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Topic: Legal Education

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There's a Reason it's Not Spelt *Legalease*:
Legal Education as Second Language
Acquisition

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INTRODUCTION

Law cannot exist outside of language. Law is drafted, approved, proclaimed, administered, interpreted and repealed through acts of language.¹ Indeed, without language our legal institutions and frameworks are inconceivable.² As such, a legal education is, fundamentally, a linguistic education.

But it also requires more than simple vocabulary to understand a language. Language, as a method of human communication, consists not only of words but also of structures in order to form the messages we wish to transmit. Grammatical rules and syntax are an important element of any language in order for it to be clearly communicated. Similarly, rules and structures are equally important elements of the law. Without effective communication of legal language, law – such as judgments and legislation – could not be communicated, interpreted, and applied.

In many ways, the learning of legal language is analogous to the learning of any other second language. Upon entering law school, students are plunged into this new language, exposed to new vocabulary and new structures. Perhaps the most difficult initial challenge facing students entering their first year of legal studies is gaining a working knowledge, and eventually a mastery, of this new language. However, becoming fluent in legal language is a rite of passage for law students: it allows them to understand and brief cases, discuss legal principles and advance their positions. As law students progress through their studies, legal vocabulary and structures become second nature for them. Students begin to “think like a lawyer,” often even employing language, structures

¹ Xabier Arzo, ed, *Bilingual Higher Education in the Legal Context: Group Rights, State Policies and Globalization* (Leiden, Netherlands: Martinus Nijhoff Publishers, 2012) at 24 [Arzo].

² John Gibbons, ed, *Language and the law* (London, UK: Longman House, Burnt Mill, 1994) at 3 [Gibbons].

and reasoning they learn at law school in everyday situations.³ On a linguistic level, law school therefore represents an educational process similar to that of immersion programs for language learning.

If we accept that legal language represents a new language that students must learn over the course of their legal studies, it is possible to use a theory of second language acquisition as a framework through which to trace the legal language development of students. After such an analysis, it is possible to apply pedagogical methods stemming from the same theory as a basis for similar purposes within the context of legal education.

Here, I propose the Second Language Acquisition Theory of linguist and educational researcher Steven Krashen. Krashen's work, and his theory of second language acquisition in particular, has been influential to the field of language education and has inspired much research in the field of second language acquisition. Since 1980, his theories have provided a unique insight into the processes at work in language studies, continuously provoking important debates that have resulted in a vast breadth of empirical research on second language acquisition. Following his foundational research Krashen, as well as numerous researchers and educators, has translated theory into practice: by using Krashen's findings, practical classroom-based formulations of teaching methods and pedagogical best practices are currently being implemented across the world. Given the novel understanding of legal education that I am proposing within this article, it seems appropriate that such a foundational linguistic education theory be used as a basis for analysis.

³ Scott Turow, *One-L: The Turbulent True Story of a First Year at Harvard Law School*, 3rd ed (New York: Penguin Group, 2010) at 75 [Turow].

In this paper, I will be drawing on examples of legal language acquisition processes from my personal experience with legal education. Having previously graduated from language immersion programs and both studied and worked in the field of second language acquisition, I am also an alumna of the McGill University Faculty of Law (“McGill Law”). Given my particular interest in legal education, during my final year of studies I acted as a teaching assistant for a mandatory first year law course titled Introduction to Legal Research and Methodology. This course introduces students to legal research skills in civil and common law jurisdictions, court structures, legislative processes, and prescriptive legal writing. As a teaching assistant, I was required to prepare lesson plans, create and grade student assignments, and provide students with detailed and constructive feedback throughout the year. This paper thus presents a reflection on my own legal language acquisition experiences and those of my colleagues, as well as reflections following my yearlong observations of fifteen first year students.

Following a brief explanation of Canadian specificities, both in terms of language and legal traditions, and how these have influenced the unique curriculum at McGill Law, it is necessary to provide an overview of second language acquisition and immersion education theory. Once these contextual elements have been established, it is possible to systematically employ Krashen’s language theory, divided into five main language learning hypotheses, as a structural framework through which to view and analyze various instances and milestones in students’ legal studies. Finally, this article will advance suggestions for curricular reform and pedagogical tools as they relate directly to the amelioration of second language acquisition within the context of legal education.

Bilingual and Bijural: Canadian Specificities Impacting Language Acquisition

Lawyers and legal academics working within a legal system that operates in two (or more) languages arguably require an extra formation: abilities such as translation and language switching become increasingly important.⁴ Canada represents such a legal system on two distinct but related levels. First, Canada is a bilingual nation where both French and English are official languages and enjoy equal status in law. Second, these languages are intrinsically connected to two separate legal cultures and traditions. While the majority of Canadian provinces and federal laws operate under the common law tradition, the province of Quebec has retained the civil law tradition.

Since 1999, the Faculty of Law at McGill University has offered a combined B.C.L./LL.B. program in which students work towards jointly awarded degrees in both civil law (B.C.L.) and common law (LL.B.). Through a unique transsystemic approach to legal education, this program provides students with a legal education that is at once bilingual and bijural. Students are immersed in an integrated study of law, as most courses combine both civil and common legal traditions into one class. Though transsystemia is not universal across all McGill law courses – property courses are a notable exception to the transsystemic approach – courses in which a greater fluidity and trans-jurisdictional interaction could be imagined have implemented the pedagogical methodology.⁵ For example, McGill law students learn contract law in a transsystemic course, called Contractual Obligations, in which common law principles are taught alongside civil law principles. In addition to learning the substantive content of these

⁴ Arzo, *supra* note 1 at 26.

⁵ Peter L. Strauss, “Transsystemia – Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?” (2006) 56 J L Educ 161 at 166.

separate legal systems, students are exposed to a variety of perspectives and a contextual analysis of legal problems.⁶ Indeed, students are taught to recognize pluralism as a pervasive phenomenon in the modern legal world.⁷ Upper year courses such as Family Law, Civil Procedure, Evidence, and Labour Law have also been inspired by this pedagogical approach and are offered as transsystemic courses, encouraging a pluralist consideration of the substantive course content.⁸ As a result, students graduate from their legal studies with a sense that both the common law and the civil law are their ‘legal mother tongue.’

As a result of the particular *mélange* of Canada’s two official languages and legal traditions, there is a “unique character of civil law parlance” in the province of Quebec and among students of law in Quebec universities.⁹ Here, it is difficult to speak of *translations* of legal texts and terminology, as jurists employ a unique vocabulary and phrasing indicative of a co-lingual existence in order to express legal notions. In Quebec, French and English versions of legislative texts are treated as a single text, deriving meaning from the encounter between the two linguistic versions. For example, the French version of article 1378 of the Civil Code of Québec states that, “le contrat est un accord de volonté,” which should be directly translated using the English common law equivalent, a “meeting of the minds.” However, the drafters of the Code did not wish to express the common law notion, instead choosing to use the expression “agreement of wills” in the English version. Thus, this phrasing is unique to Quebec law, allowing the

⁶ Rosalie Jukier, “Transnationalizing the Legal Curriculum: How we Teach What We Live” (2006) 56:2 J Legal Educ 172 at 177 [Jukier]

⁷ Paul-André Crépeau Centre for Private and Comparative Law, “Transsystemic Legal Education” *McGill University Faculty of Law* (2015), online: <<https://www.mcgill.ca/centre-crepeau/transsystemic>>

⁸ *Ibid*; Jukier, *supra* note 6 at 177.

⁹ Justice Nicholas Kasirer, “That Montreal Sound” (Lord Reading Society Alan B. Gold Advocacy Lecture delivered at the Congregation Shaar Hashomayim, 23 September 2014) [unpublished].

two texts speak with one voice: the original French meaning continues to resonate through the English version.¹⁰

Consequently, students completing their legal studies at McGill must interact with legal language in both French and English. Further, they cannot assume that direct translations will be sufficient to understand the meaning and reasoning of legal notions. In terms of legal language acquisition, this lends an additional challenge to this particular subset of law students that students at other faculties or in other jurisdictions may not face. Though the language-related challenges experienced by McGill law students risk being somewhat more exaggerated, the amplification of the linguistic experience lends itself well to a clear application and illustration of Krashen's language development hypotheses.

Second Language Acquisition: Learning and Teaching

Second language acquisition refers to the scientific discipline devoted to studying the process of language acquisition. Further, the term refers to the acquisition of any language learned in addition to a person's first, or maternal, language. As such, though a "second" language is referenced, it is understood as also incorporating the learning of a third, fourth, or subsequent language.

Educational programs for the purposes of achieving bilingualism are neither a new nor recent phenomenon. Immersion programs are designed to provide non-native language speakers with an opportunity to attain a high degree of proficiency in the target

¹⁰ *Ibid.*

language.¹¹ By offering the majority of the regular school curriculum in this other language, immersion programs go beyond instructing language as a separate school subject. Indeed, the second language becomes a medium for instruction, and as such students must learn the language in order to learn the curriculum and engage in meaningful communication.¹² During this time, a central feature of language learning is that it occurs through interactions with meaningful content – the substantive course material.¹³ Becoming bilingual, therefore, arises as a by-product of learning substantive course content.¹⁴ Students are not seen as simply learning the language, but rather learning through the language.

In a law school context, students do not enroll in legal education with the express objective of learning legal language. It is instead a by-product of learning substantive law and being immersed in new terms and new structures. Much like students in language immersion programs, in order to gain knowledge, engage with their peers, and communicate their ideas, law students must attain a certain proficiency in a second language: legalese.

Generally, the term “second language acquisition” is used in reference to the processes of learning a second language and does not refer to the teaching of a second language. However, it is my philosophy that teaching and learning should be understood as two sides of the same coin. I believe teaching to be intrinsically related to learning: a better understanding of learning informs better methods of teaching. For example, the

¹¹ Alex Hughes, “Building Bridges (and Creating Gaps) Through French Immersion: Not Just Anglophone, Not Quite Francophone” (2014) *State University of New York at Buffalo Romance Studies Journal* 108 at 110 [Hughes].

¹² Fred Genesee. *Learning Through Two Languages: Studies of Immersion and Bilingual Education* (Cambridge, MA: Newbury House Publishers, 1987) at 11, 15 [Genesee].

¹³ *Ibid* at 15.

¹⁴ *Ibid* at 11.

quality of teaching and appropriateness of pedagogical techniques will have an impact on a student's learning processes. Similarly, teaching provides a place for reflection and dialogue through which teachers are also learners: their understanding of materials may be deepened or altered by their own preparation and by student input, and through interactions with their classes teachers will learn the effectiveness of their pedagogical approaches. As such, once an understanding of second language acquisition *learning* is established, it is possible to formulate recommendations for best practices in regards to second language acquisition *teaching*. Researchers and educators have successfully introduced and empirically evidenced Krashen's theories of language acquisition in the classroom; below, I hope to use qualitative research and anecdotal observations in order to successfully demonstrate that similar conclusions can be drawn in a law school setting.

SECOND LANGUAGE ACQUISITION THEORY AND LEGAL EDUCATION

Krashen's theory of second language acquisition is comprised of five main hypotheses that explain and illustrate how students develop competencies in a non-native language: the Acquisition-Learning Hypothesis; the Comprehension, or Input, Hypothesis; the Monitor Hypothesis; the Natural Order Hypothesis; and the Affective Filter Hypothesis. I have taken the liberty of presenting Krashen's hypotheses in an order that is slightly altered from his original publications – this is not done to call into question his work nor the connections he made between hypotheses, but simply to better serve my purpose of highlighting various experiences of legal education. Each of these hypotheses

will be explained in turn and subsequently applied to legal education and illustrated using various examples, the same format used by Krashen in the original development and demonstration of the theory.

The Acquisition-Learning Hypothesis

At the core of his theory, Krashen advances the notion that there are two distinct and independent methods through which knowledge of a second language is developed: one can *acquire* language, and one can *learn* language. The distinction drawn between acquisition and learning is perhaps the most fundamental of Krashen's hypotheses.¹⁵

Language Acquisition

Language acquisition is a natural, informal and intuitive process that occurs subconsciously, both through oral and written language. What is distinctive about acquisition is that while it is occurring, the learner is unaware that they are indeed acquiring language.¹⁶ This process is often colloquially referenced by the notion of “picking up” a language and is similar to the processes children undergo when learning their native language.¹⁷ Through the acquisition process, students gain a “feel” for correctness: grammatical sentences sound right while agrammatical sentences sound wrong, though the student may be unsure what rule was violated to induce such a feeling.

¹⁵ Stephen Krashen. *Principles and Practice in Second Language Acquisition* (New York: Pergamon Press, 1982) at 10 [Krashen, “Principles”].

¹⁶ Stephen Krashen. *Second Language Acquisition: Theory, Applications, and Some Conjectures* (Mexico: Cambridge University Press, 2013) at 1 [Krashen, “Theory”].

¹⁷ Krashen “Principles”, *supra* note 15 at 10.

Once students have acquired a particular knowledge, it is stored in our brains subconsciously.

Language Acquisition as an Element of Legal Education

Students acquire language when they focus on what is being said, rather than how it is said. They acquire when language is used as a means of communicating real ideas.¹⁸ Just as students in language immersion classrooms begin to acquire language competencies through continued exposure to the target language, so too will law students once immersed in their legal studies. Though this may be less evident to law students – after all, they are still speaking in a language they know, such as English or French – language acquisition remains an active phenomenon as students develop competencies with legal vocabulary and phrasing.

For example, during first year studies at McGill Law, students are required to take courses taught transsystemically, incorporating both common law and civil law. As course content is a combination of both systems, course titles are often unique to McGill. While first year students at common law institutions may take a course titled Contract Law or Contracts, McGill Law students take Contractual Obligations; while common law students elsewhere may have a course in Tort Law or Torts, McGill Law students have a course in Extra-Contractual Obligations. Without needing to study or actively learn why courses of similar content are titled differently, students will acquire a “feel” for their distinction through regular exposure and interaction with course materials. For instance, through discussions relating to the civil law tradition or by familiarizing themselves with

¹⁸ Stephen D. Krashen & Tracy D. Terrell. *The Natural Approach: Language Acquisition in the Classroom* (New York: Pergamon Press, 1983) at 19 [Krashen, “Natural”].

the Civil Code of Québec, students will acquire the knowledge that *obligation* is a civil law notion and its use where courses also include the teaching of the common law is likely in part due to the transsystemic nature of the course.

As she began her second semester of legal studies, a first year student confided in me that she was not exactly sure how she had come to learn some of the legal language she used on a daily basis:

In about November I had this realization that I seemed to know when to use common law language or civil law language. I didn't really seem to ever conflate the two. But when a friend at a common law faculty in another province asked me how I knew the difference, if I had had to sit down and study the different words... I realized that I never had. It just kind of came to me from being immersed in these courses, listening to professors and doing readings. Obviously the professors weren't going to mix up which terms were used when, so I guess I just kind of absorbed their language habits.

This subconscious “absorbing of language habits” through oral or written language is exactly what the language acquisition portion of the Acquisition-Learning Hypothesis envisions. As will be discussed in subsequent sections of this article, effective language acquisition requires more than just immersion in the target language: indeed, contextual factors such as comprehensibility and meaningfulness of the communicated message as well as emotional affective variables contribute to the degree to which language may be acquired.

As language acquisition occurs naturally and informally, students are often unaware of their acquisition until it is specifically brought to their attention. At the start of his second year, a student recounted to me a personal anecdote that made him realize he had acquired more legal language than he had thought. After a year of legal education,

he went home for the summer and attended his family's annual reunion. No one in his family has ever studied law nor works in the legal profession in any way. During the event, a few members of the family began having a political discussion and wanted to know "what the law kid thought about it." Having already formulated an opinion on the matter, he launched into an explanation as to why a specific point of view was perhaps unconstitutional when certain elements or test criteria were considered, but may be justifiable if considered in light of the principles of fundamental justice and indeed may be saved by the *Oakes* test. After a few minutes, he realized he had lost his audience. Eventually, a family member gestured for him to stop and remarked, "well, it sounds like they're teaching you well over there at McGill, but I'll be damned if I can understand what you just said!" Having been immersed in legal language all year with colleagues and professors who were experiencing the same immersion, the student hadn't realized he had adopted a different or specific way of speaking and discussing ideas. Effectively, he had acquired legal language without a conscious effort and was now employing them in the same subconscious way.

Language Learning

Contrary to language acquisition, language learning occurs consciously. When language learning happens, the individual is making a conscious effort to learn and, as such, is aware they are learning certain materials.¹⁹ Language learning is what generally comes to mind when one thinks of formal education or classroom learning, as it is what occurs when students actively study rules and grammatical structures. Language learning

¹⁹ Krashen, "Theory", *supra* note 16 at 1.

is less effective than acquisition as it is less natural and, as will be detailed in sections below, less compelling method of language development.

A secondary element of language learning is error correction, or the act of explicitly correcting specific mistakes made by the student in order to encourage a conscious relearning of knowledge.²⁰ While error correction has little or no effect on language acquisition, the method can be a useful tool during conscious language learning.²¹ Error correction generally takes the form of a teacher correcting a student by repeating the corrected version of the student's incorrect oral output. A teacher may also decide to briefly question the student as to why their first attempt was wrong or require them to repeat the corrected version. In a law school context, this could be analogized to a Socratic method of questioning, in which the professor may attempt to provoke or pull the correct answer or form of response from a student during lecture.

Language Learning as an Element of Legal Education

Certain concepts introduced in law school require active or conscious learning. For law students, this often includes the understanding – and memorization – of technical terminology. For example, the technical definitions of legal language are not always well suited to simple acquisition. Instead, their meanings are complex and specific, and in order to fully comprehend and apply the associated notions students must consciously learn what distinguishes various terms. As language learning is active and conscious, students tend to focus their attention and efforts upon these processes. Often, this focus on learning and memorization is an attempt to feel in control of one's learning and quell

²⁰ *Ibid.*

²¹ Krashen, "Principles", *supra* note 15 at 11.

the fear and anxiety that is often associated with legal education, as discussed in sections below.

A graduating student from McGill Law reflected on an instance when a prospective student asked her whether the French-English bilingualism requirement for the faculty had been a difficult obstacle during her studies:

I told her it's not really a problem. If I don't know what *patrimoine* means, I look it up and find out it means *patrimony*. But I don't actually know what 'patrimony' means in English either! French or English doesn't matter, everyone here has to learn legalese.

Another student continued by noting that there are also instances where she knows the plain meaning of the word and can use it in casual conversation, even if she is unable to give a proper definition, but the “legal meaning” is different to varying degrees. For example, the term *maître* in French means “master.” However, in the legal context of Quebec and France, *Maître* (or *M^e*) is the predicate used for individuals holding certain legal positions, such as lawyers and notaries. Both men and women are referred to as *Maître*, and there is no English-language equivalent for the Anglophone lawyers of Quebec – they simply use the French terminology. To those unfamiliar with the legal culture and legal language of Quebec or France, this use of *maître* may seem odd or be confusing, or would be assumed to mean the individual in question had become a “master” or expert in the profession as opposed to simply being a member of the profession.

During their legal studies, every student of a Canadian law faculty must take a course in criminal law. In Canadian criminal law, it is not enough for students to simply know the general sense of the word “murder” – the unlawful killing of one person by

another. Instead, students must learn a very specific definition for a very common word: as defined in the *Criminal Code of Canada*, “murder” is defined as culpable homicide; “culpable homicide” is also precisely defined, but in a separate article.²² But stopping here is insufficient. Students must also learn to distinguish between “first degree” and “second degree” murder. While second degree murder is defined as all murder that is *not* first degree murder, determining first degree murder involves many requirements and conditions including contextual elements and the types of people involved.²³ Due to the intricacies of these definitions, it is unlikely a student will successfully acquire their exact proper definition and usage in an unconscious way. Instead, students will pour over textbooks and the Criminal Code, rigorously drafting notes and summaries explicitly distinguishing the various elements required to distinguish between offences.

While the technicality in legal discourse depends greatly on the subject matter, areas such as criminal law are difficult as they include many invariable, complex terms. Other areas, such as property, contract and tort, date back to medieval times and thus have not only technical, but arcane terms.²⁴ For example, before law school, it is unlikely students would have received much exposure to Latin terminology, particularly as it is used in law. As students are unlikely to learn Latin just for the sake of acquiring the legal meanings required in law school, students will learn the terms or phrases necessary as they arise. In some instances, students must learn the Latin phrase and the notion behind it. For example, students will learn not only the meaning of *audi alteram partem*, or “to hear the other side,” but also the legal notion that it evokes as one of the main principles of natural justice. In other instances, students must learn not only the English (or French,

²² *Criminal Code of Canada* (R.S.C., 1985, c. C-46) at arts. 229, 222.

²³ *Ibid* at arts. 231(7), 231(2)-(6.2).

²⁴ Yon Maley in Gibbons *supra* note 2 at 23.

or other) equivalent, but also its grammatical rules for use. *Prima facie*, for example, translates to “at first face” or “at first appearance;” however, in common law jurisdictions the doctrine of *prima facie* also signifies that the evidence, unless rebutted, would be sufficient to prove a particular proposition or fact. Further, much like how students of second languages learn in what order to place words in a sentence, law students must learn how to correctly place *prima facie* in a sentence. Much like how children learning French as a second language will have a tendency to structure their sentences using their native tongue’s grammar – such as saying *la rouge fleur* instead of *la fleur rouge* – new students of legal language may be tempted to structure sentences according to the grammatical rules of normal parlance. However, here it would be incorrect to say, “the evidence is accepted *prima facie*”, though students may understand a direct translation to mean, “the evidence is accepted at first sight.” Instead, the proper structure, “*prima facie* evidence,” is likely to be learned through error correction by professors or teaching assistants and conscious attention on the part of students to their readings and assignments.

A final legal structure that students will not simply acquire, but must rather work actively and consciously to learn, is proper citation. Indeed, legal research relies on proper citation for two principal reasons. First, complete and accurate citation allows us to find the decision, legislation, or piece of doctrine. Second, it conveys important information about the case, including when it was decided, at which court level, and – of particular importance for students in transsystemic legal education – the jurisdiction. In Canada, the *Canadian Guide to Uniform Legal Citation*, also known as the *McGill Guide*, is the official and standardized legal citation system.

However, standardization does not mean simplification. For example, citation takes different forms for papers, memoranda, and facta.²⁵ Students must then learn the proper usages of *ibid*, *supra*, and *contra*; when pinpoints require reiteration and when they are implied; and where commas and periods are necessary. Finally, McGill students have the additional challenge of using the bilingual *McGill Guide*, in which requirements vary between English and French versions, in a transsystemic classroom: students must remember to use the specific citation rules of the language in which they are writing, regardless of the language of the source cited, with the exception of capitalization rules which instead follow the language of the source.²⁶ Students, even those working as citation editors for academic journals, are extremely unlikely to learn the specific rules and structures of all forms of citation by heart. However, the base forms that students use constantly will begin to be learned through repetitive citation exercises in legal writing class as well as through use in their assignments and papers.

The Comprehension, or Input, Hypothesis

In the Comprehension Hypothesis, also sometimes referred to as the Input Hypothesis, Krashen advances a fundamental principle of language acquisition theory: students acquire language when they understand messages.²⁷ Indeed, new or unknown elements of language, such as vocabulary or structures, can only be acquired when students understand the overall meaning of the input, whether oral or written. Students are able to understand unknown elements of language by building upon knowledge they

²⁵ McGill Law Journal. *Canadian Guide to Uniform Legal Citation*, 7th ed (Toronto: Carswell, 2010) at 1.3, 1.2.1, 1.2.2.

²⁶ *Ibid* at 1.3.5.

²⁷ Krashen, “Theory”, *supra* note 16 at 3.

have previously acquired, by context, and by general knowledge.²⁸ Consequently, students cannot acquire language if messages are overly complex and deciphering their meaning based on existing knowledge is out of the student's reach. For example, if a student is currently ranked at level 2 of second language competencies they are able to begin acquiring language proficiencies through messages communicated to them at level 3. However, this same student will not acquire language skills if that same message is communicated to them at a level 4 or higher comprehension level, as the form of the message will be complex beyond their capacities.

According to Krashen, the Comprehension Hypothesis is founded on the notion that language is acquired by input rather than output. As such, increasing a student's output through speaking or writing exercises will not result in increased language acquisition.²⁹ This is founded upon the notion that, during output, students have only the ability to employ their existing knowledge – they are not able to correctly and consciously produce elements of language that are more complex than that which they already understand. Indeed, the ability to produce language is the result of language acquisition, not the cause of language acquisition.³⁰ However, this is not to suggest that teachers should discourage student output: engaging in conversation, for example, is an effective way for students to receive comprehensible input as well as potentially engage in error correction and monitoring processes.

Finally, Krashen advances that the input must be more than simply comprehensible: it must be *compelling*. In order to ensure the language acquirers pay attention to and internalize the input, the input must be sufficiently interesting. If

²⁸ *Ibid.*

²⁹ *Ibid* at 4.

³⁰ *Ibid.*

comprehensible input is adequately compelling, students will forget or ignore the fact it is being presented in a second language.³¹ For example, studies have shown that when students are “lost in a book” or become avid readers due to compelling storylines, students will experience marked improvement in the target language.³² Other methods of engaging with compelling input may involve listening to compelling stories or movies, exploring music with lyrics in the target language, or engaging in conversations with fascinating people or on specific topics of interest to the language acquirer. Krashen suggests that compelling input appears to eliminate the need for motivation, that is to say the conscious desire to improve; here, improvement occurs subconsciously as students acquire the target language.³³ Notably, the compelling element of the Comprehension Hypothesis can prove to be a helpful strategy when students, particularly children, are otherwise uninterested or unmotivated to learn a second language.

The Comprehension Hypothesis in Legal Education

During the beginning of a student’s law studies, it is easy to feel bombarded with information. For the majority of students, this will be the first time they have studied the law or learned about the legal system or legal principles beyond an informal, cultural way. The pure vastness of potential materials in law school – evidenced by an ever-growing pile of textbooks, casebooks and summary materials students find themselves accumulating – may prove daunting. The more the student feels overwhelmed by this

³¹ *Ibid* at 15.

³² Stephen Krashen. *The Power of Reading*, 2nd ed (Portsmouth, NH: Heinemann and Westport Libraries Unlimited, 2004) at 22-24.

³³ Krashen, “Theory”, *supra* note 16 at 15.

new and intense experience, the more they will find it difficult to understand messages and thus acquire legal language.

As a first year student at McGill Law, I was required to take Introduction to Legal Research and Methodology, the same course for which I later became a teaching assistant. It is in this class that first year students are first assigned a case judgment to read. As the entering class of 2012, we were assigned the decision *City of Westmount v Rossy*.³⁴ The professor informed us she had chosen the case because it was recent, the incident had occurred locally, the judgement was relatively short (34 pages in English, 37 pages in French), interesting and, she assured us, straightforward. Students were excited – they were about to embark upon a rite of law school passage!

However, for the vast majority of students this was the first time they had been required to interact with the text of a judicial decision. Without guidance or instruction as to how to read a case, many felt lost at sea. Students were unable to determine which details were relevant or irrelevant to the court’s ultimate decision. Reflecting back on the experience, a third year law student remarked:

It felt like such a long reading assignment. I couldn’t tell what was important or not – I highlighted almost every sentence [of the judgment]! I started off with a highlighter colour-code, but I had no idea what I was doing so that ended pretty quick. I took *pages* of detailed notes, because I had no idea we should use the headnote to guide us or indicate to us what was or wasn’t important to the case... I didn’t even know what a headnote was. Instead I was taking notes about the car, how old the tree was that fell, and definitely every article [of the Civil Code of Québec] that either party cited. It was so stupid and pointless, because at the end of the day all I needed to know was that in Quebec, if a car is involved, the no-fault insurance law applies!

³⁴ *City of Westmount v Rossy*, 2012 SCC 30.

Towards the end of the semester, the professor asked whether students had comments or suggestions as to the course content or structure. One student raised her hand hesitantly and suggested that, before assigning the first case reading, the professor spend at least a few moments explaining *how* to read a case. For example, the importance of a headnote or on what elements of the decision students should be concentrating. Her suggestion supports the principles of the Comprehension Hypothesis: if input is of a complexity that they can understand or decipher, students will acquire language skills. If the input is overly complex for the student's current understanding, the message of the content will be lost and no language acquiring will occur.

As with students in language immersion programs, a central feature of legal language learning is that it occurs through interaction with meaningful content.³⁵ Here, meaningful refers both to meaningful content in terms of course objectives, but also meaningful to the student in that the content is compelling. Here, it is impossible to tailor a program's curriculum to the interests of individual students – certain courses are required for accreditation as a law faculty, for example. There will also necessarily be divergence among student interests, particularly as the student population of law faculties continues to diversify. Indeed, it is impossible to cater to the interests and wishes of every law student. Instead, a balance must be struck between required courses and elective, seminar-style courses that provide students the opportunity to explore areas of interest more profoundly or even specialize in a particular area of law. Beyond this balance, making course content compelling for students likely falls to the method of instruction, recommendations for which will be discussed below.

³⁵ Genesee, *supra* note 11 at 15.

The Monitor Hypothesis

Monitoring refers to the internal editing process that is possible thanks to the grammatical rules and structures that are learned. While acquisition initiates a student's output in a second language and may be responsible for their perceived fluency, learning has only one function: to monitor, or edit, that output.³⁶ During the monitoring phase of language use, students inspect language using their consciously learned knowledge to correct errors.³⁷ In order to successfully use the monitor process, Krashen outlines three important conditions:³⁸

1. *Knowledge of the rule*: students must already know the rule. This presents a difficult condition to fulfill, as second language students – and indeed many native speakers – are exposed only to a small part of all the grammatical rules of any given language. Further, even the most studious and well versed of students do not learn every rule to which they are exposed.
2. *Time*: students must have sufficient time for conscious reflection. For most individuals, the rate and rhythm of normal conversation does not allow for enough time to think about and employ appropriate rules. In addition, the conscious use of rules in conversation can lead to difficulties in communicating the overall message, as the speaker may be required to adopt a slower and more hesitant style of speech. An increased attention to one's own monitoring process may also lead to an inattention to what the conversational partner is attempting to communicate.
3. *Focus on form*: students must consciously be thinking about correctness during output, whether oral or written. For the Monitor Hypothesis to be effective, time

³⁶ Krashen, "Principles", *supra* note 15 at 15.

³⁷ Krashen, "Theory", *supra* note 16 at 2.

³⁸ *Ibid* at 2-3; Krashen, "Principles", *supra* note 15 at 16.

is not sufficient: the student must also be consciously focused on the forms and rules required of their specific output. A student may become overly involved in communicating the meaning of the message that they are producing that they lose sight of certain structural details by failing to attend to how they are communicating.

Research and studies among both child and adult second language learners has shown that language learners are only able to employ the monitor process when these three conditions are met.³⁹ Some individuals will attempt to create ideal situations in which to monitor all the time, constantly checking their output with their conscious knowledge of the second language.⁴⁰ Consequently, these individuals speak slower, often speaking hesitantly and self-correcting in the middle of utterances. In practice, they become overly concerned with correctness to the detriment of fluency. On the opposite end of the spectrum, some individuals will disregard situations in which all three Monitor conditions are met. These individuals tend to rely completely on language acquisition processes and the associated acquired “feel” for correctness.⁴¹

On its own, the Monitor Hypothesis appears to be a weak tool for language development and has limited influence in second language performance overall. Largely, this stems from the requirement that the three conditions be met in order for monitoring to occur. For example, though the student may already know the applicable rule, there is no guarantee that they will recall the rule in the appropriate context, either because they have forgotten they know it or because they do not recognize that it is applicable to the

³⁹ Krashen, “Theory”, *supra* note 16 at 3; Krashen, “Principles”, *supra* note 15 at 17.

⁴⁰ *Ibid* at 19.

⁴¹ *Ibid*.

situation at hand. Further, to focus on the monitoring or editing aspect of language development shifts emphasis from meaning to form, thus slowing the flow of conversation or other source of output.

Due to these difficulties, the Monitor Hypothesis is best engaged in situations where it does not interfere with communication and meaningful language interactions. Educators must understand the objective of the Monitor Hypothesis as being to create or provide for optimal opportunities for conscious self-correcting. For these reasons, written exercises are well suited to the Monitor Hypothesis, as students have the time necessary to reflect consciously upon the language they have learned and acquired in order to produce meaningful output. However, as will be discussed below, this does not negate the possibility of structuring oral exercises that present appropriate opportunities for students to engage in monitoring.

The Monitor Hypothesis in Legal Education

In first year studies at McGill Law, there are few opportunities for students to submit written work and receive detailed feedback, particularly in the first semester. However, the mandatory first year course Introduction to Legal Research and Methodology, for which I served as teaching assistant, offers students their first opportunities at written work and thus the ability to engage in the Monitor Hypothesis of language acquisition. Teaching assistants are responsible for between twelve to fifteen students, thus allowing for small classroom teaching and the ability to provide detailed feedback through which students can learn and refine their written work.

The students' first assignment, due the final week of September, was to create a summary for an assigned case. To my students, I assigned the United Kingdom King's Bench decision of *Errington v Errington and Woods*.⁴² This case deals with a unilateral contract in which a father purchases a house for his son and daughter-in-law in his own name, promising to transfer the deed to them once they had paid the final mortgage installment. After the father dies, the widow brings an action for possession of the house against the couple. A relatively short case of approximately 4900 words, students were asked to summarize the case – including facts, issues, brief judicial history, judges' reasoning, holding and ratio – as well as respond to a brief reflection question within a 700 word limit (770 words if students chose to write in French). Worth only 10% of the course's overall grade, the assignment presented students with the opportunity for a low-risk introduction to legal schoolwork.

In my correction of the students' work, I noticed a recurring theme: in every assignment, I included corrections regarding word usage or the importance of language in law. My comments continuously underlined how one word could alter a meaning or even evoke a different legal notion altogether. For example, in *Errington* it is necessary for students to understand how, in a legal context, it was incorrect to describe a unilateral contract arising from a promise as an “agreement” or “arrangement” between parties. Notably, this assignment illustrated the difficulty some students initially experience with McGill's transsystemic method. Of fifteen, two students summarized and reflected upon the English common law case using Quebec civil law terminology, including references to the Civil Code of Québec. As such, each student received comments regarding legal

⁴² *Errington v Errington and Woods*, [1952] 1 KB 290, [1952] 1 All ER 149.

language specific to their assignment, and the following week I included a discussion of general language comments in my lesson plan.

Initial language obstacles eventually subsided. As the semester progressed, students began to develop an understanding of when certain terminology was inappropriate through constant exposure in class and in readings. My students' second assignment, a memo for which they were given a fictional set of facts and five actual sources of law, was due five weeks after the first assignment. During this time, students attended my course weekly and completed short exercises that drilled certain concepts in legal writing such as identifying jurisdiction-specific terminology, writing in active voice, point-first writing styles, and understanding the structure of judicial decisions. By the time their second assignment was given, students had learned sufficient legal language rules in order to effectively engage the Monitor Hypothesis processes. Indeed, rather than commenting and correcting language issues in each of the fifteen assignments, such comments were found in only a couple copies.

By their second semester and final written assignments, students acquired and learned enough legal language rules to successfully decipher and respond to the questions posed to them by their assignments and exams. Students are also increasingly conscious of the form their work takes, and have learned to focus their attention to the correctness of their vocabulary and phrasing. Importantly, by the end of their first year most students have also learned to allow ample time for editing. The combination of these three elements fulfills the three requirements for the Monitor Hypothesis.

Students will become conscious of their progress through monitoring, particularly when they have given themselves sufficient time to edit and reflect upon their own work. After submitting her final written assignment of the year, a first year student who had, on her first assignment, conflated civil law and common law language explained the impact of a year's worth of legal education on her language monitoring skills with the following statement:

I feel like the last four years of my university writing [during an undergraduate degree] is gone, in the garbage. Now I catch myself editing as I go, telling myself no, this is too flowery, or that this isn't proper for legal writing. I've been converted. Brainwashed into something better!

The Natural Order Hypothesis

According to Krashen, students acquire (rather than learn) elements of language in a predictable order, though there will inevitably exist slight variation among acquirers.⁴³ Research has shown that the order in which knowledge is acquired does not necessarily follow a clear simple-to-difficult trajectory.⁴⁴ Indeed, seemingly complex rules or notions may be acquired before those that are seemingly simple. For example, students of English as a second language often follow a natural order of acquisition of grammatical morphemes that begins with the *-ing* suffix and plurals, followed by an understanding of articles (such as *a* or *the*), moving onto the past tense of irregular verbs and, finally, the past tense of regular verbs and singular suffixes.⁴⁵ While developing a knowledge of irregular verbs before regular verbs may appear counterintuitive, numerous

⁴³ Krashen, "Theory", *supra* note 16 at 2.

⁴⁴ *Ibid.*

⁴⁵ Krashen, "Principles", *supra* note 15 at 13.

empirical studies of second language acquisition among English acquirers demonstrate significant support for this finding.⁴⁶

Importantly, the order of acquisition occurs naturally and may not be influenced or altered by language learning techniques such as grammar drills or language exercises.⁴⁷ Language is acquired when the learner is ready to acquire the knowledge, often to the frustration of the language teacher whose role is, effectively, to ensure students learn.

The Natural Order in Legal Education

Lacking specific empirical research with regards to legal language acquisition, I am not prepared to suggest a specific or particular natural order of legal language acquisition among law students. Indeed, this is an area for potential future research in legal language acquisition. However, from classroom and student observations it is clear that some forms of language knowledge are acquired before others regardless of time, emphasis or effort spent on specific learning outcomes.

Legal education has been described as having “no logical place to begin.”⁴⁸ For many students, the overwhelming amount of materials creates a sense of having missed the beginning. Therefore students feel they are scrambling to make up what has been missed while keeping on top of what is being presented. Here, students must move forward with their coursework and understandings of course materials, but must also gain an understanding of what “came prior” that they feel they missed. They are stuck in an

⁴⁶ *Ibid.*

⁴⁷ Krashen, “Theory”, *supra* note 16 at 2.

⁴⁸ James R. Elkins, “Rites de Passage: Law Students ‘Telling Their Lives’” (1985) 35 J Legal Educ 27 at 41-42 [Elkins].

arbitrary starting point, a middle ground from which they must proceed not only forward but in all directions.⁴⁹

However, if we consider legal writing structures as analogous to grammatical structures in second language acquisition, a few observations may be made as to patterns that emerged among first year McGill Law students. During an initial case summary assignment, the course professor lectured extensively on the purpose of a *ratio*, how to draw it from a case, and how it differs from a case's holding or outcome. Only brief comments were made as to the expectations of the assignment's other required sections, including a statement of facts, issues, judicial history, and a summary of legal reasoning. Regardless of time or emphasis allocated to explaining the various sections of the assignment, student assignments most often illustrated a difficulty in identifying correctly formulated issues and ratios. By the second assignment, the drafting of memoranda, ratios had been understood and students were effectively locating them within case law and applying them to new sets of facts. However, formulating clear and precise issues still proved difficult for the majority of students. Only by the third and final major assignment did students demonstrate an overall ability to construct clear, precise, and well-organized issues for memoranda. Anecdotally, this would suggest that – as is proposed by the Natural Order Hypothesis - the order of acquisition occurs naturally and may be unaltered by language learning techniques such as grammar drills or language exercises. Instead, it could be inferred that students required an overall understanding of the components of these exercises before acquiring a sense of proper and precise structure. Once this sense had been acquired, students were able to formulate issue statements that structured their research and arguments both effectively and efficiently.

⁴⁹ *Ibid* at 42.

The Affective Filter Hypothesis

As a final element of his theory Krashen acknowledges the role that affective variables, particularly negative emotional responses, play in the ability – or inability – to acquire language. The Affective Filter Hypothesis states that affective variables do not impact language acquisition directly, but rather can prevent input from reaching the area of the brain responsible for language acquisition.⁵⁰ For example, if the acquirer is nervous, anxious, bored, has low self-esteem or heightened self-doubt,⁵¹ or generally does not believe they can sufficiently acquire the language and cultural knowledge necessary to successfully integrate into the linguistic community,⁵² the student may understand the input but will fail to acquire the language. Effectively, affective variables will filter out the input, thus prohibiting language acquisition.

In practice, the Affective Filter Hypothesis provides an illustration of one reason why students may receive the same comprehensible input yet progress in their language acquisition at varying rates.⁵³ It is important for language educators to recognize that other elements of the language development process may directly influence students' affective filter thresholds. For example, if students receive error correction too early in the Acquisition-Learning Hypothesis process, they are more likely to become self-conscious and doubtful of their language abilities.

⁵⁰ Krashen, “Theory”, *supra* note 16 at 4; Krashen, “Principles”, *supra* note 15 at 32.

⁵¹ *Ibid* at 31.

⁵² For a general discussion of this point, please see F. Smith. *Joining the Literacy Club* (Portsmouth, NH: Heinemann and Westport Libraries Unlimited, 1988) or Hughes, *supra* note 10.

⁵³ Krashen, “Theory”, *supra* note 16 at 5.

The Affective Filter in Legal Education

Law students generally come to law school expecting to be challenged and stimulated. What they don't necessarily anticipate is a polarizing emotional experience. The first months, perhaps even semesters, of law school are particularly intense, having been described as an "emotional merry-go-round"⁵⁴ ranging from sadness to euphoria.

Most notably, law students are plagued by fears of failure. Having maintained sufficiently high grades through previous degrees in order to be accepted into law school, most students have never known serious academic failure. In fact, many have been at the top of their classes, graduated with honours and distinctions, won awards – and have come to expect these sorts of achievements of themselves.⁵⁵ After receiving a B- on her first writing assignment, one of my students made an appointment to meet with me to go over her work. She didn't question any of my corrections or comments, but rather the grade: surely it was wrong, as she had "always gotten As" during her undergraduate degree. She acknowledged that law school was difficult and was meant to be more challenging than undergraduate studies, but she had worked hard on the assignment and spent many hours on the final result. In light of this, did I not see how she was entitled to a higher grade? For her, a "failing grade" was not actually a failing grade, but rather one that did not measure up to the expectations she had set for herself. As I explained that this was not how law school grades worked, the look of disappointment on her face and in the tone of her voice was obvious.

Fear of failure gives rise to anxiety. As students begin to feel overwhelmed, they often question whether they will ever grasp all the doctrinal notions and case details

⁵⁴ Elkins, *supra* note 48 at 30.

⁵⁵ *Ibid* at 39.

outlined in their textbooks. Some students will question whether they may have overcommitted themselves to the task and wonder how they will possibly make it through the semester, let alone the entire degree program. Feelings of inadequacy – in relation to their peers and in relation to how they imagine a law student should be – are not uncommon.⁵⁶ In the safety of reflective journals, law students admitted to feelings of fear, bewilderment, irritability, frustration, tension, stress, alienation, dissatisfaction, apprehension, doubt, intimidation, terror and even impending doom.⁵⁷

Some students admitted to feeling “small, belittled, and stupid.”⁵⁸ Even after months of law school students may still experience “sinking stomach syndrome” when they walk into the classroom.⁵⁹ From a second language acquisition perspective, these feelings and negative emotional responses can be incredibly detrimental. Low self-esteem and a general lack of confidence in one’s ability to comprehend and retain material is particularly problematic for second language acquirers as heightened self-doubt impedes the acquisition of language and meaning.

For example, during a tutorial session in the second semester I presented my students with a short in-class assignment to practice their legal research skills. In hopes of giving them an interesting reprieve from their first year mandatory course content, I prepared the assignment using wills and estate law. I gave a short presentation on “the basics” of wills and estates and then gave students the remaining half hour of class time to work on the assignment. As the students eagerly worked away at the assignment and chatted with each other about the answers they were finding, one student was visibly

⁵⁶ See e.g. Elkins, *supra* note 48.

⁵⁷ *Ibid* at 28, 32-33.

⁵⁸ *Ibid* at 40.

⁵⁹ *Ibid* at 35.

distraught. When offered help, the student replied she did not understand what the assignment was asking of her. Working one-on-one to provide prompts seemed only to confuse and frustrate her more. Eventually she exclaimed, “I just don’t get it, I don’t understand these words – like, what is ‘intestate,’ or ‘probate’? I don’t understand anything – I don’t understand how everybody gets it except me!” Seeing that she was beginning to tear up in frustration, I told her not to worry as “it takes some practice.” Later that evening, I sent her a short email reassuring her that feelings of frustration were perfectly normal and acceptable, and attached a review of my presentation on wills- and estates-related vocabulary. She replied the next day and explained that she had been stressed and depressed during tutorial as in her previous lecture she had been called upon by the professor and incorrectly answered the questions posed to her. In front of 50 of her peers, she felt embarrassed, ashamed, and incompetent – these feelings had carried with her into our class, and she was literally unable to process the new materials presented to her. Having been reassured by her peers and by myself that there was nothing to worry about and given a chance to go over the tutorial presentation while feeling more confident in her abilities, she found she was easily and quickly able to complete the assignment.

This example is but one illustration of the adverse effects negative emotional responses may have on the legal language acquisition of students. Though a negative self-image or heightened self-doubt may arguably impact the learning of any course’s materials, from the literature and lived experiences law school appears to be a particularly detrimental emotional space for this type of acquisition influence. The consistency and intensity of distress, frustration, fear, anxiety and doubt are not conducive to optimal language acquisition. As has been established, as law and language are intrinsically

related, a difficulty acquiring language due to the Affective Filter Hypothesis thus affects the student's ability to acquire the law.

FROM SECOND LANGUAGE THEORY TO LEGAL EDUCATION METHODOLOGY

More than just requiring language in order to exist, law is its own language. Indeed, as was demonstrated through the framework of Krashen's Theory of Second Language Acquisition, learning the language of law is similar to the learning of a second language through an immersion process. Having established this similarity on a theoretical level, how might legal education be informed by second language acquisition pedagogies that have arisen from this theory? Specifically, how can educators implement pedagogical best practices for the acquisition of legal language into traditional law classrooms and faculties, taking into consideration the specific limitations and resources of law schools?

The following are general recommendations formulated around an average student's law school experience and informed through the above analysis using Krashen's hypotheses. These recommendations are by no means exhaustive: there are many avenues possible for the reform of legal education, and the below suggestions represent but a few of the options available. The effectiveness of their introduction into faculties' curricular structure will necessarily depend and vary on the institution and faculty in question due to differences in specialties, philosophies, and resources.

During Law School: Supporting Language Acquisition

How do students develop language competencies? Following an examination of Krashen's five main hypotheses, it has been demonstrated that acquisition plays a significant role in language development among students of a second language. In contrast, learning appears to figure only peripherally. This does not mean that teaching and structured, formal learning environments have no relevance to student development. Rather, these findings instead suggest the need for a paradigm shift in the common conception of language – and, for our purposes, legal – education.

Encourage Output

Though Krashen may consider comprehensible input to be essential to second language acquisition, it does not mean output is for naught. Output contributes to second language acquisition, though it does so indirectly: the more one speaks, the more likely one is to be spoken to.⁶⁰ In many situations, the dialogue created by conversation will be an appropriate level for comprehensible input to be acquired by the student, as without a minimum level of understanding there is no continued conversation.

If the optimal input is compelling and relevant to the student, engaging in meaningful output may also have a role to play. Allowing for students to produce output of interest to them means students will seek an audience to experience their output, which creates the potential for feedback, dialogue and discussion. In order to promote discussion between peers in a formal legal education setting, this could be achieved

⁶⁰ Krashen, "Principles", *supra* note 15 at 60.

through in-class presentations or debates, Student-Initiated Seminars,⁶¹ or “academic conferences” during which students give short presentations to fellow law students regarding areas of particular interest to them or in which they have completed previous research.

Allow for Personal Reflection

Law school can be a time of intense mental and emotional difficulty for many students. Coursework is challenging and plentiful, and students have high expectations of themselves.

Without a space or opportunity for reflection, students are unlikely to recognize how far their legal language development has come. Indeed, students tend to focus on content: have they learned a course’s substantive law sufficiently well in order to do well on the final examination? Progress in language development is not specifically considered as an area of improvement, but rather as a simple vehicle through which the course content is communicated. Without giving consideration to the importance of language during their studies, students risk missing the essential connection between law and language.

By providing students with an opportunity for reflection on their accomplishments, they are pushed to consider how they know what they know. This is an exercise best done in small groups, particularly among peers who have achieved a certain

⁶¹ “Student-Initiated Seminars” are seminars proposed by groups of students in a field or domain that is of special interest to them, but is not a regular part of the faculty’s curriculum. A faculty member cooperates with students to oversee the construction of a syllabus and reading list, assignments, due dates, and grading.

level of comfort with each other. Here, tutorial groups or small study groups may be the best forums for students to comfortably and safely express themselves.

During reflection and discussion, legal language is central: because students had acquired language and learned legal structures during the semester or year, they are able to effectively communicate with other students, with professors, and with professionals in the legal field. Reflection provides further opportunity to use language and thus students are further practicing, developing and rehearsing their acquired skills. Though they may not have succeeded in memorizing all the codal articles of the Civil Code of Québec noraced all of their substantive law examinations, developing competencies in legal language is an equally important accomplishment that should be recognized. Highlighting these achievements in a positive way can help students lower their Affective Filter by reassuring them of their abilities and boosting their self-esteem. In addition, providing an opportunity for reflection allows students to consider the essential nature of legal language, encouraging continued attention to the importance of language during their future legal studies.

With this in mind, I attempted to create a temporary reflective space for my tutorial students at the end of the year, before their first set of law school final exams. During my first tutorial with students in September, one student remarked having heard rumours from upper years that the Introduction to Legal Research and Methodology course “didn’t teach ‘stuff’,” by which he meant actual substantive law, and thus the course was less important than for example contract or constitutional law. I revisited this comment during my final tutorial by first asking students what they felt they had learned during the course. Students suggested a variety of skills, including legal writing, database

research, and how to read a case efficiently. Multiple students commented on having learned the importance of precise language and how various language elements can affect the message you wish to convey. When asked if there were any particular accomplishments students felt proud of having achieved this year, students were quick to point out their progress. They noted this improvement was not necessarily evidenced by better grades, but rather that they no longer felt scared to go to class, that they knew better how to prepare before lecture, that they had developed tools to become more efficient with their time. One student remarked that, before this discussion, she hadn't realized how much legal language she had "picked up along the way" through simple exposure as she had never stopped to consider the language-related means through which she was learning course content.

So, I asked my students, have you not learned some pretty important "stuff" in this course? Yes, they agreed, because learning the law required far more than simply learning substantive law.

Foster an Interest in Legal Education

The learning curve of a student in their first year of law school is steep. Unfortunately, it is in the first year that classes are largest: at McGill Law, first year lectures range in size from 50 to 180 students, whereas upper year seminars and specialized courses can be as small as a dozen students.⁶² Ideally, first year courses would be smaller in size in order to allow more interaction between students and between

⁶² For example, Comparative Federalism (Summer 2013) had 12 students, Restorative Justice (Fall 2014) had 20 students; Introduction to Legal Research and Methodology is comprised of the entire first year class (approximately 180 students), and core first year courses divide the entire class into three, occasionally four, sections.

students and the professor. This would require a shift away from the traditional lecturing method of amphitheaters and the Socratic method. With a smaller class, a more intimate classroom setting could be used to facilitate and encourage discussion, collaborative work, and even peer editing of assignments. This sort of cohort-style environment would provide for increased personal attention in order to ensure the Comprehension Hypothesis is being maximized across all students, particularly as input could then be tailored to the needs or interests of students to a greater degree than is possible in a larger group setting. Further, smaller and more intimate groups allow students to become better acquainted with their colleagues and professor: students' Affective Filter is more likely to be lowered in a familiar and comfortable setting, increasing the effectiveness of their acquisition.

From a practical perspective, it is perhaps unreasonable to assume the average law faculty could undertake such a structural shift. A sufficient number of seminar-style classrooms would be required, curriculum may require altering to allow for a more interactive approach to teaching and learning, and additional professors may need to be hired or, at the very least, professors already with the faculty would be required to teach an increased course load. All of these requirements would place a great strain on financial resources, which a faculty may be unable to account for – particularly if this model were broadly implemented, rather than only for specific classes.

As such, in order to increase students' interaction with educators, it is likely more feasible to engage upper year students as teaching assistants and group assistants to guide tutorials and small group sessions. Presently, McGill Law uses both teaching assistants and group assistants: teaching assistants are responsible for the coursework and

assignments for first and second year tutorials, while group assistants are engaged at the request of professors to assist in large lecture courses that do not have set meetings as smaller tutorials. Third and fourth year students apply and interview in order to fill these positions, and in turn receive course credit: teaching assistants are engaged for two consecutive semesters for 4 credits, while group assistants are engaged for either one or two semesters for 2 credits each. Financially, this is arguably a good investment for the Faculty. While students who act as assistants are unpaid, these students pay the Faculty as the credits they receive are included in the calculation of their tuition fees. Socially, having upper year students assist with first and second year students can create a sense of community and camaraderie in the faculty, lower students' affective filters, and inspire students to consider academic or teaching careers.

Throughout a student's legal education, they will consistently be required to brief cases and create summaries. Particularly at a first year level, this can be a new and confusing challenge for students. Though these repetitive exercises are extremely important to students' studies and, eventually, their examinations, there is rarely an external figure to guide the students or verify that they understand the materials, correctly assimilate the law, or even keep on top of the coursework. Here, upper year students serving as small group teaching assistants may also be able to bridge this pedagogical gap by serving as leaders for tutorials, workshops, drop-in sessions, peer editing groups and even peer support networks.

However, we should not assume that all upper year students, just by virtue of being upper year students, are well versed in educational methodology. Instead, the requirements for enrolling as a teaching or group assistant should be modified to involve

not only classroom responsibilities, but also a course during which upper year students reflect actively and collectively on pedagogy and methods, structure and support in education. While such a seminar currently exists at McGill Law, the Legal Education Seminar, students who take the course are primarily doctoral candidates who are interested in teaching and who hope to secure teaching mentorships and fellowships at the Faculty. Though it would be unnecessary to require teaching and group assistants to enrol in this seminar, it would be beneficial to incorporate its core themes and concepts explored into the assistants' "course" (for lack of a better term, as they are receiving course credit for their work). Not only would this support and improve the assistants' approaches to working with first and second year students, but would also foster and encourage an interest in legal education and pedagogy. Whether or not these students ultimately become teachers or university professors, these objectives are undeniably a valuable investment in lifelong teaching. If we recall that learning and teaching are intrinsically related concepts, encouraging lifelong learning must also require fostering lifelong teaching.

Flip the Classroom

In legal education, the lecture format remains a dominant force.⁶³ Certainly, some educators have incorporated other methods into their teaching styles. Some professors take questions periodically from students or pose questions for brief discussion, engaging in a Socratic framework. Others incorporate technology such as PowerPoint

⁶³ Peter Sankoff, "Taking the Instruction of Law Outside the Lecture Hall: How the Flipped Classroom Can Make Learning More Productive and Enjoyable (for Professors and Students)" (2014) 51 University of Alberta Law Review 891 at 892 [Sankoff].

presentations, YouTube video clips or other visual media into their classes. However, a principal structure prevails: lecture intensive courses in which a professor speaks from the front of the classroom and students type at various speeds, ranging from passive clicking to frantically trying to keep up.⁶⁴

The introduction and eventual omnipresence of laptops, wireless Internet and online social media have created a tempting distraction for students in large lecture courses, increasing the likelihood students will become passive learners. As a student, it was my habit to sit in the back corners of amphitheater style classroom during large lecture course. This provided me a clear view of nearly all of my classmates' computer screens. During any given lecture, I would bear witness to at least half of my colleagues checking their Facebook profiles, Twitter feeds, emails, read news through various online sources, and even send messages through dating websites. Even when teaching in a smaller tutorial setting, I initially had difficulty engaging my students as they had become accustomed to sitting passively behind their computer screens while a teacher spoke at them. If student disengagement and passivity were issues present in the traditional lecture format, technology has increased the problem to epidemic proportions. Noted one graduating student,

I actually stopped attending [two upper year, required courses] because the lectures were so pointless and boring. The prof wasn't saying anything beyond what was in the readings. Why do the readings, then have them read back at me? If I went to class, I half-listened to the lecture but I mostly just read the [news]paper... I didn't do either fully. And that frustrated me. I could get more work done by staying home, so I did.

⁶⁴ *Ibid*; see also e.g. Benjamin V Madison III, "The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students" (2008) 85:3 U Det Mercy L Rev 293 at 301 or Joanne Ingram & Robin A Boyle, "Generation X in Law School: How These Law Students Are Different From Those Who Teach Them" (2006) 56:2 J Legal Educ 281.

A potential solution to the issue of student disengagement is the introduction of a “flipped classroom,” also sometimes referred to as the “inverted classroom.” The flipped classroom format involves the removal of lecture content, all or as much as possible, from the classroom.⁶⁵ In class, time is repurposed for inquiry, application and assessment through a variety of activities or lab-based work.⁶⁶ This method has been successfully implemented in many university classrooms, from first year calculus courses⁶⁷ to law lectures.⁶⁸ In law courses, the “liberated” class time could be used to work through problems in small groups and as a class, engage in debates and discussions, or complete various other activities that are impossible to undertake in large, traditional lecture settings. The opportunities for communication and problem-solving that the flipped classroom provides allows for increased student engagement and effectively requires them to become active learners.⁶⁹

In order to avoid sacrificing instructional time or content, students are required to view or listen to pre-recorded video or audio capsules. Though the ultimate format may come down to the professor’s preference, visual learners and a generation used to graphic displays may find listening to a podcast less engaging and therefore less successful at bringing the material to life outside the classroom.⁷⁰ As such, most professors opt to video record themselves, or provide voice recordings over a visual presentation of images, presentation slides, or other graphic representations. The goal of these capsules is

⁶⁵ Peter Sankoff & Craig Forcece, “Flipped Classroom” - online: You Tube <<http://www.youtube.com/watch?v=XJDa-b2YXnc> > at 1:55 [“Flipped”].

⁶⁶ Jamie Mulholland et al, “On Flipping the Classroom in a Large First Year Calculus Course” (2014) online: <<https://cms.math.ca/Events/CMEF2014/vignettes/29V%20-%20Jamie%20Mulholland.pdf>>

⁶⁷ *Ibid.*

⁶⁸ See e.g. Sankoff, *supra* note 63 or “Flipped”, *supra* note 65.

⁶⁹ “Flipped”, *supra* note 65 at 4:00.

⁷⁰ Sankoff, *supra* note 63 at 895.

not to recreate or replicate a lecture nor to address every aspect of a topic, but rather to provide students with the basic information required to successfully grasp the legal concepts and participate actively in class.⁷¹ Research has shown that students arrive to class better prepared and with a better understanding of core materials.⁷² Further, the flipped classroom provides a flexible learning experience, as students can choose exactly when they wish to learn: students have materials available on demand, and may pause “lectures” or re-watch them as necessary.⁷³ Finally, flipped classroom techniques offer an attractive way of transmitting basic information to students as well as allow for the reinforcement of ideas through classroom discussion.⁷⁴

In terms of Krashen’s Second Language Acquisition Theory, the flipped classroom speaks directly to the Comprehension Hypothesis. In a traditional lecture format, students often do not prepare for class by skipping some, or all, of the readings if they anticipate the lecture to be repetitive. In a flipped classroom, students must view and engage with the materials before class, doing so at their own pace. These materials are prepared into capsules by professors, tailored to the anticipated comprehension level of students. This allows students to comprehend messages through the materials, understanding unknown elements of language by building upon knowledge they have acquired through previous capsules and classes. Finally, Krashen’s theory states that the input received by students must be compelling. Flipped classroom video capsules are generally short in length, approximately 20 to 30 minutes, and with the proper technology have the potential to be visually engaging. If comprehensible input is adequately

⁷¹ *Ibid* at 899.

⁷² *Ibid* at 900; “Flipped”, *supra* note 65 at 38:20.

⁷³ Sankoff, *supra* note 63 at 902

⁷⁴ *Ibid* at 902.

compelling, students will improve subconsciously through their engagement with materials, acquiring language and legal notions. Indeed, previous research indicating that students feel better prepared for class with a flipped classroom model may be evidence of the Comprehension Hypothesis at work.⁷⁵

However, the flipped classroom format does present certain challenges. While there are admittedly law school courses that students are able to coast through with the help of previous years' summaries, this format does not allow for such disengagement. Not only is student participation necessary within the classroom, but students are also expected to attend after having spent a certain amount of external time watching the capsules and preparing for the in-class activities. A difficulty may therefore potentially arise if many law professors adopt this model for their courses: students may become overloaded or overburdened.⁷⁶ While some professors have accounted for this by modifying their reading lists – one going so far as to cut all cases from his syllabus⁷⁷ – other professors have modified their syllabus only slightly and instead implemented techniques designed to demonstrate to students their inefficiency due to passive learning habits. For example, one professor requires students to track their time, as if for the purposes of billing a client.⁷⁸ This “real world” practice highlights to students to what extent they may be inefficient with their time and how, if required to complete a task within a reasonable but limited amount of time, they are able to achieve the readings required of them without spending all night in the library.

⁷⁵ *Ibid* at 900.

⁷⁶ “Flipped”, *supra* note 65 at 39:00.

⁷⁷ *Ibid* at 40:00.

⁷⁸ *Ibid* at 39:50.

A final difficulty with the flipped classroom perspective may be technology-based. First, faculties must have the required technology available for use. Depending on the complexity of the capsule, this may range from a computer tablet and electronic pen⁷⁹ to digital video recorders, green screen and lighting kits, and a working knowledge of digital video editing software.⁸⁰ This may be difficult to achieve if faculties' financial resources or information-technology services are limited. Second, professors themselves must be comfortable with using the technology required for the recording and distribution of lecture capsules. If professors would like to implement the flipped classroom model but are unfamiliar with the required technology and processes, they would need to learn the techniques on their own or through faculty- or university-offered technology courses or services.

Provide Opportunities for Acculturation

Acculturation also has an important role to play in second language acquisition. For students of a second language, prolonged contact with the target language's culture will result in the student adapting to or even borrowing traits and linguistic elements associated with that culture. The degree to which the student acculturates to the target language community will impact the degree to which the student acquires the target language.⁸¹ For example, students of French as a second language benefit greatly from exchanges or extended sojourns in Quebec or France, during which time they were

⁷⁹ Sankoff, *supra* note 63 at 898.

⁸⁰ Mulholland, *supra* note 66 at 3-4.

⁸¹ Krashen, "Principles", *supra* note 15 at 45.

entirely immersed in the French language.⁸² This is a result of continued, consistent exposure to the language and culture – including slang, idioms and varied structures – as a means of gaining comprehensible input and, over time, lowering the student’s affective filter as they gain confidence. Indeed, a situation of immersion such as non-touristic travel can supply significantly more and varied input than can a classroom.

Here, the goal of education must be to provide students with the tools and opportunities to not only access greater authentic input, but also to continue improving and refining their abilities once “in the real world.” During law school, an immersion can occur through various methods. Students, once they have gained a base knowledge of substantive law, can participate in legal clinic placements, volunteer for their university or local legal information center, or clerk. They may also work as an intern for an organization or in a law office as a summer student, and possibly even part time during the academic year. For those interested in pursuing graduate studies in law, the ability to attend conferences, continuing education sessions offered by bar associations, and even auditing or participating in graduate level courses will expose them to the types of language, structure and ideas that await them.

All of these opportunities will expose students to “legal culture” in the sense that these experiences remove their legal education from their present classroom setting. Instead, students will be immersed in “legal language in action,” regardless as to whether that takes the form of a conference speaker, courtroom visits or a corporate setting.

⁸² Hughes, *supra* note 10 at 118-122.

After Law School: Lifelong Learning and Refinement

Contrary to popular belief, attaining the fluency of native speakers is not a realistic aim for second language immersion programs. The purpose of immersion programs is to provide students with the opportunity to achieve a meaningful level of functional fluency, allowing them to effectively communicate and interact with native speakers in the target language.⁸³ Upon completion of an immersion program, students should have the tools necessary to use language effectively and practically.⁸⁴ For example, the objectives of French Immersion programs in Canada are often formulated as enabling students to “participate easily and willingly in conversations in French”, “to communicate for both personal and professional needs” and to “accept employment where French is the language of work.”⁸⁵ In order to attain the fluency of native speakers, students of French Immersion programs must continue their studies at a post-secondary level and/or immerse themselves in French environments during which time they interact and communicate with native speakers.⁸⁶

Similarly, attaining perfect fluency is not a realistic expectation for students of a three-year law degree. Upon graduation from a first law degree, a student’s legal language learning continues through a variety of mediums: at bar schools, in law firms or legal clinics, at legal conferences, at Continuing Legal Education and professional development sessions, or through the pursuit of graduate studies in law. Just as the objectives of language immersion programs are to adequately prepare students to

⁸³ *Ibid* at 110.

⁸⁴ See e.g. Fred Genesee, “What do we know about bilingual education for majority language students?” *The handbook of bilingualism*. Eds. TK Bhatia & WC Ritchie (Malden, MA: Blackwell Publishing, 2004) 547-576.

⁸⁵ Alberta Education, “A made-in-Canada solution!”, *Government of Alberta* (24 February 2014) online: <<https://education.alberta.ca/parents/resources/youcanhelp/solution.aspx>>

⁸⁶ Hughes, *supra* note 10 at 118-122.

participate easily and willingly in conversations, to communicate for professional needs, and to accept employment in their second language, so too should law school prepare students to work with legal language in an easy and effective manner.

However, I do not mean to suggest that one's language education is ever complete: language development, in any language, is a continual and lifelong process. Even native speakers of a language acquire new vocabulary and structures throughout their lives through exposure to diverse contexts and the evolution of language. In law as in any other language, the role of formal education is to provide students with the skills, tools and resources necessary to continue that lifelong learning as well as to instil within students a passion for personal development and language refinement.

CONCLUSION

Stephen Krashen's Second Language Acquisition Theory was originally conceived, studied and designed for bilingual and immersion classrooms. Thus, the five hypotheses and the resulting recommendations for educational reform focus specifically on how to achieve ideal classroom conditions for language acquisition and language learning.

We have seen that a legal education is analogous on many levels to a linguistic education. Indeed, language and law are intimately connected. Further, upon entering law school students are suddenly immersed in a world of legal language vocabulary and structures previously unknown to them, much like language immersion students who are thrust into a classroom conducted entirely in a foreign language. Like language

immersion students, law students acquire much of their language capacities without conscious effort or active learning; instead, the knowledge of language is developed through engagement and interaction with meaningful content presented or available to them in the target language.

It is widely recognized that education does not take place in a social vacuum.⁸⁷ For that reason, it is essentially to consider all factors that influence education: beyond simply the language acquisition processes that occur at a cognitive level, mental and emotional factors must also be recognized as having an important role in language acquisition. These same principles apply to legal education. The contextual factors that come together to create the environment within which students receive their legal education significantly impacts the quality of education they ultimately enjoy. If acquisition is a more important process than learning in the development of communicative abilities, we must concern ourselves with the question of how people acquire and consequently shift our conceptions and approaches to pedagogy accordingly.

⁸⁷ Genesee, *supra* note 10 at 151.

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