which delegated agency may be exercised: for example, partnerships, corporations, cooperatives, informal associations, mandate and agency, trusts, fiduciary relationships.[128] The second issue concerns the underlying logic of the endeavour: what is the relationship between organization by reciprocity and rules of duty and entitlement, and organization through the pursuit of common ends or shared purposes as principles of human association?[129] In pursuing these two inquiries, the goal is to confront students with the choices about social organization that are implied once one sees law as centrally about institutions and processes of human interaction, and not just as a manifested fact of political power.

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[127] The reader will recognize these issues as those which the reconstituted Law Commission of Canada selected as key themes in its first five-year strategic agenda. See the various documents, discussion papers, and reports posted on the website of the Law Commission of Canada, online: <www.lcc.gc.ca>. There is nothing magical in these issues; any similarly complex set of problems of public governance could serve equally well. The point is that by identifying certain contemporary public policy issues of this character that could be addressed in every first-year class, already one is showing the importance of understanding doctrinal categories and the need to transcend them in apprehending and solving legal problems.

[128] That is, how does the law configure the idea of legal personality and create the conditions under which groups of legal persons may confidently delegate decision-making authority to one of their numbers, or to a third-party, such as a trustee, a managing partner, an arbitrator or a judge? On the first of these questions, see Christopher D. Stone, *Earth and Other Ethics: The Case for Moral Pluralism* (New York: Harper & Row, 1988), which examines the implications of organizing legal regimes on the basis that entities other than what the author characterizes as "contemporary-normal-proximate-persons" are worthy of legal regard. See Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (Berkeley: University of California Press, 1986) for a consideration of the second question, namely the different forms of legal subjectivity and the manner in which collective action can be organized.

[129] See Lon L. Fuller, "Two Principles of Human Association" in Winston, *supra*, note 71 at 81. This investigation also implies assessing both the contemporary critique of rights—as developed, for example, in Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) and Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational, 1994)—and the contemporary critique of alternatives to rights adjudication—as argued, for example, in Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: University of British Columbia Press, 2004).

These questions and themes ought not, of course, to be exclusive to a Foundations of Canadian Law course within the transsystemic programme. Any Introduction to Law course taught in any faculty of law may be meant to show how other curricular offerings are not simply predetermined, fixed, or frozen collections of rules and concepts, but ways of imagining possible worlds and reconstituting legal categories, forms, and processes to embody and instantiate that imagination. What makes the course specific to McGill is that the very idea of a constitutive polyjurality holds out this exercise not as a pedagogical tool for assisting students to understand the "law in force" in a given jurisdiction. Rather, constitutive polyjurality implies that the conception of interpretive practice argued here is a precondition to the study of law.

B. Identity, Power, Hierarchy

If a Foundations of Canadian Law course must attend substantively to the diverse mechanisms, processes, and institutions of social ordering found both in everyday life and in the artifacts of the state, then the course must also attend to the ends that are being advanced by reference to one or more of these forms of social ordering.[130] This moves discussion directly to a reconsideration of the objectives of legal education: What kinds of knowledge, abilities, and understandings should students acquire during a legal education? And how should the curriculum be designed so that these objectives are addressed in a coherent and developmental manner?[131]

In implementing the transsystemic programme, the faculty sought to identify, on a year-by-year basis, a series of learning objectives, subdivided as a "knowledge base" and "skill sets" that the curriculum was meant to achieve. The manner in which these objectives of the first-year tuition are described is revealing for what it tells of the difficulty of turning ambition into an accomplishment, even when a significantly new curriculum is being proposed. The two sets of objectives are expressed in a manner that would be recognizable in any Canadian faculty of law.[132] Well-known categories of knowledge such as public law, private law, the

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[130] For an elaboration of the relationship of these processes of social ordering to the substantive ends they promote, see the essays collected in part IV ("The Art of Institutional Design") of Witteveen & van der Burg, *supra* note 8 at 279ff.

[131] It is one of the happy collateral outcomes of the process by which the transsystemic curriculum was developed that the faculty was obliged to consider what it imagined the objectives of legal education to be. See Baker, *supra* note 30, for a list of the various faculty reports. For a similar and more well-known endeavour undertaken half-a-century earlier, see *Preliminary Statement of the Committee on Legal Education of the Harvard Law School* (Chair: Lon L. Fuller; 1 March 1947).

[132] According to the document entitled "Learning Objectives" that was posted on the faculty's web-site under the rubric "The New Transsystemic Programme" between 1998 and 2003, the first-year knowledge base comprises: (1) the intellectual and historical foundations of public law and private law in Canada; basic principles of the rule of law in Western legal traditions; (2) the main classifications and conceptions of law; the legal basis of the international order; (3) the main theories

rule of law, national law, and international law, as well as basic conceptions of the role of law in society, are maintained as key goals. For their part, the skill sets are those one expects to find listed in all law faculties today: mastery of legal research tools and competence in legal writing. There is, of course, much benefit in attempting to specify the broader purposes of a curriculum, especially where the listed objectives connect with other intellectual disciplines. But, taken together and understood as a recipe, these types of inventory can actually hide or obscure, rather than open to question, the social relations to which the identified knowledge categories and skills are meant to relate.

Social relations are not simply things given by legal forms, but embody human agency in interaction. Legal forms constitute and are constituted by social relations.[133] This implies that concerns both about the legitimation of power, with an emphasis on the complexity of the notion of rationality, and about the basic forms of justice must infuse the Foundations of Canadian Law course. In exploring different sites and processes of deliberative decision making, a key interpretive task is to understand how they presume certain features of human agency and certain kinds of authority.[134] Moreover, given the predominant role that equality plays as an organizing motif in modern society, the questions of what constitutes equality, from where does inequality arise, and what is the relationship between ideas of inequality and discrimination must be addressed.[135] Such questions cannot be considered without a prior inquiry into the Janus-faced concept of identity—identity both as a criterion by which we seek commonality with others, and identity

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of comparative law and private law; (4) basic ideas about law as a form of social ordering. The first-year skill sets presented in the same place include: (1) communications: express simple legal arguments orally and in writing in a clear and persuasive manner; explain and critique legal rules and doctrine orally and in writing for an audience of peers; (2) reading: identify and state rules expressed implicitly and explicitly in complex legal texts; (3) research: use the library to locate legal doctrine, case law and legislation necessary to analyze a particular legal problem in a Canadian and American context; complete rudimentary research tasks using legal databases; (4) teamwork: work in small groups on an intellectually sophisticated problem.

[133] See "Legality and Illegality" in Lukács, *History*, *supra* note 75 at 256.

[134] The kind of analysis undertaken by Weber as approached and critiqued in post-Weberian scholarship in the sociology of law is fundamental to exposing assumptions about agency, power, and authority in legal settings. See *e.g.* Michel Coutu & Guy Rocher, eds., *La légitimité de l'État et du droit: autour de Max Weber* (Sainte-Foy, Qc.: Presses de l'Université Laval, 2005).

[135] Of course, in a first-year Foundations of Canadian Law course one can do no more than introduce students to the vocabulary of justice in law, for example, by commencing with Aristotle's *Nichomachean Ethics,* book V. The aim would then be to tie the contemporary literature of distributive justice and equality—such as John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1976); Michael J. Sandel, *Liberalism and the Limits of Justice*, 2d ed. (Cambridge: Cambridge University Press, 1998); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983); Jon Elster, *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens* (New York: Russell Sage Foundation, 1992); Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989); and Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990)—to specific issues raised in other courses.

as a criterion by which we individuate ourselves as against the collective Other. The politics of identity underpin contemporary discussions of equality, discrimination and distributive justice, with the consequence that embodied conceptions of legal subjectivity become foundational concepts of law.[136]

This evocation of legitimacy, authority, equality, and identity points to some possible objections to the McGill Programme as presented thus far. First, it might be said that this account of the substance of a Foundations of Canadian Law course ignores the real world of hierarchy, of subordinated identities, of exclusion and discrimination. Where in this conception of the course is gender analysis? Ethnicity? Religious oppression? Cultural marginalization? Second, the account ignores, more broadly still, not only the politics of difference but the politics of power, of oppression and inequality. Where is the recognition of the use and abuse of law as a mechanism of privilege and domination? Taken together, these two criticisms charge that the ambitions of constitutive polyjurality might simply be so many formulaic accommodations of the status quo, so many denials of the pathologies of power, and so many reproductions of the cultural hegemony of white male privilege.

These are important objections. Is there an answer to them? An initial response is that the Foundations of Canadian Law course as conceived here actually does provide a framework within which they can and should be addressed.[137] To argue, for instance, that the standard model of law and legal education reflects historic privilege and must be reconsidered is true, but raises a paradox. It is true because all social and political structures reflect historical distributions of power. As critics

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[136] Again, the literature sets are voluminous and the ambitions of the course have to be modest. Nonetheless, some of the work of Charles Taylor, for example, including *Sources of the Self* (Cambridge, Mass.: Harvard University Press, 1989) and "The Politics of Recognition" in Amy Gutmann, ed., *Multiculturalsm and the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25, could be used to frame topics addressed elsewhere in the first-year programme. Likewise, Iris Murdoch, *Metaphysics as a Guide to Morals* (New York: Penguin Press, 1993) and Kwame Anthony Appiah, *The Ethics of Identity* (Princeton: Princeton University Press, 2005) could be used to achieve a similar purpose.

[137] Recognizing the salience of these critiques and the importance of their being addressed from the start of the curriculum in first year permits us to raise another point: is it necessary, in order for an issue to be fully considered, that it actually be discussed within a framework that identifies that issue by name? Two possibilities exist. First, would it be the case that a course attentive to "feminist analysis" be completely organized as a "feminist" course, or would this be to essentialize feminism? Again, would it be necessary that the Foundations of Canadian Law course have units entitled, say, "post-modernism", or "Foucauldian analysis"? The question is difficult because, at an instrumental level, the answer is no. It is the substance that matters and if the course were taught from such a perspective by referring to these literatures, the objection would be met. Yet, if part of the critical exercise is to decentre the normal and move critique from an exogenous position to one endogenous to legal thinking, then an important symbolic point is being made by specifically referring to these themes in the formal organization of the course. We consider this second objection, and whether the transsystemic programme adequately meets it, in our discussion of the difference between interdisciplinarity and transdisciplinarity in the section "Prologue".

of the status quo point out, the objective of education is not just to recognize the contingency and inequity of these distributions, but to design and implement a curriculum and a course that enables professors and students to illuminate, challenge, and overcome distributional inequality and unfairness.

The paradox arises because of uncertainties about the relationship of law to social forces. On one view, because the existing body of legal doctrine and institutional practices are a construct of history, class, gender, race, and numerous other relations of exclusion, critical analysis positioned in one of these discourses will reveal how and why certain interests are privileged, and will suggest how the existing body of legal doctrine and existing institutional practices can be changed in order to overcome exclusion and subordination. But if legal doctrine and practices are largely dependent on social forces, then something more that a change to doctrine is required in order to overcome the structural, constitutive practices of categorization and characterization that resulted in inequality and exclusion in the first place.[138]

A fully realized Foundations of Canadian Law course would address this paradox by offering a methodology for exploring how legal and social structures reciprocally influence each other. Such an approach would contest pre-existing frontiers of knowledge—including the frontier between legal knowledge and social knowledge—and would lay bare the interpretive practices by which choices about knowledge categories are made. That is, by seeing diverse ways in which society and law mutually inform each other, our access to law as social artifact increases, and so too does our ability to transform it. On this interpretation, the deep endeavour of the course would be to reveal the tacit dimensions of legal and social knowledge.[139]

This response does not, however, fully meet the critique. For the issue of power is not just about changes (or the absence of changes) to the fields of the legal, but about the directions and forms that change takes. Modern structures of power succeed precisely because they are incomplete, always inviting the participation and cooperation of the subject.[140] By co-opting and normalizing such engagement, the argument goes, the hegemonic order pre-empts external, system-wide critique and resistance. Does a constitutive polyjurality simply make hierarchical power more complete because its claim about the emancipatory potential of human agency is the ultimate co-optation?

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[138] Of course, the bulk of critical analysis in the academy is not naively programmatic in this way. Many critical scholars do not invest in instrumental outcomes, do not imagine the recapture of law as the primary objective of their work, but focus rather on analysis and critique. Still others do imagine the recapture of law, but go no further than critique. See Duncan Kennedy, *A Critique of Adjudication: Fin de siècle* (Cambridge, Mass.: Harvard University Press, 1997).

[139] For an important discussion of this tacit dimension in law, and the implications for legal education of that which attends to it, see Andrea Brighenti, "Visibility: A Category for the Social Sciences" (Ph.D. Research Paper, University of Milan, 2005) [unpublished].

[140] This point about hegemonic power is derived from Gramsci, *supra* note 75.

As phrased, this question is difficult to answer. For if one adopts a constitutive polyjural perspective, all legal actors—citizens, legal theorists, officials, indeed anyone involved with law—are both contesting and legitimating all possible legal normativities. The approach denies that the state has a monopoly over the law, either institutionally or symbolically. The critique of legal positivism that inheres in the Foundations of Canadian Law syllabus just presented, while not formally grounded in the types of identity and power critiques under discussion, nonetheless equally challenges the a priori, decontextualized conception of law that these analyses bring to light.

Indeed, to see the course as exploring how different forms and processes for facilitating human interaction and achieving social order allocate individual and collective agency means rejecting the idea that law and legal education exist apart from law students and law professors. None of us can escape personal responsibility for our choices and actions.[141] Conceiving legal education more generally as interpretive practice (as embodied interpretation) means that professor and student are not merely role-players in an abstract game to which their commitment is merely contingent, but are human beings endowed with the capacity and charged with the responsibility for improving the social institutions through which people can pursue their life projects.[142]

The idea of legal education as interpretative practice calls forth a further observation about power and exclusion. Why should this kind of legal education be exclusively offered, or offered at all, in a law faculty? Why not in some other institution? Does this approach to learning law depend on its location within an elite institution that remains largely inaccessible to most citizens?[143] This critique

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[141] See Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass.: Harvard University Press, 1994). For a similar indictment of the mode of positivist Master of Business Administration pedagogy that teaches that students are personally freed of and separate from "moral responsibility" for their actions in their "business lives", see Jeffrey Pfeffer & Christina T. Fong, "The Business School 'Business': Some Lessons from the US Experience" (2004) 41 J. Management Stud. 1501 at 1514-17. The goal, in other words, is to reinstate desire and ethics in the pursuit of wisdom. See Peter Goodrich, "Law in the Courts of Love: Andreas Capellanus and the Judgments of Love" (1996) 48 Stan. L. Rev. 633 at 675: "Legal training teaches the subject to separate the personal and the legal, demanding the repression of emotion and the privileging of the objectivity of rules over the subjectivities of truth—Aristotle's wisdom without desire." See also Panu Minkkinen, "The Law-Giver's Place: On the Unethical Quality of Legal Wisdom" (1993) 2 Soc. & Legal Stud. 445.

[142] It is important to signal that this is not a claim for the unlimited power of agency to trump social and economic power. Nor is it a claim that people's conceptions of themselves as agents can exist independently of the social structures within which they are embedded. The real power of agency lies in the awareness of its contingency and limitations. For a discussion of this agency-driven legal pluralist conception of legal education, see Martha-Marie Kleinhans & Roderick A. Macdonald, "What Is a *Critical* Legal Pluralism?" (1997) 12 C.J.L.S. 25; Melissaris, *supra* note 26; and Macdonald, "Here, There, and Everywhere", *supra* note 2.

[143] The point is more general: this type of legal education might be inaccessible to many who have the financial and other resources to attend university, but who do not have a prior educational

has much to tell about the ambitions for the transsystemic programme as traced out here, and about much current legal education. Legal education should be more broadly accessible through public legal education programmes, community forums, clinics, and the like. But if so, one would think that the focus of the education, given this critique, should not just be on the "law in force" in the official courts, but also on the "law in force" in the community, the apartment building, the workplace, and the marketplace. More than this, the education should address strategies for contesting the law generated by these different sites of social power. In the end, if one aim of the transsystemic education is to question received categories and boundaries of legal analysis, there is no reason why the aim should not also apply to the forms and sites of legal education itself.[144]

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background that would permit them to engage the form and substance of the transsystemic programme. We address this point below in the concluding "Prologue".

    [144] *CODA:* We agree with this critique of legal education in general, but do not see it as an argument against the programme as imagined here. Professors in any faculty of law could aspire to move their pedagogies beyond traditional assumptions about the nature of law. The conception of the aims of legal education we raise speaks to the responsibility of those who are sufficiently privileged to be able to partake of a legal education in a faculty of law. Their responsibility is to learn how those who are engaged in legal practice are in fact also engaged in the processes of creating, discovering, making, applying, and interpreting law. Law, and any particular branch of it, such as, for example, property, civil responsibility, and contracts, is constituted by the beliefs and practices of its agents—be they, for example, owners, lessees, occupiers, tortfeasors, those vicariously liable, victims, contractors, third-party beneficiaries, and so on. In the transsystemic programme, law begins and ends where professors and students decide it does. The Foundations of Canadian Law course is meant to provide the epistemology upon which these interpretive decisions may be taken. For a discussion of what a programme of public legal education might look like were it to be designed on the same assumptions about legal knowledge as the transsystemic programme, see Macdonald, "Access to Justice", *supra* note 59 at 85-101.

IV. Park:[145] Legal Subjects and Legal Agents[146]

In the phrase "No Vehicles in Park", the term "park" (regardless of the specific content one gives to its definition) is the *object* of a prepositional phrase. Both its location in the phrase and its usual referents for law professors and students suggest passivity—the park does not act. Even changing the syntax of the phrase so that "park" becomes the *subject* of a passive construction—"Parks Are Not to Be Entered by Vehicles"—does not change the grammatical function of the word: "park" is a noun. How different our understanding would be if we were to imagine the term as a verb—"Park yourself here for the moment"; a gerund—"Parking for pleasure"; or even as the noun-subject of an active grammatical construction— "Parks are people!" Because the McGill Programme is meant to reveal presuppositions, traverse boundaries, contest dichotomies, and in some measure destabilize settled structures of meaning, a Foundations of Canadian Law course adequate to it must pose epistemological questions that encourage professors and students to imagine alternatives to the given order. In such a course, parks are to be apprehended and interpreted as all the above, including, as merely one example, nouns.

Earlier, in the discussion of modes and sites of pedagogy, we noted that the marked modifier "alternative" is not meant to signify a static state of affairs that reinforces the "normal". "Alternative" is action and points to transitions. To adapt a phrase ascribed to Gertrude Stein, the aspiration of alternative modes of communication and alternative course work is to learn how to "[a]ct so there is no use in a *centre*", no normal, no standard legal education.[147] For reasons given earlier, we will generally not use the word "alternative" in this section but will, by preference, use expressions like non-standard and decentred.

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[145] *The Oxford English Dictionary* gives as contemporary usages of "park": (1) a noun referring to a large public garden in a town, used for recreation; (2) a large enclosed piece of ground; (3) an area devoted to a specific purpose; (4) (in a car with automatic transmission) the position of the gear selector in which the gears are locked, preventing the vehicle's movement; (5) a verb referring to the action of bringing a vehicle one is driving to a halt. The word "park" was, incidentally, originally a legal term designating land held by a royal grant for keeping game animals that was enclosed, and, therefore, distinct from a "forest" or a "chase", neither of which was governed by special laws or officers.

[146] *THEME:* The aim of this section is to explore the potential of different modes of communication and multiple forms of assignments to transform legal curricula and pedagogy by positioning professors and students not as subjects of a reified body of knowledge (even transsystemic knowledge), but as creative agents of law who pursue the practice of legal education as interpretation without a pre-fixed, immutable centre. It argues that, as interpretation, the making and remaking of law through legal education must deploy multiple communicative modes and engage students with multiple assessment formats and opportunities for the active reconstitution of legal knowledge. In so doing, a Foundations of Canadian Law course contests the prescriptivist view that legal subjects are passive recipients of norms generated by some other agent.

[147] Interview of Anne Carson by Will Aitken in "The Art of Poetry No. 88" *The Paris Review* 171 (Fall 2004) 190 at 226 [emphasis added].

The practices of interpretation from the margins do not lend themselves to passive or formulaic learning. That is, as practice*s* they can neither be taught by a form of magisterial lecture or professor-dominated seminar in which students are conceived as empty vessels that passively receive information transmitted by a professor, nor can they be reduced to algorithmic formulae such as CIRAC that imply that a practice is nothing more than a decision protocol.[148] On the contrary, practice must be practised. And because *practices* are iterative, they will always be incomplete, always emergent and changing. It follows that just as the McGill Programme itself can never be fully realized, any pedagogy within it—whether in its forms or its substance—can never be fully accomplished.

This conclusion applies equally, at least in principle, to the various written exercises that constitute the evaluation practices of every course in the McGill Programme.[149] Because all are part of the pedagogy, all are recursive.[150] All begin with a design that is implemented, itself assessed, redesigned, and reiterated. This process does not describe a closed loop. Rather, each reiteration tracks and tests a new interpretative dimension. For example, if the first iteration involves autonomous work, then the next iteration may involve group work. If the third iteration demanded linguistic expression, the fourth may call for a paralinguistic medium, and so on. Such exercises require the ability to develop and express arguments in various substantive modes, in different written and unwritten forms, and to direct such forms to various audiences.

In view of the particular objectives of the Foundations of Canadian Law course, its assessments must specifically and directly aim at understanding interpretive practices. It must, that is, seek to expose the way in which categories of legal knowledge are generated from both conceptual and empirical sources.

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[148] As most law students learn, the acronym CIRAC stands for "Conclusion, Issue, Rule, Application, Conclusion"—the apparently magical formula for writing memos, essays, and exams that will be evaluated with an "A" grade. We do not claim that formulae are unhelpful. Like the notorious *plan en deux parties* of French legal scholarship, the discipline of a formula can assist in framing an inquiry and a response. Too often, however, a formula becomes an excuse for not thinking about other ways of imagining a practice. Consider how different scholarship would be if a student were obliged to submit and justify, successively, a two-part outline, a three-part outline, and a five-part outline. Similarly, magisterial lecturers can initiate a dialogue with themselves through which students are invited, individually and vicariously, to participate in the practice being demonstrated.

[149] Presently, as part of the continuing implementation of its new undergraduate programme, the McGill Law Faculty is reconsidering its evaluation and grading policies so as to emphasize the formative dimension of assessments. See Adelle Blackett, *Report on Student Evaluation and Rankings* (Montreal: McGill University, Faculty of Law, 2004). For an earlier report that focuses on modes and objectives of assessments, rather than on grading per se, see Daniel Jutras, *Ranking and Grading in the Faculty of Law: Discussion Paper* (17 June 2002).

[150] The word "recursive", borrowed from mathematics and linguistics, captures the relationship between syllabus, classroom, informal teaching, and assessments. The *Oxford English Dictionary* gives the following meaning: "Applied to a grammatical feature or element which may be involved in a procedure whereby that feature or element is repeatedly reintroduced; applied to a grammatical rule in which part of the output serves as input to the same rule."

Assignments cast and submitted in a non-standard format are meant to match the interpretive effort with the knowledge that they are designed to expose and to challenge. More than this, because law ultimately depends upon our capacity as human beings to communicate meaningfully with each other: in a constitutive polyjural curriculum, these assignments should permit and encourage attempts at expression in as many different ways as possible, ultimately with the goal of decentring the normal.

A. Modes of Communication—Assignment Formats

Although the ambition of constitutive polyjurality takes pedagogy beyond the institutions of the state and the practices attending these institutions, the capacity to deploy natural languages to engage in debates that produce legislation, or oral advocacy to influence a judicial decision, cannot be discounted. For many, this alone justifies a focus on traditional written assignments that involve the drafting of factums, case analyses, legal memos, and essays that primarily address legal doctrine, on the one hand, and oral advocacy through mooting, on the other. Indeed, there is much to be said for ensuring that courses provide instruction in and opportunities for practicing the everyday forms and techniques of legal communication.

Still, even within the realm of official law, there are numerous other kinds of writing that constitute the stock-in-trade of the jurist. These forms of writing include, for example, actually drafting legislation, regulations and by-laws, or contracts, articles of incorporation, and constitutions for university and community organizations. Each of these is more than an alternative mode of expression leading to an alternative textual outcome. Each engages alternative sources of legal knowledge and alternative conceptions of normativity. But the McGill Programme goes even further than this in its aspirations. It presumes that legal communication mediated through texts that speak to audiences other than judges and legislatures is just as important, if not more important, in constituting law. These texts range from the familiar—securities prospectuses, client letters, settlement offers—to the exotic—nursery rhymes and fables, Shakespearian sonnets, novels, boy-scout pledges, posters, and web sites. The list is virtually without limit.[151] All texts are interpretive sites in law.

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[151] These examples are offered for two reasons. First, even within the standard set of legal texts that lawyers routinely deploy, there is considerable diversity of forms, frames, and registers. Why should a legal writing programme or course not require students to write, for example, newspaper op-ed pieces, briefs to parliamentary committees, notice and comment submissions in a regulatory context, cabinet memoranda, speeches, and press releases? Second, the other examples are not nearly as exotic as might initially appear. If argument and persuasion are central objectives of legal communication, there should be room to practise and deploy all these discursive resources in the curriculum of a law faculty. James B. White has been, perhaps, the most eloquent proponent of taking a broad-based approach to legal writing. For an illustration of the possibilities for designing creative writing exercises, see James

The same claim can be made about oral and performative legal communication. Consider everyday occasions of oral advocacy such as trial practice, appellate pleading, public agency presentations, and presentations to parliamentary committees. In each the objective is communication and persuasion—the attempt to convince others to share one's interpretation. As with written communication, the fora for oral advocacy are practically limitless. The inventory could include presentations to corporate boards or union executives, shareholder meetings, public consultations, meetings with public servants, discussions with police and public prosecutors, client interviews, negotiations with other lawyers, press conferences, and crucially, the myriad forms of everyday conversations with others. That advocacy of this type is not external to law is hardly news, although few law faculties actually put the insight into practice. Lip-service is not, however, an option for a Foundations of Canadian Law course in the McGill Programme. Because advocacy is part of the interpretive practices by which law is constituted, in a constitutive polyjural curriculum all these sites and all the discourses appropriate to each of them will be part of everyday pedagogy.

The argument here is more general. Legal communication often goes beyond text and spoken words and extends to practice, to ritual, to feelings, and to public performance as modes of human interpretation. The most common forms of embodied action or hot performance include community organizing, public marches and protests, petition signing, public meetings, electioneering, street theatre, theatre of the oppressed, mime, and even planning and engaging in acts of civil disobedience.[152] Many other symbolic forms can be wielded as the interpretive practices of law creation: for example, film, music, art, cartoons, sculpture, television, internet multi-media, dance. Only our imagination limits these forms of engagement.[153]

The above inventory at once reflects and embodies the modes of legal apprehension, communication, and interpretation that inhere in the aspirations of the transsystemic programme. But if they are to come to life, they must also be reflected in the classroom and in the assignments and assessments of every course.[154] True, the Foundations of Canadian Law course carries a special burden.

B. White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston: Little, Brown & Co., 1973).

[152] Of course, many of these activities are complemented by texts like, for example, placards and manifestos, or by public discourses, like chanted slogans and speeches. But as E.P. Thompson argues, the performance is normative in its own right. See E.P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (New York: The New Press, 1993). For a detailed exposition of how these different kinds of activities may be deployed to achieve the same kinds of results as might be anticipated by a lawsuit, or by lobbying a legislature to amend or enact a statute, see Saul D. Alinsky, *Rules for Radicals: A Practical Primer for Realistic Radicals* (New York: Vintage Books, 1972).

[153] We take our cue about symbolic forms from Ernst Cassirer, as interpreted by Susanne K. Langer, *Philosophy in a New Key*, 3d ed. (Cambridge, Mass.: Harvard University Press, 1957) at 43.

[154] The claim is not that all aspects of constitutive polyjurality must be consciously pursued in every course. We only mean to observe that every course should attend to one or more of them, that the

If it is to fulfill its cartographic role for the programme, these interpretive practices must be embedded within it. All dimensions of legal education—across both time and space—would be sites for embodied interpretation. Ultimately, the programme's constitutive polyjural objectives could be reflected in every course, in every assignment, and in every interaction.[155]

Within the pedagogy of any given course, these various forms of communication centrally constitute the active practice of education. The 100% final sit-down issue-spotter exam merely encourages and rewards a kind of passive mimicry on the part of the student—the reproduction of the standard textual, rules-based form of legal discourse captured by the CIRAC formula. However meaningful and important for the substance of the topic being explored, the regurgitative doctrinal essay exhausts almost all its pedagogical usefulness after it has been done once. This said, the abilities tested by such assignments are not unimportant. Students must be encouraged to become expert at reproducing and effectively deploying traditional modes of legal communication. Of course, in a constitutive polyjural curriculum the pedagogical goal is that they will be able to do so as part of a self-critical interactive process. An examination or paper should be conceived as the beginning, not the end, of the evaluation process. More generally, all types of assessment should be explicitly designed, through their continual iteration across various forms, to draw out and critique the indeterminacy of legal knowledge, and having done so, to reconceive the elements of indeterminacy. This is not to say that anything goes with respect to assignments; all assignments, including assignments submitted in a non-standard format, have a set of learning objectives attached to them, and a particular discipline that attaches to those objectives.

Nonetheless, whenever students submit assignments in a non-standard format they are departing from the predictability of the conventions they have learned governing standard pedagogy and learning—and this generates a moment of doubt, of uncertainty, of vulnerability. Admittedly, every time a student submits a piece of work for evaluation (an essay, a mid-term, an exam), or undertakes to give a performance (a moot, a presentation, answering a difficult question in class), there is a moment of doubt and vulnerability. But when the student undertakes something unusual and novel besides, another layer of doubt and apprehension is added,

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curriculum must be designed so that most are explicitly available on an ongoing basis, and that students should be encouraged to take up these opportunities.

[155] It follows that just as the forms of pedagogy for such a curriculum ought to instantiate its objectives, so too should course syllabi, assignments, and teaching materials. More than this, para- and extra-curricular activities, and ultimately all aspects of the operation of a law faculty, should reflect such an approach: professorial and student recruitment practices, library acquisitions and services, faculty governance processes, and so on.

because the normal, socialized reference points governing evaluations are nowhere to be found.[156]

The lesson to draw from this interpretive difference, however, is not that uncertainty and doubt can be eliminated simply by better instructions and increased familiarity. They cannot, and helping students come to this realization better prepares them for the fact that such reference points are largely absent from the everyday *habitus* of legal practice.[157] The goal of non-standard assignment formats is not, then, to eliminate constraints upon students and professors. The point is to assist professors in ensuring that the constraints actually imposed in evaluations, whether in standard format or any other format, are non-catechistic, formative, and to the greatest extent possible, affirmative for the student.

There is yet another kind of vulnerability between student and professor that is particularly evident in a first-year Foundations of Canadian Law class. When submitting a non-standard assignment in a course of this type, a student cannot avoid giving substantial consideration to the ongoing narrative restatement of his or her own personal identity, for the submission is directly related to—and constitutive of—her or his own life to date as artist, scientist, movie producer, parent, and so on. To write a standard essay or an exam in the "commanded" format allows for a modicum of dissociation, if not almost complete dissociation, of one's self from one's work that is harder to achieve with non-standard, or performative, or embodied assignments that do not typically admit of a distinction between law and life.[158] The submission of such assignments is freighted with

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[156] For these reasons, in the current context of legal education, for a professor to permit and for a student to submit such an assignment is an act of courage. After all, how many times previously in his or her education, has a student encountered such a demand? How is the student to know how the instructor will react? How is the student actively and creatively to connect the form and substance of his or her chosen legal embodiment, whatever it might be? How can the student ensure that communication will in fact take place? Of course, these questions are fundamental, and revealing, for they apply equally to ordinary assessments deploying conventional communicative forms. Furthermore, they apply particularly to students who submit standard-format assignments in a course where non-standard assessments are permitted.

[157] See *e.g.* James C. Freund, *Lawyering: A Realistic Approach to Legal Practice* (New York: Law Journal Seminars-Press, 1979) at 15-16 [emphasis in original], regarding the "essential formlessness" of the problems faced by practicing lawyers:

> Generally ... problems come to your desk in much more of a state of disarray. A client indicates that he wishes to take a certain course of action and asks if there are any problems. *You* have to identify the potential source of trouble ... and ferret out the sections that might possible be violated. *You* have to decide whether there are tax implications which present a serious enough issue to be brought to a tax expert. It's a rare client who can frame precisely the correct inquiry; your role is to define [*i.e.,* symbolize] the issue in legal terms and then answer the question he should have posed (but didn't). ... What I want you to keep in mind ... is the frequent need for the lawyer to create his own analytical framework; nothing is handed to him on a silver platter.

[158] This is not to say that some non-standard forms of assessment cannot equally permit such a dissociation. For example, a diorama, collage or scrapbook may be produced in a way that conceals

emotional baggage: at risk is not only, nor simply, what the student thinks, but what the student *believes*. Non-standard assignments conduce to students testing and assessing their convictions both qua students and qua human beings.

Once again, this is inevitable, necessary, and to be encouraged. Law and legal education are irreducibly and ineluctably human endeavours. The stakes are high because they are usually personal. They are personal not just for the student submitting the assignment, but for the professor who is called upon to evaluate it. While the classic assignment is relatively easy to assess at a superficial level (it is just a matter of "measuring" it against pre-set criteria and knowledge), the assessment of an assignment in a non-standard format requires the professor to create immanent criteria of evaluation that necessarily vary from case to case.[159] And once again, since the curricular and evaluative normal will reflect the voices that have previously been heard within an interpretative tradition, these various options can be seen as transitional—can become a way by which subordinated voices and perspectives are moved off the periphery and brought into the everyday pedagogy of the faculty.[160]

All assessments in some measure test what students have learned and their ability to apply that learning to the solution of various problems. They all also provide students with an opportunity to think carefully about a problem in light of the formal and informal pedagogy of a course and to share their thoughts with other members of the class. When undertaken in non-standard formats, they can also encourage students to take an active rather than passive role, and to become a live creator of legal forms and meanings. They have the potential to foster collaborative teaching and learning practices between professors and students.[161]

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rather than reveals personal identity. Also, while performance of a song, dance, mime, or an oral presentation necessarily unites the artist's body with his or her work, not all non-standard submissions do so. Nevertheless, once a student moves onto the terrain of any non-standard assignment, the likelihood of maintaining a dissociation between oneself and one's work is reduced.

[159] For example, when one chooses a specific symbolic form, what counts is neither the mere aesthetic outcome (which would amount in fact to a rejection of the assignment), nor the mere concept that the students wants to present (which would amount to a form of instrumentalism), but rather the relationship between the chosen symbolic form, its inherent articulation, and the intellectual reflection that emerges throughout that form and that is interwoven into the kind of symbolism chosen by the student.

[160] Two ideas are expressed here. On the one hand, the more these assignments tax the knowledge of the professor, the more they will bring into the faculty insight, expertise, and understanding from non-traditional sources. On the other hand, they are not to be moved to the centre, for that would simply be to reinvent a hierarchy of knowledge and understanding. On this point, see James R. Elkins, "Rites de Passage: Law Students 'Telling Their Lives'" (1985) 35 J. of Legal Educ. 27. Claims for recognition in legal education by women, people of colour and members of first nations are also framed in the language of the margins.

[161] There is, to be sure, nothing automatic about these types of assignment producing collaborative learning. Strategically inclined students could simply learn how to apply the "course summary"

The "paper chase" in this perspective becomes the chase of self-respect and articulation of self as jurist, much more than the chase of grades, credentials, and financial reward. Making room for, perhaps generally encouraging, students to exploit the full range of communicative symbolisms and the full range of iterative assessment possibilities is what enables students in a Foundations of Canadian Law course as envisaged here to understand their education as tradition and not object, as immanent aspiration and not achievement, as interpretation and not essence. It enables them to recognize their role as legal agents and not just as legal subjects.[162]

B. The McGill Programme as Reification?

If, as we argue, the course in Foundations of Canadian Law appropriate to the McGill Programme must open the ambitions, the forms, the substance, the processes, and the participants in the legal education endeavour such that they reflect an effective constitutive polyjural curriculum, does this not suggest a certain completion or finality to the endeavour? In our view, because a tradition is a conversation that embodies practices, and because practices must be practiced, that is unlikely. The Foundations of Canadian Law course, like the transsystemic programme itself, will always be immanent, and will never be fully realized.

Yet the opposite conclusion is suggested by contemporary structures of legal education and especially by the concept of law as unificationist monojurality[163] that organizes the curriculum even in faculties where the majority of faculty members personally do not share this perspective. Not surprisingly, therefore, the McGill Programme, just like any other innovative law faculty curriculum, is always at risk of being reassimilated into conventional understandings.

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system by analogy, in order to navigate non-standard assessment structures. One simply hopes that these opportunities will conduce to students taking greater responsibility for their own education.

[162] We acknowledge that students may have expectations about the nature of a legal education that would make such forms of evaluation particularly unsettling for them. For example, those that tend towards institutionalized, conventional modes of learning and evaluation may not see either the point of, or the need for these types of assignments. However, this is not an argument against encouraging such forms of assignment or activity; it is merely a caution about the steps that will have to be taken to ensure that, in practice, they can be successfully pursued. We address this point further in the concluding "Prologue".

[163] We use the expression "unificationist monojurality" by preference to the more common characterization of "analytical positivism" for two reasons. First, while most people who hold to a legal positivist ontology would also take a unificationist monojural approach to the artifacts of legal study (see *e.g.* H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Oxford University Press, 1994); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979)), not all who take this approach are legal positivists in the usual sense of the term (see *e.g.* Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986); Richard A. Posner, *Economic Analysis of Law*, 6th ed. (New York: Aspen, 2003)). Second, not all legal positivists take a unificationist monojural approach: see Brian Z. Tamanaha, *A Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Oxford: Oxford University Press, 1997).

Although this special issue is meant to provide "a critical examination of pluralistic and multi-systemic approaches to law",[164] there is a chance, in framing the inquiry in this manner, that those unfamiliar with the history of legal education at McGill and with the aspirations of the new programme will misconstrue it not as the search for a new, emergent level of legal analysis but as a quest for a new location for distilling a legal *essence*.[165] Conceived this way, transsystemic pedagogy does not really transcend current approaches, but rather reifies concepts and resituates categories at one level of abstraction removed from that of the former National Programme's comparative approach.[166] The McGill Programme would no longer privilege civil law and common law as analytical categories but would focus on "transsystemic law", represented as another system of law-bearing norms and principles. In this conception, the "trans" in transsystemic legal education would not carry the same kind of meaning as the "trans" in transdisciplinarity. Particular systems might be transcended, but the idea of "systemic" teaching and research would remain firmly in place.[167]

This conception of the McGill Programme does not directly engage the ambition to constitutive polyjurality immanent in the transsystemic idea. Many professors now teaching in the programme or working on its teaching materials

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[164] The themes of the issue are nicely expressed in open-ended terms by the editors as follows: "To a certain extent, this is intended to reflect the character of legal education at McGill. ... By examining two legal traditions, not just comparing them but identifying and evaluating their underlying norms, principles and commonalities, students inquire as to the essence of law" (Call for Submissions, McGill Law Journal Special Issue, 2004).

[165] In taking the essentialist tack, the movement from system to transsystem would be imagined as analogous to the taxonomic move from genus to family. The level of analysis changes, but the analysis of levels remains the same. Under this approach, the movement would resemble the move from teaching the law of a particular political jurisdiction, say the law of Massachusetts, to some notion of a national law of the United States by various American law faculties at the turn of the twentieth century—that is, a move move from species to genus. For a discussion of this stage in American legal education, see Grant Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977) and G. Edward White, *Patterns of American Legal Thought* (Indianapolis: Bobbs-Merrill, 1978). On the transition from genus to family in Western legal thinking, consider the question raised in the path-breaking article by René David, "Existe-t-il un droit occidental?" in Kurt H. Nadelmann, Arthur T. von Mehren & John N. Hazard, eds., *Twentieth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema* (Leiden: A.W. Sythoff, 1961) 56. Our argument is that the analytic move required of the new programme is not just taxonomic but is also hermeneutic.

[166] This ratcheting-up of analytic abstraction—the converse of "defining-down"—is characteristic of transcendental methodological aspirations. For a critical appraisal of this methodological move in the social sciences, see Jason Ryan MacLean, "The Banality of Culture: A Review of Michel Maffesoli's *The Contemplation of the World: Figures of Community Style*", Book Review (2000) 26 Critical Sociology 166.

[167] In such a perspective, transsystemic teaching is more like the traditional notion of interdisciplinarity, as opposed to transdisciplinarity. See generally Margaret A. Somerville & David J. Rapport, eds., *Transdisciplinarity: reCreating Integrated Knowledge* (Oxford: EOLSS, 2000). We address this point below in the "Prologue".

know that to imagine the pedagogy as the search for legal doctrine that captures "cause" or "*imprévision*" in the civil law as well as "consideration" and "unconscionability" in the common law requires them also to inquire about conceptual foundations, institutional structures like courts and legal professions, socio-economic conditions, political values, and so on. Rather than treating the civil law and the common law as real entities having an essence, and therefore treating transsystemic doctrine as another real entity having an essence, they see transsystemic teaching as an opportunity to imagine law and law teaching as part of a narrative tradition—as part of a conversation through time.[168] The pedagogical aspiration and practice being sought in pluralizing form, content, and process is to reconsider the social relations that are *constitutive* of all types of legal systems.[169]

An example can show the complexity of pluralistic transsystemic pedagogy. Imagine the following commercial transactions: the financing of the distribution and sale of snowmobiles in Rimouski, Quebec, in Kapuskasing, Ontario, in Grenoble, France, and in Aviemore, Scotland. Imagine too the financing of the distribution and sale of automobiles in Montreal, Toronto, Paris, and London. In what conceptions of law would we say that the transsystemic affinities are Montreal and Rimouski (and more remotely Paris and Grenoble) on the one hand, and Toronto and Kapuskasing (and more remotely London and Aviemore) on the other? Does transsystemic pedagogy mean finding commonalities across all eight locations? Consider now that the primary pairs might rather be Rimouski and Kapuskasing (and more remotely Grenoble and Aviemore) on the one hand, and Montreal and Toronto (and more remotely Paris and London) on the other. Consider, still again, that the pairs might be Rimouski and Kapuskasing (and more remotely Montreal and Toronto) on the one hand, and Paris and Grenoble (and more remotely London and Aviemore) on the other. The point is that if the McGill Programme does not interrogate the grounds on which the ideas of both "system" and "trans" are situated, it will not actually *transcend* them.[170]

These examples are a reminder that the temptation to recreate a unificationist monojurality will not be resisted simply by attending to words. Replacing the expression "transsystemic" by some other adjective that carries no implicit content (the "McGill" Programme, for example) does not speak to the key substantive

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[168] To recall, this narrative conception of tradition is derived from Glenn, *Legal Traditions*, *supra* note 24, and may be contrasted with mainstream views like that advanced by Merryman, *supra* note 22.

[169] We address the three main dimensions of this approach to legal education—polyjurality, multilingualism, and transdisciplinarity—in the concluding "Prologue".

[170] The example can, of course, be dissected even further. For present purposes however, the extent to which it is developed is sufficient. The point here is simply to show that particular state legal systems and legal traditions, which constitute the usual reflections of comparative law, are not exhaustive of the transsystemic possibilities. They can be usefully complemented by transaction type (financing distributions, financing sales), object of the transaction (snowmobiles, automobiles), overall structure of the economy (North American, European), and so on, as criteria for regrouping and dissociating legal regimes. For a discussion of these lines of inquiry as applied to legal education, see Kasirer, "*Métissage*", *supra* note 18.

issue: one or the other label can be effective as a signal; one or the other can also be no more than a cosmetic change. In a manner reminiscent of debates about whether the National Programme should have been entitled the "Canadian" Programme in 1968, the faculty confronts the question whether a new word is required to signal this new phase in the McGill tradition of legal education.[171]

Recall, for instance, de Tocqueville's almost apologetic admission in *Democracy in America* that he could not do justice to his subject without coining the strange new term "individualism".[172] Or the problem encountered by Raymond Williams who, while writing *Culture and Society*,[173] discovered an interdependence in the relationship between concurrent changes in discourse and society. Williams' initial task was to analyze the transformation of culture coincident with the emergence and development of industrial capitalism in England. He soon realized, however, that the word "culture", as with other key words of Western culture such as "class", "industry", and "democracy", had assumed new meanings in response to the very changes he was attempting to investigate. It was not simply the case that the meaning of the word "culture" had been influenced by those changes (of course it had) but rather that the new meaning of "culture" was by turns entangled with, generated by, and constitutive of those changes.[174]

The point here, however, is broader yet. However one decides to label the McGill Programme, it is important to consider carefully the semantic shifts bound-up with the term "transsystemic". Not doing so can inadvertently lead to a reification of the idea. According to Lukács, reification occurs when "a relation between people takes on the character of a thing and thus acquires a 'phantom-objectivity', an autonomy that seems so strictly rational and all-embracing as to conceal every trace of its fundamental nature: the relation between people."[175] As Cassirer notes:

> [T]he distinctions which here are taken for granted, the analysis of reality in terms of things and processes, permanent and transitory aspects, objects and actions, do not precede language as a substratum of given fact, but that

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[171] The various advantages and disadvantages of using the word "transsystemic" as an epithet to describe the new McGill Programme are reviewed, *supra* note 18.

[172] Alexis de Tocqueville, *Democracy in America*, trans. by Arthur Goldhammer (New York: Library of America, 2004) vol. 2 at 585-87.

[173] Raymond Williams, *Culture and Society: 1780-1950* (New York: Harper & Row, 1966).

[174] *Ibid.* at xi-xviii. See also Jean-François Lyotard, *The Post-Modern Condition: A Report on Knowledge*, trans. by Geoff Bennington & Brian Massumi (Minneapolis: University of Minnesota Press, 1984).

[175] Lukács, *History*, *supra* note 75 at 83. To see how the application of Lukács' notions of reification brings into critical relief the otherwise occluded social relations constitutive of "globalization", and for a discussion of the alternative of embedded and embodied interpretation, see Jason MacLean, "Globalization and the Failure of the Sociological Imagination: A Review Essay" (2000) 26 Critical Sociology 329.

> language itself is what initiates such articulations, and develops them in its own sphere.[176]

Bringing a pluralist epistemology to understandings of the new programme and imagining law and legal education as embodied interpretation can be at least a partial prophylactic against imparting a "phantom-objectivity" to and reifying the transsystemic idea.[177]

Prologue:[178] No Toilets in Park[179]

In the preceding discussion of a Foundations of Canadian Law course appropriate for the McGill Programme today we have, for the most part, left implicit our answer to the larger question: what do we mean by the approach to law and legal education embodied in the transsystemic programme?[180]

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[176] Ernst Cassirer, *Language and Myth*, trans. by Susanne K. Langer (New York: Harper and Brothers, 1946) at 12.

[177] *CODA:* Given its location in the undergraduate curriculum, the Foundations of Canadian Law course is a key site for cautioning students against the two main perils of reifying the transsystemic idea—reification as essentialism, and reification as the effacing of the personal in understanding concepts. As applied to the McGill Programme, the problem of essentialism results in constructing a Merryman-like static tradition of transsystemic law that focuses only on the interactions of civil law and common law, and that presumes the possibility of a meta-system of, to recur to René David's expression, "un droit occidental" (David, *supra* note 165). A Foundations of Canadian Law course in a transsystemic programme that conceived tradition as a Glenn-like conversation would attempt to situate various strands of civil law thinking, various strands of common law thinking, and the various other normative regimes of the type signalled in the snow-mobile example as epistemic variations on the constitutive polyjural theme. Reification as ignoring the personal results in retaining or reproducing a model of law and legal education in which legal subjects retain their status as passive targets of legal regulation. A Foundations of Canadian Law course in a non-reified transsystemic curriculum would focus on contingency and agency in examining how legal subjects actively imagine and engage with these multiple legal orders.

[178] The *Oxford English Dictionary* gives as a first sense of prologue "the preface or introduction to a discourse or performance; ... esp. a discourse or poem spoken as the introduction to a dramatic performance." Given our claim that the McGill tradition of legal education has been an ongoing conversation, it is appropriate that this contribution appear to end as a prologue to a fresh reiteration of the practice of legal education at McGill.

[179] This concluding Prologue recurs to the phrase "No Toilets in Park" to suggest three ways in which the transsystemic programme may be said to embody the faculty's continuing commitment to constitutive polyjurality—a jural dimension, a linguistic dimension, and a disciplinary dimension. In so doing, the essay begins anew, by framing the challenges faced by those who would pursue further development of the assumptions about law immanent in the idea of constitutive polyjurality.

[180] *THEME:* This question is, of course, not just *a single* question. It can be posed and answered in several ways, each of which presupposes a different focus of inquiry. For example, one might say that the programme could be conceived as any of: (1) a combined bilingual and bijural education; (2) polyjuralism; (3) the search for a new normative structure—be it transnational, a *mixité*, or legal pluralism; or (4) pluralistic interdisciplinarity. A detailed exposition of what such a taxonomy would look like is set out in Dagicour, *supra* note 17. Alternatively, the programme could be conceived as: (a) unidisciplinary—ranging from bijuralism, to cosmology, to métissage; or (b) pluridisciplinary—

In earlier sections, we have represented the transsystemic approach as having three dimensions: (1) a jural dimension; (2) a communicative dimension; and (3) a disciplinary dimension. In its jural dimension, the new programme can be seen as a further iteration of the faculty's traditional conversation about constitutive polyjurality. Framed as a matter of how human beings communicate, the programme can be seen as an expansion of the faculty's long-standing bilingual vocation. Understood as a way of incorporating into everyday categories of legal knowledge the panoply of insights and knowledge that positivist analysis considers as exogenous, the programme necessarily moves from an inter- to a trans-disciplinary register.

What does it mean to say that the transsystemic programme is a further iteration of constitutive polyjurality? A presupposition of many involved in conversations about the McGill curriculum from its inception in the nineteenth century to the present has been that law, legal education, and legal practice must be apprehended from multiple perspectives. Each system of jural thought being taught—for example, in 1853, Roman law, international law, local customary law, civil law, common law—has its own basic assumptions, implications, and consequences in relation to what must be regarded as law, what knowledge and skills should be privileged in legal education, and what instrumental and ethical choices should govern the practice of both. Each system of thought always tends to develop and protect its own identity by imposing normative boundaries upon its promoters, officers, theorists, and practitioners.

Applying these ideas, one can see how the various historical iterations of the McGill curriculum have reflected different conceptions of constitutive polyjurality. The endeavours of Lee (1915) and Cohen (1968) both privileged contemporary formal bijuralism—teaching common law and civil law side by side but sequentially. Some of the faculty's founders, by contrast, conceived a curriculum that promoted no one system of thought and no one jurisdiction. In our own interpretation, the new transsystemic programme ultimately goes further even than this: legal education is interpretative practice within a framework of *normative pluralism*. In consequence, the view of law as embodying monist, centralist, positivist, and prescriptivist commitments can no longer be sustained except as a heuristic counterpoint.[181]

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ranging from "law and ...", to interdisciplinarity, to transdisciplinarity. Such a model for conceiving the programme is elaborated in Chamberland, *supra* note 17.

[181] On the specific meaning of these rejected premises, see Macdonald, "Here, There, and Everywhere", *supra* note 2; see also Kasirer, "Bijuralism", *supra* note 18. If one were to transpose these ideas into the manner in which the Foundations of Canadian Law course has been taught, one would generate the following triptych: in a first hypothesis—monojuralism—law is empire; in a second hypothesis—bijuralism—law is a cosmology; in a third hypothesis—polyjuralism—law is *métissage*—the concern is with the mixing and the mixer, not the mix. This last point is elaborated in Kasirer, "*Métissage*", *supra* note 18.

The second dimension of the historical conversation about legal education at McGill is communication. The new programme necessarily frees law and legal education from its preoccupation with written texts and formal institutions because it embraces chthonic as well as Western traditions. But the programme goes further, and frees law and legal education from natural languages as exclusive instruments for transmitting information—whether the transmission is oral or in writing. The new curriculum is built on the assumption that natural languages are as much symbolic discourses as instrumental vehicles for transmitting self-contained rules, principles, standards, and norms. Legal normativity and interpretation arise in symbolic interaction, whatever the symbols in play.[182]

Once again, the tradition of legal education at McGill holds language in general, and legal language in particular, to be culturally rooted. Engagement with more than one legal language necessarily implies engagement with more than one mode of symbolic interaction. Even a bijural curriculum will achieve few of these objectives if its language—of legislation, cases, doctrine, scholarship, and teaching—is singular. To see legal education and law as bilingual, as in the National Programme, is to acknowledge that legal subjects-cum-agents themselves create law by interpreting law in their own way. Such an understanding of legal language as located in the words and grammar of a natural language which are themselves rooted in the larger culture of their users, leads beyond semantics to semiotics. The semiotic diversity of law's normative artifacts—music, art, dance, architecture, and myriad other media—are not just complementary symbolic forms as communicated through natural languages, but are *normative symbols* in their own right.[183]

A third prong of the new programme can be found in the way it apprehends disciplinary knowledge. Prior to Comte and the rise of "legal science" as a methodological endeavour, legal education did not presume clear boundaries between systems of knowledge. Fuzzy boundaries, the migration of ideas and methods across such boundaries, and a willingness to draw insight from a wide range of sources characterized mid-nineteenth-century legal education. As a

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[182] Compare this perspective with, for example, the way in which the bijuralism project of the federal Department of Justice is being managed. For an explanation of that project's methodology, see Marie-Claude Gervais, "Programme d'harmonisation de la législation fédérale avec le droit civil de la province de Québec: postulat de complimentarité et questions de méthode" (2000) 3 R.C.L.F. 37.

[183] A wonderful discussion of these points may be found in James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990). The three approaches to legal communication in more than one language are considered successively by Roderick A. Macdonald in "Legal Bilingualism" (1997) 42 McGill L.J. 119, "Rapports juridiques informels", *supra* note 66 at 137, and by Roderick A. Macdonald and Clarisse Kehler Siebert, "Orchestrating Legal Multilingualism" in Gémar & Kasirer, *supra* note 66 at 377. A more comprehensive discussion of the third dimension may be found in Kasirer, "Canadian Jurilinguist", *supra* note 66. In relation to the normative dimensions of nontext law, see Nicholas Kasirer, "Convoler en justes noces" in Pierre-Claude Lafond & Brigitte Lefebvre, eds., *L'union civile: nouveaux modèles de conjugalité et de parentalité au 21e siècle* (Cowansville, Qc.: Yvon Blais, 2002) 29.

product of this epistemology, the early McGill Programme was in a sense predisciplinary. The disciplinary conception of law was largely institutionalist (focused on the official bodies of the political state) and structuralist. In this conception, reflected today by one strand of curricular offerings such as "Law and Economics", both law and economics are perceived as real entities communicating with each other in a distinct conceptual mode.[184] Even the late-twentieth-century revision of "Law and ... (fill in the blank ...)"—interdisciplinary studies—does little beyond creating "new objects of study by examining the themes of aspects which different disciplines have in common."[185] That is, even an interdisciplinary approach that acknowledges disciplines as partial but complementary denies the possibility of there being a meta-discipline.

The central feature of the new programme is that it recognizes and imposes no disciplinary boundaries: it only provisionally acknowledges disciplines, even in their functions as poles in an interdisciplinary exercise, and reaches for a transdisciplinarity without disciplines. In this usage, transdisciplinarity means the transcendence of particular disciplinary epistemologies. It is a new epistemology. This is not to affirm that a transdisciplinary approach is simply another epistemology like all those it purportedly transcends. If transdisciplinarity just mimics existing disciplines with frontiers and epistemic constructs, then it will quickly degenerate into just one more discipline. True transdisciplinarity, rather, acknowledges that it is impossible to recover a state of predisciplinarity. Professors and students at McGill cannot re-enter an epistemic Garden of Eden. The transsystemic programme, however much grounded in constitutive polyjurality, must nonetheless build itself upon its disciplinary inheritance. The notion of a legal tradition as conversation demands nothing less.[186]

Is there an approach—are there approaches?—to legal knowledge that can be called in aid of the transsystemic programme in its contemporary iteration? We believe that contemporary conceptions of legal pluralism offer one such possibility. Those claiming to be legal pluralists hold that there can be no *ex ante* definition of law's essence. Law is about practices of interpretation; it is about the way in which we give meaning to signs like "No Vehicles in Park" and "No Toilets in Park" and to patterns of interaction by which people represent themselves to others and communicate their beliefs, desires, and aspirations. On the legal pluralist hypothesis, there is no discontinuity between the interpretive practices of law and

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[184] Of course, there is another strand of "law and economics" thinking that seeks to subsume law entirely within economics, and thus recur not to interdisciplinarity but to monodisciplinarity. Traces of this approach can also be found in some early Marxist analysis—consider, for example, the critique of these views by Karl Renner, *The Institutions of Private Law and their Social Functions*, trans. by Agnes Schwarzchild (London: Routledge, 1976)—and in some poststructuralist approaches.

[185] Desmond Manderson, "Some Considerations About Transdisciplinarity: A New Metaphysics?" in Somerville & Rapport, *supra* note 167 at 86.

[186] See Kasirer, "Bijuralism", *supra* note 18 and Roderick A. Macdonald, "Transdisciplinarity and Trust" in Somerville & Rapport, *supra* note 167 at 61.

the interpretative practices of legal education. In both we attend to how human beings negotiate their normative relationships with each other.

Together, these ideas suggest a non-definitional way of framing inquiry about law and, by ricochet, about legal education. We are engaged in the legal endeavour whenever we "symbolize human conduct and interaction as governed by rules."[187] As noted in the Epilogue, this conception of law as interpretive practice also grounds a conception of legal education as interpretive practice. These various practices will always be unstable, and will always be of uncertain realization. Consider the following dimensions of uncertainty attending to the transsystemic programme.

An initial contingency is whether it can actually be taught: What are its materials? What are its methods? What are its sites? As suggested earlier in this essay, these questions only present themselves in stark form if one accepts two premises: first, that the only materials of law are texts, and second, that these texts must be official artifacts of the state such as legislation and cases. But if teaching is problem-based, or simulations of different processes that bring "live facts" pertaining to the "total decision", then the very notion of pedagogical "materials" is changed.[188] Teaching and learning would engage the theoretical frameworks, materials, and pedagogical methods in each of the disciplines through which we practise legal interpretation.[189] Transdisciplinarity means refusing to relegate another discipline to the role of handmaiden in the service of law.[190]

Uncertainty about teaching can also generate a sense of indeterminacy with respect to scholarship. What type of scholarship would the new programme produce? Would it simply degenerate into the meta-discourse of talking about itself? This may be a reasonable concern in the future although the anxiety caused by the need to actually teach the programme has, perhaps with the exception of

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[187] This tentative hypothesis of the legal pluralistic imagination is drawn, in the first instance, from Lon L. Fuller, *The Morality of Law*, *supra* note 8 at 106, as developed in Macdonald, *Lessons*, *supra* note 104 at 3-12.

[188] This is not just a modern realist plea to put some content into the "materials" part of "Cases and materials." See Fuller, "On Legal Education", *supra* note 80.

[189] One of us attempted such an approach by arranging with a McGill Property Law professor, Robert Godin, to conduct a walking tour of downtown Montreal. The group did walk around downtown a bit, but for the most part the experience consisted of a day-long seminar for fifteen students, involving a transdisciplinary exploration of the law and practice of civil law property.

[190] We draw this idea from the Shakespeare Moot project. See Manderson, "In the *Tout Court*", *supra* note 68 and Desmond Manderson & Paul Yachnin, "Love on Trial: Nature, Law, and Same-Sex Marriage in the Court of Shakespeare" (2004) 49 McGill L.J. 475. Paradoxes abound in this interdisciplinary exercise. For one, while the content of the endeavour is novel in that it focuses on the Shakespeare canon, the form is traditional—a moot. For another, in the 2004 round, one English professor who was a member of the bench crafted a judgment in the style of a regular Supreme Court of Canada decision, while one law professor wrote a judgment in the form of a Shakespearian sonnet. The organizers of the moot, in true transdisciplinary spirit, were quite aware of these paradoxes, and made reflection upon them part of the pedagogy for the 2005 Shakespeare Moot project.

articles such as this one, kept professors and students focused on actually developing and delivering the curriculum.[191] Moreover, there is no reason why the scholarship of the programme should be exclusively doctrinal. Many forms of legal scholarship—historical, theoretical, empirical—have informed constitutive polyjurality at McGill in the past. The case for their doing so today is equally strong. The goal of scholarship, and particularly transsystemic scholarship, should be to reconstitute law as interpretive practice.[192]

We turn now to a final contingent dimension of the transsystemic programme—the professors and students who will make it what it becomes. The challenges are several. Consider first the student clientele. Is there a sufficient number of students with the requisite desire, life experiences, prior education, and habits of mind that they are able to flourish within this programme? And also, from where would they come? For example, some might argue that the programme as conceived is actually a form of elitism or social engineering meant to prevent "the wrong kind of people" from obtaining a legal education at McGill. But this would be to mistake predisposition for existing capacities. Again, the programme might be thought so sophisticated that only students with a certain background could cope with it. We believe that this is to underestimate students and to underestimate the extent to which legal education today imposes similar reconstitutive educational demands on students. And yet, it may also be that only a certain type of student would be, or claim to be, interested in the programme. This we see as the central challenge not at the point of admission, but during the teaching of curriculum. The programme will succeed as a conversation as long as students who are admitted to the faculty retain their commitment to pursuing a legal education grounded in the idea of constitutive polyjurality.

The challenge is no less profound in relation to the professoriate. How does one recruit for such a programme? Might it be that the programme may attract professors inclined to dilettantism? The objection here would be that professors will only know a little bit about a lot of things. But once the faculty gives up on the aspiration to, say,

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[191] For example, the project to develop coursebooks and other materials suitable for transsystemic teaching suggests that, for the moment, scholarly effort is being primarily directed to the substance of the programme. See Rosalie Jukier, Stephen Smith & Jean-Guy Belley, "The Transsystemic Coursebook for the Law of Contractual Obligations" (Papers presented at a McGill faculty workshop, 16 March 2005) [unpublished]. Compare Walter van Gerven, Jeremy Lever & Pierre Larouche, eds., *Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford: Hart, 2000); Walter van Gerven *et al.*, *Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on National, Supranational and International Tort Law: Scope of Protection* (Oxford: Hart, 1998); and Walter van Gerven, "Casebooks for the Common Law of Europe: Presentation of the Project" (1996) 4 E.R.P.L. 67. See also Pierre Larouche, "Ius Commune Casebooks for the Common Law of Europe: Presentation, Progress, Rationale" (2000) 8 E.R.P.L. 101 and Pierre Larouche, "Recueils ius commune pour le droit commun de l'Europe" (2000) 3 R.C.L.F. 99.

[192] See Jason MacLean, "Reconstructing Pluralism, Re-Enchanting Law" (B.C.L./LL.B. Term Paper, McGill University, Faculty of Law, 2004) [unpublished].

comprehensively cover the law of secured transactions in Quebec (or Manitoba), the issue becomes rather, how does one choose what to cover—of any of the law of Quebec, Manitoba, the Roman Catholic Church, the Mohawk Nation, or even Walmart. A constitutive polyjural vision does not require equal attention to every cognizable legal tradition, or to every cognizable symbolic discourse, or to every possible disciplinary perspective. What matters is that professors do not unconsciously close down the scope of inquiry by failing to attend to these possibilities.

Here is another possible criticism. Few, if any, new recruits will be able immediately to embark on this type of teaching project. What strategies would the faculty have to put into place to enable new professors up to develop constitutive polyjural instincts? Notice that this does not amount to only hiring those who have been exposed to transsystemic teaching during their own studies. Nor does it mean indoctrinating external recruits into a particular ideological programme. The transsystemic aim surely must be for young professors to develop their own conception of their courses and not merely to imitate others. The goal is to nourish a commitment to constitutive polyjurality as a mode of inquiry, but not to an institutional politics. It is also to assist professors in conceiving the pedagogical possibilities that taking on such a commitment offers. No educational *institution* survives by inbreeding; no *educational* institution flourishes without consciousness of its aspirations.

In the introductory Epilogue we mentioned that we would choose, as the site for our reflections, the course known at McGill today as Foundations of Canadian Law. We developed this essay by considering, as an invitation to our interpretive thesis, the heuristic "No Vehicles in Park" as juxtaposed against the grammatically and syntactically identical sign "No Toilets in Park". The transsystemic programme was explored as one expression of constitutive polyjurality—an expression that sees legal education as interpretive practice and that invites students (and professors) to act as agents of their own education.

Recently, one of us presented the transsystemic project at a Canadian Studies Forum hosted by the Harvard Law School.[193] Most present agreed that the programme was a noble and ambitious endeavour, but were sceptical that it could be carried off. Few thought that McGill, or any law faculty, would be able to recruit professors able to teach or students able to learn in such a programme. Fewer thought professors and students would be willing to rise to the challenge. The scepticism could be signposted in language similar to our organizing heuristic: Is "No People in Programme" a normative or a descriptive statement? Both? Or neither?[194]

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[193] The title of the presentation, meant to signal the several challenges outlined in greater detail in this essay was: "If It's Not Impossible, It's Not Worth Doing: The Challenges of Transsystemic Legal Education" (22 November 2004).

[194] *CODA:* The mildly optimistic response then given was: "No People in Programme" will always be, in fact, an open question.