Beyond Nation and Law: A Manifesto
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It is my great privilege to stand here today to honor the Dickson Poon School, its Transnational Law Institute and its director my friend and colleague Peer Zumbansen on this auspicious occasion. I know that I stand between you and the reception to follow, and with that in mind I will make my remark brief and perhaps more pointed than is my usual practice.

There is a certain ritual in discussions of transnational law. This ritual is built upon worries about situating transnational law within the contemporary ideological structures of "law-through-the-state." It is the essence of the ritual to produce a revelation transnational law by inventing a connection to or a derivation from out of the state—that enterprise that now passes for the entirety of the reality from out of which emerges "law." I am a great advocate of ritual; it is a useful performance and affirmance of orthodoxy. But I mean to look to a quite different orthodoxy: to that end I want to invert the conventional ritual and situate law and the state within the transnational.

To situate law and the state within the transnational, it is necessary to start with law in the state but to embed it within a more authoritative and broader context. When I teach a course which is called Introduction to U.S: Law and Legal Systems, I usually start with the fundamental question: what is law? That inevitably leads to a consideration of law's fundamental normative principles. Let's call it a cluster of normative values around a concept of justice, and its process components, certainty and predictability.

But quickly we come to understand justice and process as relational and contextual. Justice is understood in relation to the values of the community which would bind itself by a set of values and process is understood as just or fair in the context of the transaction or occurrence to which it relates. These relational and contextual elements are well in evidence in the formative sources of the great legal systems of global civilization. Justinian's Institutes speak to justice as giving every man his due (now of course better understood in gender neutral terns, to give everyone their due). Marxist Leninist systems speak to justice as bound up in the societal movement toward the establishment of a communist society. Religions speak to justice as a connection to a relational connection to a divine or natural source. Even the most rigid system takes as its starting point a relation between ideal and the realities of the communities to which it is directed or form which it arises.

This insight usually then tales us back to the key frameworks around which the relational and contextual can be fixed. It takes us back first to custom and tradition, and through it, to fundamental notions of consent. The former expresses the lived realities of the community, the

way it practices its rules and values. The latter touches on the assent to the practices which are performed. This assent comes in a variety of forms, from an internalized and socialized embrace of practices and values, to the mere forms of consent that must be policed by an outside force; and everything in between.

From custom, tradition and consent, we layer law's systemic character. These include its disciplines, usually classified by a variety of types—in Anglo America these include the usual fields of tort, contract, criminal, family law etc. And it also includes the architecture of its expression—again in Anglo-America these include common law, equity, statute, administrative regulation and decisions, and privatized authority.

Only then—only after one has exposed the normative architecture of law in and of itself; only after one has developed its self-referencing expressive forms—only then do we introduce the state and its institutional apparatus into the discussion. This introduction has important consequences. It diminishes law from an architecture of behaviors to an object and expression of politics. With the introduction of the concept of the state, one can see how the original concept of law mutates and shrinks. The effect can be understood in two principal respects. First it shrinks as a set of self-referencing practices and values autonomous of the state because it is now bound by and reduced to the outer boundaries of the ideological expression of the state—that is law is reduced to consequential expression of politics. Its expression is practices through state managed remediation mechanics and it is generally subject to its oversight—but more deeply, it is reduced to only that conception possible and compatible with the conception of the state itself. Second, it shrinks as an instrumental institutional expression of the state itself. It is in this sense that the ideology of the state merges law into it; law and the state merge and in the merger law becomes an instrument, an expression, of the state, which is itself the expression of a politics that has acquired a specific form within a specific territory. Law ceases to be a thing in itself; it is rather the means by which the state expresses itself. The context and relational aspects of justice become the context and relational aspects of justice within the state and its institutional apparatus.

But the introduction of the state also complicates law in another way. It requires the production of another law—a law of laws that binds law to the state and the state to law. This is rule of law in its institutional context. T is with the introduction of the state that also a meta-legality is necessary. This meta legality is all the more needed the more completely law is subsumed within the institutional apparatus of the state. We understand this meta-legality as constitutional law; and it is no surprise that this constitutional meta-law arises with the constitution of the state itself from out of the rubble of the more disordered sovereignties of the age that preceded the French and American revolutions.

Further, meta-legalities also produce another consequence—the need for communications among these reified law systems now incarnated as states. If law is the state and the state is law, then a language of personal relations must be developed. There is a horizontal language—the language of comparative law—that makes communication among those subject to states possible. And there is the language of international law, a law that makes relations among states and between them, that permits concerted action when it suits, all the more possible.

So. . . . when we speak to law, generally, we have come to assume that it is embedded within and expressed through the state. This becomes the unremarkable reality of a remarkable appropriation. That appropriation is made possible by the insinuation of an ideology of politics—of the character, nature, power and status of the state, into the ideology of law. That ideology transforms the former into the incarnation of popular will and vests that popular will with an extraordinary instrumental power over its customs and traditions. And it transforms the latter from an autonomous expression of the accumulated expressions of norms to the instrument of the expression of will as managed by and through the apparatus of state—managed by only by a representative body but by that singularly powerful apparatus of regulatory and administrative mechanisms to which law has been delegated, and thus delegated, absorbed into its own body. The ideology of the state is, as well, the transformation of law from normative expressions of justice to the managed cage within which administrative discretion may be exercised. If law is the state and the state is law, one must also admit that both are now exercised as discretionary applications by the apparatus of the state itself.

Our conceits about, and the construction of, a political ideology of the state has appeared to fuse law and the state in a permanent union and in the process diminished law. We have come to believe that law wears the collar of the state. On the manner of the ancient way on which law referenced a married couple by identifying the husband by name and the wife merely by status—John Doe et uxor, contemporary ideology speaks to the the name of the state by name. . . . and its law generically.

But Philip Jessup, innocently enough, as he sought to embed those human activities that could not be confined to the state, or even among them, within the state, began a process that has proven that the union of law and the state is not merely loveless, but that it is also a perversion that explains only a small, though potent enough, part of what law is.

And thus my provocation: half a century from now, in gatherings like this one, our grandchildren may look back and marvel at the lunatic arrogance of a project that sought to confine law in and to the state in the manner that our twentieth century thinkers found so mindlessly without problem.

They may conclude that the madness of the Enlightenment, of metastasized scientism, of Napoleon and Marx, and Anglo-American pragmatists, and those who followed hem, who sought to classify and confine law to the state—for that is what their ideological lenses constrained them to see—that this ideological madness did the enterprise of law a great injury.

They may also conclude that the law that binds people, communities, enterprises, states—indeed that the law that binds itself—is not merely transnational, but that it is trans institutional as well.

They may further conclude that one ought to study the "law of and in the state" in the way we presume today to approach the study of transnational law. That would presume that this law of the state be treated as a subset of a much broader and more complex terrain of governance with an infinite variety, scope, jurisdiction, and practice. That would further presume that this law of and in the state would be subsumed within a common set of meta principles that distinguish law from other forms of compulsion, and from the exercise of personal discretion applicable to a

range of law attached and detached front he state. But it would also require acknowledging that such a radical inversion of the study of law of the state within the transnational rather than the study of transnational law attached to or derivative of the law of the would require a change in the approach to the way in which we understand politics, representation, consent and justice. And with that we return to where we study—the consideration of the connection between law and justice, not between law and the state.

They would also conclude that principles of polycentric governance—of the simultaneous and coordinated application of systems of law to objects, persons, conditions and transactions, will reorient and help broaden the increasingly inadequate mechanics of conflicts of law—itself confined to the state—and thus overturn the differential privileging of non-state actors as "law makers."

And lastly, they might conclude that arguments over the character of transnational law—as method, field, substance, etc.—fail to recognize the meta-characteristics of transnational law as a description of the entire field of law itself. And thus the inversion of our ritual is complete.

In his Twilight of the Idols, Nietzsche once famously worried about the four great errors—of inverting cause and effect, of false causes, of imaginary causes, and of the illusion of free will. The relationship today of the law of state to transnational law reminds one of at least the first three of these errors. The contemporary rituals that serve as the acceptable discursive patterns around the "transnational" invert the cause and effects of law as it constructs an ideology built on the assumption that law derives from the state rather than the state deriving from law. It perpetuates the false causation built on a notion of transnational law that is conceived as possible only through the state and only as a means of ordering communication between and among the legal orders of states. It imagines a causality grounded in a first principle of state. That imaginary redefines law as something that cannot exist, as such, beyond the state. And it supposes that states acquire a free will to order their domestic law when such a possibility is both illusory and especially for states down stream of global production chains largely fantasy.

In the face of the realities of globalization, which itself might be understood as an effort to return to a more "natural" state of law, we academics do ourselves a great harm by continuing to serve as the shills of an ideology that itself may be remote from reality. To fail to acknowledge the emerging realities makes us complicit in the production of ideologically necessary constructs of inverted, false or imaginary cases in the service of a peculiar and quite specific view of the state—but not necessarily of law.

And thus a manifesto of transnational law.

Thank you.