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# *Toward Cosmopolitan Law*

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**Richard Janda\***

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The term “transsystemic law” was coined to characterize the study of law in which the McGill Faculty of Law has been engaged ever since it combined civil law and common law education into a single curriculum. In seeking to characterize and reflect on the possible significance of the transsystemic idea, the author draws on a parallel attempt to recharacterize the curriculum and study of philosophy undertaken by Jacques Derrida.

To reinvent the legal curriculum as a study of legal pluralism using transversal categories not proper to any particular jurisdiction or legal tradition opens up the concept of law itself and beckons us to revisit the relation between law and philosophy. Derrida had already discovered that to reinvent the philosophy curriculum involved in particular the need to overcome the division between continental and analytic traditions, moving beyond the idea of philosophic systems so as to seek out a paradoxical and charged cosmopolitan standpoint. For Derrida, the prolegomenon to this task involved revisiting and reinvesting the relation between philosophy and law. To teach transsystemic, cosmopolitan law is an attempt to fashion what Kant had called “the universal law of hospitality”: hospitality between law and other disciplines, hospitality among legal traditions, hospitality between guest and stranger. Hospitality is sought out and provided in the name of a certain emancipatory justice that would unconditionally provide for and forgive the debts we owe each other.

L’expression «droit transsystémique» a été imaginée afin de caractériser le mode d’étude du droit dans laquelle la Faculté de droit de McGill s’est lancée depuis qu’elle a combiné l’enseignement du droit civil et de la common law dans un seul et même cursus. En cherchant à définir et réfléchir quant à la portée possible de l’idée transsystémique, l’auteur s’inspire de la tentative parallèle de refondre le cursus et l’étude de la philosophie entreprise par Jacques Derrida.

Réinventer le cursus juridique en une étude du pluralisme juridique utilisant des catégories transversales n’appartenant pas à une juridiction ou tradition juridique spécifique revient à défricher le concept du droit lui-même et nous invite à repenser la relation entre droit et philosophie. Derrida avait déjà découvert que réinventer le cursus de philosophie impliquait en particulier le besoin de surmonter la barrière entre traditions continentales et analytiques, d’aller au-delà de l’idée de systèmes philosophiques afin de rechercher un point de vue cosmopolite paradoxal et tendu. Pour Derrida, au nombre des prolégomènes à cette tâche figurait la nécessité de revisiter et réinvestir la relation entre philosophie et droit. Enseigner le droit transsystémique et cosmopolite est une tentative de façonner ce que Kant avait appelé «la loi universelle de l’hospitalité» : hospitalité entre droit et autres disciplines, hospitalité entre traditions juridiques, hospitalité entre hôte et étranger. L’hospitalité est recherchée et offerte au nom d’une certaine justice émancipatoire qui rembourserait et oublierait les dettes que nous nous devons les uns aux autres.

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## Introduction

A rather ill-tempered 21 October 2004 obituary in the *Economist* that marked the death of Jacques Derrida concluded with an observation and a remark: “In his final years he became increasingly concerned with religion, and some theologians started to show interest in his work. God help them.” Something similar might have been observed about Derrida’s latter-day writings on law. The philosopher might perhaps have smiled at the thought that although jurists have as much reason to be interested in his work as do theologians, they have less right to invoke God’s aid when approaching a text like *Du droit à la philosophie*.<sup>1</sup> Yet approach this text I will, because it offers a privileged position from which to consider what it means to pose law’s questions afresh in a new programme of study that would emancipate law from the authority of jurisdiction; that is, to engage in transsystemic legal inquiry. More precisely, obliged as we are to identify what it is that we seek to privilege in McGill’s new programme of study for law, we have the privilege of attending to how and why Derrida felt obliged to discuss the relation between law and philosophy in proposing a new programme of study for philosophy.

The title, *Du droit à la philosophie*, was first proposed twenty years ago when Derrida gave a seminar on the occasion of his appointment as director of the Collège international de philosophie.<sup>2</sup> The philosopher was about to be charged with a legally constituted function—and not for the first time. That investiture prompted him to reflect on how law traversed philosophical institutions and was therefore the ground of the possibility of philosophy. Derrida thus began to trace a disciplinary inversion in which philosophy, the architectonic science, found itself tributary to law, instituted as it were by that which it claimed to institute. As he pursued this reflection in subsequent years, he kept the title for his 1990 tome and both delimited and augmented it for the 1997 essay *Le droit à la philosophie du point du vue cosmopolitique*.<sup>3</sup>

There is an engaging polysemy to the words “droit à la philosophie” that cannot be captured in a single English phrase. The first sense concerns the movement “From Law to Philosophy”: “Il s’agira plus précisément encore du rapport des structures juridiques qui soutiennent, implicitement ou explicitement, les institutions philosophiques (enseignement ou recherche) à la philosophie *elle-même*, si quelque chose de tel existe en dehors, avant ou au-delà d’une institution.”<sup>4</sup> Derrida is prepared

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<sup>1</sup> (Paris: Galilée, 1990). The discussion that follows focuses principally upon the first essay, “Privilège: Titre justificatif et remarques introductives”.

<sup>2</sup> See the introductory footnote in *ibid.* at 9.

<sup>3</sup> (Paris: UNESCO, 1997).

<sup>4</sup> Derrida, *Du droit à la philosophie*, *supra* note 1 at 12 [emphasis in original]: “To be more precise, it will have to do with the relation between the juridical structures that support, implicitly or explicitly, the institutions of philosophy (teaching or research) *with* philosophy *itself*, if such a thing exists outside, before or beyond an institution” [translated by author]. For the reader’s convenience,

to treat the relationship between juridical structures and philosophy on the jurist's terms, acknowledging that his title is also a contract—a contract between law and philosophy, and also a contract that is promised “à plus d'un paradoxe.”<sup>5</sup>

A first paradox is already lurking in the relationship between a law that renders philosophy possible by placing it in an institutional setting and a philosophy that renders law possible by identifying its idea. Further paradoxes lurk in the other readings that can be given to the title.

A second reading given to the title concerns the need to speak “Of Law to Philosophy”—Derrida adds as an afterthought “to speak to philosophy of law.” Here Derrida remains on the outskirts of what a jurist would call the philosophy of law, through which the jurist appropriates a province of philosophy. Rather, Derrida has in mind a pedagogical task aimed at having philosophers become engaged by the questions of law. He identifies “l'énorme continent de la problématique juridique,”<sup>6</sup> a territory about which philosophers speak too little. Philosophers in the past have spoken of law and claimed it within the province of their inquiry, but this territory is one that contemporary philosophers have been reluctant to survey; they have forgotten how “immense et foisonnante” it is.<sup>7</sup> There are the makings of a dispute as to who will successfully claim that territory, philosophers or jurists, and thereby establish their right, their *droit*. Philosophers are being asked to return to a territory the grandeur of which they can perceive, better perhaps than the jurists who have occupied and administered it.

A third reading given to the title, which might occur first to the jurist, is somewhat startling: “Of the Right to Philosophy”. What kind of right is this? What does it mean to have access to philosophy guaranteed by law? For whom and against whom is it claimed? This formulation is all the more remarkable in that “right” is linked to philosophy itself, not to an individual's effort to conceive it or to express it, as in the case of freedom of conscience or expression. It suggests access to a private or public domain where philosophy is found, to places where the activity of philosophy is conducted, and to institutions and media that convey it. It also suggests that philosophy forms a conceptual unity to which one can have access. In other words, the acknowledgement of a right to philosophy entails singularity, identity and generality to philosophy, the very possibility of which raises vexed questions for philosophy itself, and leads Derrida to ask who can legitimately pretend to speak for philosophy. Yet Derrida himself did, first in 1982 when he co-chaired the mission that led to the founding of the Collège international de philosophie, and then in 1989, when he co-chaired the Commission de réflexion pour l'épistémologie et la philosophie, which proposed a grand reorganization of education in philosophy

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whenever quoting the original in French, I provide an English translation in the footnote. Unless otherwise indicated, all translations are mine.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* at 13: “the enormous continent of the juridical problematic.”

<sup>7</sup> *Ibid.*: “vast and luxuriant”.

extending all the way to kindergarten. In those two settings, he was able to speak legitimately on behalf of philosophy because of official mandates conferred on him according to French law. If curricular reform is the foundation of a right to philosophy, it also exemplifies the relation between law and philosophy.

The fourth, adverbial sense given to the title concerns whether it is possible to proceed “Right to Philosophy”, that is, directly, without any form of detour. Derrida casts doubt on whether it is still possible—despite what some believe—to philosophize “tout droit”,<sup>8</sup> implying therefore that it was possible, or at least believed possible, to do so in the past.<sup>9</sup> If philosophy is now mediated by upbringing, teaching, philosophical institutions and indeed by language, it loses its immediacy and hence any guarantee that it might have to being universal or natural. Proceeding right to philosophy would be the shortest distance between two points—from here to universality—and thus would allow philosophy to be conducted *sub specie aeternitas*. Yet, proceeding right to philosophy, without curve or deflection, invokes rectitude as a governing principle for philosophy. That, too, is a form of mediation. Furthermore, if rectitude is a characteristic of law in its strict sense, then philosophy is already being rendered juridical when it directly seeks out its own pure form.

Derrida sought to unravel those four readings of “droit à la philosophie”, at first privileging law so as to sketch the curriculum and contemporary mission of the study of philosophy. My purpose will be to unravel those four readings of “droit à la philosophie” in reverse order, at first privileging philosophy to sketch the curriculum and contemporary mission of the study of law in relation to justice. In particular, these four readings cast light on four ideas that have haunted some of our latter day thoughts about law at McGill: (1) legal pluralism; (2) transsystemism; (3) cosmopolitanism; and (4) instrumentalism. The form of legal pluralism for which transsystemic legal inquiry has an instrumental purpose is cosmopolitan law; transsystemic legal inquiry seeks to move law toward cosmopolitan law.

## I. Legal Pluralism

Were it possible to proceed right to philosophy without recourse to language or norms of communication, then the only law of immediate concern to philosophy would be natural law—or as Derrida puts it, “plus radicalement un ‘droit’ avant l’opposition *physis/nomos*.”<sup>10</sup> Under such circumstances, “la philosophie aurait le droit de parler du droit et non l’inverse.”<sup>11</sup> The pretense of a singular, universal jurisdiction of philosophy with respect to law would entail that any heterogeneities of law, any differences of instantiation, would be erased by self-legitimizing philosophy. Because philosophy would be concerned with law in its original, natural, universal

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<sup>8</sup> *Ibid.* at 14: “directly” or “right away”.

<sup>9</sup> His example here is René Descartes: see *ibid.* at 14, n. 1.

<sup>10</sup> Derrida, *Du droit à la philosophie*, *supra* note 1 at 49: “more radically a law prior to the opposition between nature and convention.”

<sup>11</sup> *Ibid.*: “philosophy would have the right to speak of law and not the reverse.”

sense—Derrida privileges Kant’s account of “strict law” (*das stricte Recht*) to illustrate such an approach<sup>12</sup>—, it would ascribe no axiomatic significance to legal pluralism. Legal pluralism would only be an assemblage of particular manifestations of law’s nature, and law’s nature would be found within the idea accorded to original reason (*logos*). Legal pluralism would fall entirely into the realm of convention: derivative, contingent, and subject to the infinite variability of historical and political contexts. Philosophy, embodying law’s *logos*, could claim to institute law; law, by capturing and rendering philosophy’s assumed jurisdiction, could in turn express itself as originating from a singular norm or principle. Philosophy would teach law to subordinate pluralism to a universal juridical idea and origin. Law, governing itself according to philosophy, would call that origin its “*grundnorm*”; its ongoing unfolding and elaboration would be called law’s “State”.<sup>13</sup>

But here a curious inversion of roles would begin to unfold. Governing itself according to a universal philosophic origin, law could place everything, even philosophy, within its institutional confines: “Le juridisme consiste ici à étendre sans limite la question *quid juris*, même là où c’est à une compétence philosophique qu’il revient de dire le droit au sujet du droit, de déterminer l’essence du droit et le concept pur de droit, d’interpréter la fondation comme justification.”<sup>14</sup> Derrida’s friend, Jean-Luc Nancy, identified a “*lapsus iudicii*” as emerging “parce que la philosophie se pense—*se dit*—selon le droit.”<sup>15</sup> Law subordinated to philosophy re-emerges as master of philosophy. According to Derrida, “l’hégémonie du juridique consiste précisément dans l’effacement ou plutôt dans le re-trait du ‘proprement juridique’.”<sup>16</sup>

Thus the philosopher’s conceit that reason proceeds right to philosophy, that the procedure of philosophy brings right to it, can create a fissure in the idea of reason. In quest of unmediated, pure reason, philosophy seizes upon right reason. Philosophy finds its law. It does not simply find itself. In finding its law, it must acknowledge that it is governed. It is not unmediated as in its own original conception.

Unstable and paradoxical as the notion of proceeding right to philosophy might be, that notion nevertheless leaves its trace. It is, as it were, a dead end that must constantly be revisited. For it is by retreating from the notion of unmediated reason that we begin to privilege legal pluralism. But we bring legal pluralism into the

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<sup>12</sup> Introduction of the Doctrine of Right § E, discussed by Derrida, *ibid.* at 71-81. Derrida here draws extensively on Jean-Luc Nancy’s *L’impératif catégorique* (Paris: Flammarion, 1983). Indeed, he dedicated this essay to Nancy.

<sup>13</sup> The jurist Hans Kelsen read Kant in this way. See Hans Kelsen, *Pure Theory of Law*, trans. from the 2d ed. by Max Knight (Berkeley: University of California Press, 1967).

<sup>14</sup> Derrida, *Du droit à la philosophie*, *supra* note 1 at 90: “Legalism consists here of a limitless extension of the question *quid juris*, even where it lies within the competence of philosophy to pronounce rightfully on the question of law, to determine the essence of law and the pure concept of law, to interpret the foundation as a justification.”

<sup>15</sup> Nancy, *supra* note 12 at 55: “because philosophy thinks itself—*calls itself*—according to law.”

<sup>16</sup> Derrida, *Du droit à la philosophie*, *supra* note 1 at 90, n. 2: “juridical hegemony consists precisely in the effacing or rather in the re-tracing of the ‘properly juridical’.”

foreground, paradoxically, still under the spell of the idea that law is governed according to an origin in universal reason.<sup>17</sup> Were that pretence inoperative, were it not also inscribed in law, there could be no point to revealing legal pluralism by unmasking what Rod Macdonald has called “legal monism” (the notion that law is a singular entity), “legal centralism” (the notion that law emanates uniquely from the state), “legal positivism” (the notion that law can be stated in definitive form) and “legal prescriptivism” (the notion that law resides in a prescription external to oneself).<sup>18</sup>

In this way, conceptions of legal pluralism are revealed to be the bastard children of law’s mediation of philosophy.<sup>19</sup> But for what Derrida calls the “iteration” through which law and philosophy trade roles in giving right to each other, legal pluralism would have no significance; it would simply be multiple instantiations of law’s contingency. If, on the contrary, law mediates philosophy, law can speak of philosophy as philosophy speaks of law. There is no singular, pure, jurisdiction in philosophy. Thus, the original, most radical, significance of legal pluralism resides in the absence of a singular origin for philosophy. Derrida emphasizes that this insight is gained from observing philosophy’s reliance on *quid juris*. By mediating philosophy, law undermines philosophy’s rectitude and invests it with the plurality of convention. Yet law’s mediation of philosophy is only revealed by reason’s attempt to proceed *right to philosophy*, which procedure gives law its language. Even to speak of an original, radical, universalist legal pluralism shows how indelibly the attempt to proceed right to philosophy leaves its trace. Here legal pluralism still trades on an idea of “strict law”, Kant’s definition of which Derrida repeats: “la possibilité d’une contrainte réciproque complète s’accordant avec la liberté de chacun suivant des lois universelles.”<sup>20</sup> This definition can be re-read as making the universal plural: what is universal is the freedom of each to apprehend what the universal law is and to choose to be bound by it.<sup>21</sup> Everyone is a source of law. The possibility of such a re-reading may have led Kant to exclude that text from his “system” and leave it in his Remarks, an editorial choice that intrigues Derrida.<sup>22</sup>

In light of the iteration of law and philosophy revealed by the philosopher Derrida, what should we now privilege in our conception of legal pluralism? Once it

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<sup>17</sup> It is therefore striking that Rod Macdonald has in the past chosen the expression “universalist polyjurality” to express the idea of transsystemic law: Roderick A. Macdonald & Jason MacLean, “No Toilets in Park” in this issue of the McGill L.J. at 732, n. 33.

<sup>18</sup> Roderick A. Macdonald, “Here, There ... and Everywhere: Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden” in Nicholas Kasirer, ed., *Mélanges Jacques Vanderlinden* (Cowansville, Qc.: Yvon Blais) [forthcoming in 2006]. See also Martha-Marie Kleinhaus & Roderick A. Macdonald, “What Is a *Critical* Legal Pluralism?” (1998) 12:2 C.J.L.S. 25 and Roderick A. Macdonald & David Sandomierski, “Against Monopolies” [forthcoming in N. Ir. Legal Q.].

<sup>19</sup> See Derrida, *Le droit à la philosophie du point de vue cosmopolitique*, *supra* note 3 at 33.

<sup>20</sup> Derrida, *Du droit à la philosophie*, *supra* note 1 at 78: “the possibility of a complete reciprocal constraint that accords with the freedom of each to be bound by universal laws.”

<sup>21</sup> This theme is taken up by Jean-Luc Nancy in *Être singulier pluriel* (Paris: Galilée, 1996).

<sup>22</sup> See Derrida, *Du droit à la philosophie*, *supra* note 1 at 84.

is acknowledged that we return to pluralism only after confronting the paradox of an unmediated, universal philosophical foundation for law, it must also be acknowledged that legal pluralism presents its own paradox. Insofar as it preserves law's hypertrophy or hegemony, denying that there is *in principle* any domain to which the *quid juris* question does not extend, legal pluralism reasserts a universality of law and thus, by a second iteration, paradoxically restores philosophic inquiry into a singular natural law, now understood as a basis for all inquiry.

We are thus left privileging an inquiry into the paradoxes of mutually constitutive singularity and pluralism in law. That inquiry entails, to begin with, that we should investigate the circumstances under which legal pluralism is legitimately enabled in and confined to a public domain. A public domain is not any domain of human endeavour: it is a place to come to share what might be pursued for need, for advantage, for love, for art, for religion, or for philosophy, but it is not need or advantage or love or art or religion or philosophy. Thus, for example, there can be philosophy in the public domain, but the public domain does not rule philosophy. It would not be a hypertrophy of law to ask *quid juris*, by what right or norm, philosophy comes into the public domain. It should remain a dubious hypertrophy of law for it to ask by what right or norm philosophy is philosophy.

More pointedly still, an exploration of mutually constitutive singularity and pluralism in law would unravel how each plural order comes to claim completeness and singularity in its own domain. The characteristic form of coexistence among plural legal orders is conflict of laws or persuasive authority rather than a challenge or invitation to provide a new point of origin for law; to start law afresh.<sup>23</sup> Philosophy for its part would seem to involve an invitation, perhaps even a solemn duty, to start afresh at seeking a point of origin. Even to follow philosophically persuasive authority, or to identify and delimit conflicts with other philosophic doctrines, always represents the possibility of a new departure for philosophy. When law is founded—not simply re-interpreted or re-formed—, one legal order is dissolved and another is put in its place. What might be called the conservation of legal personality is overcome precisely where a legal order itself creates a public domain in which new legal personality is enabled but confined, as in the case of incorporation. To the contrary, of course, a legal order, albeit one of many, may seek to exclude the creation of new legal persons in its midst, thus acting as a brake on legal pluralism. Whereas formal exclusion of legal pluralism is always countered by its informal proliferation in the private choices of individuals, the topology of legal pluralism is shaped and altered by the effort within a legal order to gain and exercise jurisdiction.

Most pointedly of all, an exploration of mutually constitutive singularity and pluralism in law would acknowledge the rupture and connection between law and

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<sup>23</sup> See H. Patrick Glenn, "Persuasive Authority" (1987) 32 McGill L.J. 261 and Gunther Teubner, "Dealing with Paradoxes of Law: Derrida, Luhmann, Weithölder" in Oren Perez & Gunther Teubner, eds., *On Paradoxes and Inconsistencies in Law* (Oxford: Hart, 2006) 41 (emphasizing the centrality of conflict of laws for Weithölder—all law is conflict of laws).



justice revealed most clearly when law is instituted through a founding and justifying moment.<sup>24</sup> We have already noted that the most radical significance of legal pluralism lies in the absence of a singular origin for philosophy. This is because philosophy is mediated by law as it seeks to proceed right to law. Were it able to proceed directly to law without mediation, philosophy would give a universal foundation to law. There would be no rupture between law and justice. But *logos* is not up to this task. As Derrida puts it, “there is never a moment that we can say *in the* present that a decision *is* just (that is, free and responsible), or that someone *is* a just man—even less, ‘I am just.’”<sup>25</sup> Each founding seeks to proceed right to law without mediation, achieving by violence what cannot be achieved by *logos*. In such violence lies what Derrida calls, following Pascal and Montaigne (hence drawing upon philosophical authority), the mystical foundation of authority.<sup>26</sup>

## II. Transsystemism

The assertion of a right to philosophy is an act of humility—almost of contrition—on the part of the philosopher who acknowledges law’s mediation of philosophy. By asserting a right to philosophy, philosophy seeks law’s attention and must make out a legitimate claim on law’s terms. And it is strikingly difficult to make out that claim. Derrida acknowledges that part of the difficulty of the case resides in the apparent Eurocentrism and linguistic bias with which philosophy is expressed; i.e., by what right can one speak of a right to philosophy if this is an eminently particular, not universal, claim? Indeed, with uncharacteristic frustration, *piqué à vif*, he begs us “d’essayer de déplacer le schéma fondamental de cette problématique en se portant au-delà de la veille, fatigante, usée, usante opposition entre l’eurocentrisme et l’anti-eurocentrisme.”<sup>27</sup> But even if he could overcome the charge that philosophy is Eurocentric, Derrida acknowledges a deeper challenge: “À l’intérieur de chaque langue, européenne ou non, ce qu’on appelle la philosophie doit se lier régulièrement et différemment selon les époques, les lieux, les écoles, les milieux sociaux et socio-institutionnels, à des procédures discursives distinctes et souvent difficiles à traduire entre elles.”<sup>28</sup> To assert a right to philosophy as a democratic right, “il faut y être formé.”<sup>29</sup> The right to philosophy becomes an abstruse, inaccessible and hidden right

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<sup>24</sup> See Jacques Derrida, “Force de loi: le ‘fondement mystique de l’autorité’ / Force of Law: The ‘Mystical Foundation of Authority’” (1990) 11 *Cardozo L. Rev.* 920 at 940-45 [Derrida, “Force de loi”].

<sup>25</sup> *Ibid.* at 961-63.

<sup>26</sup> *Ibid.* at 942.

<sup>27</sup> Derrida, *Le droit à la philosophie du point de vue cosmopolitique*, *supra* note 3 at 31: “to attempt to displace the fundamental scheme of this problematic by moving beyond the old, tired, tiresome, wasted and wasting opposition between Eurocentrism and anti-Eurocentrism.”

<sup>28</sup> Derrida, *Du droit à la philosophie*, *supra* note 1 at 53: “Within each language, European or non-European, that which we call philosophy must bind itself regularly and differently according to epochs, places, schools, social and socio-institutional milieux, to distinct discursive procedures that are often difficult to translate between each other.”

<sup>29</sup> *Ibid.*: “one must be educated for it.”

dependent upon indoctrination. The architectonic science is thus reduced to being a litigant with a weak case, trying to cast indoctrinated philosophic pluralism as a universal right.

The challenge posed by philosophy's indoctrinated pluralism is illustrated through what Derrida calls its canonical example. If the canonical example of legal pluralism is the coexistence of civil law and common law traditions, the canonical example of philosophy's pluralism is the coexistence of continental and analytic (or anglo-saxon) philosophic traditions. Derrida calls the coexistence of these two traditions "un immense problème et une énigme pour les philosophes européens ou anglo-américains qui y sont formés."<sup>30</sup> These traditions are testimony to a breach in philosophy and are constituted by what Derrida calls "[u]ne certaine histoire, notamment mais non seulement une histoire coloniale."<sup>31</sup> The two philosophic traditions have been constituted as hegemonic points of reference throughout the world. So as to engender a universal accessible right to philosophy, Derrida charges philosophy with a preliminary task: the displacement and the "deconstitution" of these hegemonies.<sup>32</sup> The task is to move beyond—or perhaps out from under—indoctrinated systems of thought. In this respect, philosophy must become transsystemic if it is to assert a right to philosophy. Derrida insists that the effort to practice such a transsystemic philosophy involves democratizing philosophy and is in the name of a democracy of the future.

In this new relationship between law and philosophy, the jurist is no longer labouring to derive particular norms from philosophy's universal maxims. Law lends right to philosophy and philosophy lends transcendence to law: hence transsystemic law. This provides the occasion to reconceive the relation among legal right, legal tradition and legal system. For the philosopher to ask about the right to philosophy engages the jurist in a parallel inquiry into the right to law, or what we would call access to justice. That inquiry into fundamental rights is intimately connected to a transsystemic methodology, which concerns displacing and de-constituting legal traditions. As is true of deconstruction altogether, the displacement and de-constitution of legal traditions involves their reappropriation and reinscription back within law. Transsystemic law is a project of deconstruction.

Just as for Derrida transsystemic philosophy involves a renewal of education in philosophy, so too transsystemic law involves a renewal of education in law. But it is also a project of juridical inquiry and ought to become a form of legal practice. As concerns the renewal of legal education through transsystemic law, it is instructive to consider the outlines of the programme of education at the Collège international de philosophie, of which Derrida was elected founding director in 1983.

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<sup>30</sup> Derrida, *Le droit à la philosophie du point de vue cosmopolitique*, *supra* note 3 at 35: "an immense problem and enigma for European or Anglo-Saxon philosophers who are educated in them."

<sup>31</sup> *Ibid.*: "[a] certain history, notably but not only a colonial history."

<sup>32</sup> *Ibid.* at 36.

The report that led to the creation of the Collège urged a movement beyond interdisciplinarity, which it characterized as the study of a predefined subject using the separate methodologies of distinct sciences.<sup>33</sup> As necessary as interdisciplinarity was, it could not itself push out the frontiers of research. Instead, “[le] motif de l’intersection ou du croisement serait une sorte de charte pour le Collège.”<sup>34</sup> This last phrase remains the Collège’s motto to this day. Derrida devotes the first page of his own “Coups d’envoi” (“Kick-offs”) for the Collège to insisting that his proposals for teaching, pedagogy and education would be neither systemic nor doctrinal.<sup>35</sup> Whereas the idea of philosophic “system” would constitute one of the themes and problems for study at the Collège, the institution would not impose a system on its research. Derrida refers to “la coordination non-systémique” as characterizing his proposals.<sup>36</sup> Under the rubric of “traduction, transfert, transversalité” he expresses cautious support for comparative philosophy, identifying it an empirical, uncertain term, but without doubt requiring pride of place at the Collège.<sup>37</sup> He urges a philosophical “transcontinentalité” so as to overcome what seems to have become incommunicable between philosophic traditions.<sup>38</sup> In short, there is a family resemblance between Derrida’s pedagogical project for the Collège and the project of transsystemic education, which contains the kernels of transdisciplinarity, non-systemic and non-doctrinal pedagogy, empirical comparative law, and the opening of communication and exchange among the world’s legal traditions.<sup>39</sup>

What Derrida has to say about the theme of law and philosophy of law for the Collège deserves particular attention in a law faculty. Derrida suggests to begin with that the philosophic study of law ought to be situated by taking into account the legal problems posed by modern technological, economic, political and artistic trends and shifts.<sup>40</sup> He asserts that a number of themes that jurists would recognize from private law—the destination of property, gift, exchange and debt—are particularly well suited to that task. Again he offers cautious support for comparative, together with ethno-sociological and historical, approaches. But he insists that these “classical” approaches be supplemented by more innovative ones, such as what he calls “analyses ‘pragmatiques’ de la structure des énoncés juridiques.”<sup>41</sup> Destination of property, gift, exchange and debt can be investigated for what they tell us about how legal problems are raised by changes in modern life. Inversely, one can explore the

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<sup>33</sup> Derrida, *Du droit à la philosophie*, *supra* note 1 at 569. See also Margaret A. Somerville & David J. Rapport, eds., *Transdisciplinarity: reCreating Integrated Knowledge* (Oxford: EOLSS, 2000).

<sup>34</sup> Derrida, *Du droit à la philosophie*, *supra* note 1 at 569: “[the] motif of intersection or crossing would be a kind of charter for the Collège.”

<sup>35</sup> *Ibid.* at 580-81.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* at 611-16.

<sup>38</sup> *Ibid.* at 614.

<sup>39</sup> On the latter point, see H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 2nd ed. (Oxford: Oxford University Press, 2004).

<sup>40</sup> Derrida, *Du droit à la philosophie*, *supra* note 1 at 603; see also 555-556.

<sup>41</sup> *Ibid.* at 603: “‘pragmatic’ analysis of the structure of legal pronouncements.”

legal conditions of modern life: Derrida gives the example of the juridical conditions for constituting a work of art or the production and reception (proprietary destination) of those works. Those two simultaneous directions of philosophic inquiry (how does modernity pose problems for legal forms and how do legal forms constitute modernity?) reflect the entanglement of law and philosophy. The political, indeed theologico-political dimensions of modernity raise for Derrida a number of provocative and disparate lines of philosophical-legal inquiry, which he identifies in a non-exhaustive list:

les phénomènes de la société totalitaire, les nouvelles techniques de torture physique et psychique, les nouvelles conditions de l'investissement et de l'occupation de l'espace (urbanisme, espace naval et aérien, "recherches spatiales"), les progrès de l'informatisation, les propriétés et transferts de technologies, la propriété, la reproduction et la diffusion des œuvres d'art dans de nouvelles conditions techniques et compte tenu de nouveaux supports de production et d'archivage.<sup>42</sup>

A preoccupation first with how law both enables and constrains free, emancipated choice and, second, with how law both participates in and restricts social transformation appears to guide Derrida's choice of examples. The social transformation Derrida seeks to signal is the omnipresence of what he calls "pouvoirs techno-scientifiques".<sup>43</sup> It is accompanied by a putting into question of traditional juridical axioms such as the value of the subject, conscience, the responsibility of the individual and freedom. Derrida asserts that this transformation is of sufficient depth and significance to call for a new elaboration of the concept of law itself, of its axioms and of its international, public and private law domains. He singles out the law of international human rights as calling for a reconceptualization, something that French philosophy, with its tendency to hide behind the eloquence of classical human rights declarations, fails notably to acknowledge: "Si nécessaire qu'elles soient, de telles déclarations ne tiennent plus lieu de pensée philosophique."<sup>44</sup> The attempt to speak of a right to philosophy is Derrida's contribution to such a reconceptualization.

The jurist's response to Derrida's set of proposals for philosophic inquiry into law might be to claim disciplinary jurisdiction and to reappropriate them into legal inquiry. The emblematic text that Derrida invokes repeatedly as authority for a privileged and discrete role for the discipline of philosophy within the university is Kant's *Conflict of the Faculties*.<sup>45</sup> Kant had argued in favour of a faculty of

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<sup>42</sup> *Ibid.* at 603-04: "the phenomena of totalitarian society, the new techniques of physical and psychological torture, the new conditions of investment in and occupation of space (urbanism, maritime and air space, "space research"), the advances in information technology, the properties and transfers of technology, ownership, the reproduction and diffusion of works of art within new technical conditions, having regard to new support for production and archiving."

<sup>43</sup> See *ibid.* at 556.

<sup>44</sup> *Ibid.* at 604: "As necessary as they are, such declarations no longer stake out philosophic thought."

<sup>45</sup> See *ibid.* at 97, 101 and 554, as well as Derrida, *Le droit à la philosophie du point de vue cosmopolitique*, *supra* note 3 at 17.

philosophy to take its place beside the faculties of law, medicine and theology—that eighteenth-century university triumvirate. A faculty of philosophy would not claim competence with respect to the specific knowledge generated within the other disciplines, but at the same time it would claim the mantle of science of sciences: the philosopher would claim the right “de dire le droit au sujet de la totalité [des] savoirs et de l’essence du savoir en général, du sens de chaque région de l’étantité ou de l’objectivité.”<sup>46</sup> Once again law makes its appearance at the very moment philosophy stakes out its disciplinary claims. Philosophy asserts a right and states a law as it enters the territory of the university. If it is diminishing or even eclipsing the jurisdiction of any faculty, it is that of the law faculty. It thus becomes particularly pointed that in founding a new college of philosophy, Derrida reminds us of the eighteenth-century conflict of the faculties and proceeds to propose a curriculum in law for philosophy.

There is much that could be said, taking us far beyond the inquiry into transsystemic law, about how it is that the faculty of law has successively abandoned part of its jurisdiction within the university to other faculties and thus narrowed the compass of its own inquiry. It might be noted that whereas by now other sciences have staked out claims to the discovery and study of natural laws, it was Sir Francis Bacon, that brilliant but corrupt jurist, who laid out the programme for modern empirical natural sciences. Derrida’s apparently hegemonic ambition for philosophy in the legal domain might be explained as an effort to reverse law’s older hegemonic ambition. But it could also be explained as filling a jurisdictional vacuum left by law. Derrida can be read as asserting that philosophy must ask the questions about law that law will fail to ask itself.

Is it indeed the case that law will fail to ask itself how it is transforming modernity, how it is being transformed by modernity and how its own concept must be elaborated anew? Is not the project of transsystemic law—parallel to Derrida’s project of transcontinental philosophy—precisely the effort to elaborate the concept of law anew? If so, is it an overreaching of law into the jurisdiction of philosophy to do so or, on the contrary, would it be an overreaching of philosophy to elaborate a concept of transsystemic law?

Perhaps the first task of transsystemic law is to identify what it means for law and philosophy to share jurisdiction and for neither of them to conceive of itself as complete. If it becomes a task for any particular legal order to situate itself within plural legal orders, it must originally be a task, in conceptualizing law, to identify how law stands in relation to philosophy and indeed to other domains of inquiry. The project of transsystemic law should therefore become informed by the project of transcontinental philosophy, particularly at the point of intersection of the two. Derrida identifies that point of intersection quite clearly in proposing the terms of

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<sup>46</sup> Derrida, *Du droit à la philosophie*, *supra* note 1 at 100: “to state the law with respect to the totality [of] knowledges and of the essence of knowledge in general, of the sense of each region of beingness or of objectivity.”

reference for a philosophic inquiry into law. Uninformed by philosophy, the effort to conceptualize transsystemic law could dwell only upon finding points of intersection among legal traditions and characterizing commonality and difference in the relative stability of diverse legal forms. What might not be contemplated is that the very effort to traverse legal traditions is itself part of an effort to gain renewed purchase for law in the face of social transformation. It is an effort to reinvest law with the creative, emancipatory capacity to challenge the sources of power it serves to deploy. Conceiving of transsystemic law in relation to social transformation requires the intersection of law and philosophy.

How would transsystemic legal inquiry address the relationship between law and social transformation? To begin with, transsystemic inquiry would have to proceed in two directions at once, investigating how social transformations manifest themselves in legal forms and how legal forms enable social transformations. Thus, for example, a transsystemic inquiry into the law of contract would consider the ongoing reconfiguration of public and private spheres through the use of contractual arrangements linking these spheres. Classical conceptions of contract law anchor contract within the sphere of individual choice and characterize the contract as the reciprocal exercise of free will. The ongoing transformation of the state, characterized in part by privatization and contracting out, has redeployed contract as a means for importing public obligations into the private sphere and for pushing market incentives into the provision of public services. Taking a cue from Derrida's reading of Walter Benjamin,<sup>47</sup> one critical site for investigating that phenomenon would be the nature of contracts to provide policing services.<sup>48</sup> Within the legal pluralism of the state, the police can be left with authority to produce law beyond what they legitimately enforce. Contracts for policing services could be investigated both to inquire into how they instantiate the intersection of public and private domains and to discover whether and how they serve to legitimate the production of law by the police.<sup>49</sup>

Gathering together examples such as policing contracts, self-government agreements, public-private infrastructure partnerships, and university performance contracts, a transsystemic investigation of contract law would seek to evaluate the

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<sup>47</sup> Benjamin, "Critique of Violence" in Marcus Bullock & Michael W. Jennings, eds., *Walter Benjamin: Selected Writings* (Cambridge, Mass.: Belknap Press, 1996) vol. 1, 236.

<sup>48</sup> See Derrida, "Force de loi", *supra* note 24 at 1006-1015. See also Jacques Derrida, *Cosmopolites de tous les pays, encore un effort!* (Paris: Galilée, 1997) at 36-38 [Derrida, *Cosmopolites*], translated as "On Cosmopolitanism" in Jacques Derrida, *On Cosmopolitanism and Forgiveness*, trans. by Mark Dooley & Michael Hughes (London: Routledge, 2001) 1 at 14-15 [Derrida, *Cosmopolitanism*].

<sup>49</sup> An indication of the issues raised here can be found in Bruce Benson, *To Serve and Protect: Privatization and Community in Criminal Justice* (New York: New York University Press, 1998). See also "Policing Services", online: Privatization.org <[http://www.privatization.org/database/policyissues/police\\_local.html](http://www.privatization.org/database/policyissues/police_local.html)>. The Royal Canadian Mounted Police has long provided the lion's share of its services on the basis of "contract policing": see Canada, Solicitor General, *Partners in Policing: The Royal Canadian Mounted Police Contract Policing Program* (N.p., 1996), online: Public Safety and Emergency Preparedness Canada <[http://ww2.psepc-sppcc.gc.ca/Publications/Policing/pdf/199690\\_e.pdf](http://ww2.psepc-sppcc.gc.ca/Publications/Policing/pdf/199690_e.pdf)>.

democratic legitimacy of contractual forms that are reconfiguring public and private domains. It would of course compare examples from across jurisdictions and legal traditions to each other, and would compare the different sets of examples with each other. Comparisons would undoubtedly help to delimit the contours of the legitimacy problem, for example by revealing the different forms of more or less meaningful democratic accountability that accompany these contracts. But comparison is a prolegomenon to transsystemic legal inquiry, not its end point. Transsystemic law is much more than comparative law. Its most important and difficult task is to move beyond the confines of received, conventional forms and link up with a philosophic inquiry into the justice of the relationships that are expressed within those legal forms. But in so doing, it will complement philosophy's deliberate abstraction from the conventional realm—what Derrida calls philosophy's “droit à l'incompétence”<sup>50</sup>—with insight into the conventional realm.

### III. Cosmopolitanism

To speak of the intersection of philosophy and law suggests that they could exchange approaches and solutions at least to their canonical examples of plural traditions, and to the paradoxes of pluralism *tout court*. Transsystemic legal inquiry leads to a general practice of opening traditions and legal orders to each other and allowing them to live in each other's midst. Following Kant, Derrida calls such a universalist pluralism “cosmopolitanism”, and the practice it engages “hospitality”.<sup>51</sup> The Kantian *locus classicus* is the *Definitive Article in View of Perpetual Peace*: “The law of cosmopolitanism must be restricted to the conditions of universal hospitality.”<sup>52</sup> Derrida is prepared to follow Kant's characterization of this as a natural law, one that is imprescriptible and inalienable.

Yet cosmopolitanism and hospitality are no more unmediated than is philosophy itself. Indeed, in his reading of Kant, Derrida draws particular attention to the interplay of unconditional and conditional hospitality. The unconditional right of hospitality derives from what Kant calls the “the common possession of the surface of the earth.”<sup>53</sup> But access to that public good is itself conditional since it operates in finite space and does not permit infinite dispersion. As Derrida makes clear in a gloss on Kant, the public good excludes “ce qui s'élève, s'édifie ou s'érige au-dessus du sol: habitat, culture, institution, État, etc. Tout ce qui, à même le sol, n'est plus le sol, et même si cela se fonde sur la terre, ne doit pas être accessible à tout arrivant.”<sup>54</sup>

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<sup>50</sup> Derrida, *Du droit à la philosophie*, *supra* note 1 at 100: “right to inexpertise”.

<sup>51</sup> See Derrida, *Cosmopolites*, *supra* note 48. See also *De l'hospitalité: Anne Dufourmantelle invite Jacques Derrida à répondre* (Paris: Calmann-Lévy, 1997).

<sup>52</sup> Immanuel Kant, *Perpetual Peace: A Philosophical Essay*, trans. by M. Campbell Smith (New York: Garland, 1972) at 137-38, cited in Derrida, *Cosmopolitanism*, *supra* note 48 at 19.

<sup>53</sup> *Ibid.*

<sup>54</sup> Derrida, *Cosmopolites*, *supra* note 48 at 53: everything that is “erected, constructed, or what sets itself up above the soil: habitat, culture institution, State, etc. All this, even the soil upon which it lies,

Hospitality is delimited by boundary conditions and by property. It accords to the peaceful stranger the right of entry, but only invites the stranger in as a resident on the basis of treaty, thereby giving rise to a continued and necessary interplay of public goods and boundaries. Cosmopolitanism operates within boundaries, though these boundaries are not impervious.

Derrida acknowledges that the effort to transform the law and make it more just remains confined by the interplay of conditional and unconditional hospitality. The limits of conditional hospitality are fixed by the plurality of laws, without which the unconditional natural law of hospitality would remain a mere aspiration.<sup>55</sup> Derrida envisages a process of experimentation through which the plurality of law could test the limits of conditional hospitality. How close could we come to the point at which the refuge and sustenance granted to the stranger would acknowledge the stranger's claim upon all that is mine? Although Kant had set an apparently modest goal for cosmopolitanism, Derrida suggests that more is required by justice and "une démocratie à venir".<sup>56</sup> They could even require that at least within what he calls cosmopolitan "cities of refuge", domestic philosophical and theological conceptions of law not only accommodate those of strangers, but open themselves to the possibility of being transformed by the presence of strangers.<sup>57</sup>

#### IV. Instrumentalism

To undertake a conceptual movement from law to philosophy means having philosophy receive law as a source for philosophy. Whereas philosophy identifies cosmopolitanism as the ideal toward which law tends, law gives further impetus to philosophy by prescribing for it albeit conditional cosmopolitan norms of hospitality, norms that lend instrumentality to philosophy. The intersection of law and philosophy does not permit the mere contemplation of the phenomenon of law by philosophy. Philosophy inquires into the gulf that will never be bridged between law and justice, but nevertheless acknowledges the task of expressing justice through law. Philosophy is thus led to consider the normative setting in which its concepts can gain instrumentality, conjoin theory to practice, ends to means, and therefore to venture into prescribing purposes with which law should align. What follows is a brief catalogue of Derrida's programmatic and instrumental legal prescriptions, beginning

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is no longer soil pure and simple, and, even if founded on the earth, must not be unconditionally accessible to all the comers" (as translated in Derrida, *Cosmopolitanism*, *supra* note 48 at 21).

<sup>55</sup> Derrida, *Cosmopolites*, *supra* note 48 at 57. Here Derrida echoes Pascal's famous dictum: "la justice sans la force est impuissante; la force sans la justice est tyrannique" ("justice without force is powerless; force without justice is tyrannical"). For a discussion, see Derrida, "Force de loi", *supra* note 24 at 935-43.

<sup>56</sup> Derrida, *Cosmopolites*, *supra* note 48 at 59: "a democracy to come" (as translated in Derrida, *Cosmopolitanism*, *supra* note 48 at 23).

<sup>57</sup> See Bruno Latour, *War of the Worlds: What About Peace?* (Chicago: University of Chicago Press, 2002) and Bruno Latour, "Whose Cosmos, Which Cosmopolitics? Comments on the Peace Terms of Ulrich Beck" (2004) 10 *Common Knowledge* 450.



with those that link philosophy to law and proceeding to those of wider juridical ambition.

*Du droit à la philosophie*<sup>58</sup> records Derrida's efforts, pursuant to legal mandate, to formulate an elaborate programme for the support of philosophy by the French state. This included a not altogether auspicious convocation of the *États Généraux de la philosophie*, at which Derrida was exposed directly to the use of force to maintain the operation of a legal institution.<sup>59</sup>

*Le droit à la philosophie du point de vue cosmopolitique*<sup>60</sup> reflects upon the kinds of cosmopolitan legal institutions within which philosophy might be enabled and pursued. It is a UNESCO publication that was derived from a UNESCO lecture, and offers the outlines of an agenda for UNESCO's role in support of philosophy. The apparently narrow reach of UNESCO's instrumental role initiates a further inquiry into the potential for cosmopolitan institutions.

*Cosmopolites de tous les pays, encore un effort!*<sup>61</sup> analyzes how the transsystemic refuge of ideas requires cities of refuge. It proceeds to elaborate the ways in which the right of hospitality must be extended to refugees.

*Spectres de Marx: l'état de la dette, le travail du deuil et la nouvelle Internationale*<sup>62</sup> is a retrospective on the promise of justice in Marx after the fall of communism in Europe. Derrida condemns the notion that liberal democracy has achieved an end of history, and points out ten "plagues" on the new world order: unemployment, the exclusion of the homeless and the exiled, trade wars, market failures, foreign debt burden, the arms and drug trade, nuclear proliferation, inter-ethnic wars, mafias, and the incoherent, unequal application of international law.<sup>63</sup> These plagues lead Derrida to call for a "New International" that would entail "une transformation profonde, projetée sur une longue durée, du droit international, de ses concepts et de son champ d'intervention."<sup>64</sup>

*Force de loi: le "fondement mystique de l'autorité"*<sup>65</sup> explores the gulf between law and justice, insisting that justice is always to come and always exceeds law and calculation.<sup>66</sup> Yet because justice must be rendered into law and calculated, Derrida insists that law must preserve within itself an emancipatory ideal that allows a reconsideration of law's foundations: "Cela fut vrai par exemple à la Déclaration des droits de l'homme, à l'abolition de l'esclavage, dans toutes les luttes émancipatoires

<sup>58</sup> *Supra* note 1.

<sup>59</sup> For Derrida's version of the altercation with Bernard-Henri Lévy, see *ibid.* at 548-49.

<sup>60</sup> *Supra* note 3.

<sup>61</sup> *Supra* note 48.

<sup>62</sup> (Paris: Galilée, 1993).

<sup>63</sup> *Ibid.* at 135-39.

<sup>64</sup> *Ibid.* at 140: "a profound transformation, projected over a long period, of international law, of its concepts, and of its field of intervention."

<sup>65</sup> *Supra* note 24.

<sup>66</sup> *Ibid.* at 968-71.

qui restent et devront rester en cours, partout dans le monde, pour les hommes et pour les femmes. Rien ne me semble moins périmé que le classique idéal émancipatoire.”<sup>67</sup>

*On Forgiveness*<sup>68</sup> explores the Truth and Reconciliation process in South Africa and produces what must rank as Derrida’s most ambitious aspiration for law: “What I dream of, what I try to think as the ‘purity’ of a forgiveness worthy of its name, would be a forgiveness without power: *unconditional but without sovereignty*. The most difficult task, at once necessary and apparently impossible, would be to dissociate *unconditionality* and *sovereignty*.”<sup>69</sup> The boundary conditions of cosmopolitan hospitality concern sovereignty. As currently conceived, unconditional public goods, notably those for which we forgive debts, are thought to pool sovereignty. Derrida would have us imagine effacing sovereignty altogether with respect to unconditional public goods.

## Conclusion

In presenting such a dream for philosophy and for law, Derrida acknowledges that he remains true to the spirit of the Enlightenment and that he remains a Kantian. Law gives to philosophy its impetus to fashion a practice of justice, and philosophy gives to law its impetus to fashion emancipatory institutions. Transsystemic legal inquiry should follow this impetus. If it is to be oriented toward a justice to come, transsystemic law will have to elaborate a practice of hospitality among plural legal orders. Derrida teaches us that law’s instrumentalism is not to be found in achieving justice directly among those plural orders. Rather, transsystemic, cosmopolitan law should seek to sustain the development of pluralist institutions that can continue to be refashioned for a future of justice. This entails that there be a practice of cosmopolitan law, and not simply a posture or perspective that is cosmopolitan. A cosmopolitan jurist will acknowledge that any apparent alignment of justice with law remains illusory because it will ultimately be revealed as inherently incomplete and generative of new injustices. Nevertheless, this jurist will accept responsibility for participating in the stewardship of actual, living, breathing social institutions because it is only through engagement with them—including their realignment and rupture—that the future of justice, of which hope and faith form constituent elements, can be pursued. Such an instrumentalism is surely to be embraced.

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<sup>67</sup> *Ibid.* at 970-72: “This was true for example in the Declaration of the Rights of Man, in the abolition of slavery, in all the emancipatory battles that remain and will have to remain in progress, everywhere in the world, for men and for women. Nothing seems to me less outdated than the classical emancipatory ideal” (*ibid.* at 971).

<sup>68</sup> In Jacques Derrida, *On Cosmopolitanism and Forgiveness*, trans. by Mark Dooley & Michael Hughes (London: Routledge, 2001) 25.

<sup>69</sup> *Ibid.* at 59 [emphasis in original].