The Black Anthropocene: And the End(s) of the Constitutionalizing Project

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Abstract

This paper is written in response to the assumptions and objectives of the Constitutionalizing in the Anthropocene project but can be read as a stand alone piece. The analysis presented here grasps the Anthropocene as a condition where ontological assumptions of a modernist split between human and nature no longer hold. The project to constitutionalize the conditions of living in the Anthropocene recognises the importance of this shift but fails to fully acknowledge the implications. This paper firstly lays out the approach of the Black Anthropocene as both a (para-)ontological understanding and an ethico-political response that engages the Anthropocene without (or below) the representational categories of law. The second part takes the analysis further demarcating two distinct approaches to relationality and the legal subject. The third utilizes this framing to rethink constitutionalization, through the lens of the Black Anthropocene, as a project of disavowal of the constitutive role of law and constitutionalizing in the production of the Anthropocene. In focusing on the constitutive role of anti-Blackness, as central to the modernist ontology of Human and world, this paper enables alternative ethico-political openings that question rather than seek to preserve the authority and legitimacy of the constitutionalizing project.

Keywords Black Anthropocene, ontology, Constitutionalization, anti-Blackness

1. The Black Anthropocene

The Anthropocene, as grasped in a hegemonic or governmental register, appears to unravel the categories and distinctions essential to a modernist imaginary – the world, nature, and the environment no longer appear capable of being assumed or taken for granted.[1] As the project of 'Constitutionalizing in the Anthropocene' notes, the Anthropocene appears to confront international legal mechanisms with problems and issues beyond their competences and capacities. 'Catastrophic environmental degradation is the most urgent challenge for humanity today':

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[1] As powerfully noted in Frédéric Neyrat's contribution, Special Issue.

It is no longer enough to respond merely with some new or augmented global environmental agenda and legal framework. Gone is the era of the Holocene, where the world and its resources awaited unlimited human exploitation, and where global constitutionalism meant figuring out how to divide the spoils. Ours is the era of the Anthropocene, a geological period wherein humans have altered atmospheric, geologic, hydrologic, biospheric and other Earth system processes to such a degree that our Holocenenic legal frameworks have proven demonstrably inadequate to address the risks that it entails.[2]

The 'ending of the world' that moderns took for granted has enabled a range of potential responses. This paper suggests that the proposal of constitutionalizing in the Anthropocene risks closing alternative possibilities, reducing the challenge to narrow questions of technical and organizational reordering. In such a framing, the Human remains as the knowing and governing subject of law and constitutionalization, and the world remains as the object to be known and governed, but in ways that are understood to be more effective or efficient in our age of environmental and climate crisis. In contradistinction, the Black Anthropocene, understood both as an ontological statement and a post- (or ante-/anti-) political stance forces us to challenge the governmentalizing project of saving the world of modernity and its subject, the Human.

The Black Anthropocene is an understanding and a response that both affirms the condition of the Anthropocene and provides a new scaffold of meaning and an ethico-political practice without (re)centring the Human as subject. As Kathryn Yusoff argues: 'An idea of the Black Anthropocene poses the question as a redescription of the Anthropocene through the racializing assemblage from which it emerged, rather than claiming a space for Blackness within or outside the Anthropocene'.[3] It is important to note here that the conception of (anti)Blackness is not one which is dependent upon skin pigmentation but, as Yusoff states, 'Blackness is a name for nonnormative subjectivity'.[4] Blackness is a state of relational differentiation, as inscribed in the process of distinguishing an 'unmarked' referent as the norm, as a fully Human subject.[5] Blackness is 'produced' with the production of the modern

[2] Tilburg University, Public Law and Governance 'Constitutionalizing in the Anthropocene' research project description, April 2021. Available at: https://www.tilburguniversity.edu/sites/default/files/download/CtA%20abv%20project%20description%20-%20april%202021.pdf Last accessed 7 February 2022.

[3] K Yusoff, *A Billion Black Anthropocenes or None* (Minneapolis, MN, University of Minnesota Press 2018), 61.

[4] Ibid., 19.

[5] As Fanon famously stated, 'Ontology – once it is finally admitted as leaving being by the wayside – does not permit us to understand the being of the black man. For not only must

ontology of the autonomous rational subject and world as instrumentalizable object. Thus, what is forwarded here is not an alternative '-cene' to the Anthropocene but an understanding that places anti-Blackness and the modern ontology (of the individuated subject and world as available to it) at the heart of our contemporary condition. The ethico-political response to this centring, for Yusoff, cannot be one of 'individuated liberal modes of subjectivity and subjection'; '[i]n short, that world must end for another relation to the earth to begin.'[6]

It is crucial to emphasise that for the Black Anthropocene the problem is not merely the racializing construction of the Human but also the implicit 'anti-Blackness' within the ontological assumption of the 'world' as object.[7] In the dominant modernist Anthropocene imaginary of moving 'beyond the human' or the human/nature divide, it is assumed that the Human can be reformed while the world remains the same. In which case, reconstructive work is still possible. World-making can continue, informed by new sensitivities culled from systems theoretical approaches, critical or Indigenous imaginaries, cosmologies and ontologies and other radical and emancipatory understandings.[8] Mainstream critical theorists are happy to engage with disruptive understandings of complexity, care and entanglement but the Human as world-saving subject is still central to these imaginaries. Perhaps, exemplary in this respect has been Bruno Latour's call for Europe to take the lead in 'reinventing' or 'recalling' its construction of modernity, moving beyond both state-based and global conceptions of planetary problems.[9] At stake in this call for domestic and international reform, Latour argues, is the meaning of the Human, waged in struggles of 'Terrestrials' or the 'Earthbound' against the 'Moderns'.[10] Apparently, rationalist, universalist, scientific or linear understandings of the world can just be replaced by relational, more-than-human, poetic or nonlinear approaches. Even if not everything of the modern world can be saved, we can at least repair our disciplines and salvage our critical and creative capacities.

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the black man be black; he must be black in relation to the white man.' F Fanon, *Black Skin, White Masks* (London, Pluto Press 1986), 110.

[6] Ibid*.,* 63.

[7] See, for example, the critique in Z Zalloua, *Being Posthuman: Ontologies of the Future* (London, Bloomsbury Academic, 2021), 160.

[8] G Raygorodetsky, *The Archipelago of Hope: Wisdom and Resilience from the Edge of Climate Change* (New York, Pegasus Books 2017); S Jasanoff and M L Martello (eds) *Earthly Politics: Local and Global in Environmental Governance* (Cambridge, MA, MIT Press 2004). See also the interventions by Kotzé, Kim and Horst, Special Issue.

[9] B Latour, *Down to Earth: Politics in a New Climatic Regime* (London, Polity Press 2018), 99-106.

[10] Ibid*.*

From the perspective of the Black Anthropocene, the critical work of saving the world through more-than-human relations and knowledges comes across as problematic, lacking an appreciation of the violence implicit in the construction of both the Human and the World.[11] In drawing attention to this violence, critics such as Deborah Danowski and Eduardo Viveiros de Castro argue that for Indigenous peoples, the 'end of the world' can be dated from Columbus' arrival in the Americas.[12] In a similar register, work within Critical Black Studies draws attention to how discourses of moving 'beyond' the Human reproduce existing hierarchies of being, arguing that this disavowal of the world already sacrificed is ethico-politically untenable.[13] This ontological focus distinguishes the Black Anthropocene from radical Marxist and Third World Approaches to International Law (TWAIL) scholarship, seeking legal reform and the reconstruction of international law through targeting the hierarchies and oppressions of racial capitalism.[14] The Black Anthropocene thereby could be placed in relation to critiques stemming from the literature on critical environmental law[15] and posthuman legalities,[16] in its radical questioning of both ontological and epistemological assumptions informing the human/nature divide. However, the Black Anthropocene seeks neither to merely redraw the boundary between human and non-human nor to indicate the need for a new epistemological approach to the powers and agency of subjects and objects, but to work outside these categories and the possibility of their (re)construction. The end of the human/nature divide is thereby not a policy option or a choice, enabling a 'second chance' for modernity. There there can be no 'wiping the slate clean' and starting anew.

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[11] L Gordon, *Her Majesty's Other Children* (Lanham, MD, Rowman & Littlefield 1997).

[12] D Danowski and E Viveiros de Castro, *The Ends of the World* (Cambridge, Polity Press 2017).

[13] E Glissant, *Poetics of Relation* (Ann Arbor, University of Michigan Press 1997); T L King, 'Humans Involved: Lurking in the Lines of Posthumanist Flight' (2017) 3(1) *Critical Ethnic Studies*, 162 at 177-178.

[14] See, for example, B Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge, Cambridge University Press 2009); A Gorz, *Strategy for Labor* (Boston, Beacon Press 1967); E O Wright, 'Transforming Capitalism through Real Utopias: 2012 Presidential Address', *American Sociological Review* (2012) XX (X), 1–25; U Natarajan, J Reynolds, A Bhatia and S Xavier, 'Introduction: TWAIL: On Praxis and the Intellectual', *Third World Quarterly* (2016) 37 (11) 1946-1956; M W Mutua, 'What Is TWAIL?', *Proceedings of the ASIL Ann. Meeting* (2000) 31-38.

[15] A Philippopoulos-Mihalopoulos, 'Critical Environmental Law as Method in the Anthropocene', in Philippopoulos-Mihalopoulos and V Brooks (eds.) *Research Methods in Environmental Law: A Handbook* (London, Edward Elgar 2017), 131-158.

[16] See, for example, the volume 'Posthuman legalities: New Materialism and law beyond the human', edited by E Boulot, A Grear, J Sterlin and I D Vargas-Roncancio, *Journal of Human Rights and the Environment* 12(0) 2021.

The significance of the shift to the register of ontology is that it brings attention to the historicity of the human/nature divide, disputing claims that this division is something given, as originary or natural. The human/nature divide itself is problematised and considered as the effect of the historical process of colonial and capitalist 'development' – i.e. in the construction of the anti-Black 'world' that is now under threat from climate change. As Zakkiyah Iman Jackson argues, there can be no discussion of addressing the human/nature divide without addressing the question of (anti-)Blackness: moving beyond the modernist ontology of the Human and an anti-Black world 'is simultaneously the movement toward blackness, whether blackness is embraced or not, as blackness constitutes the very matter at hand'.[17] The human/nature divide is understood to be at the core of the modernist episteme and a historical product of the process of European colonial expansion and the appropriation of territories, bodies and goods that underpinned capitalist growth and (settler)colonial rule – as 'racial capitalism'[18] inaugurated a bifurcated world policed domestically and internationally through the 'colour line'.[19] From a Black Anthropocene perspective, it is therefore a problematic act of disavowal to claim that the problem of the human/nature divide is one that is only recent or one that is only 'revealed' by the contemporary condition of the Anthropocene.[20]

Key to the conceptual and ethical import of the Black Anthropocene is not merely a grasp of the problematic modernist binaries between human and nature as a problem of ontology. While ontology is a central concern, the Black Anthropocene, as an analytic, is anti- or non-ontological, in that it does not seek to posit another 'truth' of the world. Elizabeth Povinelli's recent work captures this well, in the claim that 'the first condition is a racial and colonial condition, not an ontological one'.[21] Rather than starting with abstract, timeless or metaphysical assumptions of entanglement or relation, the (ontological) violence of world-making is placed centre-stage.[22] In the face of this ongoing violence, the Black Anthropocene is an articulation of a new set of ethico-political practices and understandings which seek to extend and hold open the work of disruption and of refusal. The Black Anthropocene ethico-politically puts to question the world, not as a modernist conceit or as too human-centred,

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[17] Z I Jackson, 'Outer worlds: The persistence of race in movement "Beyond the Human"' (2015) 21(2/3) *GLQ: A Journal of Lesbian and Gay Studies*, 215 at 217.

[18] C J Robinson, *Black Marxism: The Making of the Black Radical Tradition* (London, Zed Books 1983).

[19] W E B Du Bois, *The Souls of Black Folk* (Amazon 2020) [1903]; D F da Silva, *Toward a Global Idea of Race* (Minneapolis, MN, University of Minnesota Press 2007).

[20] C Bonneuil and J-P Fressoz, *The Shock of the Anthropocene* (London, Verso 2016).

[21] E Povinelli, *Between Gaia and Ground: Four Axioms of Existence and the Ancestral Catastrophe of Late Liberalism* (Durham, NC, Duke University Press 2021), 2.

[22] C L Warren, *Ontological Terror: Blackness, Nihilism and Emancipation* (Durham, NC, Duke University Press 2018).

but as inextricable from anti-Blackness as its disavowed ontological ground. As Fred Moten writes, '[B]lackness is the anoriginal displacement of ontology … ontology's anti- and ante-foundation, ontology's underground, the irreparable disturbance of ontology's time and space.'[23]

Rather than start from the world of ontology, the Black Anthropocene seeks to deconstruct, to desediment, to disrupt these assumptions, emphasizing the non-/post-/para-/quasi-ontological; i.e. the violence that it takes to fix or stabilize imaginaries of entities or relations.[24] The world of modernity is then grasped ethico-politically as a product of violence, grasped not merely in socio-historical terms (of coloniality, dispossession, slavery and genocide) but also ontologically (sedimenting cuts and divisions) enabling some entities to become individuated as legal subjects of rights and responsibilities and others to be 'thing-ified', denied agency and open to instrumentalization and gratuitous violence. The Black Anthropocene resists what are thereby seen as hegemonic and governmentalizing demands to save or preserve the existing ordering of the (anti-Black) world, positing this order and form of ordering as itself the problem to be addressed.[25] The Anthropocene as a problematic is thus seen to potentially open up to question precisely the nature of this 'world' rather than assuming it as an unproblematic ground for articulating a project of salvation.

Thus, the Black Anthropocene inverses the hegemonic construction of the Anthropocene problematic. In the dominant framing, it is the changing world (where climate change reveals

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[23] F Moten, 'Blackness and Nothingness (Mysticism in the Flesh)', *South Atlantic Quarterly* (2013) 112 (4), 739.

[24] Nahum Dimitri Chandler's work on para-ontology has been widely influential in bringing ontological concerns to the centre of attention in Critical Black Studies, focusing, in particular, on the work of WEB Du Bois on double consciousness and the question of the global colour line. See, for example, N D Chandler, *X: The Problem of the Negro as a Problem for Thought* (New York, Fordham University Press 2014); see also Chandler, 'Of Horizon: An Introduction to "The Afro-American" by WEB Du Bois—circa 1894', *Journal of Transnational American Studies* (2010) 2 (1). This work as been taken up in different ways. Notably, Fred Moten has used the concept of paraontology to think about Blackness as necesarily being ungraspable from 'any already given ontology': 'The lived experience of blackness is, among other things, a constant demand for an ontology of disorder, an ontology of para-ontology'. See F Moten, 'The Case of Blackness', *Criticism* (2008) 50 (2), 177-218, 187; also Moten, *Stolen Life (Consent not to be a Single Being)* (Durham, NC, Duke University Press 2018). R A Judy, on the other hand, has taken issue with the conceptualization, suggesting that 'para-semiosis', or 'para-individuation' better grasps the non-ontological being of Blackness. See 'Of Human Flesh: An Interview with RA Judy by Fred Moten', *boundary2* 6 May 2020 ; also R A Judy *Sentient Flesh: Thinking in Disorder, Poiesis in Black* (Durham, NC, North Carolina Press 2020).

[25] Gordon, 'Black Existence in Philosophy of Culture', *Diogenes* (2014) 59(3–4) 96.

relational dependencies and interconnections) that poses a problem for modernist understandings and assumptions. For the Black Anthropocene, it is rather modernist understandings and assumptions (of the Human as an autonomous subject and of the world and the nonhuman as an subjugated object) that are the problem and are fully implicated in the changing environmental conditions brought about by the ravages of capitalism and colonialism. The inversing of the problematic is of fundamental importance for the framing of the question. As Claire Colebrook states: 'If "anthropos" continues to save the world, he does so by means of the destruction of worlds. This destruction is a necessary component of a world... where black bodies were taken up as so many things and resources that the world needed to manage in order to survive.'[26] Thus, rather than focusing upon how this (anti-Black) world can be saved or preserved, one might 'recognize that "the world" has already demanded the end of so many modes of existence to the point where the end of the world might be an opening to something other than constant annihilation... a mode of existence *without world*'.[27]

It is this trajectory of thought, which rejects the displacements and disavowals of dominant approaches to the Anthropocene problematic, that underpins the Black Anthropocene. It can be read in a range of theoretical perspectives oriented to what could be called 'ontology-critique' in Critical Black Studies. Thereby locating questions of racial violence and exclusion in the unstable construction and (re)production of the Human and the broader problematic of the violent forging of modernity itself.[28] In fine, there are three aspects of the ethico-political demands of the Black Anthropocene that I wish to highlight.

First, regarding **reparation,** in the Black Anthropocene the ethico-political requirements of reparative work seek neither to 'make good', repair or restore what has been lost from the modernist world of entities and relations, nor to save what remains of modernity. The ethico-political requirements of reparative work from the Black Anthropocene seek to account, instead, for and with what has been disavowed in the making of modernity. As Tiffany Lethabo

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[26] C Colebrook, 'What would you do (and who would you kill) in order to save the world? Dialectical Resilience', in D Chandler, K Grove and S Wakefield (eds) *Resilience in the Anthropocene: Governance and Politics after the End of the World* (Abingdon, Routledge 2020), 179 at 196.

[27] Ibid., 197.

[28] See, for example, Glissant, *supra* note 13; S Wynter, 'Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, its Overrepresentation—An Argument' (2003) 3(3), *CR: The New Centennial Review;* A Mbembe, *Out of the Dark Night: Essays on Decolonization* (New York, Columbia University Press 2021); Gordon, *Freedom, Justice and Decolonization* (New York, Routledge 2021); Z I Jackson, *Becoming Human: Matter and Meaning in an Antiblack World* (New York, New York University Press 2020); da Silva *supra* note 19.

King notes, the point is not to reject the subjecthood of the human per se but to recognise the violence that was its precondition.[29] Reparative work refuses the disavowals of modernist cuts and binaries, bringing in the violence and genocide imbricated within modernist 'development' and 'progress'.[30] Reparation is the call for the end of the world of modernist ontology, rather than its refiguration or reform.[31] King makes the point powerfully that: 'Black and Native/Indigenous absorption into the category of the human would disfigure the category of the human beyond recognition'.[32] As Zakiyyah Jackson argues, putting anti-Blackness at the centre of our conceptual framing enables the generation of 'new possibilities for rethinking ontology' and 'alters the meaning and significance of being (human)'.[33] This is why reparative claims of the Black Anthropocene are not about 'equality' or 'rights of inclusion' or rights to representation.[34] Instead, reparation requires 'a different ethics, one not grounded in the subject/object distinction', whereby freedom is understood as an open-ended non-ontological, non-grounded project of more-than-individual becoming.[35]

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[29] King, *supra* note 13, at 177.

[30] Yusoff, *supra* note 3, at 61; K. McKittrick, *Demonic Grounds: Black Women and Cartographies of Struggle* (Minneapolis, MN, University of Minnesota Press 2006).

[31] In this respect, the Black Anthropocene takes a different approach to that taken in the abolitionist literature, for example by Ruth Wilson Gilmore, who calls for the abolition of the carceral state and the creation of parallel legal institutions based on redefined undeerstandings of community safety; See Gilmore, *Golden gulag: prisons, surplus, crisis, and opposition in globalizing California* (Berkeley, University of California Press 2007).

[32] King, *supra* note 13, at 165.

[33] Jackson, supra note 28, at 1.

[34] Key is the shift away from a representational ontology of the individuated subject; upholding requirements of intelligibility (being rendered 'transparent' to the law). Instead, following Glissant *(supra* note 13) it is the 'right to opacity', which is emphasised. In fine, what is at stake is not the possibility of creating alternative forms of representation but instead the resistance to representational authority/authorization itself.

[35] Judy, *supra* note 24, at 19; see also Moten, *supra* note 24, at 30. This is the openess of non-individuation, of incompletion, rather than the transparency that enables individuation and inter-relation. This ethico-political project could be framed in terms of the 'asthetic sociality of Blackness'; see, for example, L Harris, *Experiments in Exile: CLR James, Hélio Oiticia, and the Aesthetic Sociality of Blackness* (New York, Fordham University Press 2018) or, in the case of Stefano Harney and Moten, as the 'undercommons'. They write: 'the undercommons is not a collection of individuals-in-relation, which is precisely how the commons has been traditionally theorized ... It is what is given in the impossiblity of the one and the exhaustion of the very idea of the one.' Harney and Moten, *All Incomplete* (New York, Minor Compositions 2021), 122.

Second, regarding **critique**, in the Black Anthropocene the ethico-political requirements of critical work are those of refusal and resistance. This is highlighted by movements of *abolition* or *decolonisation* of institutions cut from and set over society. These institutions are tasked with reproducing modernist hegemony, such as the police or the university.[36] The practices of critique in the Black Anthropocene could also be grasped as movements of *flight* from the world of modernity and as struggles to hold the anti-Black world open, beyond divides of entities and relations. 'Flight' should be understood as not 'from' institutions of governmental power 'to' some time or place of absence, but rather as a way of being or a practice of being in relation.[37] It is important to bear in mind the distinction between these practices of critique which lack positive grounds on the one hand, and modernist claims of rights or identities on the other hand.[38] It is the refusal of claiming what has been refused to Black subjects;[39] the critical refusal of positive grounds of claims/demands/ positions.[40] This critical work could be framed as 'ante-political' politics, rather than anti-political:[41] a politics of holding and opening rather than one of destruction and construction.[42] The space created is not formal but rather of a practice, a mode of being, as 'malpractice',[43] an 'undercommons',[44] or a 'para-semiotic' becoming.[45]

Third, regarding **futurality**, the ontological focus of the Black Anthropocene enables a grasping of futurality not in a temporal sense of 'after' the world of modernity but rather as a process. The precondition for this is a *radical openness* to the outside and to alterity, not on

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[36] Harney and Moten, *The Undercommons: Fugitive Planning & Black Study* (New York, Minor Compositions 2013).

[37] Judy, *supra* note 24, at 423.

[38] J Sexton, 'The *Vel* of Slavery: Tracking the figure of the Unsovereign', in T L King, J Navarro and A Smith (eds.) *Otherwise Worlds: Against Settler Colonialism and Anti-Blackness* (Durham, NC, Duke University Press 2020), 94.

[39] Harney and Moten, *supra* note 36.

[40] Wilderson, *Afropessimism* (New York, W. W. Norton & Co 2020).

[41] Moten, *The Universal Machine (Consent not to be a Single Being)* (Durham, NC, Duke University Press 2018), 11; J K Carter, 'Other Worlds, Nowhere (or, the Sacred Otherwise)' in King, Navarro and Smith (eds) *Otherwise Worlds*, *supra* note 38, 158 at 182.

[42] In line with 'the refusal of what has been refused' (see, for example, Moten and Saidiya Hartman, 'To Refuse that which has been Refused to You', *Chimurenga*, 19 October 2018), the work of critique is not about participating as an individual in the formal sphere of civil society and institutional politics but an ethical or aesthetic practice of sociality (Harris, *supra* note 35; Harney and Moten, *supra* note 36) or a 'being-in-common' (Judy, *supra* note 24) that emphasises the collective, yet not in 'political' terms.

[43] Carter, *supra* note 41.

[44] Harney and Moten, *supra* note 36.

[45] Judy, *supra* note 24.

the basis of an alternative ontological grounding or telos, but on the basis of the need to counter instrumentalising subject-centred approaches.[46] It is an openness to relations with the world that the subject is active-within, rather than a relation of the subject to the world as an object, that then requires duties of care and enablement.[47] Futural openness is radical, not constrained in terms of either instrumental self-interest or by a priori methods or speculative practices.[48] This radical openness thereby enables 'unthinking mastery' and the subject as defined through this approach to the world.[49] Alterity and encounter enable the *unmaking* of the self as an individuated subject, by removing assumptions of superiority or knowledge and developing other sensing/sensory techniques.[50] Futural work is not about making the future but unmaking the ontological constraints of the present.[51] Key to this practice is the idea of *opacity*[52] – that we are open to the outside as a way of understanding the self as part of a process of becoming in-relation[53] – that refuses the empowerment or freedom of the self as an individual able to know and master a world understood as 'transparent'.[54]

In light of these three reparative, critical and futural aspects of the ethico-political demands of the Black Anthropocene, the Black Anthropocene can best be viewed as an ontological understanding and ethico-political agenda of unmaking, of unconstitutionalizing. The Black Anthropocene would hold open the 'unconstructable' and 'unknowable' part of nature, or

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[46] A Karera, 'Blackness and the Pitfalls of Anthropocene Ethics' (2019) 7 (1) *Critical Philosophy of Race*, 32 at 52.

[47] See Judy, *supra* note 24, at 416.

[48] K Keeling, *Queer Times, Black Futures* (New York, New York University Press 2019).

[49] J Singh, *Unthinking Mastery: Dehumanism and Decolonial Entanglements* (Durham, NC, Duke University Press 2018).

[50] R DiAngelo, *White Fragility: Why it's so Hard for White People to Talk about Racism* (London, Allen Lane 2018).

[51] In this respect, the Black Anthropocene is quite distinct from the literature on the 'pluriverse' which equally seeks to problematize modernist understandings of human exceptionalism and to develop alternative approaches to knowledge, see, for example, A Escobar, *Designs for the Pluriverse: Radical Interdependence, Autonomy, and the Making of Worlds* (Durham, NC, Duke University Press 2018) ; E Viveiros de Castro, *Cannibal Metaphysics* (Minneapolis, Univocal Publishing 2014); E Kohn, *How Forests Think: Toward an Anthropology beyond the Human* (Berkeley, University of California Press 2013).

[52] Glissant, *supra* note 13.

[53] A Yountae, *The Decolonial Abyss: Mysticism and Cosmopolitanism from the Ruins* (New York, Fordham University Press 2017), 117.

[54] Silva, *supra* note 19, at 1-16.

'the Earth' (with Neyrat)[55] rather than leaping to move beyond the wounds of coloniality through becoming 'open to' planetary possibility.[56] This holding open, in other words, is not that of boosting human capacities and affordances by being 'open *to*' the alterity of other forms of planetary being, and thereby adding more into the world that exists.[57] To hold open is instead to be 'opened *by*' the 'unconstructable' and 'unknowable'.[58] The Black Anthropocene is not constructive but rather deconstructive, disruptive, breaking and holding this break. While the politics of modernity were those of construction – of constitutionalizing – from the 'artificial man' of Hobbes' *Leviathan* to the claims of rights, subjects and states – the Black Anthropocene refuses the demands of the constructing subject and its world of cuts and violence. The Blackness of the Anthropocene comes to the forefront because it is precisely Blackness that forms the disavowed grounds of the modernist subject and world.[59] Blackness is the unmarked ground of indistinction or in-difference from which modernist entities and relations are cut and held together.[60] The second section of the paper draws upon Édouard Glissant's *Poetics of Relation* to illustrate the ontological stakes of distinct approaches that are moving 'beyond the Human': those of constitionalism and those demarcated here in terms of the Black Anthropocene.

2. Constitutionalizing beyond the Human?

The distinctiveness of Black Anthropocene approaches and their challenge to the 'constitutionalizing in the Anthropocene' project is perhaps nowhere summed up better than in Édouard Glissant's counter position of the 'thought of the Other' – which can be read as the constitutionalizing desire to move beyond the Human by embracing alterity – to the 'other of Thought', where the subject is 'prized open' from the outside by a world of infinite Relation.[61] Glissant develops an approach which works against a modern ontology of human/nature separation in a very different way than the constitutionalizing project's

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[55] Neyrat, *The Unconstructable Earth: An Ecology of Separation* (New York, Fordham University Press 2019).

[56] Neyrat, Special Issue.

[57] See *supra* note 51 above.

[58] See, for example, the formulation in R Negarestani, *Cyclonopedia: Complicity with Anonymmous Materials* (Melbourne, re.press 2008), 197.

[59] A Mbembe, *On the Postcolony* (London, University of California Press 2001), 11; Jackson, *supra* note 17; D. Leong, 'The mattering of Black lives: Octavia Butler's hyperempathy and the promise of the new materialisms', *Catalyst: Feminism, Theory, Technoscience* (2016) 2 (2) 1.

[60] This process of 'doing, making or worlding', as Zakiyyah Jackson emphasises, following Karen Barad, is an agential practice, constitutive of the world, *supra* note 28, at 184; see also K. Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Durham, NC, Duke University Press 2007).

[61] Glissant *supra* note 13, at 154.

imaginary of extending the reach of law beyond the human. For the constitutionalizing project and its expansion of categories of legal relations, the starting point is implicitly given: it is that of the subject separate from and logically prior to or before the world. The constitutionalizing project seeks to expand the field of legal relationality by bringing in and formally recognizing more agencies and actors. The world is thereby already known and assumed to be available as a field for the extension of the law.

Reading with Glissant, the constitutionalizing project could be understood to reproduce the modernist assumptions underpinning Einstein's theory of Relativity, held to fall short of taking a relational ontology far enough in the challenge to anthropocentrism. Key is the fact that, for Einstein, the world is there for us: '[t]he universe has a "sense" that is neither chance nor necessity', which provides '"guarantees" [both of] the interactive dynamics of the universe and of our knowledge of it'.[62] Thereby: 'Just as Relativity in the end postulated a Harmony to the universe, cultural relativism (Relativity's timid and faltering reflection) viewed and organised the world through a global transparency that was, in the last analysis, reductive'.[63] Thus, from Glissant, we can draw out two distinct 'tendencies' or ontological approaches of understanding relational becoming: one with a telos, which assumes a remaking of the human as subject, namely the constitutionalizing approach; the other, which underpins the approach outlined here and does not organise the world through a global transparency, that of the Black Anthropocene.

The first approach – that of expanding the field of legal relations, of constitutionalizing in the Anthropocene – appeals to scientific, evolutionary, or underlying cybernetic laws and rationalities of 'interactive life' that 'has become increasingly based on attempts to imagine or to prove a "creation of the world" (the Big Bang), which has always been the "basis" of the scientific project'[64] that enables a telos of progress, of new ways of productive engagement through entanglements with nonhuman others. For Glissant, this is problematic: 'The idea of God is there. And the notion of legitimacy reemerges. A science of conquerors who scorn or fear limits; a science of conquest'.[65] On the contrary, the second approach, which underpins this reading of the Black Anthropocene, tends in:

> ...the other direction, which is not one, distances itself entirely from the thought of conquest; it is an experimental meditation (a follow-through) of the process of relation, at work in reality, among the elements (whether primary or not) that weave its combinations... This "orientation" then leads to following through whatever is dynamic, the relational, the chaotic – anything fluid and various and moreover

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[62] Ibid., 134.

[63] Ibid., 135.

[64] Ibid., 136-137.

[65] Ibid., 137.

uncertain (that is, ungraspable) yet fundamental in every instance and quite likely full of instances of invariance.[66]

Glissant therefore advocates an alternative approach to being in the world, of *poetics*,[67] challenging universal, generalising or transcendent totalities in its focus on ever more stringent demands for specificity. His approach is a practical one, in which the subject is not producing itself and the world: the 'world' has already been catastrophically imposed, the task is to survive within it, to carve out alternative ways of being by holding open the cuts, the inability to decide or to judge or to place. As Glissant states, the notion of 'opacity' highlights 'an irreducible singularity'.[68] 'The opaque is not the obscure, though it is possible for it to be so and be accepted as such. It is that which cannot be reduced, which is the most perennial guarantee of participation and confluence'.[69] As Tiffany Lethabo King notes, in her reading of Glissant, this establishes a 'poetic politics', which can 'conceptualize a kind of "uncharted" surroundings that are continually made, remade, or unmade'.[70] The key point about Glissant's conception of 'opacity' – shared by her use of the 'black shoal' – is that this slows and disrupts assumptions of regularity and linearity, which are the condition of possibility for the constitutionalist impulse. Opacity 'enables other modes of thinking', and thus 'opens up other kinds of potentialities, materialities and forms'.[71]

It is important to note that approaches heuristically described here as those of the Black Anthropocene – which share with the constitutionalizing project a decentring of the Human subject – are concerned with a different relation to alterity or otherness. Thus, for Glissant, opacity is a vital concept, whereby the subject no longer aspires to see the world in its own image.[72] There is no longer an archimedian point from which the equalizing or homogenizing projection of law is possible. There is neither an external nor an internal determination of the other, as creolization – i.e. the open encounter with otherness without an assumption of superiority[73] - produces a world in difference and disunity.[74] In fact, it is more precisely not a production of a world but a holding of a world in difference, a gathering of the world: as a

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[66] Ibid.

[67] Ibid., 142.

[68] Ibid., 190.

[69] Ibid., 191.

[70] King, *The Black Shoals: Offshore Formations of Black and Native Studies* (Durham, NC, Duke University Press 2019), 8.

[71] Ibid.

[72] Glissant *supra* note 13, at 111.

[73] See, for example, Glissant's distinction between 'creolization' as an open and ethical mode of being and 'creoleness' as an identity or fixed essence, ibid., at 89.

[74] J E Drabinski, *Glissant and the Middle Passage: Philosophy, Beginning, Abyss* (Minneapolis, MN, University of Minnesota Press 2019), xv.

chaos-monde, whose aesthetics embrace 'all the elements and forms of expression of this totality within us; it is totality's act and its fluidity, totality's reflection and agent in motion'.[75] For Glissant then, the task of living in the Anthropocene would not be one of individuation, but one of holding, 'giving-on-and-with' through a process 'of bringing-into-relation',[76] through maintaining differences.[77] Black Anthropocene approaches seek to deconstruct, to hold open the cuts of coloniality, and instead to offer a world without fixed distinctions. The Black Anthropocene is a world of 'Relation, or totality in evolution, whose order is continually in flux and whose disorder one can imagine forever'.[78] The world without the violence of the cuts of the modern ontology, the world as *chaos-monde*, is a world without individuated subjects and distinct entities in relation. In fine, Glissant offers an 'analytic thought [that] makes it possible to continue indefinitely [the] perspective of deferral'.[79]

In the mode of thought categorised here as that of the Black Anthropocene, moving beyond the modernist concept of the Human cannot be grasped in the more-than-human terms of the extension of relations of equivalence and legal subjecthood. The concern, as stated above, is the *unmaking* of the subject, not its imagined projection or extension. There can be no assumption of living in harmony with the world or finding the world life-affirming from a position before or above the world. In the framework of the Black Anthropocene, moving beyond the Human is informed from a different (non-)subject positionality; the experience of not being a subject before the world. This is the positionality of those objectified as less-than-human, 'thing-ified' by the world-historical process of racial capitalism.[80] As Fred Moten writes, relationality already presumes 'an expression of power, structured by the givenness of a transcendental subjectivity that the black cannot have but by which the black can be had'.[81]

Thus, in the Black Anthropocene the experience of being in the world is different, it is not one of affirmation but one of of negation. Being in the world, in other words, is not an affirmation

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[75] Glissant *supra* note 13, at 94.

[76] Ibid., 142.

[77] Ibid., 95.

[78] Ibid., 133.

[79] Ibid., 139.

[80] A Césaire, *Discourse on Colonialism* (New York, Monthly Review Press 1972), 42; Robinson, *supra* note 18.

[81] Moten, *supra* note 23, at 749; *supra* note 41, at 204. Therefore, for Moten, black studies could 'be understood as a critique of enlightenment and even as a critique of judgment from the position of what [might be called] an eternally alien immanence or more precisely, from a radical materiality whose animation… has been overlooked by masterful looking.' F Moten, *Black and Blur: Consent not to be a Single Being* (Durham, NC, Duke University Press 2017), 67.

of the world as available to expand one's experience and sense of self, but a negation of this sense of self and an affirmation of the opposite experience, namely that of 'being opened by the world'.[82] In contrast, the project of constitionalizing in the Anthropocene is one which necessarily reproduces the ontological framework of law and subject/world relations, with its anthropocentric assumptions. Despite its problematization of the Human subject and objectified world, through its attention to more-than-human collectives, the logic is still subject- or human-centred, concerned with opening to and apprehending the (nonhuman) other. The Black Anthropocene offers another approach or, more precisely, another logic – the 'logic *of* the other'.[83]

This mode of alienated being is what Sarah Jane Cervenak and J. Kameron Carter refer to as 'paraontological life'.[84] Non- or para-ontological life is both the fungible material through or from which the modern subject and modern ontology is constituted or carved out, but also the potential site for the unmaking of these ontological cuts and imaginaries.[85] This alternative positionality or non-subject position is constituted by the violence of colonial exclusion. Therefore, the experience of being in the world is unsettling, lacking in ontological security.[86] Paraontological life, confronted by unknowability and forced to improvise and to invent on the move, is captured well in R. A. Judy's recent magisterial study *Sentient Flesh*.[87] Whereas theorist Bruno Latour would perhaps be a good example of thought that enables the approach of constitutionalization, for example, emphasising the desire to inculcate capacities and affordances to respond to relational entanglements, the approach of the Black Anthropocene differs in that it 'unsettles being' rather than affirming alternative ways of

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[82] See also Negarestani, *supra* note 58, at 197.

[83] M Bey, *The Problem of the Negro as a Problem for Gender* (Minneapolis, MN, University of Minnesota Press 2020), 5, italics in original.

[84] S J Cervenak and J K. Carter , J. K. 'Untitled and Outdoors: Thinking with Saidiya Hartman' (2017) *Women & Performance: a journal of feminist theory* 27 (1): 45-55, 47.

[85] See N D Chandler, *supra* note 24; N D Chandler, *Toward an African Future – of the Limit of the World* (London: Living Commons Collective 2013).

[86] F Fanon, *The Wretched of the Earth* (London, Penguin Classics 2001), 41; also D V Jones, *The Racial Discourses of Life Philosophy: Negritude, Vitalism, and Modernity* (New York, Columbia University Press 2012).

[87] Judy, *supra* note 24. As noted above, *supra* note 24, Judy highlights a conceptual distinction between the paraontological, as used by Chandler and Moten, and his preferred framing of a '*poiesis in black* as *para-semiosis*' (*supra* note 24, at 321) emphasising further the need to move beyond discoures of being. Nevertheless, in the broader conceptualization of the paraontological, as used in this paper, Judy makes an important contribution in his thinking of 'sentient flesh', in the '*persistent dynamic* of being-in-common', in which the subject as a unit is not the ground for performance or activity, rather 'It is the activity that articulates the differentiation and so the subjects' (ibid., at 317, italics in original).

knowing and engaging with the world. Black Anthropocene authors seek to develop thought as deconstructive, whereas affirmative constitutionalist approaches are necessarily constructive.

In fine, this paper seeks to forward the argument that the hidden assumptions of constitionalist approaches to the Anthropocene are challenged and brought into view by alternative approaches that foreground the problem of the world of the modern ontological grammar. These alternative approaches suggested by a Black Anthropocene locate this modern world as one forged in and through slavery, coloniality and racial capitalism. Most importantly, this framing is highly generative for thinking about human rights and the environment, in that it forwards a non-ontology or para-ontology rather, than a subject-centred relational ontology. This non- or para-ontology is key to modes of thinking that wish to avoid the hubris of extending modernist frames of rights and law, and thereby refuse an ontology of being. As Marquis Bey argues:

> a notion of a paraontology… functions as a critical concept that breaks up and desediments. By way of this, it permits the rewriting of narratives and the very conditions of understanding the present as such. Importantly, the goal is not to create a different, alternative ontology. Paraontology is not a search for new categories, as if categorization is a neutral process. It is not; categorization is a mechanism of ontology, an apparatus of circumscription. What the paraontological suggests is a dissolution.[88]

In contrast, the grammar of law and constitutionalization constitutes or grounds an ontology of being or of presence. It provides the precondition for its appropriation of entities available for legal subjectification. The Black Anthropocene overtly challenges the assumption of individuated entities amenable to the legal gaze.[89] The assumption of discrete entities, as the very condition for discourses of rights and constitutionalism, is exactly what cannot be assumed in approaches categorised here as those of the Black Anthropocene. In other words, it is not so much a question of destabilizing closures or distinctions between entities, but rather of deconstructing or desedimenting the processes through which certain differences and cuts are seen to be meaningful or natural. For the Black Anthropocene approach, this undermining takes the form of an ontological deconstruction of the world to which meaning is given by the 'global colour line' – a line understood as undergirding modernist binaries,[90] including those of culture and nature, subject and object, human and animal. Thus, the world 'after the end of the world of modernity' is the world in which these cuts and violences can no longer be legitimated or authorised, only disavowed. From this perspective, the desire to maintain or give new life to the constitutionalizing project is, as such, a project of disavowal.

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[88] Bey, *supra* note 83, at 17.

[89] See, for example, Harney and Moten, *supra* note 36.

[90] Du Bois, *supra* note 19; N D Chandler, *supra* note 85.

This is the focus of the third section of this paper. What precisely has to be disavowed for constitutionalizing living in the Anthropocene?

3. Constitutionalizing in the Anthropocene

The project of constitutionalizing in general (captured well in the introduction to this Special Issue) will be read through its articulation of three disavowals of central importance to clarifying the stakes of the Black Anthropocene. Firstly, the constitutionalizing project disavows the ontological stakes of moving beyond the human/nature divide. This move maintains the assumption that the world of modernity – thats rests on the human as subject and the world as object – still endures. Thus, alternative ways of thinking and governing are assumed to be automatically available via the transformation and expansion of the field of law, by enlarging the political community of subjects in order to resolve the problem that 'humanity' is facing. The second disavowal is of the failure of law and of constitutionalism to come to terms – even in the framing set by the constitutionalizing project – with its own role in the construction of the Human as individuated legal subject. Thirdly, and perhaps more fundamentally, there is a disavowal of the constitutionalizing drive itself as a world-making (and world-destroying) practice.

3.1 Law beyond the Human/Nature divide

The constitutionalizing project seeks to go beyond the modernist view of the territorially-bound rights subject to enlarge the scope of the legal community. This expansion is both temporal, by including future generations, and spatial, by encompassing eco-systems as *terrae-dictions*, thereby including new objects of care and concern.[91] Thus, the removal or attenuation of the human/nature divide is seen to enable the extension of law and to pose questions of how 'the Anthropocenic collective's new subjects, nature and future generations, can secure representation in governance institutions' and 'how new regulatory instruments [can] distribute and institutionalize legal and political authority'.[92] The constitutionalizing project has not moved far, seemingly, from the projection of the Holocene where the world as object is open and infinitely available and transformable through hierarchical powers of division between entities (within and without the law) and the carving of land and territory through the mechanism of law.[93] The powers of binary categorisation remain, regardless of the imagined transformation of law away from its Holocene framings and concerns. The maintenance of the division between the law and its outside still depends upon the hierarchical capacity of delivering entities over to law – and of rendering them

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[91] Tilburg University, *supra* note 2.

[92] Ibid.

[93] D Chandler, 'International Justice', *New Left Review* (2000) 2 (6), 55-66.

transparent through this process. However, as Fred Moten argues,[94] this power of legal interpellation will necessarily fail to grasp the agential becoming or creaturely life, which will always be 'out from the law's outside'.[95] From a Black Anthropocene perspective, instead, the ontological grasp of the end of the human/nature divide would question the alleged meaningfulness of these binary distinctions between subject and world.

Thus, the first disavowal of the constitutionalizing project is that law can make its Other or its outside transparent to it, through the inclusion of more subjects or agencies within its constitutionalizing reach. The supposed plasticity and manipulability of law in its construction of categories of temporal and spatial division, and the redrawing of the boundaries between entities considered to be within and outside the law, is something highlighted, for example, in Sylvia Wynter's writings on the reworking of understandings of 'Man' as a malleable and changing legal subject, while what is held constant is the reproduction of the 'coloniality' of the hierarchical construction of being.[96] The history of law's redrawing of the formal boundaries of inclusion and exclusion, without attempting to challenge the socio-economic and ideational structures of power that shape these, makes it difficult to make a convincing case that assimilating other ontological or cosmological concepts into this framework would amount to any substantive change.[97] The desire to draw upon other cosmological conceptions of subjects and entities in order to rewrite the categories of law is not a recognition of non-Western or non-Eurocentric understandings, but their disavowal.

As Saidiya Hartman notes, the ability to occupy other subject positions may 'be considered transgressive or as a way of refashioning whiteness' but, in reality, is 'just an extension of the master's prerogative'; alternative conceptions of the subject are 'utterly displaced and effaced'.[98] Thus, there are critiques, across a number of registers, of attempts to construct sanitised and reusable Indigenous understandings,[99] as if the Anthropocene was a call for enlarging Western or hegemonic regimes of power and knowledge. A resistance against such

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[94] Moten, *supra* note 41, at 43.

[95] Ibid., 50.

[96] Wynter, *supra* note 28, 257.

[97] S V Hartman, *Scenes of Subjection: Terror, Slavery and Self-Making in Nineteenth-Century America* (1997).

[98] Hartman and F B Wilderson 'The Position of the Unthought' (2003) 13(2), *Qui Parle*, 183 at 188-9.

[99] D Chandler and J Reid, *Becoming Indigenous: Governing Imaginaries in the Anthropocene* (London, Rowman & Littlefield, 2019); Z Todd, 'Indigenizing the Anthropocene', in H Davis and E Turpin (eds) *Art in the Anthropocene: Encounters among Aesthetics, Politics, Environments and Epistemologies* (London, Open Humanities Press 2015), 241; Davis and Todd, 'On the Importance of a Date, or, Decolonizing the Anthropocene' (2017) 16(4) *ACME: An International Journal for Critical Geographies*, 761.

attempts drives the 'ethnographic refusal' of Audra Simpson, Eve Tuck and K. Wayne Yang,[100] based not merely upon opposing the exploitation of others' knowledge but on the political rejection of the acquisitive desire of (re)constitutionalizing itself. Refusing the demands of saving this/their world then opens up to question the ontological assumptions at the heart of law, enabling some of these ontological assumptions to be saved and others to be sacrificed.

Consideration of the ethico-political positionality that enables the constitutionalizing project to choose among other cosmological concepts and approaches, reveals some of the problems with the positionality of the legal 'gaze'.[101] While other cultures and communities may consider decision-making without the 'distinctions that have ordered western human societies until now',[102] the translation or appropriation of these approaches by the constitutionalizing project would presumably require that they lose whatever meaning or signification they possessed. Throughout the constitutionalizing project's description, the assumptions of the capacity of the law and of constitutionalizing practices to represent, to include, to know and to work to reproduce binaries of inclusion and exclusion over time and space are not in doubt. Perhaps it is ironic that in attempting to not 'simply and uncritically "globalize" our current understandings of law and governance', the constitutionalizing project imagines not the Anthropocene but law itself to 'transcend' the binary divides between human and nature at its foundation, on the basis of even greater mastery of 'complex intersections between nature and culture'.[103] This is done by disavowing that the binary divide essential to the legal imaginary of mastery is merely being reworked, reproducing subject/world relations, rather than being surpassed in some way.

3.2. Law as hierarchy

The second disavowal is not so much related to the capacity of law to regulate and know its constitutive outside, but its capacity to fully include its constitutive inside. Implicit in the project to extend the reach and remit of law in the Anthropocene is the claim that it does not contain the same hierarchical dynamics that undermine its promise of inclusion. It is very much stressed as 'key' to the constitutionalizing project that the overhaul is a critical and a substantial one that can 'genuinely' address problems rather than reinforce existing hierarchies (as already referred to above):

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[100] Cited in King, *supra* note 13, at 168-169.

[101] D Chandler, 'The Bureaucratic Gaze of International Human Rights Law,' in S Meckled-Garcia and B Cali (eds.) *The Legalization of Human Rights: Multidisciplinary Perspectives* (Abingdon, Routledge 2006), 117-133. This critique equally holds for any imagined positionality whereby conceptual fames can be chosen as if from a 'tool-box' without any recognition of a meta framing through which these choices can be made.

[102] Tilburg University, *supra* note 2.

[103] Ibid.

Our key hypothesis is that it is inadequate to simply and uncritically 'globalize' our current understandings of law and governance to face this challenge, and that genuinely addressing catastrophic environmental degradation requires passing from a law of the Holocene to a *law of the Anthropocene*.[104]

The constitutionalizing project promises something other than a reworking of institutions and mechanisms, namely a different type of law and constitutionalism: 'In the Anthropocene, human dignity becomes a dimension of the more general concept of *vulnerability* that forms the normative core shared by human, animal, and non-animal rights, while *recognition* and *care* become drivers of a responsive ethics that can orientate decision-making'.[105] According to the initial project description, then, the Anthropocene 'poses profound constitutional and structural questions about what the subjects and objects of governance should be, how they should inter-relate, and how and from where they will derive their legitimacy and accountability to the expanded Anthropocenic collective'.[106]

The problem with this way of thinking, one regularly highlighted in work in the fields of Critical Indigenous and Black Studies, is that the constitutionalizing project disavows its failure to fully include and to ground its foundational category of the rights-bearing Human. Therefore, extending rights beyond this category lacks credibility. As Axelle Karera powerfully notes: 'reconfigurations of subjectivity and its creative invention of a "future people" as solutions to our ecological demise, hinge on the forgetting of the atrocious making of "another people" by slavery and the responsibility such violent history bestows on the Western world'.[107] The conflation of the Human with the non-Human merely extends the essence of the law as a mechanism of control and regulation, rather than a product of free subjects. An extension of the law to imagine the inclusion of the nonhuman or future generations removes even the fig leaf of accountability to equally constitutive subjects. Saidiya Hartman's *Scenes of Subjection* sums up well how the expansion of law reinforces rather than challenges hierarchy and

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[104] Ibid.

[105] Ibid.

[106] Ibid. It should be noted that all references to the Tillburg University project are to the intial project description from May 2021 (the formulation through which the project was granted 6-year funding by the Dutch Ministry of Education). The project's premises have evolved since then, and some aspects may read differently from the ways in which the project is described in the editorial introduction, Special Issue (which was written following the workshop, for which this paper was initially invited, and in light of and in response to the discussions had during it).

[107] Karera, *supra* note 46, at 44.

inequality, with the 'reinscription of racial subjection' enabling 'the continuities of slavery and freedom as modes of domination, exploitation, and subjection'.[108] As Yusoff argues:

> The colonial assumption for the responsibility for and of the world is articulated anew as the white man's burden – a paternalism that is tied to a redemptive narrative of saving the world from harm on account of others while maintaining the protective thick skin of innocence.[109]

The history of the project of the extension of rights or legal entitlements is one marked with inequalities, exclusions and oppression. It is ironic that at a moment in history when the constitutionalizing project faces a major challenge, with the refusal of legal recognition and inclusion being broadly articulated across Critical Indigenous and Black Studies, its attempt at extending legal recognition and protection should be assumed to be unproblematic. The refusal of the rights of representation has been argued by Indigenous scholars such as Audra Simpson[110] and Glen Sean Coulthard[111] while, for Critical Black Studies scholarship, exclusion from the modern order or the field of political and legal being has demonstrated the incompatibility of human being with the modernist ontology of law.[112] Law and the constitutionalizing project cannot address problems by granting rights and inclusion when these have already been refused by members of the existing 'Anthropocenic collective'.[113]

3.3. Law as constitutive

The third disavowal inverses the relationship between the constitutionalizing promise and the conceptual rethinking that is required. By presenting law as epiphenomenal – as merely the consequences of a set of relations – the constitutionalizing project disavows the role of law as constitutive of these relations.[114]

> The Anthropocene's transcendence of human/nature, public/private, and global/local distinctions foreshadows worrisome consequences for our current Holocene-era

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[108] Hartman, *supra note* 97, at 172.

[109] Yusoff, *supra note 3*, at 27.

[110] A Simpson, *Mowhawk Interruptus (Political Life across the Borders of Settler States)* (Durham, NC, Duke University Press 2014), 11.

[111] G S Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, MN, University of Minnesota Press 2014).

[112] For example, Wilderson, *Red, White & Black: Cinema and the Structure of U.S. Antagonisms* (Durham, NC, Duke University Press 2010); Moten, *supra* note 41, at 192-196.

[113] See also, *supra* note 42.

[114] See also Horst, on the constitutive role of law, Special Issue.

institutions of law and governance, which were conceived and structured around precisely those dichotomies.[115]

The problems to be addressed appear to be external or unconnected to the law and constitutionalizing practices. Apparently, until we reached the Anthropocene, we lived in the happy times of the Holocene, 'where the world and its resources awaited unlimited human exploitation' and where 'global constitutionalism meant figuring out how to divide the spoils'.[116] Up until today, constitutionalism was thereby unproblematic. There was no problem at all during the Holocene with the fact that law could assume that the world was there as an object for exploitation. It is only retrospectively that there is felt to be a need to acknowledge that the history of international political and legal theory is one of 'world-making' via the genocidal expropriation of 'spoils', from those who were not considered capable of adequately exploiting this world and its resources, and who thereby became resources for exploitation themselves. Even now there is no real recognition by the constitutionalizing project that the assumption that the world and its resources 'awaited unlimited human exploitation' was inextricable from the existence of law and from constitutionalism itself.

Now, apparently, in this epoch of the Anthropocene, there is a problem with constitutionalism since the 'spoils', which were previously taken to be unproblematically available to those with the power to expropriate them, have themselves become matters of concern: 'the scale of the changes posed by the Anthropocene are so great that they are destabilizing how we distinguish nature from culture, global from local, public from private, distinctions that have ordered western human societies until now'.[117] The 'distinctions that have ordered western human societies until now' – what a revealing expression! – apparently need to be rethought on the basis of an entanglement between humans and nature revealed by the Anthropocene. Or perhaps, as Latour would say,[118] on the basis that these 'distinctions' were never really a true guide or understanding of the practices of the Moderns. Humans and nature, the global and local, the public and private are not neatly separable spheres but, in fact, entangled or related in ways which were never important previously.

Of course, for law and the constitutionalizing project to be meaningful, these distinctions had to hold previously and the capacity to continue to redraw and remake distinctions has to remain unquestioned. For the constitutionalizing project to hold, it is necessary to disavow the fact that these distinctions themselves are the products of law and constitutionalism – that these distinctions in fact *are* law and the constitutionalizing project. Thereby, processes

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[115] Tilburg University, *supra* note 2.

[116] Ibid.

[117] Ibid,

[118] Latour, *We Have Never Been Modern* (Cambridge, MA, Harvard University Press 1993).

of constitutionalization face a doubling of the problem, which is not so much that of global climate change per se, but that of the erosion of the categories and assumptions that 'structured' understandings of law and governance on the one hand, and the need to contain this problem through a disavowal of the role of law and constitutionalism in the creation of the problem itself on the other hand. There is much positive and reparative work to be done in the reckoning or recognition of the role of law and constitutionalism in the construction of the categories and assumptions of 'humans' and 'nature' and of the legal 'gaze' of transparency, which makes the world available to be known, 'protected' or 'genuinely addressed' by the self-governing subject of law.

Aspirations to (re)affirm the legitimacy and authority of the constitutionalizing project necessarily deny the constitutive role of law and constitutionlism. In which case, the Anthropocene – understood in terms of the policy crises induced by global warming or climate change – can be presented as an opportunity for disavowal, for reworking and rewriting the project of law and constitutionalism, as if the Anthropocene provided a blank slate for another world to be made in the image/imaginary of law. In fact, it would appear that the Anthropocene imposes a new burden on law, according to geographer Nigel Clark, 'a white man's overburden'.[119] As a possible alternative, this short paper, informed by the ethico-political understanding of the Black Anthropocene, suggests that the logical, let alone ethical, conclusion would be that if the 'distinctions that have ordered western human society until now' have really ended, then there can be no world of or for law, and no constitutionalizing project.

Conclusion

From the perspective of the Black Anthropocene, the aspiration of constitutionalizing living in the Anthropocene does not just fall short of its promise of addressing the problem of climate change. More importantly, it reveals that the project of law and constitutionalism is inherently, ontologically, problematic in itself. If the promise of constitutionalism is to be maintained, it is forced to: firstly, disavow law's (re)production of a world of subjects and an outside of transparency amenable to its order; secondly, to disavow the incapacity of law to enable the full becoming of human modes of life by restricting the understanding of the Human as legal subject; and thirdly, to disavow the fact that it is the project of constitutionalism itself that has reduced 'the world' to a resource or 'spoils' to be divided up. The Black Anthropocene does not just problematise the contemporary imaginaries of law and constitutionalization; it, by necessity, works backwards to erase whatever justifications or legitimacy the project is alleged to have had in the 'Holocene' past. With the Black Anthropocene, the Anthropocene is stood on its head, no longer a *tabula rasa* of 'the modern and anti-Black world', for law to reconstitute itself free of its past; but rather as a condition

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[119] Nigel Clark, cited in Yusoff, *supra* note 3, at 28.

of erasure for the institutions of modernity, the modernist constitutionalizing project and its conditions of ontological grounding.