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## **Transsystemia – Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?**

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# Transsystemia—Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?

Peter L. Strauss

To start, I'd like you to imagine an agglomeration of twenty to thirty jurisdictions experiencing a profound change in the nature of their economic realities. Their economies, and thus the transactions within them and the businesses that conduct them, have been predominantly local in character. Now, political and economic developments are producing businesses and transactions increasingly trans-jurisdictional in character. Increasingly the counseling, drafting, and litigating that goes on in lawyers' offices involves not one jurisdiction but two or three. What happens to legal education?

As the United States emerged from the Civil War and a truly national economy began to emerge, stitched together by the railroads, the telegraph, and the business trust, my law school, Columbia Law School, was the country's leading law school. Timothy Dwight, and the Dwight method of instruction which combines textbooks and lectures with classroom hypotheticals and frequent moot courts, proved superior to all rivals in habilitating young men for the bar. Then Charles Eliot hired Christopher Columbus Langdell to be dean at Harvard Law School, and Langdell set about transforming the way in which universities delivered legal education. Where Dwight aimed to give a sound knowledge of the law to men of average ability, Harvard's case method aimed to give as much intellectual stimulation as possible to those who would become the profession's elite. The success of this venture—New York firms turning to Harvard as a preferred source for new recruits—prompted Columbia's President, Seth Low, to go north for help. William Keener was imported from Cambridge to New York. Undercut and aging, Timothy Dwight retired in a huff; his colleagues-at-arms left too and founded New York Law School, where they

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could continue to teach as they preferred. They took many Columbia students with them, and their law school became at once the country's second largest law school and within thirteen years the largest. Columbia followed Harvard into the domain of the national law school.

There are many ways to describe this change and explain its general success, first in elite law schools and quickly enough spreading through the American law school world. One way that appeals to me is that Langdell's invention of the Socratic Method freed law schools from teaching law from texts, as if it were the law of some particular common law state jurisdiction. Students no longer learned doctrine through the eyes of a distinguished commentator, but did the hard work of synthesis for themselves, from the start. A day in such a class, organized around the conceptual problem of consideration, might hop from eighteenth century England to nineteenth century New York to twentieth century Massachusetts, forward and back in time and space without apparent concern. Even as appreciation was spreading that the common law was positive law and not some brooding omnipresence in the sky, the law firms that were beginning to serve the needs of an increasingly national business community found that they particularly valued lawyers confident of their capacity to work in any of the country's jurisdictions and resourceful in imagining alternative approaches to clients' needs, drawing on the full range of the law's possibilities.

A few decades later, other changes spoke more to the question of what a faculty of law was doing in a university. The legal realists challenged formalism, technical analysis, and law as an autonomous enterprise unconnected to social fact. Columbia would once again assume the leadership of law schools, only to be derailed when the actions of another president, Nicholas Murray Butler, appeared autocratically to choose sides between those who thought the law school should be *only* a center of advanced research into the relations of law and society, and those who saw professional preparation as an important role. Legal realism's changes reached across disciplines, made of law an intellectual study more than simple professional habilitation and of law school graduates lawyers more cosmopolitan in outlook, training, and practice. In the wake of President Butler's decision, "for the second time in the history of the School of Law of Columbia University a difference of opinion on proper educational policy led to a major secession from the Faculty."<sup>1</sup> Now it was the educational radicals who left, for Johns Hopkins and Yale.

We don't ordinarily think of ourselves as comparative lawyers—those are the folks who try to understand the very different legal systems of other countries. Yet, another way of describing the Langdellian change is that it made almost all American law teachers into comparative lawyers. In a class that assesses the contract rules of New York against those of Minnesota, analyzes majority against minority rules, those that served yesterday's society against those needed for today, what else are we doing? Another way of describing the move

1. Julius Goebel, *A History of the School of Law, Columbia University* 305 (New York, 1955).

to legal realism is that it made us comparative in the transdisciplinary sense. Why does it matter if the study of social contexts within which transactions of concern to lawyers occur cross state or national lines? Were the differences between, say, Texas and New York in the 1920s markedly less or different in kind than those between France and Spain today?

Today, national businesses have become international businesses. Transactions that regularly crossed state lines yesterday just as regularly cross borders today. The American way of practicing law is not necessarily the one inevitably chosen elsewhere. The European Community has made it inadequate to learn just Belgian law today, just as it had become impractical to learn just New York law twelve decades ago. European lawyers, recognizing this, flock to our shores in droves to acquire an LL.M. Is there a comparable countercurrent? And even if there were, would it be adequate?

We have to take the next step, not just because we ought to want it as an intellectual matter (for a general interest in the world of law *is* more seemly for a university faculty than a profession-driven interest in the common law) but also because the changing market for legal services will reward the schools that adapt and punish those that do not. That is, we have to train lawyers to adapt as readily to the differing legal systems of varying nations as our current graduates adapt to the differing legal systems of the states. We need to be able to send them out of our doors with the confidence to meet the demands of practice wherever in the world, not just wherever in the country, their practice might take them.

This is already being done. I had the privilege and pleasure, during the fall of 2005, to spend a month at McGill University's Faculty of Law in Montreal, watching their new first year class start into the business of becoming world lawyers—transsystemic lawyers as they call them. I was trying to understand what was different, how, if at all, it would be possible for an American law school to adapt. Let me try to capture a few moments of the experience for you.

First, a colleague presented a paper at a faculty seminar on the emptiness of comparative law as a discipline. He did not mean that comparisons should not be made—rather, he meant that comparative law was no different from what all of them were doing all of the time. Just as we do not think of offering specialized courses in the comparative law of the states, but simply teach it all of the time, they do not think of teaching it at the national level. One colleague forcefully told me, “We offer no course called Comparative Law. Our students would rise in rebellion if we did.”

Legal education starts quite differently at McGill than it does in the United States. Every student is expected to bring the Quebec Civil Code to class every day along with the cases for the day, and is as likely to have attention called to the one as to the other. But it is more than that. It was well into the third week before I heard any case or statute discussed at all. Earlier meetings were given over to historical exegesis, or to theoretical writings, that tended

to emphasize the commonalities among the kinds of problems that people bring to lawyers, the unrepresentativeness of the cases that become prominent, the parallel histories of intellectual developments in Europe and in the common law—however different the names given them. At a discussion among most of the first-year teachers, I heard one colleague invoke rather forcefully, and without contradiction, an explicit understanding that the first weeks of teaching would actively avoid contributing to a “two camps” understanding of the enterprise. Common law case materials, when presented, are as likely to be American, Australian, or British as Canadian.<sup>2</sup> Active demystification and scene-setting appeared to be the rule, along with expressions of confidence that “you will be able to do this for yourself soon; for now I am modeling for you what you will need to learn to do.” No one was put on the spot; volunteers were welcome—and I heard some quite extraordinary interventions, rarely if ever off the mark. In a meeting with first-year students, the dominant views expressed were pleasure at the cooperative atmosphere, the willingness of people to share notes, and faculty support. I heard not a word of anxiety about having to learn two systems side by side; it was of course what they had to do.

Part of that, I came to think, was because legal systems were presented as being as much a part of the lawyer’s toolkit as we think our other hermeneutic structures are. What actually happens that brings a person to a lawyer’s office, what one colleague pungently styled “the pre-legal blah-blah-blah,” is quite as independent of the legal system that happens to be in place as of the particular limiting analytic structures that that system employs and that a lawyer must therefore learn to use to be an effective professional. This is not so hard to understand as a conceptual proposition. The students get it quickly.

Contractual obligations, or extra-contractual obligations, the two principal first semester courses in which this is done, are organized around a series of presenting problems: have the parties reached what the law will recognize to be a mutually binding accord? What kinds of injuries will be recognized as warranting legal redress, and to what extent? Code provisions and cases addressing these problems—common law cases and civil law cases—are presented as data to animate the discussion. Neither system has priority, both are simply there, as both a majority and a minority rule might be there in the common law context. Stating the case is not an early priority. I heard it done in only one September class I visited. When cases are discussed they are discussed as illustrations of the law’s intellectual structures. People are not asked, at least not yet, to put this case together with that one, to explore the possibilities of meaning in a statutory or codal text. What are explored, rather, are the intellectual structures law brings to the resolution of disputes, and the difficulties those structures (distinct in this respect from a judge’s reasoning or a legislature’s choice of language) present. As one McGill professor explained, students walk in the door having already chosen to be lawyers—that is not a problem, and thinking like a lawyer will come—but the outset of legal education is the

2. The Quebec code and Quebec civil judgments, to be sure, dominated on the civil side.

moment when one might be able to catch them in a University enterprise, to get them thinking about law in an intellectual and not an instrumental way.

A few upper-class students remarked to me that, in retrospect, they thought they had not come to appreciate *either* system, common law or civil law, until their second year, when they took courses in Advanced Common Law and Advanced Civil Law that focused on the workings of that particular system. Only then, for example, do they learn to see the Quebec Civil Code as a whole, and focus on the interaction of its several books, or on the particular interpretive skills and secondary literature that a well-trained civilian needs to have. This, colleagues assured me, was precisely what was intended. Students reached this point without having made general judgments about better or worse, simply having treated the common law and civil law as different, wholly contingent social ways for reaching generally similar outcomes in respect of generally similar problems that might bring a person to a lawyer. McGill's prior approach—where its students started with a year in one system and then in the second year learned the alternative—produced adherents; those who had year one in the common law stream became common lawyers who knew a bit about the civil law, and vice versa. Keeping system-specific training largely (although not completely) for the second year has changed this.<sup>3</sup> People might think they know where they are going and prepare accordingly—some of our students know they are going to New York, and others to California—but the school is neutral to this; it has no stake.

Note in this a certain advantage for those of us who believe that law is the queen of the social sciences, and not just an agglomeration of propositions and practices best understood through the prism of other disciplines. A McGill graduate who read an earlier draft of this paper put it this way:

[W]orking across systems...students are made to understand how contingent law as professional practice and as theory is [–] to perceive law as escaping systematization and [to understand]...that lawyers mold legal practices to fit and shape constantly shifting social practices and moral understandings. This understanding of legal contingency is distinguished from legal realism's skepticism about law. It may be true that all legal practice and theory has no fixed moral, political or other foundation, but a well trained McGill alumnus understands that this fact doesn't absolve one of responsibility for crafting particular legal solutions and understanding their normative significance and effects. And this understanding of law differs from that of the committed law and economist or legal crit. In my opinion, a well-trained McGill alumnus does not believe that any one normative theory can cover all legal practices. She has been exposed to enough diversity that she should see that not all societies give equal weight to utility concerns or race or rights. ... [I]f the

3. Civil Law Property is a first-year course; Common Law Property a second-year course. One could think this a politically expedient outcome that helped assure adoption of the curriculum overall, but it also tends to assure that students will have at least one course in their first year where they repeatedly encounter the problem of understanding legal problems for which legislative text is the primary source of resolution.

education works as it should, McGill produces informed skeptics who are constantly willing to test their theories and presuppositions against diverse legal data.<sup>4</sup>

Transsystemia might be hard to achieve across the world of legal education in the United States, as later paragraphs suggest. Indeed, it is not universal at McGill—property courses, notably, tend to stick to the legal systems of particular places, the places where the property *is*. But are there individual courses where greater fluidity could be imagined, where contact with and consideration of a range of systemic possibilities could be developed? In a commercial world of international transactions, the course in secured transactions is an obvious candidate. Professor Roderick MacDonald, in many respects progenitor of the McGill changes, made it one of McGill's first transsystemic offerings. Professor William Tetley, long McGill's teacher of Admiralty, argues for his specialty—for as long as there have been traders by sea, they have had to sail between a variety of ports, and yet maintain a common understanding of the transactions of importance to them. A conversation with H. Patrick Glenn, author of *Legal Traditions of the World*, suggested a means of reinvigorating the course in Conflict of Laws, or (as it is usually called outside the United States) Private International Law. Suppose it were reconceived, not as a place for allocating the application of the divorce or tort laws of Alabama and Minnesota, but as a setting in which students had to encounter the framing of commercial relations and resolution of commercial disputes in NAFTA (or Europe)—arbitral and legal avenues, private and state. The suppositions of a common market intersect with the options open to its participants for ordering their transactions in ways that deepen understanding. McGill may have no course in comparative law; but its students find encounters with problems like these deeply intriguing.

One cannot attend McGill classes or explore its teaching materials without recognizing its natural advantages. It is no accident this happened there.

- Montreal is actually bilingual, as Canada is formally so.
- As a result, the literatures of two great legal traditions are easily available to students there.<sup>5</sup> Quebec has an intense and modernized civilian tradition—albeit one inflected in various ways by the common law<sup>6</sup>—where the bulk of Canada, including federal Canada, answers to the common law.

4. E-mail from Hoi Kong, McGill graduate and Columbia Law School graduate student, (Oct. 9, 2005) (on file with author).

5. Such literature is not readily available in other places. French civilian literature is available, but not German (or Italian, Spanish, Portuguese). The result is a constant threat of conversion to a bijural rather than transsystemic approach of which the faculty seems aware; yet it cannot offer nearly as authentic experience of German or Spanish (or NAFTA or Mexican) thinking, say, as French, English, or American.

6. No one would mistake an opinion of a Quebec court for one of French judges, but an English or American reader would find its diction and concerns rather familiar; conversely, it may be that McGill's approach to teaching law would be more familiar in civilian than in at least American legal educational circles.

- The politics of possible separation both pushes Quebec's leading Anglophonic intellectual institution towards building possible bridges of national unity, and creates an atmosphere of challenge highly conducive to collegial coordination and sacrifice. Faculties less isolated and threatened, less needful of demonstrating their continued relevance to the rest of the nation, on the one hand, and of exploring the hopes of rapport, on the other, might find it harder to act together in the manner that so large a curricular innovation requires.
- Building at McGill did not occur overnight. McGill only began offering the LL.B. in 1970<sup>7</sup>; frustrations with the original framework for doing so (an optional fourth year) produced a National Program in which one began as either a common or civilian lawyer, then switched to the other side in one's second year. Only after that program revealed its inadequacies did the current regime begin. The faculty has taught the two systems side by side, and considered the results, for over three decades. The faculty has built a cadre that finds it much easier to explore new paths, that requires less intellectual capital to sacrifice, than one that had been teaching to one or the other system alone.

The other side of McGill's advantages are the obstacles Columbia, or virtually any other American law school,<sup>8</sup> would face in moving to education that was as indifferent to systemic differences as ours now is to state lines within our domestic common law world.

- We cannot rely on our students to be bilingual, much less bilingual in a particular second language that fortuitously happens to be the language of one of the great legal literatures of the world. McGill too faces challenges here—both its location's politics and its language limitations work to conceal the Germanic code tradition and its extraordinary literature, as well as other legal systems. There is also a risk of confusing France with the civil law world. McGill may find even larger difficulties when it moves from the relatively comfortable juxtaposition of two legal systems that share deep cultural and social affinities to, say, aboriginal law, or non-Western systems that are neither liberal-democratic nor market oriented. Transsystemia within Western European traditions may prove much easier than transsystemia as a world proposition. But our challenges are greater; at the least, we require a full rendition of civilian sources in English.

7. An LL.B. program was briefly offered during the 1920s, but disappeared almost as quickly as it was created. Before and after, McGill conferred only the B.C.L., albeit on the basis of instruction in English, not French.
8. Louisiana's law schools have long committed themselves to the civilian tradition, but without the advantages of language and politics that McGill enjoys, and in a general setting even more inflected by common law traditions and understandings.



- Second, neither we nor our students have quite the same incentives, political or professional, as exist for an essentially Anglophonic faculty in Quebec, Canada; neither our national legal system nor our national federal politics put as much pressure on us as they do on McGill to find a way to create the enduring integrity, interdependence, and interweaving of systems its current dean has named *métissage*. For us as teachers the incentives are almost strictly intellectual, and they may appear to involve overwhelming effort; for our students, the incentives are professional in a way that may not be immediate to most, dependent on career path perhaps more dramatically than would appear to a McGill student today.
- Third, and relatedly for us as faculty, more intellectual capital may be at stake for experienced teachers than the McGill faculty favoring this change risked. They had been moving in this direction, teaching side by side, encountering both B.C.L. and LL.B. candidates in their classes for three decades before taking the step into transsystemia. Save for those of us who self-identify as comparativists, and their specialty *as specialty* is one that McGillians deny, our private law faculty (and many who teach public law as well) are used to the idea that what we teach is primarily the common (i.e., domestic) law. Our courts, some indicator of how we think about law, are far less open than the Canadian courts to the consideration of external sources, even in matters of human rights. Few of us have learned the values or instincts of codal systems. Our teaching materials are all rich with comparison and depth already, but these assets have been created within the common law framework and might have to be abandoned or at least radically reshaped fully to incorporate the code tradition alongside our own. It is a lot easier to continue in accustomed paths.

Then again, perhaps the difficulties are overstated. Writing this has reminded me of my first teaching post, teaching criminal law as a member of the faculty of the Haile Selassie I School of Law in Addis Ababa, Ethiopia.<sup>9</sup> Ethiopian law was strictly code law, its orientation reinforced by the almost total absence of a body of reported cases. Those codes had been drafted, on contract, by leading intellectual lights of the civilian world—René David on commercial law, Jean Graven on criminal. Our faculty, less than twenty, was about half American. Our deans were American as well. We Americans were mostly young, mostly untrained in civilian perspectives or resources in any formal sense. What did I know about the continental approaches to criminal law? But we had civilians as colleagues, people from Quebec, Belgium, Germany, and Finland. Teaching from and to the codes was simply not a great obstacle. One quickly discovered, as indeed the nature of first-year instruction suggests that the McGillians have

9. The years when I was there, 1966-68, were a time when McGill served as the training ground for a continuous stream of young Ethiopian lawyers—precisely because it was a place where one could get effective civil law training in English; the LL.B. had not yet returned to Montreal.

discovered, that if one approached the matter from the perspective of human problems (which are universal), and desired outcomes (also widely shared), the question of how one got from point A to point B was just a system whose particulars could be learned. Murder, arson, and rape, to take the examples that impressed themselves on me, are shared outrages of all societies; issues of causality, mental capacity, justification, and defense assert themselves universally as well. One can approach them as problems, identify their elements, and then see how a particular system might work them through. Save for the difficulty in finding theoretically oriented writing about common law system issues, a difficulty that has diminished considerably over the years, discussions in the secondary literature proved to be concerned with the same issues of translation from real life to legal system, granted (as was not hard to understand) that different systems were involved. In short, taking a problem-oriented stance, in itself not so hard for one trained at a national American law school in the Realist era, made the task much less difficult than it might have seemed. As long as one remembered that the legal nomenclature and organization were simply that, the contingent structure that this particular society had devised for translating the “pre-legal blah-blah-blah” into desired results, one could do just fine. Nor do I think we were fooling ourselves about the results; our graduates quickly ascended to leadership of the Ethiopian legal community; when they came to the States for graduate study, as many did (at Yale and Columbia, for example), they proved to be as capable as any European student; in the early 1970s, teams from the Haile Selassie Law School twice won the international side of the Philip Jessup Moot Court competition in International Law.

Nonetheless, the lesson of McGill, and indeed of this experience, is that one should not expect to reach transsystemia overnight. Getting past the obstacles, particularly the one of intellectual capital that so often obstructs our changes will require ramps, not a bulldozer or TNT. For a school choosing to react to how the economic world, law, and the market for lawyers are changing, one could recommend a number of strategies:

- Hire young colleagues well-trained in civil law—or, even better, transsystemia—and put them in first-year courses with encouragement to change them. Columbia imported Keener from Harvard; most of us today regularly drink at the well of Yale, a habit of which I am the happy beneficiary; tomorrow the source may be McGill. The upper class curriculum will follow, as it has at McGill; it is a measure of the success of its innovations that upper-class teachers regularly must respond to the expectations first year teaching has engendered; recent curricular innovations at Columbia have not fared so well, in part because upper-class colleagues never experienced the world turning beneath their feet.
- Consider as a second-semester, first-year course like the one my colleagues George Bermann and Katharina Pistor, with the participation of Mark Drumbl of Washington & Lee, are crafting for us at Columbia, it revisits all first-year courses through the eyes of problems that create international or foreign law dimensions, requiring students to expand their field of vision.

I myself would require it, but we have not yet reached that point. Even as an elective, it will create another way to encourage dialogue among instructors, and between instructors and alumni, that will focus attention on the increasing contingency, one is almost tempted to say irrelevancy, of particular systems for the problems with which lawyers are asked most importantly to deal. Teaching our students to approach common legal problems free of the shackles of particular *common law* systems is so instinctive with us now, so obviously the thing to be done, that we hardly notice that is how we educate. The problem is learning how to take the next step.

- Imagine some upper-class courses as transsystemic courses and staff them accordingly. Admiralty, Conflict of Laws and Secured Transactions come readily to mind, as already indicated. Family Law is another possibility, particularly if one were willing to embrace the issues arising from religious as well as secular views on the subject. These offerings may be taught in conventional ways. Means must be found to impress upon their teachers the importance—to choose as instructors ones who recognize the importance—of structuring the courses to free them from any particular legal system, the importance of requiring students to develop the flexibility and understanding to come at their common problems from any systemic angle. If that means reducing coverage in the conventional doctrinal sense, in fact a common experience at McGill, that is a reduction well bought.
- Build for the long term. McGill took over three and a half decades to reach the point it currently has attained, and that under the favorable conditions noted. Its leadership has self-consciously been building faculty to this end since the 1980s. With its success demonstrated and model teaching materials resulting, others may not require as long even given the differing obstacles we face. We cannot imagine instantaneous change. NYU's Global Law Program may look quite different with 20/20 hindsight—that is, in the year 2020—than it does today, when that school may not yet have fully managed to integrate its contributions into its basic curriculum.

Perhaps not every school will make such a choice. Cities, states, and nation will continue to need lawyers whose training suits them to domestic practice. Columbia has never offered a course in New York practice—a mistake perhaps—although most if not all other law schools in my state do. Correspondingly, it may be that transsystemia will have less appeal to schools serving local or even regional bars than to schools who invite the world and imagine their graduates dispersing widely throughout it. Conversations following the oral delivery of these remarks have persuaded me, though, that this may be simply an elitist view—that I may not understand how deeply the need to accommodate differing legal systems has penetrated American law practice. All and all, I think this likely to be a market-driven choice. Firms hiring young lawyers will favor schools that they find prepare their graduates well for the realities of the firms' practice—whatever those realities are. If some European nation's

law schools, under national guidance, continue to act as if its national law were the only law a well-trained European lawyer needed to know, they will find (if Europe continues) that their graduates are finding work principally in local firms dealing only with problems of local law, and that graduates of schools in other nations are being hired for jobs that require more flexibility, broader understanding, a more European perspective. Or else the graduates of those law schools who harbor broader ambitions will find themselves having to seek supplementary education elsewhere.

Connect the dots.