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"Is There (Should There Be) a Law and Humanities Canon?"

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Abstract
This commentary considers the question of whether there is, or should be, a law and humanities canon by exploring the identity and value of the field and querying the concept of canon itself as an authoritative cultural technique of intellectual and social reproduction. I argue that the common trait which binds works in the field of law and humanities together is the connective 'and', which is inimical to the concept of a canon. Thinking with Barbara Hernstein Smith's work on value and evaluation, Hans Ulrich Gumbrecht's elegiac criticism of canons and classics, and Frantz Fanon's understanding of personal universality, I show that the notion of an inclusive or 'global' canon is an oxymoron and argue that it ought to be resisted.

Keywords: canon, classics, law, humanities, value, evaluation, authority, cross-disciplinarity, inclusion, exclusion

The field of law and the humanities encompasses a range of sub-disciplines of laws, the various disciplines of the humanities, different national, international backgrounds, and distinct interdisciplinary and cross-disciplinary academic cultures. What binds these diverse approaches and institutional backgrounds together is the interest in the meaning of law and legalities in the widest possible sense as an object of inquiry and the building and sharing of a space for discussing how to go about such a work. Law and humanities scholarship in the Anglophone academe has emphasized the linguistic and indeterminate nature of legal concepts and practices. It has interpreted their meanings drawing upon insights from philosophy, literature, literary theory, rhetoric, history, art, music and social theory.[1] Not

[1] James Boyd White, *The Legal Imagination*, Boston: Little Brown, 1973; Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (New Haven, CT: Yale University Press, 1996); Austin Sarat and Thomas Kearn (eds), *The Rhetoric of Law* (Ann Arbor: University of

only have legal language and texts been privileged sites and forms of observation, but also other cultural forms and media, such as film, image, music.[2] It has comprised historical, ethical and rhetorical analyses of law's promises of justice, with particular emphasis on the violence of law's language.[3] In the non-Anglophone academic contexts of the broad field of law and the humanities, scholars have studied law as text, image and performance,[4] as cultural techniques shaped by the specificities of law's media that have been informed by Roman, common and civil law traditions, [5] as well as by continental theories that seem to be less employed in the American law and humanities scholarship.[6] Here and there, many scholars within the field have been informed by Derrida and a certain reading of Foucault,

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Michigan Press, 1996); James Martel, *The One and Only Law, Walter Benjamin and the Second Commandment* (Ann Arbor: University of Michigan Press, 2014); Marianne Constable, *Our Word is Our Bond: How Legal Speech Acts* (Stanford: Stanford University Press, 2014); Anat Rosenberg, *Liberalizing Contracts. Nineteenth Century Promises Through Literature, Law and History* (London: Routledge, 2019).

[2] Desmond Manderson, *Songs without Music: Aesthetic Dimensions of Law and Justice* (Berkeley, CA: University of California Press, 2000); Cornelia Vismann, ""Rejouer les crimes". Theater vs. Video," *Cardozo Studies in Law and Literature* 13 (1) (2001): 119-135; Sara Ramshaw, *Justice as Improvisation*: *The Law of the Extempore* (London: Routledge, 2013); Peter Goodrich and Valerie Hayaert (eds) *Genealogies of Legal Vision*, Routledge, 2015; Desmond Manderson (ed.) *Law and the Visual: Representations, Technologies, Critique*. (Toronto: University of Toronto Press, 2018).

[3] Walter Benjamin, 'Critique of Violence', in *Reflections: Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1978); Robert Cover, "Violence and the Word," *Yale Law Journal* 95 (1986): 1601; Austin Sarat (ed.) *Law, Violence, and the Possibility of Justice*. (Princeton: Princeton University Press, 2001); Marianne Constable, *Just Silences: The Limits and Promises of Modern Law* (Princeton: Princeton University Press, 2007); Jennifer Culbert, *Dead Certainty: The Death Penalty and the problem of Judgment*, Stanford: Stanford University Press, 2007; Linda Ross Meyer, *The Justice of Mercy* (Ann Arbor: Michigan University Press, 2010); Robert Meister, *After Evil: A Politics of Human Rights* (New York: Columbia University Press, 2011); Jill Stauffer, *Ethical Loneliness: the Injustice of Not Being Heard* (New York: Columbia Uniersity Press, 2015).

[4] Béatrice Fraenkel, *La Signature, Genèse d'un Signe* (Paris, Gallimard, 1992); Pierre Legendre, "Of Texts", in Goodrich, Barshack, Schütz, eds. *Law,Text, Terror* (London: Glasshouse Press, 2006); Pierre Legendre, *God in the Mirror. A Study of the Institution of Images* (London: Routledge, 2018, orig. 1994).

[5] Cornelia Vismann, *Files. Law and Media Technology* (Stanford: Stanford University Press, 2008, org. 2000); Cornelia Vismann and Markus Krajewski, 'Computer Juridisms,'*Grey Room* 29 (2007): 90-109; Fabian Steinhauer, 'Kulturtechniken des Rechts', in A. Funke & K. Lachmayer, eds, *Formate der Rechtswissenschaft* (Weilerswist-Metternich: Velbrueck Wissenschaft, 2017).

[6] Tim Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (Oxford: Clarendon Press, 1997); Anton Schuetz, 'Thinking the Law With and Against Luhmann, Legendre, Agamben', *Law and Critique* Vol. 11 (2) (2000): 107–136; Yann Thomas, *Les Operations du Droit*, Paris: Gallimard, Seuil, 2011; Alain Pottage, 'Law after anthropology: object and technique in Roman law', *Theory, Culture and Society*, 31 (2-3) (2014): 147-166.

particularly their characterization of law as possessing an indeterminacy that opens up spaces of ambiguity and relative resistance.[7] This commentary cannot adequately render a full picture of the rich and outstanding works that have been identified or produced as part of the scholarship in law and the humanities, but only attempt to give a partial and necessarily personally inflected perspective on what makes this body of scholarship and community of scholars distinct in comparison to others.

What characterizes law and the humanities socially as a unique and precious field of inquiry and community are the open-mindedness and the spirit of scholarly exploration without disciplinary barriers and institutional turf fights. These qualities are testaments to the intellectual and personal qualities of the scholars that make this field so engaging and rewarding. The community is growing and will continue to grow, as long as it remains an inclusive and intellectually stimulating group of diverse scholars. Such an open space is rare in light of today's increasing professionalization of legal pedagogy and the challenges posed to the value of open-ended and critical inquiries in both the humanities and academic studies of law. But perhaps this intellectual freedom and generosity might also be a reflection of the relative institutional and political weakness of our field; in other words, the genuine, open-ended, intellectual exchanges can flourish precisely because there are no internal institutional powers and disciplinary boundaries to fight over.

The question of whether there is or ought to be a law and humanities canon itself appears to be based on an understanding of law and the humanities as a sufficiently delineated and matured field, as an organisation or line of scholarship that has reached a certain stage of institutionalization. It seems to presume that the field resembles a discipline, although one of a multi-disciplinary nature. For an academic canon can only act as a 'rule' or 'standard', as in the Greek origins of the word, as far as there is sufficient authority to back it, be it in the form of academic status or institutional power of a self-identifying group with a sufficient degree of identity. Such an authority may be individual or collective. Beyond the question of whether such a power exists, it is also surely only effective as long as it is recognized as

[7] Jacques Derrida, “Signature Event Context." in *The Rhetorical Tradition: Readings from Classical Times to the Present*, eds. Patricia Bizzell and Bruce Herzberg (Boston: Bedford/St. Martin's, 2001): 1475-1490; Foucault's conceptualization of power/knowledge encompasses disciplinary force, but also contains a source of resistance, see: *History of Sexuality*, Vol. I. (New York: Pantheon, 1987), pp 94-97.

being an academic and disciplinary power by the group of people at which a canon would be directed. It is by no means clear whether the field of law and the humanities is, can, or should be a discipline of some sort, whether it is and/or ought to act as an institutional authority of academic credit, even if it possessed such power of evaluation, and lastly, whether its authority would be recognized and accepted for the canon to be taken up.

I. Law and the humanities as a montage

Why has the question of canon been posed now? Does a canon reflect the maturity, generation, evolution of a field into its institutionalisation, or does a canon actively push for maturity and institutionalisation, which it may not have, or perhaps does not want to have? Although law and the humanities denotes an intellectual orientation and a field of inquiry reaching beyond the confines of the annual Association for the Study of Law, Culture and the Humanities (ASLCH) conference, the latter's historical development provides an indication of the growth of the number of scholars who identify their work or their research interests as pertaining to a combination of the parts of 'law', 'culture' and the 'humanities'. Over the last twenty-two years, the ASLCH annual meetings have approximately quadrupled in size in terms of the number of registered participants.[8] It is in the context of this growth, that the commentary has been invited to think about what "texts/questions/debates knit the field together" and whether there is, or should be, a law and the humanities canon.

If we think of the field as a "knit", we could ask what knitting technique makes the yarn hang together, and whether there are multiple yarns or a single one, which is continuously woven into a larger piece. There may be different colours, patterns and holes. But perhaps a different metaphor that could be used to think about the multidisciplinary field of law and the humanities is a montage. Various constitutive elements are visible in a montage and remain independent from the overall whole. Also the individual parts may or may not come together to form a harmonious composition. There is not a single originator or scholar who knits a pre-chosen design, but multiple contributors who attach bits and pieces of their work in different places, as well as detaching the parts that they no longer seem to fit. The beauty of a montage

[8] The 20th Annual ASLCH Meeting at Stanford Law School in 2017 was the largest one with approximately 340 participants. Thanks to Karl Shoemaker for the information.

is that it is an emergent aggregate and an evolving whole of distinctive, independent elements. The logic of a montage is the 'and': every piece has a double identity of a whole *and* a part of a whole. The montage is composed of many 'ands'. If we approach law and humanities as an evolving montage, the question is: what is the glue that makes the montage stick together? The literal adhesive is the 'and'.

In the context of law 'and' literature, Desmond Manderson has asked: "What exactly does "and" mean?"[9] He identifies three meanings of the conjunctive. It could mean two separate genres, in which, for example, literature provides a different or deeper insight into law.[10] Differently, law can be understood *as* a narrative, rhetoric, art or improvisation.[11] Alternatively some scholars seem to understand literature *as* law, or improvisation *as* law, music *as* law, film *as* law.[12] These different understandings can exist side by side and are not necessarily exclusive. However, they presuppose and produce different understandings about the nature of the conjunctive in law *and* the other genres, such as literature or art. The second and third understandings posit a metaphorical or metonymical relation, in which law is a social, cultural genre, not inherently different to the others to which it is analogized. Here, differences - legal, rhetorical, visual - are deemphasized. Inversely, the first approach differentiates between law and the 'other'; in other words, its analytical value derives from positing difference between the kinds of knowledges and by holding on to an ontology of law's or music's particularity, however constructed it may be. If there is one common trait amongst these approaches, it is the un-disciplining of the disciplinary closedness of law on the one hand, as well as the humanities, to a certain degree, to another. It seems that one part of the equation - the deconstruction of law - is working well in the field of law and the

[9] Desmond Manderson, "Making a Point and Making a Noise: A Punk Prayer," *Law, Culture and the Humanities* 12(1), 2016: 17-28, p. 18

[10] Martha Nussbaum, *Poetic Justice* (Boston, MA: Beacon Press, 1996; Anselm Haverkamp, *Shakespearean Genalogies of Power* (London: Routledge, 2010); James Martel, "The Law is Not a Thing," *Law Text Culture* Vol. 23, Special issue on Legal Materiality, forthcoming.

[11] For example, Peter Goodrich, "Law and Language: An Historical and Critical Introduction," *Journal of Law and Society* 11, 1984; Susan Sage Heinzelman, "Imagining the Law: The Novel," in Austin Sarat, Matthew Anderson and Catherine Frank, eds. *Law and the Humanities: An Introduction* (Cambridge: Cambridge University Press, 2010); Sara Ramshaw, "The Paradox of Performative Immediacy: Law, Music, Improvisation', *Law, Culture and the Humanities* 12 (1), 2016: 6-16.

[12] Desmond Manderson, *Kangaroo Courts and the Rule of Law* (London: Routledge, 2012); William MacNeil, *Lex Populi* (Stanford: Stanford University Press, 2007); Austin Sarat, Lawrence Douglas, Martha Umphrey (eds) *Law on the Screen* (Stanford: Stanford University Press, 2005).

humanities, but the humanities seem to be left intact as a blackbox, or in quite broad, general disciplinary groupings: literature, music or visual art. Some of the few examples of how legal language and processes have been employed within other non-legal settings include works in the history of sciences (common law origins of the notion of 'fact' adopted as a natural science notion) and in anthropology (adoption of inscription as a likeness to legality).[13] As a change from "law and...", or "law as...", it would be also interesting to explore other possible directions of the conjunctive dynamic such as, for example, "historiography as legality", "academic disciplinarity as law", "exemplars and legal cases", "cruel optimism as affective law", "the "real" without law" etc.

As a field, law and the humanities encompass a vast number of relations that the connector 'and' can produce: all the disciplines and sub-disciplines of the humanities, as well as those of legal scholarship. Do all of these possible conjunctive problematizations have or require their own canons? Such sub-disciplinary specializations often delineate their boundaries through edited volumes exploring an emergent theme (often in journals) or consolidate them in an authoritative collection in the format of a book or in the proliferating genre of handbooks of different publishers (Routledge, Oxford, Sage come to mind) that attempt to give an overview of the debates within a field at a given moment in time. In university pedagogy in legal studies or in specializations in law and the humanities, assigned reading lists of introductory courses contain the individual instructor's choice of the key and recommended readings that characterize the field and the dominating issues within it. Beyond these different forms and techniques of reference, credit and consolidation, is a canon all that much different, or necessary? What would a canonization serve, and what would the significance of a canon be?

Connecting the growth of the annual meetings to the question of canon could imply that a canon could serve as a reflection of, or a tool for, coherence and cohesion within a field. There may be a sense that the field has grown without a sense of direction or that the design of the "knit" has gone wrong. The desire to take stock of the past and diagnoze the present constellation for the future is timely, for it raises the necessary question about the field's

[13] Barbara A. Shapiro traces the origins of the notion of scientific facticity to English common law procedures that were adopted in the experimental context at the Royal Society: *A Culture of Fact: England 1550–1720* (Ithaca, NY and London: Cornell University Press, 2003); James Leach, "Documents against 'Knowledge'; immanence and transcendence and approaching materials," *Law Text Culture*, special issue on Legal Materiality, Vol. 23, forthcoming.

values and identity. This is because a canon would possibly not only represent a snapshot of the most discussed or referenced works of a field, but would also involve an act of valuation and judgment. A canon would stabilize into a corpus the works judged as *having* been and *continuing* to be the most valuable. But who or what is to evaluate the value of the works, and how will it or s/he define the field? The question of a canon requires us to think about the value and valuation of scholarship in the field of law and the humanities. And such normative value and evaluative valuation may run counter one another. Whilst reflections about values of the overall field are necessary, or at least it should be clear what values the field should not serve, a canon would not only be an indication of normative values, but also an evaluation of the scholarly value of various scholarly works within the field. Such an evaluative exercise of judging a scholarly work's worth is fraught with problems.

There would need to be an agreement about how such evaluation would take place and who should conduct it. As Barbara Herrnstein Smith probed the "social contexts, functions, and consequences of all forms of aesthetic and literary evaluation, including their complex productive relation to literary and aesthetic value" in the context of literary studies,[14] we can pose the question: what are the contexts, aims and consequences of a canonical evaluation? Historically, canonisation has been a process to consolidate credit and power by individuals who have held powerful positions within a given field: church councils, the pope, the academy, or individual well-respected scholars. It would therefore be more accurate to understand the inclusion of works into a canon as privileges rather than preferences. A canon, even if its yardstick of evaluative measurement was understood as being adaptable or contingent, asserts the authority and hierarchical power of the group that sets it. But if we accept that there is no universalist or objective criteria of value of a work in the field,[15] it is not clear who or what interests a canon would serve. Is there jurisdiction for a canonical claim, in other words, is there a 'territory' to discipline? Even if there was no disciplinary territory as such, the claim of jurisdiction would be the constitutive act. A canon would then serve as a performative technique of registration of interest. And it would be understood to set a precedent of evaluation and recognition of worth. Even if the claim of the validity of judgment of the person or group determining a canon was rejected and the existence of transcendental truth and objectivity denied, a proposed canon could have the effect

[14] Barbara Herrnstein Smith, "Contingencies of Value," *Critical Inquiry*, Vol. 10 (1): Canons, 1983: 1-35, at p. 20.
[15] Lorraine Daston, and Peter Galison, *Objectivity* (Cambridge, MA: Zone Books, 2007).

normalizing the titles contained in it as the list of most valuable works amidst other less valuable, diverse reading lists, *a primus inter pares*. The value and status of canonized works are in a hermeneutic relation, as Barbara Herrnstein Smith notes, that are "continuously produced and re-produced by the very acts of implicit and explicit evaluation that are frequently invoked as "reflecting" its value and therefore as being evidence of it. In other words, what are commonly taken to be *signs* of literary [my insertion: or in our context of law and humanities scholarship] value are, in effect, also its *springs*."[16]

In the field of law and the humanities, the meaning of 'and' acts as the glue, which holds together the field as an un-disciplined montage of different disciplinary insights. If a value can be derived from the 'and', it would be an open-ended value plurality, an attribute which is better mediated passively rather than positively authored. The conception of a canon, in contrast, is a list that measures and judges the worth of scholarly works and which performs its own authority. Such an act of evaluative judgment, depending on the basis on which it is performed, may be incompatible with the value of the field - a montage conjoined by 'and' - itself.

II. Canon: from a rule to the reproduction of inheritance

In ancient Greek, a *kanṓn* denotes a straight rod or bar, and metaphorically it is a rule or standard of excellence. In classical Latin, a canon signifies a measuring rod and a ruler. Early Christians adopted the word *kanṓn* when judging which books of scripture they thought were best and deserved endorsement.[17] Later, in ecclesiastical use, the canon was the rule or law of the Church in the form of an authorized catalogue of sacred writings. Literary or aesthetic canons used to list names of authors, and after the rise of reading and reception in the early eighteenth century, they mainly comprised the titles of literary works.[18] Revisiting the so-called "canon wars" of the late 1980s twenty years later, a commentator noted: "the lines aren't drawn between right and left in the traditional political sense, but between those who defend the idea of a distinct body of knowledge and texts that students should master and

[16] Herrnstein Smith, p. 30.

[17] Bruce M. Metzger, *The Canon of the New Testament: Its Origin, Development and Significance* (Oxford: Clarendon Press, 1987).

[18] Hans Ulrich Gumbrecht, " "Phoenix from the Ashes" or: From Canon to Classic," *New Literary History* 20 (1), 1988: 141-163, p. 147.

those who focus more on modes of inquiry and interpretation."[19] Post-modern literary theory has pointed to the problems associated with canons and processes of canonization that posit universal values and normalize standards of evaluations at the expense and exclusion of others.[20] Canons, as well as the concept of 'classics', which could be understood as the "concretization of the canon phenomenon in our time", disregard the distinct temporalities and modernist framework in which literary and aesthetic works are embedded, so much so that a "canon in the traditional sense of the term has long since disappeared, and this deductive conclusion corresponds entirely to a tendency to qualify as "untimely" all attempts to establish an "aesthetic canon," whatever form it might take."[21]

A canon introduces a scale of measurement and assessment of works that may or may not be transparent and justified. The question is whether law and humanities scholarship is suitable to be judged according to certain values, at all, and if so, what its values, rules and measures ought to be. As Barbara Herrnstein Smith has noted, a canon does not only reflect a measure and judgment of value, but it also constitutes its own value by evaluating work. By forming a list of works held to be of value, a canon acts as a disciplinary technique: it inscribes a group's self-understanding of its past and its desired future direction in a list of works. A canon includes and excludes certain works. Canons normalize; in reverse, they can pathologize the non-canonical. But beyond the problem of agreeing on what constitutes a valuable work, in the context of law and the humanities, it is not clear what disciplines and institution(s) are included and excluded, and who believe themselves to have the authority to canonize works, and by what selective process. The process of canonization is prone to vulnerabilities as all acts of judgment: favoritism, unconscious bias, reputational inflation, sense of entitlement, moving signposts, myths of progress and functionalist consequentialism.

Canonization can also be a response to what is seen to be a challenge to a group's identity and status. For example, the Catholic canon was only finalized in 1545-1563 at the Council of Trent in light of Reformation.[22] A canon can build a group's authority and political power

[19] Rachel Donadio, 'Revisiting the Canon Wars', New York Times, 16 September 2007, referring to the controversy around the "Western canon" in parts as responses and reactions to Harold Bloom, *The Western Canon: The Book and School of Ages* (NY: 1994, Harcourt Brace).
[20] See the contributions of the *Critical Inquiry* issue on Canon, Autumn 1983 Vol. 10 (1); also Barbara Herrnstein Smith, *Contingencies of Value* (Cambridge, MA: Harvard University Press, 1991).
[21] Gumbrecht, p. 14.
[22] Philip Schaff, *History of the Modern Church, Volume VII, Modern Christianity. The German*

amidst the existence of diverse interests. In the context of law and the humanities as a field, a canon as an authoritative list of authors or works would discipline the diverse field of law and humanities into core and periphery, or inside and outside. The reasons for creating such a list of 'authorized' or most valued works could be a group's desire to get a better self-understanding of its history; it may seek to honour past works, particularly if someone feels that they are unjustly not sufficiently attended to and referenced by the community. In property terms, a canon resembles a deed to consolidate an interest, estate or patrimony, for establishing a certain intellectual tradition. Canonization acts as a constative act of institutionalization and discipline formation. It *makes* the field, as much as it may *derive* from the field. The aim of canonization is then to promote the continued recreation, both in pedagogical and intellectual senses, of a 'discipline', by constituting a tradition of evaluation.

In *Mythologies*, Roland Barthes had laconically remarked that Racine has remained Racine. Is it useful to mythologize that law and humanities canon *is* a law and humanities canon? Would a law and humanities canon have the mythic appeal and disciplinary force to act as a pedagogically useful guide to students and future scholars by putting a canonical stamp on their scholarly concerns of their own times? What kind of "particular competencies of communication, morality (whether individual or collective), and good taste",[23] to borrow Gumbrecht's analysis of the French Enlightenment canon, would a law and humanities canon promote, and who would feel authorized to judge over these values?
Canons functioned as tools of socialization in the Enlightenment in France and were used to "justify a mode of artistic and literary praxis based essentially upon the reproduction and stabilization of certain modes of behaviour".[24] The literary canon acted as a counter balance to a scientific teleology of progress, by keeping the history of literature and the arts bound to the principle of tradition. As long as the tradition is aimed at its own reproduction, the canon is likely to remain inherently conservative in its attitude. Herrnstein Smith writes:

> pedagogic and other acculturative mechanisms [are] directed at maintaining at least (and commonly, at most) a subpopulation of the community whose members "appreciate the value" of works of art and literature "as such." That is, by providing them with "necessary

Reformation (New-York: Charles Scribner's Sons, 1883, rev. version 1910). Available at: <http://www.ccel.org/ccel/schaff/hcc7.ii.i.ix.html, § 9. The Reformation and Rationalism>.
[23] Gumbrecht, p. 160
[24] Op.cit., p. 150

> backgrounds," teaching them "appropriate skills," "cultivating their interests," and, generally, "developing their tastes," *the academy produces generation after generation of subjects for whom the objects and texts thus labelled do indeed perform the functions thus privileged, thereby insuring the continuity of mutually defining canonical works, canonical functions, and canonical audiences*.[25]

In other words, canons are tools of an academic community to maintain and recreate a tradition as a function of privilege afforded to certain works, skills, interests, tastes and values. They serve pedagogical and disciplining goals seeking to refer to and recognize certain appointed works, and to cultivate interest and inclination towards the canonical themes, texts and authors. Canonization aims to generate a community whose members appreciate the value of the canonical works, mutually acknowledge their usefulness for a disciplined community, and perform and recreate these privileged traditions.
As part of the list or class of authoritative works, canonical works would be referred to more often than excluded works. Canonical works often endure - not because they are intrinsically valuable, but by virtue of their circulation and reproduction within a particular culture:

> Repeatedly cited and recited, translated, taught and imitated, and thoroughly enmeshed in the network of intertextuality that continuously *constitutes* the high culture of the orthodoxly educated population of the West (and the Western-educated population of the rest of the world), that highly variable entity that we refer to as "Homer" recurrently enters our experience in relation to a large number and variety of our interests and thus can perform a large number of various functions for us and obviously has performed them for many of us over a good bit of history of our culture.[26]

Homer is part of the Western canon and also a classic. Would the concept of classics, "the concretization of the canon phenomenon of our time,"[27] be a more temporally situated and less judgmental way to assign value to works than a canon? Although Italo Calvino's definition of a classic is culturally inflected, he insists that "I ought to rewrite it yet again lest anyone believe that the classics ought to be read because they "serve any purpose" whatever. The only reason one can possibly adduce is that to read the classics is better than not to read

[25] Herrnstein Smith, p. 23, my emphases.
[26] Herrnstein Smith, p. 30-31.
[27] Gumbrecht, p. 141.

the classics." [28] Such a definition of classic is deeply personal, and as long as it is employed for private pleasure, it will not have a normalizing effect. But also, such a private definition of a classic does not allow individual preferences in classics to be examined in their social and cultural pre-formations (Calvino admits that the classics "camouflage" in collective or individual subconscious). These can comprise intuition, or bias, of value and evaluations. In the academic disciplinary or inter-disciplinary contexts, classics - in their very status as classic, asking to be studied and referred to - can be as problematic as canons. Hans-Ulrich Gumbrecht, a literary theorist, argues that the concept of the classics shifts the source of authority from the author to the reader, but ultimately results in a similar temporal freezing of certain works as a canon does. The categorization of works as classics by publishers, he claims, has replaced the socio-cultural function of the academic canon: both serve to further "the development of particular competencies of communication, of morality (whether individual or collective), and of good taste".[29]

The notion of "undead texts" is another interesting category to think about possibly already existing or future canon-like lists in the field of law and the humanities, as it does not seem to presuppose disciplinary measurement or hierarchical value. Lorraine Daston, a historian of science, and Sharon Marcus, a scholar of English and comparative literature, characterize "undead texts" as scholarly, ambitious, erudite and much loved, but crucially as antidisciplinary texts, which are distinct from academic classics: "Scholarly but antidisciplinary as they are, Undead Texts have not become academic classics — works that continue to serve as disciplinary touchstones long after their footnotes have become outdated. ... Undead Texts and classics share the aura conferred by renown, but unlike their more venerable cousins, Undead Texts have lost stature over time."[30] They argue that the reason that undead texts have fallen out of favour is that their eclectic undisciplined

[28] "The classics are books that exert a peculiar influence, both when they refuse to be eradicated from the mind and when they conceal themselves in the folds of memory, camouflaging themselves as the collective or individual unconscious ... The reading of a classic ought to give us a surprise or two vis-à-vis the notion that we had of it. For this reason I can never sufficiently highly recommend the direct reading of the text itself, leaving aside the critical biography, commentaries, and interpretations as much as possible." Italo Calvino, "Why Read the Classics?" *The New York Review of Books* Volume 33(15), October 1986.

[29] Gumbrecht, p. 159.

[30] Lorraine Daston and Sharon Marcus, "The Books That Wouldn't Die," *Chronicle of Higher Education*, March 17, 2019.

methodology and form can no longer be accommodated within the highly disciplined institutional landscape of contemporary academy in which the meaning of scholarly has become the monopoly of the specialized disciplines to decide. Another reason for the demise of this category, Daston and Marcus contend, is the change in understanding of historicism, from the search for analogies, patterns and structures to the privileging of local contexts and incommensurable specificities:

> Under pressure from the encroachments of both economics and sociobiology, the humanities turned historicism into a shield against unwelcome reductionism — and a weapon against what were perceived to be reckless and politically regressive generalizations. Consequently, the very fields created by Undead Texts now fault them as being too quick to flag cross-cutting similarities and too slow to acknowledge differences.

The concept of undead texts may be the closest category resembling a hypothetical law and the humanities canon, but only as the field remains antidisciplinary, or undisciplined enough: undead texts are scholarly, but they do not fit neatly into any professional discipline; similarly, the field of law and humanities does not have a high degree of disciplinary professionalization and is an undisciplined - and perhaps also an antidisciplinary - field of inquiry. But this potential similarity aside, it seems to me that the distinctive tenets of law and the humanities scholarship - indeterminacy of language and symbolic communication - favour the particular over the general; they rarely attend to patterns and structures, but rather seek meaning in legal anomalies and gaps.

I want to return to the question posed earlier in the previous section about who and what values a canon will serve. The value of law and the humanities as a field of inquiry will correspond to the degree of intellectual depth and versatility, the quality of scholarly exchanges and the sense of openness it can foster for present and future scholars. But the field is not an island, and the emerging problematizations and approaches will be reflections of the changing temporal horizons and the social and political contexts in which law and the humanities are embedded. Beyond an officially sanctioned or recommended canon, Herrnstein Smith argues that what is valuable to a given group or individual transcends a single canon composed of distinct texts. She contends that a field's values will rather always refer to a totality of "texts, artefacts, objects, and events", which a canon is unable to

capture.[31] Defining a canon may help to re-conceive a discipline as an inherited tradition with an origin and source of authority, but this may result in the replacement of the current unruly, but productive cohesive - the 'and' - with an unsuitable alternative.

III. Can there be an inclusive, or 'global' canon?

"*My black skin is not the wrapping of specific values.*" (Fanon, 227)

In 1983, Barbara Herrnstein Smith chastised the shying-away from reflections about existing and implicit evaluative dynamics in literary studies, either by recourse to the facile excuse of the non-comparability of works, or by indulging in "the humanist's fantasy of transcendence, endurance, and universality."[32] In the context of literary evaluations, her analysis sketches an ambiguous picture in which the evaluative acts of canonization are driven by social positions of dominance, but the values themselves advocate complexity and openness for adaptation:

> The works that are differentially reproduced, therefore, will often be those that gratify the exercise of such competencies and engage interests of that kind: specifically, works that are structurally complex and, in the technical sense, information rich - and which, by virtue of those very qualities, are especially amenable to multiple reconfiguration, more likely to enter into relation with the emergent interests of various subjects, and thus more readily adaptable to emergent conditions.[33]

These attributes are in accordance with the cultural demands of the "culturally dominant members of a community" which seek to cultivate "not only a competence in a large number of cultural codes but also a large number of diverse (or "cosmopolitan") interests."[34]
In her analysis, works that are most structurally complex, open to multiple interpretations and emergent problematizations, will be the ones which will be continually reproduced and most likely to be included in a canon. What we may regard as "rich" works, however, reflect the dominant Western intellectual tradition by implicitly devaluing, anomalizing and

[31] Herrnstein Smith, p. 31.
[32] Op.cit., p. 10.
[33] Op. cit., p. 29.
[34] Op. cit.

abnormalizing other forms of works and objects that might not have these analytical and theoretical qualities (of structural complexity and richness of information) and which do not lend themselves easily to different settings and problems.
A *de minimis* suggestion of value plurality as one common value, that the field of law and the humanities could identify with, is fraught with problems then: what we may see as plural values, may already be in themselves denigrating and exclusive; whilst we have grown up with and cared for the works that we feel have allowed us to 'see more', we may have to acknowledge that such an enriched vision was still a vision of a particular totality; that perhaps instead of seeing more we need to see entirely differently, and that doing so would involve a radical questioning and reassessment of taken-for-granted values that have been associated with the academic scholarship in the field of law and the humanities.

Heeding the ethical call to see otherwise, imagine what the *opposite* spectrum of values would look like if we flipped the attributes that Herrnstein Smith has identified as canonical and ideologically and culturally dominant in the literary academe. If those dominant academic values were turned upside down, the most reproduced works would be works that have a simplistic structure, be thin on information, and precisely by virtue of those very qualities would *not* be amenable to diverse reconfigurations and *not* suitable for adaptation to emergent conditions. A valued academic work would perhaps be quite specifically focused on only one matter of observation, and the particular insights would not be transferrable to any other. Its contents would be definite and would not make any general claims of structure, epistemology or ontology beyond what it describes. Interests would foster only a fixed number of cultural codes and not transcend their object of inquiry. Such a thought experiment of academic value and valuation turned upside-down yields a strangely familiar picture.

When we extend the scale of value judgments from the context of one academic field, such as literary studies, or law and the humanities, to the perspective of the broader current international academic and political constellation, it seems that the very values of the academic community and scholarship at large have undergone change. Current conceptions of academic value are different from the ones which Herrnstein Smith analyzed in the early 1980s. The ones that she had identified as the "dominant" values, favouring complexity and richness, are in defensive retreat with socio-cultural accusations of elitism, intellectualism and expertise levelled against them, and the ones which favor clearly delimited solutions

("applications") with measurable and quantifiable "impact" have become more dominant.[35] Herrnstein Smith contends that we constantly value and evaluate, so it might as well be better not to deny the reality of these practices, but to critically reflect and articulate why we value what we do and how we do so. In light of the current political and economic challenges to scholarly approaches and works that engage with complex, ambiguous, speculative questions, scholarly fields that recognize and honour these endeavours are worth defending. In some academic cultures, the mode of valuation and the definition of academic value have been turned upside down since Herrnstein Smith's analysis. There might be hope in the realization that these 'new' values and evaluations, too, are necessarily contingent and will be subject to mutation and variation.

Could a canon be a way of reinforcing the values that we want to uphold? Could we use the genre of a canon to practice inclusivity instead of hierarchical authority? Even so, the questions of value and measure still remain and rile both those excluded from and included in a canon. The inclusion and exclusion of certain works from a canon or a list of classics does not equate to their values. As Herrnstein Smith points out, works that are deemed canonical do not necessarily embody the qualities of complexity and richness; and also in reverse, excluded works do not lack them. She cites Chinweizu's powerful riposte in 1977 to the argument that literary comparisons are "painfully irrelevant" as voiced by a reviewer in the Times Literary Supplement:

> Who says that Shakespeare, Aristophanes, Dante, Milton, Dostoevsky, Joyce, Pound, Sartre, Eliot, etc. are the last word in literary achievement, unequalled anywhere? ... The point of these comparisons is not to thrust a black face among these local idols Europe which, to our grave injury, have been bloated into "universality"; rather it is to help heave them out of our way, clear them from our skies by making clear ... that we have, among our own the equals and betters of these.[36]

[35] The subjection of all academics and their "outputs" to the regulatory evaluative frameworks of "research excellence" and "teaching excellence" in the UK academy amply testify this development, which, some contend, have hollowed out the traditional academic function of a university. See Stefan Collini, *What Are Universities For?* (London: Penguin, 2012).

[36] Chinweizu, Letter to the Editor, *Times Literary Supplement,* 15 July 1977, p. 871, quoted in Herrnstein Smith, p. 9. The Nigerian-born, American-educated writer and critic was responding to a review of Onwuchekwa Jemie's 1977 a study of Langston Hughes' poetry that argued that comparing Hughes' poetry to T.S. Eliot and Ezra Pound was to "err in judgment" ("In short, to fault one poem for not being more like the other, for not dealing with the matter and in the manner of the other, is to err

Here, the appeal to universality is one of inclusive universality, one that is not only Western, and demands to measure work on the same terms. For complexity is not only a universal Western criterion, as non-Western and non-classical musical traditions, such as the unplayed, 'essential' frameworks in Javanese gamelan music, exhibit more complexity and structural virtuosity than many of the classics of the Western classical music canons.[37]

The concept of universality is not an exclusive Western property. Frantz Fanon argued that the 'universal' can be a category of oppression, but also one of liberation from the persistent imaginaries of the 'particular' other. His conception of the universal in *Black Skin. White Masks* is not one of inclusivity or representation, but one of dialectical transcendence of the particular and the social universal into a personal, human universal beyond the vagaries of social recognition. Fanon stated that universal value has been far from universal; it has been a particular, white privilege: "The Negro is aiming for the universal, but on the screen his Negro essence, his Negro "nature," is kept intact...The Negro is universalizing himself, but at the Lycée Saint-Louis, in Paris, one was thrown out: He had had the impudence to read Engels."[38] The only option left to escape the racist and colonial framings is to reach for the universal" "through one human being":

> As I begin to recognize that the Negro is the symbol of sin, I catch myself hating the Negro. But then I recognize that I am a Negro. There are two ways out of this conflict. Either I ask others to pay no attention to my skin, or else I want them to be aware of it. I try then to *find value for what is bad* - since I have unthinkingly conceded that the black man is the color of evil. In order to terminate this neurotic situation, in which I am compelled to choose an unhealthy, conflictual solution, fed on fantasies, hostile, inhuman in short, I have only one solution: *to rise above this absurd drama* that others have *staged* round me, to reject the two terms that are equally unacceptable, and, *through one human being, to reach out for the universal*.[39]

Fanon argues for the universal to escape the staged drama, but also at the same time, the

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in judgment"), which the book reviewer, in turn, criticized as "painfully irrelevant comparisons" in the *Times Literary Supplement*.

[37] Mark Perlman, *Unplayed Melodies: Javanese Gamelan and the Genesis of Music Theory* (Berkeley: University of California Press, 2004).

[38] Frantz Fanon*, Black Skin. White Masks* (London, Pluto Press, 1986, org. 1952), p. 186.

[39] ibid, p. 197, my emphases.

universal he invokes is approached "through one human being", which is not sanctioned or validated by a group or a collective. The social binary categorizations of dominant versus marginal or oppressed members of community do not always neatly overlap with the dichotomies of the west/the rest, and universal/particular. There are many more geographical and cultural gradations within those categories and ideological perspectives. In some non-Western (academic) frames of reference, certain works or artefacts may be highly valued, which in Western literary and academic contexts may be regarded as poor in informational value or lacking complexity and structure: lists, non-narrative notes, oral stories, or non-linguistic forms of knowledge, such as a song, gestures and rituals. Different texts or inscriptions also have different values in different scholarly cultures. For example, the reference points for scholarship in the Korean philosophical and literary 'canons' are different from those in, for example, the US or Germany. Not many, if any at all, are known outside the country, perhaps for reasons of lack of translation, but also for lack of interest. But now the Korean literary canons, and also even children's books, include many works of the 'Western canon', if not even more than in the Western academy itself. It would not be surprising to find similar phenomena in other intellectual traditions, although my conjectures would need much more substantive empirical research than this commentary can offer. As Fanon had analyzed, in the enculturated taste and matters of worth, the Western academy and cultural industry have remained economically most dominant. The persistent affective coloniality of the Western intellectual academe continues to create conflicting desires of both wanting and yet not wanting to be valued by the dominant group.

The question of whether a law and humanities canon could be 'inclusive' or 'global' has to be thus answered in the negative: on the one hand, the inclusion of 'other' works presumes a uniformly applicable scale of measurement based on the general applicability of certain values across different particular situations. Such an application and measurement will be contrary to the value afforded to particular, situated and contextual partial truths, which regard comparisons as futile and incommensurable. In contrast, Chinweizu and Fanon appeal to a conception of universality as a rejection of the immutable prison of particularizing identity. Here, universality performs a liberating function from the alienating frameworks of particular meanings, but it is a struggle conducted and achieved by "one human being" rather than by a canonical authority. On the other hand, the desire to include critical or 'other' works within a canon may be well-meaning but could result in a paternalistic management of 'diversity' and a desire to assimilate other orders of worth into one's own. This could result in

the subsumption of the critical potential and genuine alterity into a 'global' canon, which is driven the dominant group's tastes, ideologies and interests. Examples of such 'inclusionary' practices are the labelling of all non-western music as 'world' music, the grouping of diverse kinds of non-western-scientific or non-inscribed knowledge under the rubric of 'traditional' knowledge, or having a week each of a semester-long syllabus devoted to 'gendered approaches' and then 'postcolonial theories'. A more appropriate label for a canon of that kind would be: 'globalist', denoting a specific imperialist imaginary of what the 'globe' should be.[40]

With the globalist post-WWII order in crisis and possibly nearing its end, the constituent disciplines of laws and the humanities in their different locations and academic cultures reflect their embeddedness within specific histories and the international histories dominated by the legacies of colonialisms, racism, imperialism, World Wars, Cold war, and the American neoliberal and military hegemony. From a sociological point of view, the ASLCH can serve as a helpful specific example to think through the notions of an 'inclusive' and 'global' canon. In terms of geography, the membership of the ASLCH is predominantly North American, which is understandable given the historical origins of the organization. It is also predominantly white, which is also not surprising in light of the racial composition of the humanities disciplines. If there already existed a law and humanities canon, as it was asked as a possibility in the invitation to this commentary, a canon - already implicitly existing or to be devised - is likely to mirror the concerns and compositions of its *past* and *present* members. To relate a social composition to an intellectual value, as a canon would do, would mean to normalize and give value to the fractured realities that is our present predicament. It would be a wrongful analogy to draw. And to assume the ability to speak and pass judgments of value in relation to a canon on behalf of the imagined other - imagined because they have been in considerable minority or not audible unless assimilated - would not be inclusive and global, but rather alienating and globalist.

Other distinctions to consider as part of the question whether there can be an 'inclusive canon' are the condition of academic labour and the structure of the academic 'market'. There is a growing number of colleagues who teach and research in untenured positions and on temporary contracts, as universities increasingly rely on their labour. Outside and within the

[40] Quinn Slobodian, *Globalists. The End of Empire and the Birth of Neoliberalism* (Cambridge, MA: Harvard University Press, 2018).

North American academe, academics are governed by a different institutional work load, career progressions, evaluation cultures and finances, many of which often translate into considerably less academic freedom, salary and financial resources, particularly for those who have not yet reached the professorial grade.[41] Writing and research outside the tenure system and the North American academy underlie different political, structural and financial constraints, which influence the format, genres and scope of scholarship. These constraints are less visible, hence it is difficult to say how a canon could take into account these realities of differential conditions of intellectual work and their evaluative structures.

IV. Resisting the canon, embracing contingent values

The question of whether there is, or whether there should be, a law and the humanities canon is closely related to the ethos and the aims that the law and the humanities community may identify as its values. Whilst resisting the question of a canon, it is valuable to think about the values of law and the humanities as a field of inquiry. In 1733, Voltaire delineated the identity of Literature in a negative mode: "It is easier to say what this temple is not than to explain what it is."[42] In the absence of a pope, or a constitution, but in light of the productive and associative nature of the meaning of the key word, 'and', a minimalist suggestion of a 'law and the humanities' value could reflect what some in the field, for example, the annual ASLCH conferences, have sought to practise: the embodiment of 'and' as value plurality, which include distinct issues and approaches that pertain to and explore the meanings of laws and the humanities. It would welcome the diversity of complex questions and their mutability by drawing more 'and'-associations and conjunctions. It would seek to facilitate reflections on its own genealogy and the ways in which a variety of scholarly concerns have developed within the field. A canon, as a normalizing and authoritative cultural technique of categorization and value judgment, seems to be a fraught technique to promote such an emergent field. Devising a canon is accompanied by problems of measurements, evaluations,

[41] For example, half of academic staff in the UK are on temporary labour contracts according to the University and College Union. In the state-regulated economy of academic worth, the compulsory five yearly UK "Research Excellence Framework" evaluation of academic work gives relatively little 'value' to monographs compared to journal articles, generating a correspondingly diminished income for the department in light of labour expended. It is doubtful whether a canon could consider such differential economies of academic credit and their influence on scholarship.

[42] Quoted in Gumbrecht, p. 144.

boundary drawings and disciplinary inclusions and exclusions. The effect of canons and classics is to freeze in time and favour past works or past-past works, even with the best of intentions and promises of continuous re-evaluation, due to in-built preferences that consolidate over time. The value of works ought to be better left to be played out in the admittedly imperfect academic relations of credit and credibility.[43]

The field is currently growing into interesting directions, which figure 'law' as diverse and divergent legalities and which question the anthropocentrism and logocentrism assumed within the traditional humanities. These developments entail novel forms and contents of inquiry - beyond law and literature/art/music - to law and other forms of cultural techniques and communications, such as environmental semiotics,[44] or models and calculated simulations.[45] As ecological humanities is emerging as a sub-discipline within the traditional humanities, questions of legal and ethical standings of ecology have been raised as urgent legal matters.[46] These emergent forms of signification invite a re-evaluation of where and how the meanings of 'human' and 'legal' and 'justice' are situated and contested today. In this regard, past works in the law and the humanities, particularly on language and symbolic reference, are a rich critical resource to draw upon and to think with about the novel forms of representation that inflect and destabilize legal language and concepts, for example, non-textual logics, such as self-learning algorithms and digital legal formats.[47]

The above reflections do by no means argue that past works should disappear from the

[43] Mario Biagioli and Peter Gallison, eds., *Scientific Authorship*, (London, New York: Routledge, 2002); Sarah-Jane Leslie, Andrei Cimpian, Meredith Meyer, Edward Freeland, "Expectations of Brilliance Underlie Gender Distributions Across Academic Disciplines," *Science* 16 Jan 2015: 262-265.

[44] Kirsten Anker, "Law As.... Forest: Eco-Logic, Stories and Spirits in Indigenous Jurisprudence", *Law Text Culture* 21 (2017): 191-213, drawing on Eduardo Kohn, *How Forests Think* (Berkeley: University of California Press, 2013).

[45] Eyal Weizman, *The Least of All Possible Evils: Humanitarian Violence from Arendt to Gaza* (London: Verso, 2011).

[46] Nicole Rogers and Michelle Maloney, eds., *Law as If Earth Really Mattered. The Wild Law Judgment Project* (London: Routledge, 2017).

[47] Antoinette Rouvroy and Mireille Hildebrandt, eds., *Law, Human Agency, and Autonomic Computing: The Philosophy of Law Meets the Philosophy of Technology* (London: Routledge, 2011); Hyo Yoon Kang, "Ghosts of Inventions: Patent Law's Digital Mediations," *History of Science* Vol. 57 (1), Special issue on 'Technologies of the Law/Law as a Technology, 2019: 38-61; Special Issue on 'The Trace, The Document, The Archive: Encounters Between Legal Grammatology and Digital Technology' *Law Text Culture* , Volume 22, ed. Angela Condello (2019).

horizon of current scholarship of the field, but rather put forward the view that they are better approached as continuous encounters and arguments in the present rather than as curated museum objects of determinist, patrimonial or matrimonial lineages. Intellectual legacy is not best preserved through a canon, which itself can be forgotten if not enforced by discipline, but through reading, interpretation and critical engagement with works. Rather than making "texts timeless by suppressing their temporality,"[48] texts are better served by a genealogical reflection of their value from the viewpoint of our past, present and future concerns. The works that will be deemed sufficiently valuable and interesting enough for such an intense engagement will vary for different issues given the diversity of the field. But those works - and these may include texts, images, pieces of music and other materials - which a scholar will feel offer most resistance and obstinacy will be the ones that might provide the best ways to think *with* or *against* the challenges to the meanings of the human and the legal. If a work will continue to be read, discussed and referred to, or even loved, it will be for the reasons of its continued temporally emergent reflections; and not for reasons of its inherent, transcendental values, historicist contexts, or for its disciplining and social function as a part of a canon.

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[48] Herrnstein Smith, p. 28.