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Orford A and Hoffmann F (eds), *The Oxford Handbook of the Theory of International Law* (OUP Oxford 2016)

Review Essay

1. Approach

This essay is parasitical in nature. It reviews Orford and Hoffman's excellent book with great admiration, but treats it as a host organism from which benefits can be derived for environmental law scholarship. The reasons for so doing are various. Public international law ('PIL') is, unlike environmental law, a field of law that has long been the site of theorisation about the nature of law, the purpose and product of theory, and its challenges. Indeed, according to some well placed interlocutors, theory is an integral part of the method of PIL as "unlike other legal disciplines, international law usually involves a commitment on the part of those who have recourse to it."¹ Something similar could be said of environmental law. Unusual is the environmental lawyer that does not subscribe to environmentalism, or that might write a title such as "The Limits of Environmental Law", stressing the limitedness of what environmental law can achieve, or conceding that its many global problems are simply unsolvable.² In this vein, PIL and environmental law are closely related fields – if not siblings, then at the very least first cousins with points of shared sympathy. Amongst these would be their common idealism, a vision for a world ordered by rules which depending on one's view is either a signal strength³ or futile moralizing⁴. Alternatively, PIL and environmental law may be seen as favoured aunt/uncle and young adult – Michael to Paul Foot, say – with PIL as the elder, and environmental law the fond though far from uncritical descendant. It might not do to subject these metaphors to too much scrutiny, but the fact remains that many environmental lawyers, and so much environmental law, draw inspiration from the international legal order.

Having summarised the approach of the book in Part 2, the discussion moves to a survey of the state of 'the theory of environmental law' in Part 3. The survey is tentative for the obvious reason that such an endeavour is necessarily precarious. Treating such a variegated topic in a small number of words can only be done with the caveats and circumspection, but nonetheless, some broad findings are posited.

¹ James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (1st edn, Cambridge University Press 2012).

² c.f. Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP USA 2007).

³ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3 edition, OUP Oxford 2009).

⁴ Goldsmith and Posner (n 2).

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Part 4 develops these arguments by making the case and spaces for environmental law theorising. Part 5 concludes.

2. A Conspectus

The merest reflection will confirm that theorising about the nature and function of international law has deep roots. Foundational figures such as Grotius were as much sophisticated political theorists as natural and international lawyers.⁵ Moreover, their theorising was a deeply practical enterprise, informing and central to the debates of the day. Consider the eighteenth century Dutch jurist Cornelis van Bynkershoek. He wrote in a time of contrasting approaches to what we would today call ocean management, with the dominant approach being the 'freedom of the sea', in contrast to those which asserted claims to sovereignty.⁶ One of the primary justifications for the 'freedom of the seas' was the presumed inexhaustible abundance of the seas, which entailed that there was no reason for the assertion of national dominion. To the contemporary reader, any such notion of a 'commons' immediately raises the prospect of its tragedy, although Hardin⁷ was not the first to recognise this. Van Bynkershoek opposed the freedom of the seas on the grounds that "a res communis can be made almost useless by promiscuous use, as often happens in a sea which has been fished out."⁸ Borne from similar concerns, in the late nineteenth century international organisations such as the International Sugar Union emerged to regulate the global production, trade and use of natural resources,⁹ and by the mid-century attempts to codify territorial seas were well advanced. While the UN Convention on the Law of the Sea (UNCLOS)¹⁰ cannot be categorized as only an environmental agreement, norms protecting the environment are a significant part of it.¹¹

⁵ SC Neff, *Hugo Grotius on the Law of War and Peace* (Cambridge University Press 2011) xxiv-xxxii.

⁶ The debate is typified by the 'battle of the books' between Grotius's *Mare Liberum* (1609) and Seldon's *Mare Clausum* (1635), see Timothy Brook, *Mr Selden's Map of China: The Spice Trade, a Lost Chart & the South China Sea* (Profile Books 2014).

⁷ Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

⁸ Koen Staplebroek, 'Trade, Chartered Companies, and Mercantile Associations' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012).

⁹ Kurt Wilk, 'International Affairs: The International Sugar Régime' (1939) 33 *The American Political Science Review* 860.

¹⁰ 10 December 1982, 1833 UNTS 3.

¹¹ *Ibid*, Part XII, "Protection and Preservation of the Marine Environment".

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Against this background, the editors' introduction states their aim as to "provide readers with a sense of the diverse projects that have been understood or characterised as exercises in theorizing about international law as over the past centuries, explore which aspects of international law have seemed important to theorize about at different times and places, and analyse the uses to which different theories of international law have been put."¹² From these aims they generate a series of broad questions that with minor tailoring are no less serviceable for environmental lawyers: what do environmental lawyers think of as theory, and how does it relate to the discipline and profession? What is the proper relationship between theories of environmental law and theorizing in philosophy, sociology, economics etc? Should the practice of environmental law be measured against theories and standards derived from outside the discipline, or against the values embedded in professional practices and vocabularies? One notable feature of the editors' approach is that they do not seek to impose coherence to their subject matter, but rather convey "a sense of the theory of international law as a wide-ranging tradition that is dynamic, pluralist, and politically engaged."¹³

As with other Oxford Handbooks, the book is divided into thematic Parts. 'Histories', 'Approaches', 'Regimes and Doctrines', and 'Debates' collectively comprise a formidable forty eight substantive chapters. The authors themselves are a stellar group, not exclusively theorists, often writing on topics for which they are well known. A not-quite-random selection from Part I would include Martti Koskenniemi on 'Transformations of Natural Law: Germany 1648-1815', Anthony Anghie on 'Imperialism and International Legal Theory', and Robert Howse on 'Schmitt, Schmitteanism, and Contemporary International Legal Theory'. Each of these chapters is elegantly written, traversing broad intellectual terrains, and engaging. Despite the risks, there is precious little that is commonplace or indulgent. The authors have sought, with success, to ground their arguments in present day scholarly debates and current legal controversies. Howse in particular makes his points with considerable forthrightness. In a discussion of the ways in which Schmitt is often deployed "as a set of constructs that can be added on to workmanlike doctrinal scholarship in order to increase its theoretical octane"¹⁴, he chooses to dismantle

¹² Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP Oxford 2016).

¹³ *ibid* 17.

¹⁴ *ibid* 226.

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Nehal Bhuta's use and (in Howse's view) misuse of Schmitt in various human rights law contexts, including targeted killing. Not all the victims are on foreign battle fields.

The thirteen chapters under the rubric of 'Histories' span as well as time and personalities, territories from the European cradle of international law to the Ottoman Empire, China, Russia, and others. One lesson which ought to be obvious but bears stressing is that context – historical, cultural, territorial – deeply informs the theorising of international law and as such it is a diverse, often contradictory, pursuit. This point is driven home in Part II ('Approaches'), which consists of a similarly well-focussed set of chapters on topics including natural law (Gordon), Marxism (Knox), realism (Jütersonke), and constructivism (Dos Reis and Kessler). Again, leading figures contribute, most notably perhaps Samantha Besson ('Moral Philosophy and International Law') whose own work could reasonably be characterised as a foundation stone for the book under review.¹⁵ Her chapter initially explains the prevalence of moral philosophizing about international law and questions how best that normative theorizing might be done. Her call is for an end to the "sterile opposition between 'realist' and so-called 'moralist' approaches to international law...the way we do theory of international law should reflect the normativity of the practice of international law and be responsive to the pivotal role of normative reasoning in that practice *qua* self-reflective practice."¹⁶ No less fascinating is "Global Administrative Law and Deliberative Democracy" by Benedict Kingsbury, Megan Donaldson, and Rodrigo Vallejo. This attempts to complete some unfinished business from the first articulation of 'GAL',¹⁷ namely its "'bracket[ing] the question of democracy' as too ambitious an ideal for global administration."¹⁸ Responding to criticism of this omission and building on their original lines of argument, "this chapter is an initial attempt to open the brackets and bring GAL and democracy into the conversation."¹⁹ Arguing that GAL's innumerable sites of power cohere with schemes of deliberative democracy beyond the state, and that both institutional entrepreneurship and 'GAL lawyering' are engaged in democratic striving, the claim is that GAL is a fluid phenomenon in the process of articulating and contesting its legitimacy credentials rather than establishing them.

¹⁵ Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP Oxford 2010).

¹⁶ Orford and Hoffmann (n 11) 405-6.

¹⁷ Benedict Kingsbury, N Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15.

¹⁸ Orford and Hoffmann (n 11) 526.

¹⁹ *ibid.*

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Part III ('Regimes and Doctrines') is perhaps the most familiar element of the book, dealing as it does with what might be thought of the classical debates of PIL, namely, the nature of its sources (d'Aspremont), international legal personality (Parfitt), jurisdiction (Noll), the use of force (Kritsiotis), free trade (Orford), and so on. Of most direct interest to readers of this journal would likely be the chapter of Stephen Humphreys and Yoriko Otomo.²⁰ Whatever else may be said of it, International Environmental Law is a deeply under-theorised subject.²¹ In this respect it is somewhat similar to general environmental law – see section 3 below. It is striking that even as recently as 2007, a major text such as *The Oxford Handbook of International Environmental Law* could manage to avoid a dedicated chapter on the subject's legal theory,²² although some chapters (i.e. Toope's) did engage points of conceptual importance.²³ An upswing in IEL's engagement with legal theory can be tracked to books such as *The Philosophy of International Law*²⁴ and *The Cambridge Companion to International Law*.²⁵ In the case of the former though it might be noted that discussions of the environment are handled by ethicists such as Crisp²⁶ rather than lawyers reflecting on their discipline from an internal perspective, and for the latter whilst the approach is broadly conceptual, legal theory as such is not engaged.²⁷ Given this assessment, *Theorizing International Environmental Law* is a particularly welcome chapter.

Humphreys and Otomo commence by noting the limited scope of IEL. With little-to-nothing to say about the global food regime or natural resources, they describe their subject as "marginalia complemented by effluvia...[characterized by] general peripherality... 'soft law' [and] often dependent on other disciplines

²⁰ Stephen Humphreys and Yoriko Otomo, 'Theorizing International Environmental Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP Oxford 2016).

²¹ C.f. C Stone, *The Gnat is Older than Man: Global Environment and Human Agenda* (Princeton UP 1993) – an early example of this critique, theorising the extent to which environmental problems should be conceived as global or local, albeit by an ethicist rather than a lawyer.

²² Daniel Bodansky, Jutta Brunnée and Ellen Hey, *The Oxford Handbook of International Environmental Law* (Oxford University Press, USA 2007).

²³ Stephen J Toope, 'Formality and Informality' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP Oxford 2007).

²⁴ Besson and Tasioulas (n 15).

²⁵ Crawford and Koskenniemi (n 1).

²⁶ Roger Crisp, 'Ethics and International Environmental Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP Oxford 2010).

²⁷ Sundhya Pahuja, 'Conserving the World's Resources' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (1st edn, Cambridge University Press 2012).

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altogether – science and economics – for direction and legitimacy”.²⁸ More cutting, they see in IEL “many of the trappings of a faith [and] a kind of global moral authority [whose] principles promise the radical reshaping of ‘business-as-usual’. In vain in it seems: for, again more than most bodies of international law, that is law crying in the wilderness.”²⁹ They are note the limitedness of relevant theoretical attention IEL has attracted – a matter discussed below. One might argue on the specifics but few would disagree with the authors that there is a gap between IEL’s scope and tools, and the problems it is charged with addressing. Of the many complex issues generated by this account, the authors focus on the “constituent conceptual elements that generate [IEL’s] specific energy and propel its contradictions”, deploying two theoretical lens: the philosophical approach of European Romantic movement, and colonial governance practices.

The first of these, a staple of Environmental Humanities studies, set in place many of the notions of ‘nature’ that are routinely taken for granted – that it is ‘unspoilt’ and ‘wild’, imbued with moral significance, and so on. Cultural studies and its cultural materialism approach are prevalent, and the work of Raymond Williams looms large. In particular Williams’ famous essay *The Idea of Nature* is deployed, which disaggregates ‘man’ from ‘nature’, and hence for present purposes places nature in a position of dominion in respect of man’s law – an idea which obviously has deep roots in European Christianity.³⁰ Combined with romanticism, nature now becomes an object of aesthetic wonder and awe for humans, a site of recreation and spiritual growth. The textual linkages of these ideas with the IEL canon, especially treaty preambles, is deftly handled. The task of colonial administrators to manage the natural resources under their dominion generates a different mindset, one which seeks to “ensure sustainable long-term access to the resources that increasingly fuelled a global economy.”³¹ Here the environmental history literature does much of the heavy lifting,³² combined with readings of early conservation treaties such as the *International Convention on the Conservation of Wild Animals, Birds, and Fish in Africa* (1900).³³ Jointly these two narratives can be read as forerunners to IEL as we know it. They serve as its motivating

²⁸ Humphreys and Otomo (n 19) 798.

²⁹ Ibid 799.

³⁰ Raymond Williams, ‘The Idea of Nature’, *Problems in materialism and culture: selected essays* (Verso 1980).

³¹ Ibid 799-800.

³² See generally, Andrew C Isenberg (ed), *The Oxford Handbook of Environmental History* (Reprint edition, Oxford University Press 2017).

³³ 188 ConTS 418.

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force, yet both have very specific origins. The one is an aestheticized experience of the natural world which places the human experience (and a very particular human experience it must be said) at its centre. Its traces are present in the aspirations of extent IEL but, argue the authors, "its implicit invocation of the divine"³⁴ remains unarticulated and unfulfilled. More developed are the patterns of colonial development. Framed as they are as "viewing natural resources in terms of global production and demand, and managing them within a context of international trade",³⁵ this propelling force of IEL resembles better the world we know. Both approaches treat the non-human as a 'resource', and while IEL "excoriates the dump, the waste, the loss of life and species...it is not equipped to deal with it, for – in Walter Benjamin's unparalleled image, 'as storm is blowing from Paradise [and] this storm is what we call progress.'³⁶

Part IV, 'Debates', details a number of key points contention in PIL theory, staking out the present and potential futures of each. Each of the five chapters in this shortest of Parts contains themes of relevance to environmental questions. Yael Paz on secularism in international law, Skouteris on progress, Hoffman on legalism and politics, Beckett on poverty, and Orford on fragmentation and constitutionalization.

3. The State of Environmental Law Theory

When reading this book, a recurrent thought for this reviewer was 'what would a parallel volume on the theory of environmental law theory look like?' Safe to say, it would not stretch to well over 1000 pages, excluding scholarly apparatus. Would it achieve such impressive scope and depth, or attract such a distinguished range of established scholars along with so many interesting up-and-coming ones? This may be a false comparison given the pedigree and deep traditions of PIL. However, if a more comparable legal sub-discipline were chosen – say European Union legal theory – it is highly doubtful whether environmental law theory would shine in comparison. Yet both are of a similar age, and our subject has the advantage of enjoying global rather than regional attention. Whatever the reason, it is hard to argue with Humphreys & Otomo's contention that international environmental law theorizing is

³⁴ Humphreys and Otomo (n 19) 817.

³⁵ *ibid* 818.

³⁶ *ibid* 819.

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poorly developed.³⁷ Indeed this is so in comparison with almost any other legal sub-discipline that one cares to name – compare the health of legal theoretical work in the fields of contract/constitutional/criminal/obligations/et seq.

More generally, what traction can it be said that theory in general, and environmental law theory in particular, have on environmental law? Consider *Absent Environments*.³⁸ This has been described as in that rarefied category of books which help “to redefine and shape the discipline.”³⁹ It takes a well-established approach – Teubnerian autopoiesis, which has been profoundly important in mainstream legal sub-disciplines such as European Union and constitutional law – to interrogate the meanings of ‘the environment’ when considered in the light of concepts such as humanity, urbanisation, and wilderness. Yet in the decade since its publication, its actual shaping of the discipline has been limited. Taking the *Journal of Environmental Law* as a proxy for the sub-discipline of environmental law, it is notable how rarely *Absent Environments* is actually cited. Only one article has actually engaged with its core themes in any depth,⁴⁰ and a small handful have cited it as representative of ‘critical environmental law’.⁴¹ This is of course no criticism of the book itself or its arguments or methods. Far from it. Rather, its meagre reception into the body of environmental law scholarship, despite the imprimatur of a scholar no less distinguished than Jane Holder, suggests (I put it no higher) a cultural reluctance to engage with the large theoretical questions qua environmental law where other sub-disciplines of law are less chary. There is of course a need to draw here a distinction between pure and applied theory. The latter is not unknown in environmental law. What is in shorter supply are attempts to grapple with the essential nature of environmental law as compared with conceptualisation for the (far from invaluable task) of problem-solving. In this mode, theory is the handmaid to interpretation and systematization of a body of

³⁷ *ibid* 799.

³⁸ Andreas Philippopoulos-Mihalopoulos, *Absent Environments: Theorising Environmental Law and the City* (Routledge-Cavendish 2009).

³⁹ Jane Holder, ‘Book Review of *Absent Environments: Theorising Environmental Law and the City*’ (2008) 20 *Journal of Environmental Law* 496.

⁴⁰ Vito De Lucia, ‘Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law’ (2015) 27 *Journal of Environmental Law* 91, 4–6, 26.

⁴¹ Yaffa Epstein, ‘Favourable Conservation Status for Species: Examining the Habitats Directive’s Key Concept through a Case Study of the Swedish Wolf’ (2016) 28 *Journal of Environmental Law* 221; Elizabeth Fisher and others, ‘Maturity and Methodology: Starting a Debate About Environmental Law Scholarship’ (2009) 21 *Journal of Environmental Law* 213.

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rules. The more profound inquiries concerning the normative foundations or political implications of said body of rules is a separate and less common practice.⁴²

One response to this tentative claim is the methodological one that JEL is a weak proxy for 'environmental law'. Indeed, a broader frame of reference would certainly bolster the argument, and perhaps invert it. I look forward to those studies. Another response would be a variant of a familiar trope of environmental law, that its sheer breadth is a barrier to conceptualisation. The 'breadth problem' is that environmental law, as is well known, encompasses such an unusually broader range of legal disciplines – public international, public, EU, property, tort, to name just the most obvious – that its theorisation is unusually demanding. The major reference points enjoyed by, say, constitutional or trusts law are simply not available to environmental lawyers. These reference points, such as sovereignty or accountability or democratic legitimacy for the constitutional lawyer, are both enduring and deployed by scholars in many other jurisdictions. Such are the range of concerns of environmental law, the argument goes, that apt theories are less readily at hand. A version of this argument is made by Fisher et al when discussing environmental law's 'incoherence' in the context of its perceived immaturity. It is, as a subject "ad hoc, a conceptual hybrid, straddling many fault lines...much ink has been spilled attempting to define the boundaries of the subject [but] no definitive definition of the subject has been forthcoming."⁴³ Somewhat ironically, the authors of this estimable piece are themselves the victims of the incoherence problem they describe. When later in the paper discussing the methodological challenge that governance presents for environmental law (235ff), the authors refer to understanding "Coase's theory" as necessary to understanding emissions trading schemes (at 237). What is meant by this is somewhat unclear. From the context of trading schemes, the reference is presumably to the *Coase Theorem* and its analysis of property rights and transaction costs for the purposes of determining rights and liabilities.⁴⁴ However references to "Coase's theory" are more likely to refer to his much earlier 'theory of the firm',⁴⁵ which highlights the importance of the fact (hitherto underappreciated) that markets do not operate costlessly,

⁴² A somewhat recent, and very welcome counter-example is Jane Holder's, 'An Idea of Ecological Justice in the EU' in Dimitry Kochenov, Grainne de Burca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015). See also the rich seam of work produced by Ole Pedersen.

⁴³ Fisher and others (n 40) 219–220.

⁴⁴ RH Coase, 'The Problem of Social Cost' (1960) 3 *The Journal of Law & Economics* 1.

⁴⁵ RH Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386.

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and that these transaction costs have important consequences for the formation of firms in preference to market exchange.⁴⁶

Such minor considerations apart, whilst the fact of conceptual incoherence might be accepted, it need not be conceded that its 'breadth' or hybridity are axiomatically disadvantageous. One could readily see that the "different historical foundations for the subject [such as] property law, pollution law, tort law and planning law"⁴⁷ provide ready access to extant, mature, and well developed bodies of theory that have already addressed issues pertinent to environmental law. Indeed, such is the position of one of the very few dedicated environmental law theory monographs, *The Philosophical Foundations of Environmental Law*.⁴⁸ The anti-theoretical nature of environmental law is arguably at odds with, rather than caused by, its sub-disciplinary promiscuity.

An alternative explanation for environmental law's anti-theoretical nature derives, at least in part, from theoretical indifference of one of its parents, International Environmental Law. As noted above, until very recently major text such as *The Oxford Handbook of International Environmental Law*, in common with all the major IEL textbooks, could avoid any meaningful discussion of the subject's legal theory.⁴⁹ One should not however omit mentioning landmark works such as *Legitimacy and Legality in International Law: An Interactional Account*.⁵⁰ Drawing on Lon Fuller's distillation of the principles of legality,⁵¹ Brunnée and Toope explore the extent to which the rule of law operates in a variety of international arena including torture and the use of force,⁵² and climate change.⁵³ In each of these examples they inquire about the existence of international legal norms, and whether they are sustained or undermined by international agreements and the prevailing practices of nations, but also the media, NGOs, and other citizens. The state is not the only actor, even though as the lead author of international law it is

⁴⁶ Harold Demsetz, 'The Theory of the Firm Revisited' (1988) 4 *Journal of Law, Economics, & Organization* 141.

⁴⁷ Fisher and others (n 39) 229.

⁴⁸ Sean Coyle and Karen Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart 2004).

⁴⁹ Bodansky, Brunnée and Hey (n 21).

⁵⁰ Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010).

⁵¹ Lon L Fuller, *The Morality of Law* (Revised edition, Yale University Press 1969).

⁵² Brunnée and Toope (n 49).

⁵³ *ibid.*

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dismaying how often it is also the transgressor: “the law of the jungle is often unrecognised by the very people who help to make it.”⁵⁴ In respect of climate change, the authors carefully trawl through the history and substance of the UNFCCC to determine whether it can be characterised as resting on widely shared understandings. They conclude that it does, albeit more on the procedural side than the substantive one. They then work through Fuller’s eight principles (generality, public promulgation, prospectiveness, intelligibility, freedom from contradictions, stability, possibility to obey, and proper administration) to determine whether the climate regime’s purported legal rules satisfy the criteria of legality and as such count as genuine laws. Many of the criteria self-evidently obtain – ie. generality, promulgation – whereas others such as intelligibility are more challenging (UNFCCC Article 4(2)(a) anyone?) though with the Paris Agreement arguably better founded now than ever. The argument can be summarised thus: “that the convention’s procedural provisions fare well on the legality scale whereas its substantive aspects do less so [including the] congruence between international practice and the requirements of the UNFCCC.”⁵⁵ Quite apart from its close analysis of the climate regime, what the Fullerian, interactional, approach brings to this account is its characterisation of what constitutes a meaningful global legal regime to address climate change. Beyond treaty negotiation and standard setting, “a long-term agreement on emission reductions is unlikely to be attainable, and unlikely to have lasting obligatory force, unless it rests on a strong foundation of shared understandings, respects the requirements of legality, and is embedded in a vibrant practice of legality.”⁵⁶

The absence of environmental law theorising is sometimes welcomed, albeit in a particular fashion by Fisher et al, who rail against theory which presents itself as “grand” [241] or “over-arching” [243].⁵⁷ What is meant by these adjectives is unclear however beyond a suspicion of ‘theories of everything’, which is probably quite uncontentious. Fisher’s objection in these terms is somewhat muddled two pages later when other theories which might readily be perceived in these terms are elsewhere applauded, namely Ulrich Beck’s wide-ranging sociology of risk (245). Here however Orford and Hoffman offer some assistance, drawing a distinction between ‘grand’ and ‘technical’ forms of theorizing. The former is associated with nineteenth and early twentieth century work, which sought to “understand the role of law in international relations or to grasp the essential nature of international law” whereas the latter merely

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ Fisher and others (n 40).

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applies “an increasingly canonical body of well-established rules, principles, and concepts to the conduct of states and other international actors.”⁵⁸ Whether or not that is the distinction that Fisher et al were seeking to draw, it remains the case that the default ethos of environmental law scholarship, in the UK and EU at least, is one that focuses on problem-solving as the *telos* of law. In this mode, theory’s function is limited to serving “as an aid to the interpretation and systematization of a body of rules, with questions about the historical pedigree, normative foundations, political implications, or practical consequences of those rules largely being treated as outside the remit of the international lawyer.”⁵⁹

4. Avenues

This final section attempts a justification of theorizing environmental law. It cannot simply be assumed that this is a useful pastime, despite Kant’s well known injunction that theory and practice are two parts of an inseparable whole. Such arguments conventionally run along the lines of instrumental and intrinsic value – that in the former case legal theory is valuable to the extent that it enhances legal practice, and in the latter for the reason that it is essential to law as a field of study, and as a social practice.⁶⁰ Whether legal theory genuinely develops a flexibility of mind and imagination in legal practitioners is probably something many teachers of theory would like to believe even if they struggled to demonstrate it. As Coleman notes though, the “most compelling arguments for legal theory, however, do not rely on its instrumental value. Rather, they depend on the role legal theory plays in the integrity of law as a field of study and as a social practice.”⁶¹ What follows explores the first of these arguments – that theory enhances our understanding of our scholarship by wresting it from the grip of either black letter law, or the social preferences of legal actors or indeed other scholars.

⁵⁸ Orford and Hoffmann (n 11) 3.

⁵⁹ *ibid* 4.

⁶⁰ Jules L Coleman, ‘Legal Theory and Practice’ (1995) 83 *Georgetown Law Journal* 41 2586.

⁶¹ *ibid*.

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Economic theory has loomed large in the theorising of other social sciences, largely owing to the imperial ambitions of economics in recent decades.⁶² Law has not been immune from this trend, far from it. As Malloy notes, “for better or for worse, and without regard to one’s politics, the borrowing of market concepts has *transformed* legal reasoning and captured an authoritative position in the legal imagination.”⁶³ Environmental law and in particular climate law have been infected by this incubus for a number of reasons. *The* central work of climate change debates was written not by a physical scientist, much less a lawyer, but an economist – the Stern Review.⁶⁴ Moreover, market mechanisms deeply informed by microeconomic theorizing have been the dominant regulatory approach in climate action. From the Kyoto Protocol to the EU’s Emissions Trading Scheme to the deliberately obscure Article 6 of the Paris Agreement and any number of national and subnational trading schemes, market-based approaches are the default tool for climate policymakers. As I have argued elsewhere, with few exceptions, environmental lawyers have treated the theoretical underpinnings of these arrangements poorly.⁶⁵ That though is very much a past debate. Rather than looking to foundational texts with the mark of Chicago upon them, new strains of economic thought are emerging which offer very new diagnoses and prognoses of the climate challenge, and also wholly new avenues for legal thought and action. Foremost amongst these is the work of Michael Grubb and his ‘three domains of sustainable development’ approach.⁶⁶

The starting point is that neoclassical frameworks in economic prescriptions have been unduly influential in economic thinking and the policy process. By neoclassical (or welfare) is meant the theory that strives for economic optimisation based on relative prices and representative agents armed with rational expectations. Market design, regulation and pricing are the primary tools – for the purposes of climate action, this means carbon (externality) pricing. Self-evidently however, these methods have failed over the past two decades. The reasons are not merely familiar stories of over-allocation and regulatory

⁶² Edward P Lazear, ‘Economic Imperialism’ (2000) 115 *The Quarterly Journal of Economics* 99.

⁶³ Robin Paul Malloy, *Law in a Market Context: An Introduction to Market Concepts in Legal Reasoning* (Cambridge University Press 2004).

⁶⁴ Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press 2007).

⁶⁵ Navraj Singh Ghaleigh, ‘Economics and International Climate Change Law’ in Kevin R Gray, Cinnamon P Carlarne and Richard Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016).

⁶⁶ Michael Grubb, Jean Charles Hourcade and Karsten Neuhoff, *Planetary Economics: Energy, Climate Change and the Three Domains of Sustainable Development* (Routledge, Taylor & Francis Group 2014).

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capture, but rooted in the deep structure of this dominant mode of economics (Grubb's 'Second Domain'). While efficient markets and carbon pricing have a *role* to play, they are condemned to continuing failure if they continue to ignore the 'First Domain' of behavioural economics which focusses on the motivations, capabilities and opportunities faced by actors who we know are not wholly rational. Rather we know that individuals are creatures of habit, risk averse to change, myopic, inattentive to intangible costs, and so on. The solutions to these 'imperfections' (in the language of neoclassicism) is found not in economics but the behavioural sciences and indeed in law which identifies and seeks to guide actions towards more environmentally positive patterns. The resistance of many householders to insulation, which offers better rates of return than the market, yet which remains uninstalled, is but one of myriad practical examples. The 'Third Domain' of sustainable development acknowledges that avoiding 2C warming requires more than well functioning markets and duly 'nudged' consumers. There is a need for genuinely transformative pathways to dramatic decarbonization, through innovation, development and resilience which alter the basis of existing technologies, infrastructure, supply chains and more. Here evolutionary theories lead, and innovation law which sees beyond an inevitable link between innovation and intellectual property towards the reform of IP institutions, open innovation, and the recalibration of IP to climate change.

Planetary Economics is grounded in the idea of the complementarity of different processes which lead at different social and temporal scales, with each domain having a specific role to play in the transformation of the global systems necessary to comprehensively address climate change. Associated theories and disciplines are viewed as complementary rather than competitive. The challenge is to understand the contexts and problems for which one or other theory is more appropriate. Grubb himself is open to the likelihood that although originally expressed in terms of different foundational micro-economic theories, the Three Domains framework yields more powerful insights when deployed with the complementary disciplines which will shape it (ch12). The mantle then is there to be picked up by lawyers to minimise the 'psychological distance' of climate change (Spence, Poortinga, and Pidgeon 2012), and facilitate the strategic investments essential to delivery of Paris.

Although space precludes a fuller discussion here, environmental lawyers could similarly make greater use of well developed theories in public and constitutional law when exercising their obsession with

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climate litigation.⁶⁷ NGOs and pressure groups, no less than academic lawyers continue to be entranced by this tool yet readers of the literature could be forgiven for failing to be aware that it takes place against the backdrop of constitutional law's most enduring question – what is the proper scope of the courts in making policy decisions? Decades of literature on the merits of civic republicanism versus liberal constitutionalism are rarely if ever reflected in the environmental law literature. Doubtless this is because many cases such as *Urgenda*,⁶⁸ or *Leghari*⁶⁹ come down the right way from a simplified environmental/climatic perspective. Nonetheless there remains an obligation to subject legal materials to proper standards of scrutiny, a task which at the minimum theory is well placed to do.

5. Summing Up

This essay travels across a book of international law theory, questions the limitedness of legal theorisations in environmental law, and then pinpoints the watershed between a legal theory that theorises about law *per se* and one, more familiar to environmental law, that looks more at application of frameworks. It might be pointed out that there is little surprise that PIL scholars engage more in legal theory than environmental lawyers, simply because PIL is a legal system AND a discipline AND a subject. Environmental law is not a system, can barely be called a discipline OF law, although it maybe a discipline IN law. It is certainly a subject. But for these characteristics, it is perhaps predictable that little 'pure theorising' has been taking place. Although other paths taken in environmental law theorising are highlighted, (Brunnee and Toope, *Absent Environments* etc.) they have not been probed fully but rather identified as exceptions to a general practice of non-theorising. The kernel of a proposition of going back to public and constitutional law is suggested. May both interventions be further developed, and challenged.

The Oxford Handbook of the Theory of International Law is a wonderful book, rich in insights and intellectual integrity, it is a superbly marshalled venture for which the editors deserve great praise. They

⁶⁷ Elizabeth Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to *Massachusetts v. EPA*' (2013) 35 *Law & Policy* 236.

⁶⁸ *Urgenda Foundation v Kingdom of the Netherlands*, [2015] HAZA C/09/00456689

⁶⁹ *Leghari v Republic of Pakistan* (2015) W.P. No. 25501/2015 [*Leghari*]; *Ali v. Federation of Pakistan* (Supreme Court of Pakistan 2016).

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have assembled an impressive team of international law theorists, of various stages of seniority, pointed them in the right direction and let them go. The direction is all important. All the papers address, in one way or another, the key questions of what work theory does for international law, and for this reviewer thereby trigger cognate questions for environmental law. How does it engage with theory? Whether in its minimalist (conceptualisation for the task of problem-solving) or maximalist (grappling with the essential nature of environmental law) modes, how can approaches from this book be deployed by environmental lawyers? A number of lines of further research are essayed, and readers are urged to pick up this fine book to develop more of their own.

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