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

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Dean Parker put it well in addressing the problem of our slowness and the importance of epiphanies. I want to suggest a frame of reference to you about the forward and back part. What I want you to imagine is a jurisdiction of roughly twenty-five different states, each of which has its own body of law independent of the others. And each has its own law schools. What law will lawyers learn in each of these states? Now imagine that something happens that unites these twenty-five bodies in a quite concrete way. The economy shifts so that the economy becomes an economy for the whole unit of twenty-five, rather than separate economies for each of the twenty-five. How will law-teaching change?

A shift like this has happened twice that I am going to speak to. It happened once here, shortly after the Civil War, when our economies effectively merged into a thoroughly national economy. And recently it happened again in Europe, as twenty-five nations became a single economy. Now, think for a moment about legal education in Europe, and whether it makes any more sense for a Belgian lawyer today just to learn Belgian law, or perhaps I will call it national law, then it made one hundred years ago for someone in the emerging national economy of the United States to learn just New York law. You probably have a point of view about that. I hope you do, but this is a way of presenting my epiphany, which I hope to share with you. This should explain to you the first part of the title of my talk, "Are We Approaching a New Langdellian Moment?"

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** Betts Professor of Law, Columbia Law School. This essay would not have been possible without the support of the Fulbright Senior Specialist program, which made it possible for me to spend September 2005 at McGill University's Faculty of Law, and without the many personal and professional kindnesses shown me by that remarkable faculty. This is a transcript of the oral delivery of a paper that is being published in the December 2006 issue of the Journal of Legal Education.

When this country emerged from the Civil War and reconstruction began, Columbia Law School, which is my law school, was the country's leading law school. Timothy Dwight's method of instruction, which combined textbooks and lectures with classroom hypotheticals and notes, did the best job in the country in educating people for the bar. Everybody knew that, and many people came to Columbia. Then Charles Eliot hired Christopher Columbus Langdell as the new dean at Harvard, and he set about transforming the way legal education was delivered there. And do you know what happened next? More firms started hiring Harvard lawyers. Langdell's new method worked to produce a graduate well-adapted to the new circumstances of the marketplace. Columbia imported William Keener from Harvard to bring his method to Columbia so that we could compete. Professor Dwight didn't like that at all, and retired in a huff. Many of his colleagues left Columbia to found the New York Law School. They took a lot of Columbia Law students with them, and their school immediately became the country's second largest. Within thirteen years, it was the country's largest law school. We persisted with the Keener method—the Socratic Method—as did other elite law schools. Yale too, at some point, caught on and imported the new method.

How do we explain the new method's general success, first at elite schools and then throughout the American law school world? My explanation is that the Socratic Method freed law schools from teaching the law of a particular jurisdiction, from teaching law from texts, as if it were the law of that state that lawyers had to know. Students no longer learned doctrines through the eyes of a distinguished commentator. They did the hard work of synthesis for themselves. A day in such a class, organized around a conceptual problem such as consideration, could hop from eighteenth-century England to twentieth-century Massachusetts to nineteenth-century New York, and students needn't pay attention to that. Back-and-forth in time and space their studies went. The law firms that were serving an increasingly national business community found that they particularly valued lawyers that came out of that process, for these were lawyers confident of their capacity to work in any of the country's jurisdictions. I go to a law school in New York, but I leave ready to practice in California, or Minnesota, or Florida. I take some intensive, awful three-week bar course so that I can get over that state's particular hurdles, but I have confidence. We have succeeded in making our graduates confident that they can practice anywhere in the country. That was the transformation that Langdell brought about.

A few decades later, other changes spoke more to the question what a faculty of law was doing in a university. Legal realism challenged formalism and technical analysis, the idea of law as an autonomous

enterprise unconnected to social fact. Its changes reached across disciplines, made of law an intellectual study more than simple professional habilitation, and made of law school graduates lawyers more cosmopolitan in outlook, training and practice. There was another tragedy at Columbia around that, but I don't want to get into local history too much.

So, another way of describing the Langdellian change was that it made American law teachers into comparative lawyers. All American law teachers of private law subjects, I would suggest, are already in the business of teaching comparative law. In a class that assesses the contract rules of New York against those of Minnesota, that analyzes majority against minority rule, those that served yesterday's society against today's society, what else is it that we are doing? Another way of describing the move to legal realism is that it made us comparative in the trans-disciplinary sense. Why does it matter if the study of social contexts within which transactions of concern to lawyers occur crosses state or national lines? Were the differences between, say, Texas and New York in 1920 of another dimension or kind than the differences between France and Spain today?

Well, today (I don't think I have to say this, but I will) national businesses have become international businesses. A graduate of ours remarked to me a few years ago that 85% of the transactions that crossed his desk at a not particularly international New York law firm had one foot or another in a distant country. This is like finding a businessman on his way home from Asia sitting next to you on your trip across the country. Nor is the American way of doing law the one inevitably chosen by other states, as Dean Parker has suggested. The fact of the European Community has made it just as inadequate to learn just Belgian law today, as it had become to learn just New York law twelve decades ago. And European lawyers, recognizing this, flock to our shores in droves to acquire the LLM. Is there a comparable countercurrent? And even if there were, would that be adequate?

We have to take the next step, not just because general interest in the world of law is more seemly, more intellectual, than a profession-driven interest in the common law, but also, in my judgment, because the changing market for legal services will reward the schools that adapt and punish those that do not. That is to say, we have to learn to train lawyers who can adapt as readily to the differing legal systems of varying nations as our graduates today can adapt to the different legal systems of the fifty states.

Now we get to the second part of the title, "Is McGill leading the way?" You will hear later this afternoon, in the last concurrent session, from Rosalie Jukier, of the McGill faculty. She will be able to tell you a

lot more about this than I can. But let me try just to say a little bit on the basis of the month that I spent this fall at McGill, at the very beginning of first year legal education, watching how that faculty in civil law Quebec starts its students into legal education. Quebec is an island of the civil law in the Commonwealth of Canada, as I suppose you know. And I might start with another little anecdote: Ten years ago or so, I asked one of our Canadian graduate students, who had studied at the University of Toronto, "When you studied contracts, how many of the contracts cases that you studied involved transactions that had a relationship to Montreal?" The answer was zero. Utterly astounding to me, but there it was, the answer was zero. Not sustainable, and I think changing.

So, I spent a month at McGill watching that first year class start, trying to understand what was different. How, if at all, could an American law school adapt what it was doing? And I want to try and capture a few moments of the experience for you.

The first was a faculty seminar on the emptiness of comparative law as a discipline. Of course, the presenter didn't mean that comparisons shouldn't be made—rather, that it wasn't any different from what all of them were doing all of the time. Just as we don't offer specialized courses in comparative law of the states, we just all do it all of the time, they do not think of doing 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 very differently at McGill than it does here. Every student is expected to bring the Quebec Civil Code to class every day, along with the cases for the day. But the real difference was that it was well into the third week before I heard any case or statute discussed at all. Early meetings were given over to historical exegesis, or to theoretical writing 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 European legal systems and in the common law, however different the names given to them. At a discussion among most of the first year teachers, one colleague voiced quite forcefully an explicit understanding among them: That the first weeks of teaching would actively avoid contributing to a "two camps" understanding of the enterprise. Common law cases at McGill are almost as likely to be American, Australian, or British as Canadian. "North American law" is a phrase that I often heard used. 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 the moment, I'm just modeling for you what you will need to learn to do." Nobody was put on the spot; volunteers were welcome. I

heard some extraordinary interventions, which were rarely off the mark. In a meeting with first year students, they expressed a lot of pleasure at the cooperative atmosphere, the willingness of people to share notes, the faculty support that they were encountering. I didn't hear a word of anxiety about their having to learn the common law system and the civil law system side-by-side. That was of course what they had to do. This was what they were going to be dealing with in their professional lives.

Legal systems were presented as being as much a part of a lawyer's toolkit as we think our own hermeneutic structures are. What actually happens in the world that might bring a person to a lawyer's office, what one colleague there pungently styled "the pre-legal blah, blah, blah," is just as independent of the legal system that happens to be in place, as of the particularly limiting analytic structures which that system employs, and that a lawyer therefore has to learn to use in order to be an effective professional. The students get this quickly.

Two principal courses of the first year bring this home. McGill teaches neither "Contracts" nor "*Obligation*," but "Contractual Obligations"; "Extra-contractual Obligations" captures what we would call "Torts," and what the French might call "*Delit*." These courses are organized around a series of presenting problems: Have the parties reached what the law will recognize to be a binding accord? What kinds of injuries will be recognized as warranting legal redress and to what extent? Code provisions and cases addressing these problems are presented as data to animate the discussion. Neither civil nor common law has priority; both are simply there, as both the majority rule and minority rule might be in the common law context.

Stating the case isn't an early priority. I heard it done in only one September class I visited. And when cases are discussed, they are discussed as illustrations of the law's intellectual structures, much as this morning Jack stressed that he does. People aren't asked, at least not yet, to put *this* case together with *that* one, or to explore the possibilities of meaning in a statutory or codal text. What are explored, rather, are the intellectual structures that law brings to the resolution of disputes, and the difficulties those structures present. One McGill professor explained to me that 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 moment when one might be able to get them thinking about law in an intellectual and not in an instrumental way.

A few of the upper-class students I talked to remarked that they hadn't really come to appreciate either system, common law or civil law, until their second year. In that year they take courses in advanced common law and advanced civil law that focus on the workings of each

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 would need to have. But colleagues assured me that this is exactly what they intended. Students reach 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—the "pre-legal blah, blah, blah"—that might bring a person to a lawyer's office.

Under McGill's prior National Program, students had started with a year in one system, common law or civil law, and then spent their second year learning the other system. What the faculty found was that this produced adherents. If you started on the common law side, you became a common law lawyer who knew something about the civil law. If you started on the civil law side, you became a civil law lawyer who knew something about the common law. Keeping system-specific training largely for the second year has changed this. People might think that they know where they are going and prepare accordingly, as some of our students think they are going to California, and others to New York. But the school is neutral to this. It hasn't any stake.

Note in this a certain advantage for those of us who think 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 early draft of this talk put it this way: "Working across systems, students are made to understand how contingent law as a 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."

Now, one can't attend McGill's classes or explore its teaching materials without recognizing that McGill has some natural advantages. It is no accident that this happened in Montreal and specifically at McGill:

- Montreal is actually bi-lingual, as Canada is formally bilingual.
- In consequence, the literatures of two great legal traditions are easily available to students there.
- 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 that is highly conducive to collegial coordination and sacrifice.

- Finally, there is the history of building to this moment. Transsystemia didn't arise overnight. McGill only began offering a common law degree at all in 1970. Frustration with this first bijural program led to the National Program, which I just briefly described to you. Only after that program, too, revealed its inadequacies was the current approach adopted. The result is that the faculty has been teaching the two systems side-by-side and considering the results continuously, for more than three decades. This has made it a lot easier to explore new paths, and has reduced the intellectual capital that one must sacrifice in order to do so. This, in my judgment, is the primary reason for our own slowness to adapt. Intellectual capital is really at stake. People who have grown up learning and teaching the domestic law of the United States are suddenly faced with a need to do something quite different.

So, the other side of McGill's advantages are the obstacles that an American law school would face in moving to legal education that is as indifferent to systemic differences as ours now is to state lines within the domestic common law world:

- First, we can't rely on our students to be bilingual—much less in languages that fortuitously embrace two of the great legal literatures. This is a challenge for McGill, too, in a somewhat different way. They don't have the German literature, so there is a risk of confusing France with the civil law world. And, there are even larger difficulties when one moves from the comfortable juxtaposition of legal systems sharing deep cultural and social affinities to, say, aboriginal law, or a non-western system that is neither liberal-democratic nor market-oriented.
- Second, neither we nor our students have quite the same incentives, political or professional, as exist in Quebec. For us as teachers, perhaps the incentives are largely intellectual, and they do involve a great deal of effort. For our students, the incentives are perhaps more dependent on career path than may appear to a McGill student today.
- Third, and relatedly for us as experienced teachers, is that we would likely have more intellectual capital at stake than the McGill faculty had in making this change. Save for those of us whose self-identify as comparativists, that specialty that McGillians deny, our private law faculty is

> used to the common (that is to say, domestic) law. Our courts, some indicator of how we think about law, are rather less open than the Canadian to the consideration of external sources, even in matters of human rights. Our teaching materials are rich with comparison and depth already, but these are common law comparisons. It is a lot easier to continue in an accustomed path.

So, one can't expect to reach transsystemia overnight. Getting past the obstacles—particularly I think, the one of intellectual capital that so often obstructs our changes—is going to require ramps, not TNT. I might recommend a few strategies:

- The first one is faculty hiring. Hire young colleagues who are well-trained in civil law or even better, transsystemia, and put them in first year courses with encouragement to change them. We imported Keener from Harvard; most of us today regularly drink at the realist well of Yale. I wonder if tomorrow's source might be McGill. If you do this, the upper-class curriculum will take care of itself, as it has at McGill, where upper-class teachers just have to meet the expectations first year teaching has engendered. They don't have a choice about it.
- Second, a bit of promotion, consider as a second semester, first year course, one like that which my colleagues at George Bermann and Katharina Pistor are creating for Columbia with the help of Mark Drumbl of Washington & Lee. This is a stand-alone one semester course that revisits problems from each of the other first year courses through an international or foreign domestic law lens, thus requiring students to expand their field of vision. For myself, I would require this as a first year course; it is in my judgment utterly essential, for all of the reasons we have heard. And, I have to confess, my faculty has not yet reached the point of discussing this.
- Third, imagine some upper-class courses as transsystemic courses and staff them accordingly. Admiralty, conflict of laws, secured transactions—these are courses that come readily to mind. Of course, one can teach these courses in conventional ways, so you have to choose instructors 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. And, if that means reducing coverage in the conventional sense, which is in fact a common experience at McGill, that seems to me to be a reduction well bought.

- And finally, build for the long-term. McGill took over three-and-a-half decades to reach the point that it has currently attained, and that under the favorable conditions that I have talked about. Its leadership has self-consciously been building faculty to this end since the 1980's. With its success demonstrated and with teaching materials resulting (and also emerging from the West Conference last summer), others may not require as long—even given the differing obstacles we face. Yet we certainly can't imagine instantaneous change. NYU's Global Law Program may look quite different in the hindsight of 2020—that is to say, in the year 2020—than it does today.

Not every law school will or perhaps even should attempt so dramatic a shift. Cities, states and nation will continue to need lawyers whose training suits them to domestic practice. Schools make their choices. Mine has never offered a course in New York practice—a mistake, perhaps, as most of the other law schools in my state do offer such a course. On the other side of things, it may be that transsystemia will have less appeal to schools serving local or even regional bars, than to schools that invite the world and imagine their graduates dispersing widely throughout it. I think that this is going to be market-driven. Firms now hiring young lawyers, like those New York firms in the late nineteenth century, are going to favor schools that they find prepare their graduates well for the realities of their firms' practice, whatever those realities are. Some European law schools today, under national guidance, may still be teaching as if national law were the only law a well-trained lawyer needed to know. I wonder if they aren't going to find, if this continues, that their graduates are finding work principally in firms dealing only with problems of local law, and that the graduates of law schools in other places, Belgium say, are being hired for jobs that require more flexibility, broader understanding, a more European perspective. Or else their graduates, harboring broader ambitions, will find themselves having to seek supplementary education someplace else.

You can connect the dots.