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ARTICLE

Primal Scene to Anthropocene: Narrative and Myth in International Environmental Law

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Abstract

In recent years much jurisprudential affection has coalesced around the concept of the Anthropocene. International lawyers have enlisted among the ranks of humanities and social science authors embracing this proposed scientific time category, and putting it to work. This essay draws on sources from a range of fields including legal anthropology and critical legal theory in re-examining the reception of the Anthropocene in international law, focusing on its mythical qualities. We demonstrate how the Anthropocene both reinforces and meshes perfectly with the three narrative pillars of contemporary international environmental law: evolutionary progress; universal evaluations of nature and constructions of legal subjectivity; and legal monism. The Anthropocene, like few ideas in modern scholarship, is quite expressly a tale of origins explaining and legitimating its narrators' place in the universe. Joining signposts such as *The Tragedy of the Commons,* the *Myth of the Anthropocene* embeds collective memories eclipsing the need to reconsider complex and contested histories in understanding the contemporary roles of law in mediating people's relations with nature. In response, we call for a more inclusive account of environmental law that draws on diversity rather than universality, with particular sensitivity to those perspectives that are inadvertently excluded from the Anthropocene discourse.

Keywords Anthropocene · International environmental law · Environmental justice · Critical legal theory · Legal pluralism

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1 Introduction

'Here is the Mirror of Galadriel. I have brought you here so that you may look in it, if you will.'
'What shall we look for, and what shall we see?'
'Many things I can command the Mirror to reveal, and to some I can show what they desire to see. But the Mirror will also show things unbidden, and those are often stranger and more profitable than things we wish to behold. What you will see, if you leave the Mirror free to work, I cannot tell. For it shows things that were, and things that are, things that yet maybe. But which it is that he sees, even the wisest cannot always tell. Do you wish to look?'[1]

In recent years much jurisprudential affection has coalesced around the concept of the Anthropocene. International lawyers have enthusiastically enlisted among the ranks of humanities and social science authors embracing this proposed scientific time category, and putting it to work. In this article we critically re-examine suggestions that the Anthropocene brings paradigmatic change in social realms—'a seismic shift in human affairs on a par with the Enlightenment'[2]—by looking beneath and beyond any actual data and decisions that may one day result in the Anthropocene being officially declared in geological science. Informed by legal anthropology and critical legal theory, we focus on the concept's mythic qualities. In exploring those qualities, we do not dispute that the planet is 'on the brink of human-induced ecological disasters that could change life on Earth as we know it', nor that the rapid environmental changes result from human activity.[3] Instead, we argue that the potential of the Anthropocene to provide a radical new epistemological framework that could shape the future of international environmental law[4] should be approached with deep suspicion and extreme caution. Caution is particularly warranted where calls are made to 'reform' well-established principles of international environmental law and international human rights law.

What is the Anthropocene? Separate from any significance that may ultimately be decided in the field of geological categorization, in social science and legal literature it has been embraced as 'a powerful narrative'[5] that 'focuses on the very essence of life on earth in its greatest totality'.[6] At a pragmatic level, it has been welcomed as 'a useful concept to help leverage and (re-)focus our efforts'[7] and 'a politically savvy way of presenting to non-scientists the sheer magnitude of global biophysical

[1] Tolkien (1954), ch. 7.
[2] Morrow (2017), p. 269.
[3] Kotzé (2017), p. vii.
[4] In this article we adopt Brownlie's broad definition of international environmental law as 'nothing more, or less, than the application of international law to environmental problems and concerns'. See Brownlie (1988).
[5] Lovbrand et al. (2010), p. 211.
[6] Kotzé (2014), p. 130.
[7] Biermann et al. (2016), p. 341.

change'.[8] At the same time, Hamilton expresses alarm that the concept 'is bedevilled by misunderstandings' of those who 'misinterpret the Anthropocene in a way that deprives it of its profound significance',[9] whereas for Oldfield 'it has already been overtaken by the flood of new publications, exhibitions, media statements and events that use or abuse the term' and so there is no 'way of avoiding acceptance of multiple usage, with informal definitions and formulations alongside a rigorous definition in terms of [Earth System Science]'.[10] In sum, many scholars claim the Anthropocene to be profoundly significant, yet there is scant agreement upon the nature of that significance.

The most common ontological revelation attributed to the Anthropocene is that it is post-Cartesian: 'it demolishes residual assumptions of humanity as somehow distinct from nature'.[11] This understanding is driven by the apparent ability of humans to collectively change the parameters of the earth's geological system.[12] Against this backdrop, the argument is made that existing international environmental law is an ineffective resource for addressing the challenges presented by the Anthropocene.[13] Indeed, in international environmental law scholarship the Anthropocene is said to require deep reflection and radical action. Kotzé suggests that 'people will have to rethink their own place in the Anthropocene' because it 'demands from society […] not to continue to be blinded by ideological palliatives such as "sustainable development"'.[14] He also claims the Anthropocene serves as 'a powerful metaphor for an important normative and analytical engagement with questions of human responsibility'.[15] Vidas, Zalasiewicz and Williams assert that '[t]he conditions of the Anthropocene will bring a fundamental shift of the context in which international law operates—a shift in which the challenges are increasingly recognized as the consequences of natural, not only political, change'.[16] Stephens and Robinson refer to the Anthropocene in terms almost reminiscent of Year Zero: 'The Anthropocene has brought an end to the history of international environmental law as we have known it because it is now manifest that the human and natural spheres are inseparable'.[17] Stephens argues that this is evidenced by the failure of 'most accounts of international environmental law to come to grips with the immense consequences that the Anthropocene poses for global environmental governance'.[18] For Robinson,

[8] Castree (2014), p. 247.
[9] Hamilton (2016), p. 93.
[10] Oldfield (2016), p. 169.
[11] Dalby (2014), p. 5; see also Stephens (2017). Stephens argues that '[A]s humanity is now transforming the planet's biophysical systems, and imperilling their functioning, the Anthropocene entails the collapse of the human/nature distinction' (p. 32).
[12] Dalby (2014), p. 4.
[13] Kotzé and Muzangaza (2018), p. 279.
[14] Kotzé (2014), pp. 135, 137.
[15] Ibid., p. 155.
[16] Vidas et al. (2015), p. 4.
[17] Stephens (2017), pp. 31, 54.
[18] Ibid., p. 32.

the Anthropocene presents far-reaching implications for international environmental law so that long-standing assumptions are no longer valid.[19] We must thus start again:

> The many, independent and re-iterative efforts to frame new statements of 'rights' illustrate the human quest for [ethical] guidance. Religion has often provided it; secular civil rights or socialist proclamations address this need. The Anthropocene begins the search all over again, in a new time and under new conditions.[20]

For Philippopoulos-Mihalopoulos the Anthropocene 'opens up a different temporality and depth of thinking'[21] and for Morrow it demands 'nothing less than a wholesale refashioning of the human/environment paradigm'.[22]

What remains under-discussed, however, is that the Anthropocene is a paradigm shift in physical science only if the paradigmatic bar is set low; such is the continuity of Earth System Science (ESS) with previous research.[23] Moreover, this central ethical aspiration associated with the adoption of the Anthropocene in legal scholarship is founded on a paradox: Cartesian dualism is finally overcome by embracing a concept that further cements the human subject as the central premise of law.

Hornborg and Malm expose a yet deeper layer of the Anthropocene's contradictory core:

> The main paradox of the narrative, if not of the concept as such, becomes visible: [global environmental change] is denaturalised in one moment—relocated from the sphere of natural causes to that of human activities—only to be renaturalised in the next, when derived from an innate human trait, such as the ability to control fire. Not nature, but human nature—this is the Anthropocene displacement.[24]

A related problem is that the Myth of the Anthropocene purports a historically privileged category of humankind that is not reflective of humanity as a whole.[25] In doing so, it both reinforces and meshes perfectly with the three narrative pillars of contemporary international environmental law: evolutionary progress; universalist constructions of nature and legal subjectivity; and legal monism. Joining signposts such as *The Tragedy of the Commons,* the *Myth of the Anthropocene* embeds collective memories, eclipsing the need to reconsider complex and contested histories in understanding the roles law plays in mediating people's relationships with nature. In response, we call for an account of international environmental law that is grounded in an attitude of critical legal pluralism, with particular sensitivity to postcolonial,

[19] Robinson (2014b), p. 13.
[20] Ibid., p. 24.
[21] Philippopoulos-Mihalopoulos (2017), p. 120; see also Stephens (2017), p. 32.
[22] Morrow (2017), p. 269.
[23] Oldfield (2016), p. 165.
[24] Malm and Hornborg (2014), p. 65.
[25] Grear (2017), p. 79.

feminist and indigenous perspectives that remain largely excluded from international environmental law discourse. At the same time, we caution against discrediting well-established principles of international environmental law and human rights law, arguing that reinforcing, respecting and operationalising these principles is becoming ever more important in the face of today's environmental crises.

2 Myth in (International Environmental) Law

Why is the concept of the Anthropocene resonating at such a deep level in international environmental law scholarship? We suggest the answer lies at the source—the source of law being myth. It is widely accepted within legal anthropology that traditional or customary law is founded in mythological narrative. A defining feature of post-renaissance civilization is supposedly its rejection of myth in favour of reason, yet critical theorists have long suggested otherwise. Myth provides foundations; myths 'are world-creating and, no less important, world-legitimating and world-harmonizing'.[26] Myth 'is not fixed beyond historical contingency, but rather it exists as a shifting mosaic of fragments subject to social pressures'.[27] Westerners are not defined by a rejection of myth but rather by its internal and external repression; ours is the myth of mythlessness.[28]

Malinowski succinctly appraises myth's place in premodern and customary societies:

> Myth fulfils […] an indispensable function: it expresses, enhances and codifies belief; it safeguards and enforces morality; it vouches for the efficiency of ritual and contains practical rules for the guidance of man. Myth is thus a vital ingredient of human civilisation; it is not an idle tale, but a hard-worked active force […] a pragmatic charter of primitive faith and moral wisdom.[29]

Rouland concurs: 'Myth is narrative in which the fundamental explanations regarding the creation of the universe, the origins of life in society and the main rules by which society is governed all reside'.[30]

Hegel's *The Struggle of Enlightenment with Superstition* succinctly frames myth's re-entry into modernity: 'It will yet be seen whether enlightenment can continue in its state of satisfaction; that longing of the troubled beshadowed spirit, mourning over the loss of its spiritual world, lies in the background. Enlightenment has on it this stain of unsatisfied longing'.[31] In the twentieth century, some of those in agreement with Hegel, including Marx, invested in a cleansing iconoclasm, imagining

[26] Manderson (2003), p. 88.
[27] Von Hendy (2002), p. 218.
[28] Fitzpatrick (1992), p. 160.
[29] Malinowski (1926), p. 82.
[30] Rouland (1994), p. 157.
[31] Hegel (1967), p. 589.

a world purged of myth, whereas others viewed Hegel's stain and announced it a birthmark.

Modern law, for the overwhelming majority, allegedly has no need of myth. Negative connotations have been ascribed to myth as it is considered contrary to Western notions of 'the indivisibility of truth' that are fundamental to modernity.[32] Modernity is believed to emanate from a 'primal scene',[33] embodying an identity reflective of a 'culmination yet negation of all that preceded it'.[34] Cover first unmasked myth's continuing foundational significance for modern law in the seminal *Nomos and Narrative*:

> No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.[35]

Among the handful of legal scholars who have since sought to reveal myth's role in contemporary state-centred law[36] are Fitzpatrick and Manderson. For them the myth at the very heart of modern law is myth's own repression.[37] The Eurocentric and colonially-rooted belief that 'the very idea of myth typifies "them"—the savages and ancestors "we" have left behind', Fitzpatrick argues, is itself evidence of the existence and prevalence of myth in modern law.[38] Modernity is achieved through a 'process of becoming that locates all that was a prelude to and increment towards all that will be'.[39] In highlighting these contradictions Fitzpatrick reasons that myth *is* modernity's—a world order is constantly created out of chaos—precreation.[40] Manderson concurs: '[A]ll law must have a foundation in non-law, in illegality or violence, which is only capable of being legitimised after the fact'.[41] In the absence of myth, a unified law that coherently brings together its fundamental contradictory existences cannot exist.[42] To this end, a refusal to accept that law continues into the present to be a product of myth is in essence 'a denial of that which gives law coherent existence'.[43]

Where might we find myths of modern law? Holmes exquisitely frames its central trope in a passage emblazoned upon a UC Berkeley School of Law building wall:

[32] Fitzpatrick (1992), p. 20.
[33] Hart (1961), p. 195.
[34] Marx (1973), p. 106.
[35] Cover (1983), pp. 4–5.
[36] Fitzpatrick (1992); Manderson (2003); Cover (1983); Schroeder (2009).
[37] Manderson (2003), pp. 87–88; Fitzpatrick (1992), p. ix.
[38] Fitzpatrick (1992), p. 44.
[39] Ibid., p. 28.
[40] Ibid., p. 25.
[41] Manderson (2003), p. 89.
[42] Fitzpatrick (1992), p. 12.
[43] Ibid.

> When I think thus of the law, I see a princess mightier than she who wrought at Bayeux, eternally weaving into her web dim figures of the ever-lengthening past—figures too dim to be noticed by the idle, too symbolic to be interpreted except by her pupils, but to the discerning eye disclosing every painful step and every world-shaking contest by which mankind has worked and fought its way from savage isolation to organic social life.[44]

From Hobbes to Hart to Holmes to Hardin's *Tragedy of the Commons*, 'time and again, our legal culture retells the story of how we sacrificed the state of nature and submitted instead to a legal order marked by objectivity and obedience'.[45] Here, 'modernity is to be desired because it supplies that which primitive society supposedly lacks […] it gives us the gift of the rule of law'.[46] Law's objectivity matched against the submission of its subjects are the terms of this settlement. This is equally true for international environmental law, which aims for stability in international relations while at the same time representing the belief that 'nature' can be mastered and regulated.[47] At the roots of this belief is the story of modernity, which 'is always told as a tragedy and as a loss of innocence, but nonetheless necessary for that'.[48] For Fitzpatrick, the very fact that the concept of law includes this deliberate contrast is proof of the existence of myth.

Like all myths, the birthing story of law is retold in many variants, in many settings. Births, whether of people or legal systems, are often characterized by pain, blood and death. Among the functions of legal myth is that of a social endorphin anesthetizing and restructuring shared cultural memories such that narratives of wondrous genesis eclipse losses and traumas. Manderson terms this a 'psychological cummerbund' dramatising and ornamenting 'the cleavage that lies at the origin of any normative system, the moment of its foundation, making a virtue of necessity'.[49] Myth is also constitutive; it moulds legal subjects.[50] Manderson draws upon a metaphor of stellar constellations, illustrating how different cultures view the same randomly positioned stars and in them discover patterns giving rise to different stories. The 'patterns are not "in" the stars but in the stories under the influence of which they are approached and indeed rendered comprehensible'.[51] Playing an analogous role in relation to social facts, legal myths lay down paths of understanding and evaluation via which individuals locate themselves and navigate a world of jumbled meaning. In this perspective myths are 'neither true nor false, but a way of becoming true, and of making us true to their premises and promises'.[52]

[44] Our source is the wall at Berkeley; research indicates it is an excerpt from a speech given to the Suffolk Bar Association, 5 February 1885.
[45] Hobbes (1968), chapters 1–16; Hart (1961); Hardin (1968).
[46] Schroeder (2009), p. 139; Hart (1961).
[47] Vidas et al. (2015), p. 4; Humphreys and Otomo (2016), p. 802.
[48] Manderson (2003), p. 88.
[49] Ibid.
[50] Ibid.
[51] Ibid., p. 90.
[52] Ibid.

Returning to the primal scene, the birthing story of law presents a conundrum for environmental jurisprudence: are Eden's occupants ecologically noble savages in possession of a received natural law? Or, as law's origin myth suggests, is the primal scene populated only by isolated, brutal, lawless savages? The classic literature relies upon both of these incompatible assumptions, sometimes with a single contributor oscillating from one to the other.[53]

Having emerged, what then happens to modern law? In a word, it *evolves*. From myth to law, savage to civilized, simple to complex, innocent to mature, female to male, speaking to writing, custom to state, faith to reason, vulnerable to strong, arbitrary to accountable, common property to private property, local village market to global free market, national to international, developing to developed. The legal evolutionary road, with an occasional twist or turn, leads toward the most mythical of places: progress. This, we argue, is the first narrative pillar of international environmental law.

3 The Myth of Evolutionary Progress in International Environmental Law

Evolutionary theory entered writing about law centuries before Darwin, with prominent contributors including Aristotle, Plato, Aquinas, Maine, Durkheim, Hart and Luhmann, fronting a legion of implicit adherents. Tamanaha digests the evolutionary legal narrative as positing 'an initial primordial soup in which habit and custom are dominant in the maintenance of social order, supplemented by an indistinguishable mix of religious or mystical beliefs and morality'.[54] Positive law emerges 'in the haze of long forgotten yesteryear, as a distinct mechanism of institutionalised norm enforcement out of the customary order that prevailed in pre-political society'.[55] Eliot, even when limiting the field to those suggesting 'law is shaped by its environment in a way that is analogized explicitly to the theory of evolution in biology', discovers numerous contributors in each of the four streams he identifies: social, doctrinal, economic and sociobiological.[56] Surrounding this germ of evolutionary legal theory is a much larger endosperm of literature expressing parallel thoughts and applying evolutionary terms without explicitly referencing any biological theory. As Eliot observes:

> [T]he idea that law 'evolves' is so deeply ingrained in Anglo-American legal thought that most lawyers are no longer even conscious of it as a metaphor. We speak of the law 'adapting' to its social, cultural, and technological environment without the slightest awareness of the jurisprudential tradition we are invoking.[57]

[53] See for example Bosselmann (2015), pp. 44–61 and Burdon (2012), p. 28.
[54] Tamanaha (2001), p. 52.
[55] Ibid.
[56] Eliot (1985), p. 39.
[57] Ibid., p. 38.

Just as Eliot discovered in the discipline more broadly, the language of biological evolution casually infuses much international environmental law discourse. Some scholars who are unconcerned with specific theories of legal evolution nevertheless refer to international environmental law that *adapts* and *evolves*[58] while others write about succeeding *generations* of environmental law[59]; a conceptualisation that is also widely used in international human rights discourse.[60] These characterisations sit uncomfortably with a substantial body of anthropological evidence indicating that there is no such thing as universal legal evolution. Instead, the evidence reveals tremendous variety in the development of law and legal systems even across societies with comparable socio-economic characteristics. Accordingly, Hoebel observes that 'there has been no straight line of development in the growth of law'.[61] Stein adds that 'There is no automatic connection between a particular level of cultural development and particular legal techniques or ideas'.[62] We therefore argue that the essence of evolution as a narrative signifier resides more in the implied conceptual boundaries it builds and rebuilds than in any capacity to accurately convey legal or social phenomena.

In the remainder of this section we consider three specific variants of the evolutionary narrative in contemporary international environmental law—evolved ethics, sociobiology and the neoromantic—to illustrate evolution's conceptual malleability and the ways in which proposals for a new geological age—the Anthropocene—both reinforce and are pre-empted by these theories.

3.1 Evolved Ethics

Bosselmann was among the first international environmental law scholars to use evolution to analogize changes in environmental law, presenting an 'evolutionary model of law in seven stages regarding the environment' encompassing 'every community that is organized as a state'.[63] While noting that 'each legal system displays its own peculiarities and none will exactly fit' he nevertheless insists that it 'is important to recognize the basic patterns within the seven stages'.[64] The evolutionary progression commences at stage one, where 'law basically regulates existing private interests' in the absence of 'environmentally-related norms', and progresses to stage seven in which the 'characteristic legal instrument is the recognition of an independent dignity and legal subjectivity of the natural with-world'.[65] Bosselmann regards stages six and seven, while unattained, to be 'no longer utopian' in places

[58] Stephens (2017), pp. 49–50; Kotzé (2017), p. viii; Ivanova and Escobar-Pemberthy (2017), p. 170.
[59] Gunningham and Holley (2016), p. 273; Arnold (2011), p. 771; Angelo (2006), p. 105; Esty (2001–2002), p. 183.
[60] Vasak (1977), pp. 30–31; for a critical account see Jensen (2017).
[61] Hoebel (1968), p. 288.
[62] Stein (1980), p. 127.
[63] Bosselmann (1995), p. 120.
[64] Ibid., p. 123.
[65] Ibid., p. 127.

such as Germany and the USA.[66] A clear implication is that these jurisdictions have progressed the furthest along the legal evolutionary path.

Bosselmann includes an adapted version of a figure—'The Evolution of Ethics'—drawn from Nash's seminal volume *The Rights of Nature*.[67] The figure illustrates Nash's central theory that human ethical development is an 'expanding circle' wherein 'environmental ethics' emerge naturally in societies that succeed in attaining an advanced stage of social and intellectual evolution, until finally they recognize nature as 'the latest minority deserving a place in the sun of liberal tradition'.[68] Nash links his expanding circle to specific positive legal developments, beginning with the Magna Carta of 1215.[69] According to Nash, the US Endangered Species Act of 1973 marks the entry of 'the rights of nature'.[70] Nash's social evolutionary theory, read from a post-colonial Pacific island perspective—that of societies who at the time of the Magna Carta had in place marine conservation systems of a scale and complexity that would not arise in the US or Europe for centuries hence[71]—appears somewhat, well, mythic:

> [E]thics awaited the development of an intelligence capable of conceptualizing right and wrong. And even then, for long periods of time, morality was usually mired in self-interest, as for some it still is. Some people however pushed the circle of ethical relevancy outward to include certain classes of human beings such as family and tribal members.
>
> Geographic distance ceased to be a barrier in human-to-human ethics, and in time people began to shake free from nationalism, racism, sexism […] But 'speciesism' or 'human chauvinism' persisted and animal rights was the next logical stage in moral extension […] More recently there have been calls for 'the liberation of nature' 'the liberation of life' 'the rights of the planet' […] to be free from human disturbance.[72]

To take root, narratives of social evolution must be able to merge with other tales of legal origin, such as social contracts. Vermeylen does this seamlessly in a chapter that considers 'the ecology of the Anthropocene' in which she discusses 'new legal terrain' wherein 'the laws of nature dictate a new contract between living and non-living entities in the universe as an ultimate attempt to save the Earth'.[73] This is necessary because 'as we find ourselves in what has been perceived as a new geological epoch' characterised by the longstanding view of nature as a resource for human consumption, 'a human-centric worldview may no longer be tenable'.[74] Vermeylen

[66] Ibid., p. 128.
[67] Nash (1990).
[68] Ibid., p. 213.
[69] Ibid., pp. 7, 13–14.
[70] Ibid., p. 7.
[71] Johannes (2002), p. 317.
[72] Nash (1990), p. 6.
[73] Vermeylen (2017), p. 139.
[74] Ibid., p. 138.

relies on selected anthropological sources, arguing that anthropology itself has not only questioned the way in which humanity perceives nature, but has successfully transcended it.[75] According to Vermeylen anthropology now provides an understanding of 'how forests think'.[76]

For Vermeylen the Anthropocene 'is above all an ethical and normative concept; it is an epoch that demands a new form of governance and law'.[77] Inspired by Serres[78] and Hobbes,[79] she advances the idea of 'signing a contract with Nature', arguing that when 'humanity formed the state and signed a contract to protect its own self-interest', humans positioned themselves as masters of the natural world.[80] According to Vermeylen human mastery of Nature had the effect of 'othering' it as 'only civilised *men* could be legal subjects'.[81] However, the Anthropocene demonstrates Nature's reclamation of its legal status as a subject of (environmental) law.[82] Similarly to Nash's account of the evolution of environmental ethics, Vermeylen argues that signing a contract with Nature is possible because like the progressive broadening of the definition of legal subjects over time encompassing 'women, indigenous peoples and other poor and marginalized groups' the material expression of the Anthropocene, namely climate change and environmental degradation, demonstrates that Nature can no longer be treated merely as 'material for appropriation'.[83] While rightly urging greater engagement between environmental law and anthropology, and suggesting that more attention should be paid to the normative traditions of indigenous peoples, Vermeylen's overall narrative of an amended social contract binding every human on the planet is one of universal ethical evolution. We note the irony that, upon travelling what is portrayed as new legal terrain, one arrives at conclusions very similar to those drawn by Bosselmann a generation previously. The novelty, it seems, is that we are now in the Anthropocene.

The naturalising role of mythopoeia played by social evolutionary perspectives in international environmental law merits closer examination. In *Mythologies* Barthes suggests myth is less a concept than a system of communication. For Barthes myth is a type of speech 'defined by its intention [concept] much more than by its literal sense [form]; and that in spite of this, its intention is somehow frozen, purified, *made absent* by this literal sense'.[84] Referring to a magazine cover portraying an African colonial soldier saluting the French flag, Barthes argues that the function of myth is not to deny, but rather to talk about things: 'it purifies them, it makes them innocent, it gives them a natural, eternal justification, it gives them a clarity which

[75] Ibid., p. 144; Kohn (2013).
[76] Vermeylen (2017), p. 143.
[77] Ibid., p. 157.
[78] Serres (1995).
[79] Hobbes (1968).
[80] Vermeylen (2017), p. 158.
[81] Ibid., p. 159.
[82] Ibid.
[83] Ibid.
[84] Barthes (1972), pp. 107, 109–159, 124.

is not that of an explanation but that of a statement of fact'.[85] In Barthes' example of the magazine cover the mythical concept is French imperialism; it is in no way hidden, but is rather on display.[86] Yet there is continual oscillation between the meaning of the original sign (an African soldier saluting) and the signified concept (French imperiality) such that *the concept is naturalised and thus made to appear unmotivated*.[87] '[M]yth hides nothing' because while a communication, like the magazine cover, can distort the meaning of its origin, it cannot make it disappear: 'The French Empire? It's just a fact: look at this good Negro who salutes like one of our own boys'.[88]

In this perspective, social evolutionary narratives in international environmental law naturalise, precisely by *not* justifying, a situation in which certain Western liberal ideals of environmental ethics and law represent the developmental zenith of global governance. Fundamental tensions and apparent contradictions—that these ethics and laws arose in reaction to the worst excesses of capitalism without challenging its bases; that the countries progressing furthest along the evolutionary path are also the highest resource consumers and worst polluters; that Europeans, especially European males, have for centuries considered themselves at the zenith of ethical and legal progress, even while colonizing the world and enslaving millions—are overcome by silence.

This reminds us of Levi-Strauss who argues 'the purpose of myth is to provide a logical model capable of overcoming a contradiction'.[89] He also notes that this is of course impossible if the contradiction is 'real'. From this perspective, myth plays the vital role of enabling *a denial of choice* supressing fundamental contradictions into a shared cultural subconscious. There is a deeper, mythical significance here wherein for readers of social evolutionary narratives who consider themselves both civilized and concerned for nature—a positive nexus emerges that appears natural and eternal despite the otherwise blatant contradiction: The more alienated from nature a society, the more civilized it is. And civilized people are at one with Nature.

3.2 Sociobiology

The second variation of evolutionary narrative in contemporary international environmental law is founded in sociobiology. Robinson has recently combined the notion of the Anthropocene, genetic evolution and environmental law in a novel sociobiological legal theory. Initially, Robinson's writing on law and evolution drew only metaphorically upon evolutionary concepts. His theory of evolved norms represents something qualitatively different.[90] In *The 'Ascent of Man': Legal Systems and the Discovery of an Environmental Ethic*, Robinson uses a passage from Darwin's

[85] Ibid., p. 124.
[86] Ibid., p. 115.
[87] Hiley (2004), pp. 838–860, 840.
[88] Barthes (1972), pp. 120, 124.
[89] Levi-Strauss (1965), p. 105.
[90] Robinson (2014a), p. 46.

famous work to justify the claim that humans may not yet have attained their evolutionary zenith:

> The main conclusion arrived at in this work, namely that man is descended from some lowly organised form, will, I regret to think, be highly distasteful to many […] Man may be excused for feeling some pride at having risen, though not through his own exertions, to the very summit of the organic scale.[91]

The danger of descending into the intellectual territory occupied by Robinson in his more recent work is drawn into clear focus by revealing what the ellipsis eclipses.[92] Darwin's inability to apply a hint of self-reflection to the torture, slavery, violent patriarchy, gross inequity or the central influence of religious mysticism inherent in his own society and its empire, was typical of his generation.[93] To be clear, we do not suggest that Robinson shares, at any level, Darwin's nineteenth century attitudes to racial hierarchies but instead argue, along with others such as Gould, that this is the thin ice upon which one necessarily stands when attempting to link instrumentally ideas of global legal change and human genetics.[94] Wherever the discussion may commence, so often it concludes in a Panglossian equation: The Familiar = The Civilized = Highly Evolved.

Despite the title, *The Ascent of Man* is best described as an essay linking developments in North American and international environmental law to an argument suggesting the ethical vision set out by transcendentalist Emerson is coming to pass. By the time he authored *Evolved Norms: A Canon for the Anthropocene*, Robinson's ideas around law and evolution relied explicitly upon sociobiology.

> Sociobiology identifies traits of human nature, which jurisprudence should regard as 'evolved norms'. Based on evolved norms, humans cultivate common legal expectations to guide behavior, which they in turn confirmed as general principles of law. Once evolved norms are recognized as organizing principles for how human communities and countries make choices about gov-

[91] Darwin (1891), p. 398, as quoted in Robinson (1998), p. 497.

[92] But there can hardly be a doubt that we are descended from barbarians. The astonishment which I felt on first seeing a party of Fuegians on a wild and broken shore will never be forgotten by me, for the reflection at once rushed into my mind—such were our ancestors. These men were absolutely naked and bedaubed with paint, their long hair was tangled, their mouths frothed with excitement, and their expression was wild, startled, and distrustful. They possessed hardly any arts, and like wild animals lived on what they could catch; they had no government, and were merciless to every one not of their own small tribe. He who has seen a savage in his native land will not feel much shame, if forced to acknowledge that the blood of some more humble creature flows in his veins. For my own part I would as soon be descended from that heroic little monkey, who braved his dreaded enemy in order to save the life of his keeper, or from that old baboon, who descending from the mountains, carried away in triumph his young comrade from a crowd of astonished dogs—as from a savage who delights to torture his enemies, offers up bloody sacrifices, practices infanticide without remorse, treats his wives like slaves, knows no decency, and is haunted by the grossest superstitions. Darwin (1891), p. 398.

[93] Typical, but not inescapable as illustrated by de Montaigne in *On Cannibals*, an essay penned 300 years prior to *Descent of Man*: 'We may, then, well call these people barbarians in respect to the rules of reason, but not in respect to ourselves, who, in all sorts of barbarity, exceed them.' (de Montaigne 1580).

[94] Gould (1978), p. 530.

> erning, they can help induce widespread cooperation for bolstering ecological and social resilience.[95]

As suggested above, the sociobiological turn in Robinson's work triggers foundational problems. First, the evidence presented by Robinson's key sources, drawn from the fields of sociobiology and evolutionary psychology, is highly contested.[96] At a more fundamental level, applying sociobiological findings to substantiate claims about law and morality is highly problematic, as Brown explains:

> The notion that morality is in our genes and activated by specific parts of our brain—thus qualifying as a 'universal moral grammar' or as 'a gadget, like stereo vision or intuitions about number' excites book reviewers, who can be relied upon to hail it as revolutionary. However exalted these claims, though, they prove to be of limited utility when trying to make sense of everyday moral practice in a given milieu.[97]

Robinson's ideas are at times not easy to follow: 'While evolved norms do not compel any country's particular social, cultural, political, or legal human constructs, all legal systems do reflect the operation of evolved norms when crafting rules, processes, and institutions'.[98] Here he suggests that evolved norms are already inherent in all contemporary legal systems, yet the constructive project remains a worldwide recognition of them:

> Human reactions to a changing Earth will emerge […] reflecting traits of human nature that evolved through Darwinian natural selection and evolution. These instincts are 'hard-wired' into *Homo sapiens*. As 'evolved norms', they motivate human behavior. By magnifying positive instincts to cope with the emerging conditions of the Anthropocene, humans can select evolved norms that advantage their well-being, and even survival.[99]

The first evolved norm Robinson proposes is cooperation, which he considers to be 'both an ethical norm and a duty of good neighbourliness, acknowledged to be a customary norm in all legal systems (*e.g., droit de voisinage*)'.[100] Robinson notes that at the international plane, cooperation is 'a universally accepted principle of international law, reflected in Articles 55 and 56 of the United Nations Charter'.[101] The basis for cooperation does not arise from the coercive force of the law, but rather in an inherent desire or instinct: he argues '[g]overnments and individuals alike instinctively cooperate when providing mutual aid for disaster relief, for example amidst the intense storm impacts influenced by climate change'.[102] He refers to

[95] Robinson (2014a), p. 48.
[96] Gould (1978); Kennedy (2014), p. 12.
[97] Brown (2008), p. 363.
[98] Robinson (2014a), p. 58.
[99] Ibid., p. 61.
[100] Ibid., p. 18 (italics in the original).
[101] Ibid.
[102] Ibid.

sociobiological scholarship as describing the evolutionary foundations for cooperation, citing a range of sources from Bowles and Gintis through to Darwin.[103]

It is beyond doubt that all human social institutions, including law, are founded in cooperation. A more interesting question is whether it is wise to draw normative conclusions from this fact. Warfare and genocide also rely upon high levels of complex cooperative endeavour, as does organized crime, tar sands mining and seal hunting. When Franklin announced 'either we hang together, or assuredly we will all hang separately' both the revolutionaries and the hangmen were actively cooperating. All this goes to illustrate that sociobiology may be able to explain why male lions kill cubs or why ants do what they do, but it inevitably becomes highly speculative when applied to people.[104] The issue of importance for international environmental law scholarship is not whether people and states are apt to cooperate, but rather with whom and to what *legal* end. When extended to those questions, sociobiology's capacity to provide meaningful answers is very limited.

While Robinson does not claim that there is actual sociobiological evidence for most of the seven evolved norms he identifies, he does suggest that there is a sociobiological *basis* for them, stating that the evolved norms are not only real but also *instinctual* and *hard-wired*.[105] Moreover, he suggests that the Anthropocene demands action to promote these norms, even in the absence of evidence:

> In order to benefit from—and test—the hypothesis that humans can adapt more effectively to disruptions in the Anthropocene Epoch by magnifying positively their evolved norms, communities and countries will need to use these norms before sociobiology can confirm the evolutionary basis for the legal principles discussed here. Events are overtaking humanity.[106]

The essence of Robinson's constructive project appears to be that 'international environmental law should encourage aspects of human behaviour that promote better outcomes for the environment and here are some examples familiar to me'. If evolution were removed from the equation, few would object to that. It is the project's grounding in evolution, not metaphorically, but through actual genetic processes for which there is no sound evidence, which renders his assertions not simply unjustified, but perilous.

3.3 Neoromanticism

The third variation of the evolutionary narrative in contemporary international environmental law is neoromanticism. Romantic mythopoeia of an ecological variety commenced in reaction to the Industrial Revolution and continued strongly thereafter.[107] From Tolkien to television advertisements for SUVs, Westerners surround

[103] Ibid.
[104] Gould (1978), p. 532.
[105] Emphasis added. Robinson (2014a), pp. 47, 61.
[106] Ibid., p. 53.
[107] Von Hendy (2002), pp. 25–48.

themselves with stories affirming their natural affinity with nature, even while consuming it ever more rapidly.[108] While the cinematic spawn of *The Hero's Journey* continues to make billions for media corporations,[109] our favourite in this genre remains Wordsworth:

> The world is too much with us; late and soon,
> Getting and spending, we lay waste our powers:
> Little we see in Nature that is ours;
> We have given our hearts away, a sordid boon!
> The Sea that bares her bosom to the moon;
> The winds that will be howling at all hours,
> And are up-gathered now like sleeping flowers;
> For this, for everything, we are out of tune;
> It moves us not.–Great God! I'd rather be
> A Pagan suckled in a creed outworn;
> So might I, standing on this pleasant lea,
> Have glimpses that would make me less forlorn;
> Have sight of Proteus rising from the sea;
> Or hear old Triton blow his wreathed horn.[110]

In examining the origins of international environmental law, Humphreys and Otomo demonstrate that key concepts underpinning international environmental law were developed by classical romantic thinkers and 'the expression of those concepts was both novel and essential to the romantic ésprit itself'.[111] They identify three distinct guises in which romantic ideas regarding man and nature maintain a real, if typically concealed, influence upon contemporary international environmental law: the aesthetic, the authentic and the divine.

The extent to which such a subjective and culturally bounded notion as the aesthetic remains influential in how international environmental law is both formulated and applied—which it very obviously does—indicates the degree to which European values continue to dominate the discipline, even at its surface. Romantics defined themselves in opposition to much that they witnessed as the Industrial Revolution unfolded before them, but their construction of the authentic individual as a solitary figure silhouetted against the landscape in harmony with the bases of her own work product shared with the protocapitalists a deep antagonism to communal life, communal labour and communal property.

But it is the romantic emphasis upon the divinity of nature—and of locating divinity in nature—that is most significant for present arguments. 'It is not merely that God *is* or resides *in* nature. It is rather that the experience of the divine is locatable only through imaginative immersion in the natural world.'[112] In this perspective

[108] Curry (1998).
[109] Palumbo (2014), p. 92.
[110] Wordsworth (1807).
[111] Humphreys and Otomo (2014), p. 8.
[112] Ibid., p. 11.

humans who are both part of nature, and apart from it, construct divine Nature mythopoetically. '"Nature itself" turns out to owe everything to the imaginative authorial voice pronouncing upon it'.[113]

The world is too much with us reveals each of these elements. Wordsworth's solitary poet stands upon a lea that is pleasant, looking out upon an ocean in search of an embodied divinity that both he and the pagan know exist within it. Yet it is the pagan's creed that is outworn; only a lone poet remains to deliver our gospel.

Humphreys and Otomo proceed to observe, 'where international environmental law prizes the "intrinsic value of nature", the "nature" in question will often turn out to be vague or unlocatable'.[114] Moreover, we contend, influential theoretical perspectives informing the discipline continue to rely upon romantic notions that an authentic international environmental law is only attainable upon its subjects experiencing an epiphany revealing to them a particular set of beliefs, or myths.

In international environmental law scholarship, the publication of *The Great Work* by Thomas Berry in 1999 may be considered a neoromantic landmark. In this extraordinary work, Berry calls for a radical reconfiguration of the dominant conceptualisations of law and existing systems of governance so that they are able to support the health and integrity of the whole Earth community. Members of the organized academic school—the Earth Jurisprudence Movement (EJM)—regularly cite Berry as their key source for a philosophy that recognises Earth as a primary source of law and which treats ecological sustainability as a fundamental legal principle.[115] Earth Jurisprudence is founded on principles that emphasise human interconnectedness with the Earth in its efforts to serve as the foundation of a new legal system in which 'Human laws and Earth laws are brought together'.[116] Berry's work has enjoyed a recent surge in popularity among environmental law scholars who favour a natural law approach. This rise in interest is largely owed to the 2002 publication of *Wild Law*, a pop-law environmental treatise by Berry's devotee Cullinan.[117] Referring to *The Universe Story* by Swimme and Berry, Cullinan claims that a productive human governance system is achievable only through a conscious recognition of humans as part of nature to the extent that patterns in nature must necessarily be studied and used to inform such a system.[118] Cullinan uses the seemingly contradictory heading, *Wild Law*, to introduce the need to overcome the dichotomy between 'nature' and 'civilisation', 'wild' and 'law'.[119] Wild law is portrayed as an approach to human governance and a manifestation of Earth Jurisprudence insofar as it recognises all the human and non-human qualities of the Earth System.[120]

[113] Ibid., p. 12.
[114] Ibid.
[115] Alexander (2014), p. 31.
[116] Berry (2002).
[117] Cullinan (2002).
[118] Ibid., p. 26.
[119] Ibid., p. 30.
[120] Ibid.

Berry in *The Great Work*, and together with Swimme in *The Universe Story*, attempts nothing less than a 'comprehensive story of the universe'.[121] The story elaborates how, unlike in ancient times, in the modern period 'with all our learning and with our scientific insight, we have not yet attained such a meaningful approach to the universe'.[122] Berry unites concepts drawn from physics, theology, astronomy, chemistry, biology, history, mythology and psychology in a tortured and florid prose that, for the believer, does indeed explain the origin and purpose of all life and matter in the cosmos from the beginning of geological time into an indeterminate eco-utopian future:

> The narrative of the universe, told in the sequence of its transformation and in the depth of its meaning, will undoubtedly constitute the comprehensive context of the future.
>
> 'The Universe Story' […] is the great story taking place throughout the universe. This creative adventure is too subtle, too overwhelming and too mysterious to ever be captured definitively. Thus we are telling it with a certain hesitancy.[123]

Throughout both volumes Berry manages to effectively conceal this hesitancy. He did not need ESS to propose the designation of a new geological era. Instead he simply does it himself by proposing that this new period should be called the 'Ecozoic', which he believes indicates 'the order of magnitude of the change that is taking place and of the expanded role of the human'.[124] Just like the Anthropocene, the Ecozoic is an age in which history is erased:

> A new type of history is needed, as well as a new type of science […] gone is the period when the various civilisations could be explained through the sequence of their political regimes, and the listing of battles fought and treaties made. The period is gone when we could deal with the human story apart from the life story, or the Earth story, or the universe story.[125]

Evolution is at the heart of Berry's cosmology; it is our sacred story:

> Now in our modern scientific age, in a manner never known before, we have created our own sacred story, the epic of evolution, telling us, from empirical observation and critical analysis, how the universe came to be […] then how the earth took shape and brought us into existence.
>
> With all the inadequacies of any narrative, the epic of evolution does present the story of the universe as this story is now available to us out of our present experience. This is our sacred story.[126]

[121] Berry (1999); Berry and Swimme (1992), p. 5.
[122] Berry and Swimme (1992), p. 6.
[123] Ibid., p. 5.
[124] Ibid., p. 4.
[125] Ibid., p. 2.
[126] Berry (1999), p. 31.

From this foundation, Burdon and Cullinan propose natural law theories positing the existence of a Great Law or Great Jurisprudence.[127] The 'Great Jurisprudence' contains law or principles that govern the functioning of the universe. These principles are timeless and unified, all derived from the same source, namely the universe itself.[128] Earth Jurisprudence is embedded in this Great Jurisprudence.[129] Given the consideration of the Great Jurisprudence as '"written into" every aspect of the universe', it is seemingly evident that rational analysis is not the only means through which we obtain knowledge as we for the most part rely on interactions we have experienced with nature through history.[130] In other words, there exist a seemingly endless variety of ways, other than conducting a rational analysis of information, to discover the Great Jurisprudence. This makes it virtually impossible to identify its precise content and boundaries. Nonetheless, the essential task of all subordinate law is to find consistency with the Great Law.[131] That Burdon and Cullinan invest so much intellectual capital in Berry's ideas, and that Cullinan in particular is himself so influential, testifies both to the degree to which neoromantic mythopoeia remains active and stirring within contemporary environmental jurisprudence, as well as to the pervasiveness of the evolutionary trope.

In summarizing the discussion on the prevalence of evolutionary narratives in environmental law theory, an observation deserving emphasis is that there is nothing new or unusual about lawyers using evolution as a metaphor for legal change and development. As Eliot notes, however, only alternative narratives open opportunities to 'initiate conversations about law which involve types of human beings and environments radically different from those we know'.[132] It is precisely evolution's location on a mythical plane that allows it to transcend the violent and contested historical events that constitute past legal change. In principle, legal authors can meaningfully theorize about the evolution or adaptation of law within a jurisdiction, or group of jurisdictions, whose citizens broadly share histories, values, worldviews and narratives that shape their understanding of legitimate authority. However, evolutionary legal theory is a very different beast when presented on a species-wide basis. This brings us to the second narrative pillar of contemporary international environmental law: universal evaluations of nature and constructions of legal subjectivity.

[127] Cullinan (2002); Burdon (2015); Burdon (2012), p. 28.
[128] Cullinan (2011), pp. 77–78.
[129] Ibid., p. 78.
[130] Ibid., p. 79.
[131] Burdon (2015), p. 85.
[132] Eliot (1985), p. 94.

4 The Myth of Universalism

Universalism in legal theory is found wherever propositions are not accompanied by express or implied limits upon their application to specific jurisdictions, regions, cultures, language groups, etc. The collective noun 'humans' is a signpost to an author's universal intent; the species-encompassing 'we' points in the same direction. All the perspectives considered in the previous section are universalist. Beyond species-encompassing language, as regards evolved norms, genetic theories cannot avoid universalism except to argue that humans are differentiated into subspecies. EJM, despite resistance to such suggestions from Bosselman and Cullinan, is structurally within a classical natural law tradition that demands universal obedience to, in this case, the Great Law.[133] EJM, founded uncritically upon the work of Berry, seems also to require adherence to Berry's unique cosmology.

An immediate reaction of some readers confronted with a critique of universalism is to assume the author is writing from a perspective of either absolute moral relativism or some kind of 'classical cultural relativism'. Assumptions of that kind in the present instance, and in most cases, are responses to straw men since few contemporary scholars, within or outside anthropology, support the kind of relativist positions originally presented by students of Boas.[134] Scholars have for some decades, especially within discourses surrounding human rights, worked towards understandings of cultural difference that allow for the existence of human universals. In this body of scholarship cross-cultural dialogues have been identified as an appropriate response to universalism, while 'cross-cultural procedural criteria to distinguish a progressive politics from a regressive politics, empowerment from disempowerment, emancipation from regulation' provide a sound response to relativism.[135] These lessons have insufficiently shaped international environmental law scholarship, however, which remains susceptible to what Todorov dubbed 'unconscious universalism'.[136]

Unconscious universalism in international environmental law discourse appears in various guises. One approach is to present competing perspectives within a single intellectual heritage—often referred to as 'Western'—in language that oscillates between the specific and the universal without building either boundaries or bridges between them.[137] When conclusions are drawn, however, they apply to all

[133] Burdon (2015), pp. 80–92.

[134] Brown (2008), p. 363.

[135] De Sousa Santos (2002); also Petersen (2011).

[136] Todorov (1992), p. 71.

[137] For example, Burdon (2015) uses the descriptor 'Western' throughout the analysis, except that prescriptions are for humans, not westerners. Bosselmann recounts 'the legacy of the European cosmology' and bemoans the ongoing influence of Descartes and the Enlightenment for having bequeathed contemporary society an inheritance of 'dualism, anthropocentrism, materialism, atomism, greed, and economism'. He discusses experiences in New Zealand and Germany but does not mention, much less describe, intellectual traditions other than European or European settler societies. See also Bosselmann (2010), pp. 2424, 2430.

of humanity.[138] Of the perspectives considered, Cullinan's is the most insightful as it describes variable evidence supporting claims by Berry and others that 'our tribal ancestors "lived in harmony with nature"', and concludes that 'there is little hard evidence that all contemporary and ancient hunter-gatherer societies were ecologically benign'.[139] He warns against 'the temptation to portray some of these peoples as inherently wise "noble savages" whom we have displaced from Eden'.[140] Cullinan suggests the experiences and worldviews of indigenous peoples are significant, not because they point to a universal ethic of harmony with nature, but rather because they contain and illustrate extraordinary human normative diversity—the thousands of social and legal alternatives potentially available to all of us as humans—to the dualism, materialism and atomism about which he, Bosselman and others complain.[141] The challenge for Cullinan, having recognized and emphasized cultural diversity, is in recovering and returning to the universal project. This is not unique; it is almost inevitably encountered by natural law theorists attempting to account for cultural diversity, as explained by Brown:

> The moral principles offered by universalists tend to be sufficiently abstract that they flirt with triviality, as in 'societies everywhere hold that human life is sacred and cannot be taken without justification'. A statement such as this is not exactly wrong, but it is not particularly useful either, given the range of circumstances that qualify as justification in diverse cultural settings. A context-sensitive application of natural law would require heroic feats of casuistry to encompass the varied circumstances of humankind. The result, I suspect, would begin to look a lot like—relativism.[142]

Cullinan's particular casuistry:

> [O]nce we recognise the universe, like a dance, exists by virtue of the cooperative relationships between all involved, it must follow that our governance systems should focus on fostering and nurturing intimate relationships between the members of the Earth Community. […] How one determines whether or not this is the case can vary, provided that it is consistent with the Great Jurisprudence. The Great Jurisprudence itself not only recognizes, but insists upon, diversity.[143]

We see here that 'the Great Jurisprudence' is ultimately a universalising concept rendering the initial recognition of the diversity that characterises social systems almost meaningless. The result is a return to the universal legal subject which tends to be presented as European, male, privileged, educated and rational.[144] Braidotti

[138] Bosselmann (2010), p. 2442.
[139] Cullinan (2002), p. 95.
[140] Ibid., p. 97.
[141] Ibid.
[142] Brown (2008), p. 368.
[143] Cullinan (2002), p. 132.
[144] 'European' includes European settler-dominant societies. See Blaut (1993).

explains how this universal subject results in sexualised and racialised 'others' being excluded from the notion of 'humanity' and calls for '[s]ituated and immanent practices' that 'allow for sharper and grounded analyses' of power differences.[145] As our discussion of myth and narrative shows, the need for such analysis in legal scholarship relating to the Anthropocene is becoming increasingly pressing.[146] Here it is worth noting that international environmental law actually does resist universalism, most notably through the principle of common but differentiated responsibilities and respective capabilities.[147] As Sands and Peel explain, this principle entails a recognition of the common responsibility of states for environmental protection on the one hand, and for 'differing circumstances, particularly in relation to each state's *contribution* to the creation of a particular environmental problem and its *ability* to prevent, reduce and control the threat' on the other.[148] Together with other principles of international law, most notably sustainable development—or 'development that meets the needs of the present generations without compromising the ability of future generations to meet their own needs'[149]—it provides a framework for environmental protection while at the same time reducing inequality within and between states, and across present and future generations. The imperative to correct conditions that prevent or impair the equal enjoyment of human rights also follows from international human rights law.[150]

Among the most problematic outcomes of an uncritical acceptance of the mythic beast—*Anthropos*[151]—as the universal legal subject are claims that responsibility for the global climate and biodiversity crises is shared on a species-wide basis whereby differing levels of responsibility for these crises are downplayed or ignored. For the ESS, a repeated method of illustrating the Anthropocene is by presenting a dual series of figures representing a correspondence between 'increasing rates of change in human activity since the beginning of the Industrial Revolution', and 'increasing rates of change in the Earth System as a result of dramatic increase in human activity'.[152] Correlations between the figures are undeniably apparent. Overlooked by Crutzen and Steffen, however, are other key facts and figures that are nonetheless relevant to understanding the origins and drivers of the Anthropocene. Perhaps most notably, these include the statistics illustrating the correspondence between colonialism and slavery with the commencement of the Industrial Revolution and subsequent growth in economic activity. Here are the calculations included by Said

[145] Braidotti (2019), p. 156.

[146] Grear (2017). See also Hayman (2018).

[147] See especially United Nations Framework Convention on Climate Change (UNFCCC) Art. 3(1) and Paris Agreement Art. 2(2).

[148] Sands and Peel (2012), p. 233 (italics in the original).

[149] Report of the World Commission on Environment and Development, 'Our Common Future' (1987), p. 43 (the Brundtland Report).

[150] See e.g. Human Rights Committee, General Comment No. 18: Non-Discrimination, HRI/GEN/1/Rev.9 (Vol. I), adopted 10 November 1989, para. 10. See also De Schutter et al. (2012).

[151] A term coined by Grear; see Grear (2015), p. 225.

[152] Steffen et al. (2011).

in *Culture and Imperialism* that if presented graphically could themselves match Crutzen's j-curves:

> [I]n 1800 Western powers claimed 55 percent but actually held approximately 35 percent of the earth's surface, […] by 1878 the proportion was 67 percent, a rate of increase of 83,000 square miles per year. By 1914, the annual rate had risen to an astonishing 240,000 square miles, and Europe held a grand total of roughly 85 percent of the earth as colonies, protectorates, dependencies, dominions, and commonwealths.[153]

The relationship between colonialism, slavery and the growth of early capitalism is well researched, and widely acknowledged in Third World Approaches to International Law (TWAIL) scholarship and decolonial critical theory. Nonetheless, it is generally disregarded by the ESS authors, but as shown by critics such as Malm and Moore, the connections are far from irrelevant, both prior to and during the birth of the Industrial Revolution.[154] Steam engines replaced water mills to power the cotton mills of early industrial England primarily because they facilitated mill-owners greater access and control over human labour.[155] The milling machinery only operated with long-fibre cultivars selected over millennia by indigenous farmers in South America and South Asia.[156] Attaining cheap cotton produced through the forced labour of slaves transported to America from Africa was essential. The colonies supplied both raw materials and markets to fuel the engine of emerging global capitalism.[157] Coal burning warships liberated naval arsenals from relying upon wind, widening and accelerating European colonization and enabling the United States to defend its slave trade.[158] At the birth of the Industrial Revolution, and at every turn thereafter—from the forests of Brazil and Papua New Guinea, to fields of cotton in Alabama or sugar cane in Fiji and Queensland, to the oil wells of Somalia and the Middle East—one finds the domination of nature by people enmeshed and intertwined with the domination of people by people. In the plain words of the essayist Heglar:

> In the environmental space, we love to tell ourselves that it all started with the Industrial Revolution. But we're telling ourselves a lie. It started with conquest, genocides, slavery, and colonialism. That is the moment when White men's relationship with living things became extractive and disharmonious.[159]

For Morrison, the Eurocentric foundation underpinning the Anthropocene 'represents an effort to expand European historical experiences, frameworks and chronologies into the rest of the world […] and hides a disturbing extension of colonial

[153] Said (1994), p. 8.
[154] Malm (2016); Moore (2017); Malm and Hornborg (2014), p. 63. See also Grear (2017).
[155] Malm (2017).
[156] Russell (2014).
[157] Williams (1944), pp. 51–58.
[158] Black (2007), pp. 173–174; Karp (2011).
[159] Heglar (2019).

discourse'.[160] Rather than revealing a revolutionary post-Cartesianism, 'the terminology of the "Anthropocene" simply extends the logics of Eurocentric human exceptionalism and methodological individualism'.[161] Instead of standing as an all-encompassing concept, the Anthropocene's exclusions are in fact characteristic of the mythic *Anthropos* insofar as patterns and structures of privilege concurrently persist. Ultimately, 'the species remains as much an abstraction at the end of the line as at the source'.[162] Braidotti notes that '[t]here is something ironic to say the least in the spectacle of European civilization, that was the cause of so much devastation and multiple extinctions in its colonial occupied territories, becoming so concerned about the extinction and the future of the species'.[163] Indeed, the conditions of concern in most scholarship on the Anthropocene are all too familiar for many people in the Global South and marginalized parts of the Global North.[164]

Where the inherent irony of the discourse is overlooked and colonial history is misrepresented or simply ignored, responsibility becomes—conveniently for some—shared between us all: You and I, the worker in the Dongguan factory where the pen on our desk was manufactured and the Kudjip villager in a threadbare *Global Brand* shirt who picked the beans for the coffee we are drinking, the street hawker selling chotpoti opposite the Dhaka sweatshop where the shirt was sewn, the Kakuma seaman crewing the ship that brought the fertilizer to grow the chotpoti pulses, the girl from Juba who spent her childhood in the refugee camp the seaman walked by on his way to school, the CEO of the Manhattan company that owns the shipping line, the family in Coban awaiting remittances from the woman who cleans his Fifth Avenue office and the child begging for quarters a few blocks away. Our ancestors and our children as well. It would include societies who leave lighter imprints on the planet than did most even in pre-agricultural phases, such as people living on certain remote Pacific atolls in Micronesia and Kiribati who never had electricity until a recent solar installation provided a single light for each house at night.[165] Hundreds of kilometres of deep ocean separate them from the nearest government agent, except perhaps a local nurse or primary teacher. They still follow lifeways that enabled their ancestors to thrive in one of the world's most marginal environments for millennia. If we are to accept claims that such people share in what Philippopoulos-Mihalopoulos terms 'the Anthropocene responsibility',[166] then it must be that this has nothing to do with choices, actions or impacts and is instead a direct and inescapable function of simply being human. In this way, a species-encompassing Anthropocene threatens to finally eclipse those elements already well concealed in international environmental jurisprudence: history, culture, language, class, power,

[160] Morrison (2015), p. 76.
[161] Grear (2017), p. 79.
[162] Ibid., p. 83; Malm and Hornborg (2014), p. 63.
[163] Braidotti (2019), p. 157.
[164] Ibid. (citing Clarke 2018).
[165] Federated States of Micronesia, 'Second National Communication to the United Nations Framework Convention on Climate Change' (Palikir, FSM Government, 2012), p. 115. Sacks (1997) provides a good description of life on a remote Micronesian atoll, Pingelap.
[166] Philippopoulos-Mihalopoulos (2017), p. 120.

biocultural diversity, scale both temporal and physical, and the persistence of a plurality of legal forms.

As Yussof sums it up, the Anthropocene deploys humanity 'as a method of erasure that obfuscates climate racism, social injustice in fossil fuels, and differentiated histories of responsibilities through homogenization in a "we" of the Anthropocene'.[167] It distributes blame where none is due thereby suppressing and devaluing lived examples of how people in fact exist in a manner that is fully human, intimately connected with their neighbours and local environments, and entirely within the Holocene's limits. Concealing these different levels of diversity through a universalising narrative risks inadvertently perpetuating existing inequalities. These mechanisms of unequal distribution are illustrated increasingly clearly by the actual and projected impact of climate change. Projections indicate that developing countries will bear an estimated 75–80% of the cost of climate change, while having benefited the least from the industrial activities that have caused the climate crisis.[168] People in poverty will be worst affected, as they tend to be both more vulnerable and more exposed to climate impacts.[169] Wealthier communities have greater capacity to adapt to the effects of the changing climate[170] in large part because of the benefits reaped from the extraction and exploitation that contributed to climate change.[171] Alston warns of a 'climate apartheid' in which those who have benefited most from activities that caused the climate crisis will 'pay to escape overheating, hunger, and conflict while the rest of the world is left to suffer'.[172] Laying bare the differentiated responsibilities and impacts associated with climate change and ecosystem degradation is an initial step towards what Braidotti describes as 'the co-construction and also the counter-construction of affirmative values and relations' which, in turn, can propel radical political change.[173] In the realm of international law, this requires a move away from the 'western, elitist, male-centered and imperial' nature of the field towards a more inclusive practice embracing the transformative potential of social movements.[174]

5 The Myth of Legal Monism

The final narrative pillar of contemporary environmental law is what the anthropologist Rouland describes as 'the unitary myth' of all law being derived from the state.[175] Davies argues that this is not an explicit theory of monism but rather 'the

[167] Yusoff (2015), pp. 6–7.
[168] See World Bank (2010), p. xx.
[169] Human Rights Council, 'Climate Change and Poverty: Report of the Special Rapporteur on extreme poverty and human rights', UN Doc. A/HRC/41/39 (2019), p. 7.
[170] Ibid., p. 14.
[171] Ibid.
[172] Ibid., p. 50.
[173] Ibid., pp. 168, 172 (quote from p. 168).
[174] Rajagopal (2003), p. 23.
[175] Rouland (1994), pp. 44–46.

thought or ideal of singularity' imbued with cultural, ethical, ideological and aesthetic dimensions.[176] It underpins 'the intellectual context of legal philosophy and the picture of law conventionally manifested in legal scholarship'.[177] Griffiths' construction of 'the ideology of legal centralism', presented in contrast to legal pluralism, typifies such attitudes:

> Law is, and should be, the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state.[178]

Davies argues that both the positivist and natural law theoretical streams are based upon a notion of singularity, that 'there is One law in a particular geo-political space and that the One law is itself One system, defined by clear limits, governed by certain principles and unified by a distinct foundation'.[179] Griffiths agrees that the 'pervasive power of this legal centralist or formalist model of law is such that it may be said that all legal studies stand in its shadow'.[180] In international environmental law, it manifests in a conception of the international legal order where supposedly neutral, rational states facilitate environmental protection and achieve 'sustainable development'. TWAIL scholarship has been instrumental in illuminating the manner in which this conception downplays and ignores the power dynamics affected by these internationally prescribed objectives.[181]

A rejection of the myths of legal monism and the 'neutral' state defines a pluralist legal perspective, which regards law to be 'not what the lawyers say about it' but 'what the actors make out of it'.[182] For a pluralist, '[l]aw is not in the texts, it is in the practices'.[183] Legal pluralism thus signifies a societal characteristic of multiple legal orders observable in a given society.[184] Looking beyond practices, Manderson suggests that not only are the daily activities of people in streets, villages, workplaces and homes the sites of 'interpretative battles over the meaning and functions of law' as much as courts, parliaments and lecture halls, but that people's invisible worlds are also contributing to each individual's construction and experience of law; 'law is synonymous with the symbolic order, it is produced in the dialogue and discourse all about us: in all the things that we read and say, in the music we listen to, and the art we grow up with'.[185] Writing on international law, Rajagopal specifically draws our attention to the role of social movements in its practice. He argues that

[176] Davies (2005), p. 90.
[177] Ibid.
[178] Griffiths (1986), p. 3.
[179] Davies (2005), p. 92.
[180] Griffiths (2002), p. 293.
[181] See e.g. Rajagopal (2003), p. 22.
[182] Le Roy (1994), p. 4.
[183] Ibid.
[184] Griffiths (1986), p. 38.
[185] Manderson (2003), p. 87.

appreciating this role similarly requires an understanding of the state as 'a plural and fragmented terrain of contestation rather than as a monolith'.[186]

While legal pluralism has informed the theoretical frameworks of most legal anthropological studies of both Western and non-Western cultures for some decades, most international environmental scholars continue to couple 'law' inexorably to the sovereignty of the state. This is problematic as it disregards the ways in which colonial administration 'contributed to the complexity and diversity of plural legal configurations' and more recently, the impact of 'ever-increasing global connectedness' on how the state itself is viewed.[187] Legal anthropological studies situated in colonial and post-colonial situations provided the core of the literature on legal pluralism until, and to some degree since, the 1980s. From that time authors have also applied the notion of legal plurality in analyses of non-colonised jurisdictions, and more recently there have emerged arguments suggesting that the recognition of legal pluralism implies a shifting of perspective that could potentially displace and reorient all legal theoretical bases: 'legal pluralism must be approached not as another legal theory but as *a radicalization of the way we think about the law, which must permeate and inform all theorizing of the law*'.[188] This radicalization may involve openness 'to develop the sensibility as concerned activists' on the part of international lawyers.[189] For feminist international law scholars, it further involves 'the permissive model of international State sovereignty, as encapsulated in the *Lotus* case, giving way to a preference for co-operation and peaceful measures'.[190]

At the normative level, an attitude of legal pluralism also creates space for a much larger variety of norms that may be employed to devise cooperative solutions to the global climate and biodiversity crises. For example, Hayman and her Carcross/Tagish First Nation collaborators demonstrate in recent work how the 'slow activism' inherent in indigenous Tlingit and Tagish narratives can be employed to deconstruct and reshape definitions of the Anthropocene associated with mono-cultural representations.[191] In some Pacific Island nations, local systems of customary resource use are increasingly recognised as valuable normative approaches to environmental management as communities are seeking to cope with the adverse effects of climate change and wanting to reverse the unsustainable exploitation of marine resources.[192] These local systems are often undervalued or ignored in international environmental law, in part because they tend to be located in oral histories and other forms of intangible cultural heritage differing starkly from formal legal sources. Recognising these systems as capable of informing international environmental law and management strengthens the 'constructive, creative capacities of legal subjects […] alongside the plurality of these same subjects' so that the re-conception of law becomes a form

[186] Rajagopal (2003), p. 23.
[187] Von Benda-Beckmann and Turner (2018), pp. 255, 258.
[188] Melissaris (2004), p. 58 (emphasis in the original).
[189] Rajagopal (2003), p. 23.
[190] Chinkin et al. (2019), p. 28.
[191] Hayman (2018).
[192] Ruddle et al. (1992); McMillen et al. (2014); Rose (2008).

of 'emancipatory prescription'.[193] This *critical* legal pluralist attitude is perhaps the most powerful way to work methodically towards the inclusion of the cultural diversity of today's world in international environmental jurisprudence, as opposed to the homogenising outlook and solutions the Anthropocene discourse seeks to impose upon the world.

6 Conclusion

Readers will by now recognize that the Anthropocene narrative contains all of the necessary elements of an international environmental law myth. It commences in a prehistoric state of nature; subsequent events are set in motion via a tragic moment of enlightenment and are the inevitable outcomes of evolutionary processes. Like *the Mirror of Galadriel*, it is a bountiful repository of self-reflecting narratives; a tapestry of tales united by a special thread—each includes only one character who is thereby, at the whim of each storyteller, able to inhabit the roles of hero, villain, trickster, victim, god and demigod, often shifting roles in a single telling. This character is, of course, *Anthropos*; the universal human, the human enterprise, us; and we are educated, privileged, rational, white, male, heterosexual and able-bodied. In essence, the Anthropocene provides the most recent chapter in a legal mythology that reduces historical and contemporary facts of empire, slavery, gross inequity of wealth and power, patriarchy and global capitalism to the natural course of human evolution.

Readers may have also located a contradiction in arguments presented thus far inasmuch as they endorse existing principles of international law against proposed radical revisions conducted under an Anthropocene banner: viewed through this lens all international law is revealed to be equally mythic. This is of course the case; modern international law is the product of humanity's greatest schism—unprecedented slaughter in global warfare, mass genocide and colonial violence. The precious infant that is the UN system is the progeny of more pain, blood and death than any other legal birth. Texts such as the UN Charter and the Universal Declaration of Human Rights are undoubtedly, perhaps even self-consciously, mythopoetic. From the Gamali of Pentecost Island to the International Court of Justice in The Hague, law's creator and subject is always *Homo relator*—the storytelling ape—and it is the myriad of stories we tell each other and ourselves that define our law, and us. International law is itself a repository of stories, the best of which aspire to be global tales of universal emancipation utilising the normative weight and efficacy of international law as a system while at the same time calling for reform.[194] Ultimately, these authors believe that while we cannot escape myth, the post-Holocene will be shaped by those myths that are best loved.

[193] Kleinhans and Macdonald (1997), p. 26.

[194] Noteworthy in this context is the campaign to establish 'ecocide' as a fifth international crime. See Higgins, Short and South (2013).

Against this backdrop, it is paramount to acknowledge that the *Myth of the Anthropocene* is playing an innately conservative role in contemporary international law discourse. Maintaining and reinforcing this narrative may become even riskier as the post-Holocene advances. To take a single example, we may contemplate the near-certainty of a massive increase in migration either as a direct result of environmental catastrophes, or caused by human conflicts in which ecological degradation is a contributing factor[195] and the fact that borders in places such as Europe, the US and Australia are already being militarized against asylum seekers.[196] Every post-Holocene regime, of any conceivable description, is likely to maintain or develop some form of environmental jurisprudence justifying such militarization as necessary and virtuous. What use might a post-Holocene authoritarian regime make of some of the ideas inspired by evolution re-emerging with renewed vigour having been tied to the Anthropocene brand? Any sociobiological turn in international law must be resisted for obvious reasons, and renewed neo-romanticism must also be viewed with great scepticism, as Humphreys and Otomo warn:

> the romantic development, from Wordsworth to Yeats, tends increasingly to fasten the lone authorial voice to an imaginative didacticism, itself centred on a community steeped in a landscape with nostalgic Volk-ish contours. The pronounced conservativism that marks the later Wordsworth develops into deliberate elitism in Yeats (the 'last romantic') and flirts with full-blown authoritarianism in Heidegger—arch-philosopher of the 'authentic'. The imaginative dismissal of the human in much environmentalism may, in short, lend itself to dictatorial law, as indeed happened in 1930s Germany.[197]

A mere 90 years hence neo-romantic ideas are offering nourishment to what Klein terms 'white power eco-facism' emerging against a backdrop of ecological breakdown, and acting as 'a ferocious rationalization' for refusing to provide justice to those who are victims of this catastrophe.[198] In other words, instead of repairing the harm done to these victims as required by basic human rights principles, we risk ending up with islands of defended and privileged security amidst a sea of suffering and uncertainty.[199]

If the Anthropocene remains a topic of analysis, international environmental law scholarship needs to grapple in more depth with the questions posed by Hayman and her Carcross/Tagish First Nation collaborators: 'Whose Anthropocene is it?

[195] Werell and Femia (2013).

[196] Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fifth periodic report of Australia', UN Doc. E/C.12/AUS/CO/5 (2017), p. 4.

[197] Humphreys and Otomo (2014), p. 13. Notably, the reference to 1930s Germany was omitted from the final version of the chapter cited above (n. 113).

[198] Klein (2019), p. 45.

[199] Ibid; Malm and Hornborg make the same argument: Malm and Hornborg (2014), pp. 66–67. See also David Boyd, 'Safe Climate: Report of the Special Rapporteur on Human Rights and the Environment', UN Doc. A/74/161 (2019), p. 10 (citing evidence that climate impacts 'could push an additional 100 million people into extreme poverty by 2030').

How has it been defined, and who gets to own it?'.[200] These questions offer a useful starting point for confronting the species-talk—the universal 'we'—that features prominently in contemporary international environmental law discourse more systematically with indigenous, feminist, postcolonial and other marginalised accounts of normativity. Taking these accounts more seriously will almost inevitably result in greater modesty in the discipline's epistemological aspirations. At the same time, each of them could provide new perspectives on the questions posed in the legal literature on the Anthropocene, such as the extent to which legal orders 'can be adjusted through additional layers of norms—such as environmental law—or, instead, require a deeper reformulation of foundational concepts'.[201] The theory and practice of international law would benefit from the plurality of perspectives thus heeded. At the same time, rather than dismissing existing principles of international environmental law—such as sustainable development—as 'ideological palliatives', perhaps it is time to remove apparent yet invisible ideological veils thus revealing the actual principle and its transformative potential.

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[200] Hayman (2018), p. 78.
[201] See Viñuales (2016), p. 59.

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