The Black Anthropocene: and the end(s) of the constitutionalizing project

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This article is written in response to the assumptions and objectives of a recent project coming out of Tilburg Law School, called 'Constitutionalizing in the Anthropocene', but can be read just as easily as a stand-alone piece. The analysis presented here is based on an understanding of the concept 'Anthropocene' as rejecting modernist ontological assumptions about a split between human and nature. The concept says that this split is fictitious and can no longer hold in the present context of ecological crisis. The project to constitutionalize the conditions of living in the Anthropocene recognizes the importance of this shift but, this article argues, fails to fully acknowledge the implications for law. In contrast, this article explores the alternative concept of the 'Black Anthropocene' as a (para-)ontological understanding and an ethico-political response that better captures the concept of Anthropocene, including the legal implications. Grounded in the concept of Black Anthropocene, this article demarcates two distinct approaches to relationality and to the legal subject. It then utilizes this framing to rethink constitutionalization as disavowing the imbrication of law within a modernist ontology of separation and, as a result, the possibilities for constitutionalizing the Anthropocene at all. The article argues that focusing on anti-Blackness as central to the modernist ontology of human and world opens other possibilities for thought, leading us to question, rather than seek to preserve, the authority and legitimacy of projects of constitutionalization per se.

1 THE BLACK ANTHROPOCENE

The concept of 'Anthropocene' recognizes present-day catastrophic environmental degradation and, in so doing, unravels distinctions essential to a modernist imaginary – the world, nature and the environment are no longer capable of being assumed or taken for granted.[1] This unravelling necessarily has implications for governing the world through law. A project at Tilburg Law School aimed at 'Constitutionalizing in the Anthropocene' notes that the Anthropocene confronts international legal mechanisms with problems beyond their present competences and capacities:

> 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

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1.   As powerfully noted in F Neyrat, 'Towards a Planetary Coalition (a Preamble)', this Special Issue.

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]

At the same time, the project to constitutionalize living in the Anthropocene endeavours to establish responsive legal frameworks that might govern catastrophes. This article suggests that the proposal of constitutionalizing in the Anthropocene is grounded in a paradox. The paradox arises because the project critiques extant legal frameworks, while reducing the challenge of the Anthropocene to narrow questions of technical and organizational reordering. In such a framing, the human remains the knowing and governing subject of law, and the world remains the object to be known and governed, which undermines the core insights of the Anthropocene concept. This article argues that the paradox of constitutionalizing in the Anthropocene risks the foreclosure of alternative possibilities in the face of crisis. In contrast, the concept of 'Black Anthropocene' articulates a critical challenge to this programmatic drive to save the modern world and its subject, the human, through new forms of governmentality.

The Black Anthropocene is a concept that both affirms the condition of the Anthropocene and provides new meaning and an ethico-political practice without re-centring the 'human' as understood in Western thought. Rather, the Black Anthropocene asks those who find the Anthropocene concept helpful to attend to historical processes of racializing and dispossessing Black and Indigenous peoples, because these modes of oppression are conditions for ecological catastrophe that are largely ignored by mainstream Anthropocene scholars. 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'.[3]

Ecological catastrophe is inseparable from an entangled history of chattel slavery, Indigenous dispossession and the ravages of racial capitalism, and this entanglement is as much material as ideational. From the perspective of the Black Anthropocene, the unfolding of economic and social processes between the fifteenth and twenty-first centuries is inseparable from ontological claims in philosophical, political, legal and scientific discourses that simultaneously de-humanize Black and Indigenous peoples and position nature as an 'object' that should be exploited for a White world. Present-day structures and the ideational claims legitimizing and reproducing them can be thereby understood in terms of the 'global colour line'.[4] Accordingly, the critique of constitutionalization posited here is not a simple socio-economic or moral indictment of law for enabling capitalism from a Marxist perspective.[5] Rather, at stake is re-narrativizing modernity from its economic, political, ecological and racial underside, turning ideological self-understandings within a White world inside out. As Paul Gilroy describes, constructing modernity 'from the slave's point of view'

2.   Tilburg University, Public Law and Governance 'Constitutionalism 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* (University of Minnesota Press, Minneapolis, MN 2018) 61.
4.   ND Chandler, *'Beyond this Narrow Now' Or, Delimitations of W.E.B. Du Bois* (Duke University Press, Durham, NC 2022) 148.
5.   CJ Robinson, *Black Marxism: The Making of the Black Radical Tradition* (University of North Carolina Press, Chapel Hill, NC 2000); E Williams, *Capitalism and Slavery* (Penguin Books, Dublin 2022).

offers a rich 'unique perspective on many of the key intellectual and political issues' in modernity.[6]

In the treatment here, the 'slave's point of view' is a positionality that is liminal to but constitutive of a modernist ontology of binary division between human and world, a positionality both included and excluded – neither fully human nor fully non-human: a positionality from which an ontology of fixed essences and binary cuts can exist only through catastrophic violence. It is important to note here that forms of division and the constitution of different 'genres' of the human have been historically variable.[7] Nevertheless, the necessity of this cut between the human and the non-human and the catastrophic violence implied and required by it, grounds the conception of (anti-)Blackness. Anti-Blackness is therefore not uniquely dependent upon racial signifiers of morphology, even as ideologies and practices of anti-Blackness mark the bodies of Black people at structural, institutional and individual levels. Rather, like Anthropocene, 'Blackness' is a concept which in this case denotes for Yusoff, 'a name for nonnormative subjectivity'.[8]

Blackness, from this standpoint, is a kind of relational differentiation, inscribed in the process of distinguishing an 'unmarked' (ie White) referent as the norm – the 'fully human' subject.[9] Blackness is 'produced' as the antithesis of the modern autonomous rational subject and becomes part of the 'world' (an instrumentalizable object). Thus, what is proposed here is not an alternative '-cene' to the Anthropocene but a shift in understanding that places anti-Blackness and the modern ontology of the individuated subject and the world at the heart of ecological catastrophe. The ethico-political response to this conceptual shift, for Yusoff, cannot be one of 'individuated liberal modes of subjectivity and subjection' that bring in the previously excluded. Rather, the 'world must end for another relation to the earth to begin'.[10]

This present article relies on Yusoff's concept of the Black Anthropocene, while supplementing her work with Black Studies scholarship that does not directly affirm the Anthropocene concept, although it may indirectly challenge and enrich that concept. It is crucial to emphasize that for the Black Anthropocene, understood thus, the problem is the racializing construction of the human as well as ontological assumptions about the world – including the treatment of Black peoples within it – as object, denoted by the concept of 'anti-Blackness'.[11] In the dominant modernist Anthropocene imaginary of moving 'beyond the human', meaning beyond the human/nature divide, it is assumed that the human can be reformed while the world remains the same.[12]

6.   P Gilroy, *The Black Atlantic: Modernity and Double Consciousness* (Verso, London 1993) 55.

7.   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 257.

8.   Yusoff, supra (n 3) at 19.

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

10.   Yusoff, supra (n 3) at 63.

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

12.   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* (Routledge, Abingdon 2020) 179.

In this case, reconstructive work is possible. World-making can continue, informed by new sensitivities nurtured through theoretical approaches, critical or Indigenous cosmologies and ontologies and other radical, emancipatory understandings.[13] In other words, mainstream critical theorists are happy to engage with disruptive understandings of complexity, care and entanglement but the human is still the central, world-saving subject.

Bruno Latour's solution to ecological crisis exemplifies this approach, notably his call for Europe to take the lead in 'reinventing' or 'recalling' its construction of modernity, moving beyond state-based and global conceptions of planetary problems.[14] At stake in his call for domestic and international reform, Latour explains, is the meaning of the human, at stake in struggles of 'Terrestrials' or the 'Earthbound' against the 'Moderns'.[15] For Latour's project of salvage, rationalist, universalist, scientific and linear understandings of the world can be replaced by relational, more-than-human, poetic and nonlinear approaches; thus, even if not everything of the modern world can be saved, it is at least possible to 'wake up' to a new reality and repair and rework disciplinary understandings.[16]

From the perspective of the Black Anthropocene, however, the critical work of saving the world through more-than-human relations and knowledges is problematic, because it lacks an appreciation of the violence implicit in the separation of the human from the world.[17] In drawing attention to this violence, critics such as Heather Davis and Zoe Todd write that 'The notion of the Anthropocene-as-disaster in dominant scientific and social science discourses must also tend to the ongoing disaster of the Middle Passage … [W]e must expand and pluralize collective understandings of the disasters of the Anthropocene, and we must certainly expand our temporality'.[18] Like these authors, 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.[19] In a similar register, Black Studies scholars draw attention to how discourses of moving 'beyond' the human reproduce existing hierarchies of being.[20]

This focus on the inseparability of the 'Anthropocene-as-disaster' from the making of the modern world, both materially and ideationally, distinguishes the Black Anthropocene from radical Marxist and Third World Approaches to International

13.   G Raygorodetsky, *The Archipelago of Hope: Wisdom and Resilience from the Edge of Climate Change* (Pegasus Books, New York 2017); S Jasanoff and ML Martello (eds), *Earthly Politics: Local and Global in Environmental Governance* (MIT Press, Cambridge, MA 2004). See also Horst, 'Entanglements: The Ambivalent Role of Law in the Anthropocene' in this Special Issue.

14.   B Latour, *Down to Earth: Politics in a New Climatic Regime* (Polity Press, London 2018) 99–106.

15.   ibid.

16.   ibid 38; see also CT Wrangel and A Causevic, 'Critiquing Latour's Explanation of Climate Change Denial: Moving Beyond the Modernity/Anthropocene Binary' (2021) 50(1) Millennium 199–223.

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

18.   H Davis and Z Todd, 'On the Importance of a Date, or, Decolonizing the Anthropocene' (2017) 16(4) ACME: An International Journal for Critical Geographies 761–80, 772.

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

20.   E Glissant, *Poetics of Relation* (University of Michigan Press, Ann Arbor 1997); TL King, 'Humans Involved: Lurking in the Lines of Posthumanist Flight' (2017) 3(1) Critical Ethnic Studies 162–85 at 177–8.

Law (TWAIL) scholarship, which have tended to seek the reconstruction of international law by dismantling racial capitalism.[21] The Black Anthropocene is similar to critical environmental law[22] and literature on posthuman legalities,[23] in that it questions onto-logical and epistemological assumptions informing the human/nature divide. However, the Black Anthropocene seeks not only to redraw the boundary between human and non-human and to indicate the need for new epistemological approaches to agency, but also to work outside these categories, including 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 can be no 'wiping the slate clean' and starting anew.

This interdiction emphasizes ontological constraints, and the priority of ontology brings attention to the human/nature divide as resulting from historical processes of colo-nial and capitalist 'development' – that is, in the construction of the anti-Black 'world' that is now under threat from climate change. As Zakiyyah Iman Jackson argues, there can be no discussion of addressing the human/nature divide without addressing the ques-tion of (anti-)Blackness: moving beyond the modernist ontology of the human 'is simul-taneously the movement toward blackness, whether blackness is embraced or not, as blackness constitutes the very matter at hand'.[24] 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, Black bodies and goods that underpinned capitalist growth and (settler) colonial rule through the process of transatlantic slavery. Racial capitalism,[25] defined by Cedric Robinson, inaugurated a bifurcated world policed domestically and internationally through what W.E.B. Du Bois famously called the 'colour line'.[26] From a Black Anthropocene perspective, it is

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21.   See, for example, B Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, Cambridge 2009); A Gorz, *Strategy for Labor* (Beacon Press, Boston 1967); EO Wright, 'Transforming Capitalism through Real Utopias: 2012 Presidential Address' (2013) 78(1) American Sociological Review 1–25; U Natarajan, J Reynolds, A Bhatia and S Xavier, 'Introduction: TWAIL: On Praxis and the Intellectual' (2016) 37(11) *Third World Quarterly* 1946–56; MW Mutua, 'What Is TWAIL?' (2000) Proceedings of the ASIL Ann. Meeting 31–8. For an exception see U Natar-ajan and J Dehm, 'Where is the Environment? Locating Nature in International Law' (2019) 3 Third World Approaches to International Law Review: Reflections, available at <https://twailr. com/where-is-the-environment-locating-nature-in-international-law/>. Natarajan and Dehm argue that: 'Environmental change confronts international lawyers with the systemic injustice we help create and maintain. It demands an acceptance that we were mistaken in thinking we could construct and then govern the environment. It necessitates that we transcend the con-fines of Western modernity and embrace instead other narratives about our relationship with the natural world that more accurately estimate human ability to regulate it.'
22.   A Philippopoulos-Mihalopoulos, 'Critical Environmental Law as Method in the Anthro-pocene', in A Philippopoulos-Mihalopoulos and V Brooks (eds), *Research Methods in Envir-onmental Law: A Handbook* (Edward Elgar, Cheltenham 2017) 131–58.
23.   See, for example, the Special Issue, 'Posthuman Legalities: New Materialism and Law Beyond the Human', edited by E Boulot, A Grear, J Sterlin and ID Vargas-Roncancio, Journal of Human Rights and the Environment (2021) 12(0).
24.   ZI Jackson, 'Outer Worlds: The Persistence of Race in Movement "Beyond the Human"' (2015) 21(2/3) GLQ: A Journal of Lesbian and Gay Studies 215–18 at 217.
25.   Robinson, supra (n 5).
26.   WEB Du Bois, *The Souls of Black Folk* (Amazon, Seattle, WA 2020) [1903]; DF da Silva, *Toward a Global Idea of Race* (University of Minnesota Press, Minneapolis, MN 2007).

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problematic to claim that the human/nature divide is only recent or 'revealed' by contemporary environmental catastrophe.[27]

Although ontology is a central concern of the Black Anthropocene, this 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'.[28] Rather than starting with abstract, timeless or metaphysical assumptions of entanglement or relation, the violence of tangible world-making is placed centre-stage.[29] In the face of this ongoing violence, the Black Anthropocene is an articulation of a new set of ethico-political practices and understandings that hold open the possibilities of disrupting and refusing this condition, rather than ameliorating it. The Black Anthropocene questions the world, not only as a modernist conceit or as too human-centred, but also as inextricable from anti-Blackness. As Fred Moten writes, '[B]lackness is the anoriginal displacement of ontology … ontology's anti- and antefoundation, ontology's underground, the irreparable disturbance of ontology's time and space'.[30]

The Black Anthropocene seeks to deconstruct, to desediment, to disrupt ontological assumptions, emphasizing the non-/post-/para-/quasi-ontological violence that fixes entities as separate and distinct.[31] The modern world is therefore an ongoing product of racializing violence, not only in structural terms (of coloniality, dispossession, slavery and genocide) but also ontologically (sedimenting cuts and divisions), enabling some entities to be recognized as legal subjects with rights and responsibilities – by those with power – and others to be 'thing-ified', denied agency and subjected to instrumentalization and gratuitous violence. The Black Anthropocene thus resists demands to save the existing order of the (anti-Black) world through new forms of governmentality.[32] In short, the Black Anthropocene assumes that saving the world as such is problematic.

27.   C Bonneuil and J-P Fressoz, *The Shock of the Anthropocene* (Verso, London 2016).
28.   E Povinelli, *Between Gaia and Ground: Four Axioms of Existence and the Ancestral Catastrophe of Late Liberalism* (Duke University Press, Durham, NC 2021) 2.
29.   CL Warren, *Ontological Terror: Blackness, Nihilism and Emancipation* (Duke University Press, Durham, NC 2018).
30.   F Moten, 'Blackness and Nothingness (Mysticism in the Flesh)' (2013) 112(4) South Atlantic Quarterly 737–80, 739.
31.   Nahum Dimitri Chandler's work on para-ontology has been widely influential in bringing ontological concerns to the centre of attention in 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, ND Chandler, *X: The Problem of the Negro as a Problem for Thought* (Fordham University Press, New York 2014); see also ND Chandler, 'Of Horizon: An Introduction to "The Afro-American" by WEB Du Bois – circa 1894' (2010) 2(1) Journal of Transnational American Studies. Chandler's work on para-ontology has been taken up in different ways. Notably, Fred Moten has used the concept of para-ontology to think about Blackness as necessarily 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' (2008) 50(2) Criticism 177–218, 187; also F Moten, *Stolen Life (Consent Not to Be a Single Being)* (Duke University Press, Durham, NC 2018). RA 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 RA Judy *Sentient Flesh: Thinking in Disorder, Poiesis in Black* (North Carolina Press, Durham, NC 2020).
32.   LR Gordon, 'Black Existence in Philosophy of Culture' (2014) 59(3–4) Diogenes 96–105.

In the dominant Anthropocene framing, it is the changing world that poses a problem for modernist understandings and assumptions. For the Black Anthropocene, it is instead modernist understandings and assumptions that produce changing environmental conditions through the ravages of racial capitalism and colonialism, which pose a problem. The changing environment is not simply the outcome of, nor more important than, these prior oppressive structures. Thus, Claire Colebrook explains that instead of focusing on how this (anti-Black) world can be saved, 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'.[33]

The Black Anthropocene thus rejects dominant approaches to the Anthropocene. It can be read in a range of theoretical perspectives oriented to what could be called 'ontology-critique' in Black Studies, which focuses on how the (re)production of the human and the broader context of modernity produce racial violence and exclusion.[34] There are distinctive ethico-political demands of the Black Anthropocene that arise from this alternative ontology-critique, three of which I will highlight.

The first ethico-political demand of the Black Anthropocene is reparation. Reparative work seeks neither to 'make good', nor to restore, what has been lost from the modernist world. Instead, the Black Anthropocene seeks transformation,[35] through an accounting for that which has been disavowed by modernity. As Tiffany Lethabo King explains, the point is not to reject the subjecthood of the human per se but to recognize the violence against certain peoples and ways of life that was the precondition of the human, as defined for the modern world.[36] Reparative work refuses modernist cuts and binaries, bringing in the violence and genocide of Black and Indigenous peoples necessary to modern 'development' and 'progress'.[37] Reparation is the call for the end of the world of modernist ontology, rather than its reform.[38] King makes the point powerfully: 'Black and Native/Indigenous absorption into the category of the human would disfigure the category of the human beyond recognition'.[39] As Zakiyyah Iman Jackson argues, putting anti-Blackness at the centre of our conceptual framing enables the generation of 'new possibilities for rethinking

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33.   Colebrook, supra (n 12) at 196.
34.   See, for example, Glissant, supra (n 20); Wynter, supra (n 7); A Mbembe, *Out of the Dark Night: Essays on Decolonization* (Columbia University Press, New York 2021); LR Gordon, *Freedom, Justice and Decolonization* (Routledge, New York 2021); ZI Jackson, *Becoming Human: Matter and Meaning in an Antiblack World* (New York University Press, New York 2020); da Silva supra (n 26).
35.   For an understanding of reparation as transformative rather than restorative see Mari Matsuda's seminal article, MJ Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 323–400.
36.   King, supra (n 20) at 177.
37.   Yusoff, supra (n 3) at 61; K McKittrick, *Demonic Grounds: Black Women and Cartographies of Struggle* (University of Minnesota Press, Minneapolis, MN 2006).
38.   In this respect, the Black Anthropocene may be seen as a similar approach to that of the abolitionist literature, where abolition is part of a transformative agenda. Ruth Wilson Gilmore, for example, calls for the abolition of the carceral state and the prioritizing of community supports based on redefined understandings of collective safety; see RW Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (University of California Press, Berkeley 2007).
39.   King, supra (n 20) at 165.

ontology' and 'alters the meaning and significance of being (human)'.[40] Reparative claims of the Black Anthropocene are not about 'equality' or 'rights of inclusion' or representation, because these frames of recognition perpetuate the status quo.[41] 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.[42]

The second ethico-political demand of the Black Anthropocene is critique. Critical work consists of refusal and resistance. This is highlighted by movements to abolish and decolonize institutions that reproduce modernist hegemony, such as the police and the university.[43] Critique might also be understood as flight from the world of modernity and, instead, as holding the world open beyond absolute divides among entities, which are otherwise in relation. 'Flight' does not mean fleeing 'from' institutions 'to' some time or place, but a practice of being in relation.[44] It is important to bear in mind the distinction between such critique, and modernist claims to rights or identities.[45] Critique here means the refusal of rights-based claims that have been historically denied to Black people.[46] Critical work could be framed as 'ante-political' politics, rather than anti-political:[47] a politics of holding the world open against impositions of ontological fixity and conceptual closure.[48] The space created is not formal but rather a practice, a mode of being together, articulated in a variety of ways (and with respective nuances): by Laura

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40.   Jackson, supra (n 34) at 1.
41.   See, for example, Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, Minneapolis, MN 2014). Rather, what is key here 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 (n 20), it is the 'right to opacity' which is emphasized. 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.
42.   Judy, supra (n 31) at 19; see also Moten, supra (n 30). This is the openness 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 'aesthetic sociality of Blackness', see, for example, L Harris, *Experiments in Exile: CLR James, Hélio Oiticica, and the Aesthetic Sociality of Blackness* (Fordham University Press, New York 2018), or, in the case of Harney and Moten, 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 impossibility of the one and the exhaustion of the very idea of the one.' S Harney and F Moten, *All Incomplete* (Minor Compositions, New York 2021) 122.
43.   S Harney and F Moten, *The Undercommons: Fugitive Planning & Black Study* (Minor Compositions, New York 2013).
44.   Judy, supra (n 31) at 423.
45.   J Sexton, 'The *Vel* of Slavery: Tracking the Figure of the Unsovereign', in TL King, J Navarro and A Smith (eds), *Otherwise Worlds: Against Settler Colonialism and Anti-Blackness* (Duke University Press, Durham, NC 2020) 94.
46.   Harney and Moten, supra (n 43); FB Wilderson, *Afropessimism* (W.W. Norton & Co, New York 2020).
47.   F Moten, *The Universal Machine (Consent Not to Be a Single Being)* (Duke University Press, Durham, NC 2018) 11; JK Carter, 'Other Worlds, Nowhere (or, the Sacred Otherwise)' in King, Navarro and Smith (eds) *Otherwise Worlds*, supra (n 45) 158 at 182.
48.   In line with 'the refusal of what has been refused' (see, for example, F 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

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Harris as an 'aesthetic sociality of blackness';[49] by J Kameron Carter as 'malpractice';[50] by Harney and Moten as the 'undercommons';[51] and by Ronald A Judy in terms of 'para-semiotic' becoming.[52]

The third ethico-political demand of the Black Anthropocene is futurity. The critical ontological focus of the Black Anthropocene refers to futurity as a process, rather than a temporal sense of 'after' the modern world. The precondition for this is a radical openness to the outside and to alterity, rather than a relation of the subject to the world as an object, which then requires an ethic of care.[53] Here, as Kara Keeling indicates, the work of Édouard Glissant is key to thinking of futurity as a process of openness rather than temporal closure.[54] Glissant opens his book, *Poetics of Relation*, with the Middle Passage: the experience of catastrophic violence and dispossession – of the abyss – understood as transformative, as dissolving the subject into a 'nonworld'.[55] A new subject is thereby given violent birth. A subject not from the perspective of a modernist ontology as lacking in being, but rather from that of the enslaved person, a subject who is becoming, unconstrained by an ontology of identity, without essence, without origin, without telos.[56] This 'abyssal subject' thereby embodies futurity without possessing a 'world'.[57] The radical dispossession of sovereign subjectivity enables 'unthinking mastery',[58] becoming as a process of continual unmaking of the self.[59] By removing assumptions of essence or fixity, futural work is not about the modern subject making the future differently, but rather, unmaking the ontological constraints of the present.[60] Key to understanding the distinction between an ontology of distinctions, entities, essences and causal determination and the Black Anthropocene's futurity of openness is Glissant's concept of opacity[61] – that we are always already within a totality of Relation where ontological distinctions make no sense as entities are in 'relations that are not relationships' between groups and cultural

and institutional politics but an ethical or aesthetic practice of sociality (Harris, supra [n 42]; Harney and Moten, supra [n 43]) or a 'being-in-common' (Judy, supra [n 31]) that emphasizes the collective.

49.   Harris, supra (n 42).
50.   Carter, supra (n 47).
51.   Harney and Moten, supra (n 43).
52.   Judy, supra (n 31).
53.   See Judy, supra (n 31) at 416.
54.   K Keeling, *Queer Times, Black Futures* (New York University Press, New York 2019) 199.
55.   Glissant, supra (n 20) at 6.
56.   ibid at 5–9.
57.   JE Drabinski, *Glissant and the Middle Passage: Philosophy, Beginning, Abyss* (University of Minnesota Press, Minneapolis, MN 2019) 72; A Yountae, *The Decolonial Abyss: Mysticism and Cosmopolitanism from the Ruins* (Fordham University Press, New York 2017) 89.
58.   J Singh, *Unthinking Mastery: Dehumanism and Decolonial Entanglements* (Duke University Press, Durham, NC 2018) 122.
59.   R DiAngelo, *White Fragility: Why It's So Hard for White People to Talk about Racism* (Allen Lane, London 2018).
60.   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* (Duke University Press, Durham, NC 2018); E Viveiros de Castro, *Cannibal Metaphysics* (Univocal Publishing, Minneapolis 2014); E Kohn, *How Forests Think: Toward an Anthropology Beyond the Human* (University of California Press, Berkeley 2013).
61.   Glissant, supra (n 20).

forms: relations such as 'correlation' and 'summation'.[62] Entities are irreducible, always in excess of any representation by any other entity, even as 'new and unexpected cultural forms' are produced through creolization.[63] Thus, there is no shared world beyond the 'nonworld' of opacity, which is thereby 'also the force' bringing communities together and into contact with one another in processes of becoming.[64]

In light of these three reparative, critical and future ethico-political demands, the Black Anthropocene can best be viewed as an ontological understanding and ethico-political agenda that runs counter to any constitutionalizing project. The Black Anthropocene would hold open the 'unconstructable' and 'unknowable' part of nature, or 'the Earth',[65] rather than leaping to an imagined 'beyond' of coloniality.[66] This holding open, in other words, is not that of boosting human capacities by being 'open to' other forms of planetary being, and thereby adding more into the world that exists.[67] To hold open is instead to be 'opened by' the 'unconstructable' and 'unknowable'.[68] The Black Anthropocene is not constructive but rather deconstructive, disruptive, breaking and holding this break, whereas modernity seeks construction – 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.[69]

The second section of this article draws further upon Édouard Glissant's *Poetics of Relation* to illustrate the ontological stakes of the two distinct approaches to moving 'beyond the human' discussed in this paper: constitutionalizing and 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 clear in Édouard Glissant's counter-position between the 'thought of the Other' and the 'other of Thought'. The former can be read as the constitutionalizing desire to become more-than-human by assimilating other ways of knowing. The latter can be understood as the subject becoming continually unmade and re-made, 'prized open' in a world of infinite Relation.[70] Glissant

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62.   Drabinski, supra (n 57) at 173.
63.   ibid. As Glissant states: '[I]t is impossible to reduce anyone, no matter who, to a truth he would not have generated on his own. Plato's city is for Plato, Hegel's vision is for Hegel, the griot's town is for the griot.' Glissant, supra (n 20) at 194.
64.   ibid at 6 and 194.
65.   F Neyrat, *The Unconstructable Earth: An Ecology of Separation* (New York, Fordham University Press 2019).
66.   F Neyrat, 'Towards a Planetary Coalition (a Preamble)', this Special Issue.
67.   See supra (n 60).
68.   See, for example, the formulation in R Negarestani, *Cyclonopedia: Complicity with Anonymous Materials* (re.press, Melbourne 2008) 197.
69.   A Mbembe, *On the Postcolony* (University of California Press, London 2001) 11; Jackson, supra (n 34); D Leong, 'The Mattering of Black Lives: Octavia Butler's Hyperempathy and the Promise of the New Materialisms' (2016) 2(2) *Catalyst: Feminism, Theory, Technoscience* 1–35.
70.   Glissant supra (n 20) at 154.

develops an approach which works against a modern ontology of the human/nature separation in a very different way than the constitutionalizing project's 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 constituted 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, which does not challenge anthropocentrism. 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'.[71] Glissant, however, rejects Einstein's theory of Relativity. He explains that 'Just as Relativity in the end postulated a Harmony to the universe, cultural relativism (Relativity's timid and faltering reflection) viewed and organized the world through a global transparency that was, in the last analysis, reductive'.[72] Thus, from Glissant, we can draw out two distinct 'tendencies' or approaches to relationality: one with a telos, which assumes a remaking of the human as subject, namely the constitutionalizing approach; the other, which does not organize the world through a global transparency, namely 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 what Glissant calls 'interactive life'.[73] This first approach, he explains, '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'.[74] This approach enables a telos of progress, which in the constitutionalizing project might mean productive engagement through entanglements with non-human others. For Glissant, this understanding of relational entanglement as transparent and instrumentalizable 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'.[75] On the contrary, the second approach, which underpins this reading of the Black Anthropocene, is that of questioning. This approach:

> ... 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 uncertain (that is, ungraspable) yet fundamental in every instance and quite likely full of instances of invariance.[76]

Glissant advocates an alternative approach to being in the world relationally. What he offers is a Poetics of Relation.[77] This poetics challenges universal, generalizing or

71.   ibid 134.
72.   ibid 135.
73.   ibid 136.
74.   ibid 136–7.
75.   ibid 137.
76.   ibid.
77.   ibid 142.

transcendent totalities by focusing on specificity. His approach is a practical one in which the subject does not produce 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, to judge or to place. As Glissant states, the notion of 'opacity' describes 'an irreducible singularity'.[78] He further explains that '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'.[79] As Tiffany Lethabo King notes, in her reading of Glissant, this framing establishes a 'poetic politics', which can 'conceptualize a kind of "uncharted" surroundings that are continually made, remade, or unmade'.[80] The key point about Glissant's conception of 'opacity' is that this slows and disrupts assumptions of regularity and linearity, which are the condition of possibility for the constitutionalizing impulse. Opacity 'enables other modes of thinking', and thus 'opens up other kinds of potentialities, materialities and forms'.[81]

It is important to emphasize again that the Black Anthropocene, described here, is concerned with a different relation to 'otherness', one that is not instrumentalizing, whereby one community projects its needs and desires onto another.[82] While Glissant claims opacity as a right 'for everyone',[83] this 'right' does not equate to a liberal understanding of rights-claims, where a constituted subject claims a right that is accepted and enforced by an authority. Rather, Glissant's claim is an invitation to resist being rendered transparent towards or by this authority. Resistance is a kind of refusal – a refusal to be reduced to an individuated entity. The refusal of a modern ontological framing, which presupposes the individual subject as a natural starting point, is one that is highly generative.

It is from this positionality, as described above, that the 'abyssal' subject enters the 'nonworld', the non-ontological world of Relation.[84] Here, there is no longer an Archimedean point from which the equalizing or homogenizing projection of law is possible. There is neither an external nor an internal determination of the other because creolization produces a world in difference and disunity.[85] It denotes an open encounter with otherness without an assumption of superiority.[86] Creolization holds a world of difference in relation, resembling a chaos-monde, which 'embraces 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'.[87]

Reading with Glissant, the task of living in the Anthropocene would conceivably be one of holding, 'giving-on-and-with' in a process 'of bringing-into-relation',[88] which requires that difference be maintained.[89] Black Anthropocene approaches

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78.   ibid 190.
79.   ibid 191.
80.   TL King, *The Black Shoals: Offshore Formations of Black and Native Studies* (Duke University Press, Durham, NC 2019) 8.
81.   ibid.
82.   Glissant supra (n 20) at 111.
83.   ibid 194.
84.   ibid 136.
85.   Drabinski, supra (n 57) xv.
86.   See, for example, Glissant's distinction between 'creolization' as an open and ethical mode of being and 'creoleness' as an identity or fixed essence, Glissant, supra (n 20) at 89.
87.   Glissant, supra (n 20) at 94.
88.   ibid 142.
89.   ibid 95.

that might draw on Black Studies scholars, such as Glissant, would seek to deconstruct, to see the cuts of coloniality, to offer a world without fixed distinctions, and to respect the opacity of differently situated communities, cultural forms and beings. 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'.[90] 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. Glissant offers an 'analytic thought [that] makes it possible to continue indefinitely [the] perspective of deferral'.[91]

The concern for the Black Athropocene, posited in this article, is the making, unmaking and remaking of the subject, not projection onto the subject or the appropriation of the subject. 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 the enslaved person, those objectified as less-than-human, 'thing-ified' by racial capitalism.[92]

In contrast, the project of constitutionalizing in the Anthropocene necessarily reproduces the ontological framework of law and subject/world relations, with its anthropocentric premises. Despite its problematization of the human subject and objectified world, the logic is still subject- or human-centred, concerned with apprehending the (non-human) other. The Black Anthropocene offers another logic – the 'logic *of* the other'.[93]

This mode of alienated being is what Sarah Jane Cervenak and J Kameron Carter refer to as 'paraontological life'.[94] Non- or para-ontological life is both the fungible material from which the modern subject and modern ontology is constituted, and also the potential site for the unmaking of these ontological cuts and imaginaries.[95] 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.[96] This mode of life, confronted by unknowability and forced to improvise and to invent on the move, is captured well in Ronald A Judy's recent magisterial study *Sentient Flesh*.[97] Whereas theorist Bruno Latour would perhaps be a good example of someone whose thought might enable constitutionalization, by emphasizing corrections to modernity in light of ecological catastrophe, the Black Anthropocene differs in that it 'unsettles being'. The conceptualization of the Black Anthropocene, as articulated here, emphasizes forms of life that disrupt and necessarily challenge fixed

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90.   ibid 133.
91.   ibid 139.
92.   A Césaire, *Discourse on Colonialism* (Monthly Review Press, New York 1972) 42; Robinson, supra (n 5).
93.   M Bey, *The Problem of the Negro as a Problem for Gender* (University of Minnesota Press, Minneapolis, MN 2020) 5, italics in original.
94.   SJ Cervenak and JK Carter, 'Untitled and Outdoors: Thinking with Saidiya Hartman' (2017) 27(1) Women & Performance: A Journal of Feminist Theory 45–55, 47.
95.   See Chandler, *X: The Problem of the Negro as a Problem for Thought*, supra (n 31); ND Chandler, *Toward an African Future – of the Limit of World* (Living Commons Collective, London 2013).
96.   F Fanon, *The Wretched of the Earth* (Penguin Classics, London 2001) 41; also DV Jones, *The Racial Discourses of Life Philosophy: Negritude, Vitalism, and Modernity* (Columbia University Press, New York 2012).
97.   Judy, supra (n 31).

understandings of being, rather than those that can be instrumentalized to enable modernist modes of being to continue.[98]

To summarize, this article seeks to unearth hidden assumptions of constitutionalizing approaches to the Anthropocene, which depend upon a modern ontological grammar. The Black Anthropocene locates this modern world in the conditions of slavery, coloniality and racial capitalism, not only in the separation of human from the world in terms of ecology but also in terms of the dispossession of Black and Indigenous peoples as well as in the denial of being in relation. 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 legal rights, 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.[99]

In contrast, the grammar of law and constitutionalization appropriates entities into legal subjectification. The Black Anthropocene overtly challenges the assumption of individuated entities amenable to the legal gaze.[100] The assumption of discrete entities, as the very condition for discourses of rights and constitutionalism, is exactly what cannot be assumed in approaches categorized here as those of the Black Anthropocene. 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 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,[101] 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 authorized, only disavowed. From this perspective, the desire to maintain or give new life to the constitutionalizing project is, as such, a project of disavowal. This is the focus of the third section of this paper.

3 CONSTITUTIONALIZING IN THE ANTHROPOCENE

The project of constitutionalizing in general (captured well in the introduction to this Special Issue) can be understood as encompassing three forms of aphasia of central importance to clarifying the stakes of the Black Anthropocene. First, the

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98.   Hopefully it will be clear that the Black Anthropocene approach is one that is generative in its understanding of alternative, paraontological, modes of being that question and problematize ontological assumptions of fixity and division. It is precisely because of these understandings that the constitutionalizing drive, which remains dependent upon, but disavows, these cuts and distinctions, is problematic.

99.   Bey, supra (n 93) at 17.

100. See, for example, Harney and Moten, supra (n 43).

101. Du Bois, supra (n 26); Chandler, supra (n 95).

constitutionalizing project maintains the assumption that the modern world should endure, merely reworking the distinction between human as subject and the world as object. Thus, alternative ways of governing are assumed to be available through the transformative expansion of law, by enlarging legal subjects to resolve the ecological problem that 'humanity' is facing. Second, constitutionalization fails to come to terms with its own role in the construction of the human as individuated legal subject. Third, the law is not a neutral bystander to ecological catastrophe. Rather, the constitutionalizing drive is 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 of both human and non-human beings, and spatial, by encompassing eco-systems as 'terrae-dictions', thereby including new objects of care and concern.[102] 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'.[103] The constitutionalizing project has not moved far, seemingly, from the projection of the Holocene where the world as object is infinitely available and transformable through hierarchical powers of division between entities, and the carving up of land and territory through the mechanisms of law.[104] The powers of binary categorization 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 transparent through this process. However, as Fred Moten argues,[105] this power of legal interpellation will necessarily fail to capture life, which will always be 'out from the law's outside'.[106]

Thus, the first assumption of the constitutionalizing project is that law can make its outside transparent through the inclusion of more human and non-human subjects within its 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 by Sylvia Wynter. She writes 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.[107] The history of law's redrawing of formal boundaries of inclusion and exclusion, without attempting to challenge the underlying structures that shape these boundaries, means that any constitutionalizing project may not achieve substantive change.[108] The desire to draw upon other cosmological conceptions of subjects to rewrite

102. Tilburg University, supra (n 2).
103. ibid.
104. D Chandler, 'International Justice' (2000) 2(6) New Left Review 55–66.
105. Moten, supra (n 47) at 43.
106. ibid 50.
107. Wynter, supra (n 7) 257.
108. SV Hartman, *Scenes of Subjection: Terror, Slavery and Self-Making in Nineteenth-Century America* (Oxford University Press, Oxford 1997).

legal categories is not a recognition of non-Western or non-Eurocentric understand-ings, but their co-optation.

As Saidiya Hartman notes, the ability to occupy other subject positions may 'be con-sidered 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'.[109] This displacement may involve sanitizing and reusing Indi-genous understandings and Black radical thought in an instrumental way that contra-dicts those very understandings.[110] Resistance against co-optation drives the 'ethnographic refusal' of Audra Simpson, Eve Tuck and K Wayne Yang,[111] due to the exploitation of others' knowledge and the desire of white settlers to (re)constitutio-nalize hierarchies. These limits to external appropriation open up to question the onto-logical assumptions of transparency, equivalence and universality at the heart of law.

In other words, the constitutionalizing project reveals problems with the legal 'gaze'.[112] While non-Western cultures and communities may consider decision-making without the 'distinctions that have ordered western human societies until now',[113] the translation or appropriation of these approaches shifts the meaning they possess. In attempting to not 'simply and uncritically "globalize" [Western] current understandings of law and governance', the constitutionalizing project imagines the possibility that law might 'transcend' the binary between human and nature through even greater mastery of 'complex intersections between nature and culture'.[114] The binary divide that under-girds the legal imaginary is merely reworked, reproducing subject/world relations.

3.2 Law as hierarchy

The second, related, assumption of the constitutionalizing project is that law can over-come hierarchies through inclusion. Proponents of constitutionalization stress the cri-tical and substantive potential of laws that can 'genuinely' address problems based in structures of power:

> 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.[115]

The constitutionalizing project promises something other than a reworking of institutions and mechanisms, namely a different type of law. This is a law which does not assume the

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109. SV Hartman and FB Wilderson 'The Position of the Unthought' (2003) 13(2) Qui Parle 183 at 188–9.
110. On Indigenous co-optation see: D Chandler and J Reid, *Becoming Indigenous: Governing Imaginaries in the Anthropocene* (Rowman & Littlefield, London 2019); Z Todd, 'Indigenizing the Anthropocene', in H Davis and E Turpin (eds), *Art in the Anthropocene: Encounters among Aesthetics, Politics, Environments and Epistemologies* (Open Humanities Press, London 2015) 241; Davis and Todd, supra (n 18) at 761.
111. Cited in King, supra (n 20) at 168–9.
112. D Chandler, 'The Bureaucratic Gaze of International Human Rights Law', in S Meckled-García and B Çali (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives* (Routledge, Abingdon 2006) 117–33.
113. Tilburg University, supra (n 2).
114. ibid.
115. ibid.

autonomy of the legal subject. Rights thereby one-sidedly extend the reach of law without extending accountability: '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'.[116] 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'.[117]

The problem with this way of thinking, one regularly highlighted in work in the fields of Indigenous Critique and Black Studies, is that the constitutionalizing project not only reproduces the rights-bearing human that it purports to overcome but also, in the same move, reproduces hierarchies of agency and accountability. 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'.[118] The conflation of the human with the non-human extends law as a mechanism of hegemonic control. Saidiya Hartman's *Scenes of Subjection* painstakingly demonstrates how the expansion of law to newly constituted Black subjects in the post-emancipation period reinforced hierarchy, through 'the continuities of slavery and freedom as modes of domination, exploitation, and subjection', which 'reinscri[be] racial subjection'.[119] As Yusoff expands upon this insight in the discourse of the Black Anthropocene:

> 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.[120]

The project of rights is marked with inequalities, exclusions and oppression. Indigenous scholars such as Audra Simpson[121] and Glen Sean Coulthard[122] refuse liberal constitutionalism that operates through rights of representation or recognition. And Black Studies scholars highlight the exclusionary grounds of legal being, which empties the human of meaning in modernist conceptions.[123] The constitutionalizing project cannot address problems by granting rights when rights discourses presuppose the subjection

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116. ibid.

117. ibid. It should be noted that all references to the Tilburg University project are to the initial project description from May 2021 (the formulation through which the project was granted six-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 Fleurke et al., 'Constitutionalizing in the Anthropocene', this Special Issue (which was written following the workshop, for which this paper was initially written, and in light of and in response to the discussions had during it).

118. A Karera, 'Blackness and the Pitfalls of Anthropocene Ethics' (2019) 7(1) Critical Philosophy of Race 32–56 at 44.

119. Hartman, supra (n 108) at 172.

120. Yusoff, supra (n 3) at 27.

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

122. Coulthard, supra (n 41).

123. For example, FB Wilderson, *Red, White & Black: Cinema and the Structure of U.S. Antagonisms* (Duke University Press, Durham, NC 2010); Moten, supra (n 47) at 192–6.

and dispossession of Black and Indigenous peoples, drive the dynamics of racial capitalism and, in turn, Anthropogenic climate change.[124]

3.3 Law as constitutive

The assumption is that law is epiphenomenal to the Anthropocene. By presenting law as epiphenomenal – as outside a set of relations – the constitutionalizing project ignores how law constitutes these relations. It appears that law is responding to events entirely external to it:[125]

> The Anthropocene's transcendence of human/nature, public/private, and global/local distinctions foreshadows worrisome consequences for our current Holocene-era institutions of law and governance, which were conceived and structured around precisely those dichotomies.[126]

The constitutionalizing project assumes that ecological catastrophe is unconnected to law. Before the Anthropocene, it is said, 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'.[127] It is only in retrospect that proponents of constitutionalization acknowledge legal theory as inadvertently part of the problem. However, even now there is no clear recognition that the assumption that the world and its resources 'awaited unlimited human exploitation' was key to the historical development of law and the constitutionalizing project itself.

Only in this epoch of the Anthropocene has exploitation become a 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'.[128] The 'distinctions that have ordered western human societies until now' thus need to be rethought on the basis of an entanglement between humans and nature revealed by the Anthropocene. Or perhaps, as Latour would say,[129] on the basis that these 'distinctions' were never really real. Humans and nature, the global and local, the public and private are entangled. However, proponents of constitutionalization implicitly argue that their separation was not important before ecological catastrophe.[130]

Yet the constitutionalising project redraws and remakes distinctions. For the constitutionalizing project to hold, it is necessary to ignore the fact that these distinctions themselves are the products of law – that these distinctions *are* law. Thereby, processes of constitutionalization face a problem, which is the erosion of the categories, and the need to contain this problem through the creation of new categories. There is positive work to be done in reconstructing categories of 'humans' and 'nature' to make the world transparent, 'protected' and 'genuinely addressed'.

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124. See also, supra (n 48).
125. See also Horst, on the constitutive role of law, in 'Entanglements: The Ambivalent Role of Law in the Anthropocene' this Special Issue.
126. Tilburg University, supra (n 2).
127. ibid.
128. ibid.
129. B Latour, *We Have Never Been Modern* (Harvard University Press, Cambridge, MA 1993).
130. Tilburg University, supra (n 2).

Aspirations to (re)affirm the legitimacy and authority of the constitutionalizing project necessarily deny the constitutive role of law. In which case, the Anthropocene – understood in terms of the policy crises induced by climate change – can be presented as an opportunity for reworking the project of law, as if the Anthropocene provides a blank slate for another world to come. In fact, it would appear that the Anthropocene imposes a new burden on law, according to geographer Nigel Clark, 'a white man's overburden'.[131] As a possible alternative, this short article, informed by the ethico-political understanding of the Black Anthropocene, suggests that 'distinctions that have ordered western human society until now'[132] have not really ended. Until then, there can be no world for law.

4 CONCLUSION

From the perspective of the Black Anthropocene, the aspiration of constitutionalizing in the Anthropocene falls short of its promise to address climate change. More importantly, the project of law is problematic in itself. The rule of law cannot be reconstitutionalized without a project of disavowal: it is necessary first to disavow law's (re)production of a world of subjects and of an outside amenable to inclusion; second, to disavow law's definition of the human as legal subject; and third, to disavow constitutionalism's instrumentalization of 'the world' as a resource. With the Black Anthropocene, the Anthropocene is stood on its head, no longer a tabula rasa for law to reconstitute the world free of the past but a generative resource, enabling a reading of history 'against the grain'[133] and making it imperative to problematize constitutionalization and the project of law.

131. Nigel Clark, cited in Yusoff, supra (n 3) at 28.
132. Tilburg University, supra (n 2).
133. As advocated by Walter Benjamin, 'Theses on the Philosophy of History', in *Illuminations* (Bodley Head, London 2015) 248.