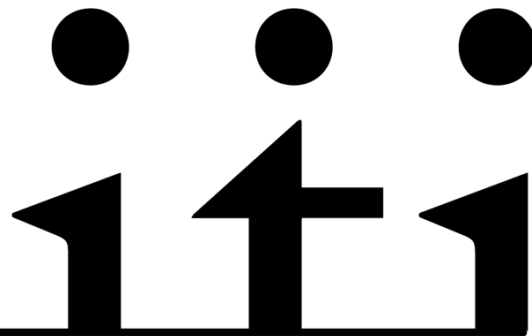


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## Rethinking the Law

Discussing Andreas Philippopoulos-Mihalopoulos'  
Spatial Approach to the Law

JUSTINE POON/DARIO HENRI HAUX

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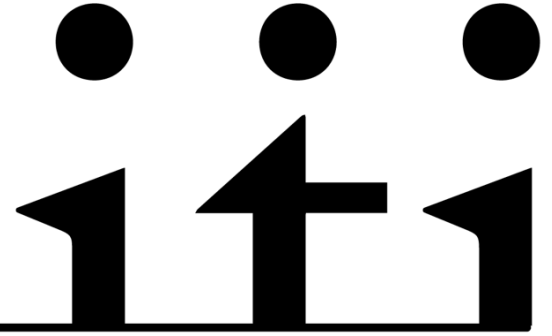
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## Rethinking the Law

### Discussing Andreas Philippopoulos-Mihalopoulos' Spatial Approach to the Law

JUSTINE POON\*/DARIO HENRI HAUX\*\*

*This paper presents a digital interview with Justine Poon, legal researcher at the Australian National University (ANU), on selected aspects of Andreas Philippopoulos-Mihalopoulos' approach to environmental law and legal science.*

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#### I. Background

Justine Poon and Dario Henri Haux have already discussed Philippopoulos-Mihalopoulos' text «Critical Environmental Law as Method in the Anthropocene»<sup>1</sup> in the beginning of October 2020 as part of the Law and Theory Workshop at the Institute for Interdisciplinary Legal Studies – lucernauris. The text critiques the limits of the legal system that prevents it from dealing with the challenges that climate change presents. It suggests new paths of thinking about the potential of critical environmental law in re-situating humanity as just one subject amongst many in an interdependent world. In the following, the two researchers will talk about some of the topics more in-depth.

#### A. Where Are You?

*Dario Henri Haux:* Good morning, Justine. Last time we spoke about the text, you mentioned that it follows the questions of «where do we live and who is we».

<sup>1</sup> PHILIPPOPOULOS-MIHALOPOULOS ANDREAS, Critical Environmental Law as Method in the Anthropocene, in: Philippopoulos-Mihalopoulos Andreas/Brooks Victoria (eds.), Research Methods in Environmental Law: A Handbook, Cheltenham 2017, p. 131 ff.

So, as a starter, let me ask you: where are you right now?

*Justine Poon:* I am in a place called Eden on the Sapphire Coast of Australia. It is in the countryside and surrounded by trees, wildlife, and water that is startling blue. This area suffered very badly from the bushfires in early 2020 and it will take some time to recover, but it is spring now, the landscape is lush and regrowing, and there is a cacophony of wildlife – I have encountered snakes, lyrebirds, black cockatoos, echidnas, a seal and even whales.

## B. Who is «We»?

*Haux:* I can just imagine how nice the nature must be at your place. When I look at [pictures from this area](#), it almost seems to be unreal, fictional...

But I do not want to waste the time of our readers with thoughts on Australian landscapes. Instead, let's have a look at (science) fiction, a topic that ANDREAS PHILIPPOPOULOS-MIHALOPOULOS (APM) is referring to in his publication. How do you and how does he approach this topic?

*Poon:* I think the questions of «where do we live» and who we define as «we» is very important in a place like this. This area of the coast is the land of the Yuin people which, like the rest of Australia, was colonized by the British under the legal fiction of *terra nullius* – a term meaning «nobody's land» or «empty land». The law, colonialism, and a certain scientific ideology that regarded the Aboriginal people who had lived here for more than 60,000 years as not worthy of recognition, brought about the terrible injustice of dispossession. This is not something that lives in the past, but continues today and it is woven into society and law.

Law conditions our relationship to the environment and to each other, for better or worse. «Where are you?» is a legal

question. Law tells a story about what the environment is for, whether it is a resource to be extracted or something we are responsible for.

However, it is also true that current laws are struggling to conceive of a different relationship between humanity and the environment, beyond property, beyond state boundaries and state relationships, and beyond traditional notions of who is an actor or a legal person. Climate change and mass biodiversity loss cannot be dealt with within the conventional story of law.

So, I think that asking «where are you?» is a useful starting point in thinking about what is so critical and potentially different about critical environmental law. We can take this question seriously to think firstly about the limitations of the story about the world that the law tells and then to imagine how law might tell a different kind of story. The underlying proposition in APM's work is that legal language is material in the sense of creating the conditions by which things are possible. To engage with a posthuman sense of ecology, we need new imaginative relations in legal thinking within the language of law and, perhaps, we need new forms of language and law to think with. These creative engagements are methods for dealing with the planetary crisis for which we have no adequate language.

## II. Perspectives on and of the Law

*Haux:* Would you say that what counts is the perspective of the law? And how perspectives within law differ?

*Poon:* APM states that his article introduces three environmental legal tenets: grammar, perspective, and methodology. If the language of law conditions our social relations and the human relationship with other beings and the environment, then we need a new grammar or way of speaking (and therefore thinking) that

fundamentally repositions humanity as just one thing amongst many things. Perspective refers to how we can use imaginative analytical devices such as the concept of the «Anthropocene»<sup>2</sup> to shake free of the prioritization of the power relations in the present and to consider the future.<sup>3</sup> Methodology refers to «new methods with which we must seek knowledge».<sup>4</sup>

The dominant legal systems of humanity's industrial and extractive era are responsible, though not solely, for the situation in which the vast majority of things in the world have no agency or action. Most things in the world are not human, and yet they are only legally visible in relation to humans. However, fact is quickly overwhelming law. There are physical changes to the world that are already revealing gaps in the law. For example, there are increasing numbers of people who are displaced by natural disasters and long-term changes to the environment that they live in through drought and sea-level rises. The current refugee protection regime does not adequately recognize the harm they are suffering from as something leading to legal rights and obligations. It is also difficult to conceptualize what responsibility might mean when the causes of environmental harm are systemic and cumulative.

It is increasingly evident that we are not the only things that matter. The trees matter in their stored carbon and in how

they burn. The soil matters. Coral reefs matter. Insects matter. Humans do not matter alone.

«The vast majority of things in the world are not human, and yet they are only legally visible in relation to humans. However, fact is quickly overwhelming law... It is increasingly evident that we are not the only things that matter.»

At the less radical end of the spectrum, legal reform extends existing legal concepts to try to ameliorate some of the bad effects – limiting some freedoms and forcing people and corporations to consider their environmental effects in a more wide-reaching way, for future generations for example. These are practical moves, but I think we can also ask questions about whether they are effective, sufficient and accountable.

At its heart, I think APM's project is about re-materialising what has been made abstract by the law and a total re-configuration of the place of the human amidst all these materialities. We need to at once limit our powers of extraction and exploitation and unleash our potential to imagine what we are when we are no longer exceptional.

<sup>2</sup> For some additional background please see IV.

<sup>3</sup> HARAWAY DONNA, *Staying With the Trouble: Making Kin in the Chthulucene*, Durham 2016, has many sympathies with this project but comes to the conclusion that what is required is a change in perspective toward a radical presentness, which is a different register of time to the future-oriented Anthropocene thinkers.

<sup>4</sup> PHILIPPOPOULOS-MIHALOPOULOS ANDREAS, *Critical Environmental Law as Method in the Anthropocene*, in: Philippopoulos-Mihalopoulos Andreas/Brooks Victoria (eds.), *Research Methods in Environmental Law: A Handbook*, Cheltenham 2017, p. 132–133.

Humans will always be different – we have these brains that allow us to dream up cities before we have even hewn a rock. We somehow thought it would be good to breed tiny handbag dogs from wolves. There is great ability and absurd desire. However, the exceptionalism and our relationship with the world, even often each other, that is distant and abstract and yet highly destructive; those things have to end.

*Haux:* ANDREAS PHILIPPOPOULOS-MIHALOPOULOS is [Professor of Law & Theory and Director of the Westminster Law & Theory Lab at Westminster Law School](#). Known as «picpoet» he is a practicing artist as well, working on performance, photography, text, installations, and sculpture, with several shows, performances, and actions around the world. Notably, he was invited to do a performance drawing on his theoretical work at the opening of the [58<sup>th</sup> Venice Art Biennale 2019](#). In one sentence: he is a creative and multitalented legal scholar – or how would you describe him? Have you ever met him in person?

*Poon:* That is a pretty good description! I had the pleasure of presenting in a panel that he convened at the 2015 Critical Legal Conference a few years ago. I like the idea of a laboratory for law and theory research very much. It suggests a place where experts from different disciplines are brought together to constantly put their talents and thinking to new objects of inquiry.

### III. The Spatial Turn

#### A. «Space», «Time», «Hyperobjects»...

*Haux:* The text we are discussing was published in 2017. In 2014, PHILIPPOPOULOS-MIHALOPOULOS released his book «Spatial

Justice: Body, Lawscape, Atmosphere».<sup>5</sup> He argues, that there cannot be law or justice, which is not articulated through and in space. Building on the discussions regarding the *spatial turn*, he aims to underline the connection between space (geographically, sociologically, and philosophically) and the law – understood in a very broad way. In his theory, APM draws our attention to the bodies (human, natural, non-organic, technological), who occupy a certain space at a certain time. Although I have just read excerpts of his book, I have the impression that even in the text we are discussing, he is making references to some of the concepts. I especially think of terms such as «space», «time», «hyperobjects» or «bodies». How would you describe these terms?

*Poon:* I suppose I would contextualise them in terms of the major movements in critical legal theory:

- How law looks at space in terms of the atomized actions of individuals and how it ought to look at space as a plane of many interactions and a site of contestation and play.
- How law looks at bodies, which is related to space, and which has mainly centered around the materiality of law and how it creates conditions of possibility and how things live.
- How law looks at time too often from the present set of rights and not enough from the responsibility toward different futures that are impacted by our present actions.

Why have there been all these «turns» in critical legal theory? Perhaps it would be helpful to think about the archetypal legal question – it concerns the law as it applies in a particular moment and the

<sup>5</sup> PHILIPPOPOULOS-MIHALOPOULOS ANDREAS, *Spatial Justice Body, Lawscape, Atmosphere*, Oxon 2015.

relationships and positions of the actors at that moment. It is strongly focused on a present moment and the past is dealt with insofar as it has led to the present and the future is relevant insofar as it is connected to an outcome that the law of the present demands. This leads to a lot of things and interests being left out of legal consideration.

There is a constant searching for new ways to conceptualize law because facts become too insistent to ignore. Our legal technology is no longer fit for purpose if our purpose is a world that continues to be livable for most things.

«Our legal technology is no longer fit for purpose if our purpose is a world that continues to be livable for most things.»

Hyperobjects raise the question of: «How do we examine the big things, such as climate change, that are immanent to us and in fact change the way that we are? How do we make useful objects of inquiry out of them so that we can do something?» Hyperobjects are more than structurally immanent – they are very big and very small – something that affects every system and has effects down to a cellular level. An analogy is with the sun. The sun is far away and gigantic but can also mutate our cells, leaving a trace of its power in the form of moles and melanomas.

Hyperobjects also raise the stakes of the problem. So, yes, we can reconceptualize law as a plane of beings and things, however not all things have the same weight. Some things change the premise of the question altogether. In the face of climate change, it is absurd to try and labor under

the same understanding of law and relations that we have had thus far.

APM's passage about hyperobjects on page 143<sup>6</sup> contains a series of perspective-shifting considerations *about* perspective itself. Climate change is posited as something planetary and systematic – it comes from human effects, but it cannot be controlled by human intentions. However, it is also measured and understood through localized effects that are divided again when the effects find themselves viewed through the different disciplines – economists quantifying the risks, ecologists looking at biodiversity, the changing (and unchanging) timelines and priorities of electoral politics etc. And lawyers – how do we view the issue? Are we searching for responsibility *and* trying to construct it? This is happening whilst we are simultaneously changing and being changed by the object of inquiry we are trying to pin down.

The shift in how we conduct lawful relations is critical. That is, law needs to be more creative and engaging with what forms of life it enables and destroys, as opposed to limiting its role to affirming norms and hierarchies set in place in the past. Moreover, law will have to see nearly every question as one that involves climate change. The discretion of legal matters can no longer be maintained. The hyperobject gets *in*. Yes, this approach will create more uncertainty and perhaps be quite messy. I think the suggestion here is that it is a mess we cannot avoid because we have already created a situation in which traditional categories of property, relations, and hierarchies are thrown into doubt. We already live in climate change's world.

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<sup>6</sup> PHILIPPOPOULOS-MIHALOPOULOS (Fn. 1), p. 143.

## B. ...«Bodies» and «Ruptures»

*Haux:* How does APM's understanding of the «body» differ from your perspective of the bodies becoming boats?<sup>7</sup> Is yours a more individualistic one?

*Poon:* In my work so far, I have been quite literal when I talk about the body. I mean a human body and tracing what happens to asylum seekers when they encounter Australia's maritime border and appear as a body just recognizable enough to be captured within the state enforcement apparatus, but not enough to have their protection claims taken seriously.

The law is not just a process of abstraction but also creates something quasi-material through the categorization of its objects of inquiry. Everything that enters into law becomes a more limited form of itself through being limited by the parameters of the legal question and what is considered relevant to a case. It is my contention that the metonymic<sup>8</sup> use of boats in the political discourse when talking about asylum seekers reveals the character of the legal category. Bodies become boats because whilst humans cannot be «illegal», the presence of boats can be made illegal. There is an exchange that takes place within the law that swaps out a rights-bearing subject for a legal object, which the state is then compelled to stop, detain, and remove from the territory through force.

«I am quite literal when I talk about the body. I mean

a human body and tracing what happens to asylum seekers when they encounter Australia's maritime border [...] just recognizable enough to be captured within the state enforcement apparatus, but not enough to have their protection claims taken seriously.»

*Haux:* Last time we met, we discussed the importance of ruptures and the continuum. As the latter term itself indicates, APM wants to point out, that everything is a body. However not all bodies are the same. Is he trying to make differentiations within the body, which can be understood as a whole «container»? What would then be the role of the ruptures?

*Poon:* Everything is bodies on an immanent plane, but bodies have different weights and pressures. APM brings DELEUZE and GUATTARI's philosophical ideas on rhizomes, the body without organs, and life as a creative composition into the legal context. These ideas advocate for a resistance to certainty and rules in favor of embracing the different potentials created when bodies (all bodies and not just human bodies) come into contact. APM points out that these contacts create lawful relations – in fact, we are always inside the continuum of the lawscape, or of law's atmosphere and we are always creating law.

<sup>7</sup> POON JUSTINE, How a Body Becomes a Boat: The Asylum Seeker in Law and Images, in: [Law and Literature 2018/08\(30\)](#), p. 105 ff.

<sup>8</sup> Metonym is the linguistic device of referring to something as another thing that is closely related to it. In this instance, policy and discourse on refugees and asylum seekers often refers to, and becomes interchangeable with the boats that they take to get to Australia.

The primary question in *Spatial Justice* is what do you do when you want to occupy a space that another body is in already? Activating this question activates ethical relations, rather than leaving it up to the existing rules that predetermine outcomes.

The «rupture» is an analytical question – what relations are created in the contact between bodies within the lawscape? – and a creative question – how do we move differently in order to create more ethical lawful relations? Following the earlier discussion, law is a kind of hyperobject too. It is difficult to comprehend it as a whole and its effects are both sprawling and diverse and not always coherent. As a vehicle for social norms, we are also shaped and changed by law.

Ruptures create these moments of «withdrawal» from which we can think about something that is altering our perceptions as we think.

*Haux:* So, in some way APM is trying to find ways of articulating the object of inquiry?

*Poon:* Yes, I think that is right. The starting point is that we are trying to examine how the language of the law conditions us, even *whilst it conditions us*. There is no external and objective position to take.

Fiction and other imaginative devices create ways of taking an outside perspective – a temporary «withdrawal» from our present conditions and laws in order to make law into an object of inquiry.

## IV. The «Anthropocene»

### A. The «Age of the Humans»...

*Haux:* So now we turn to the «anthropocene», the «age of humans», whose existence or at least starting point is still being widely discussed. The term itself derives from a publication by PAUL CRUTZEN and EUGENE STOERMER in 2000,<sup>9</sup> where they first use the term. Whilst they dated the roots to the late 18<sup>th</sup> century, the [International Working Group on the Anthropocene](#) defined the period around 1950 as central, as during this period the amount of plutonium and radio-carbon, the concentration of CO<sub>2</sub>, and the amount of plastic particles increased massively.

After all, the term «anthropocene» as a metaphor stands for a new – or the past? – relationship between humankind and nature. Or how would you describe it, perhaps through APM's point of view?

*Poon:* The «anthropocene» does work as a strategy and as the conceptualization of fact in a way that we can understand through language.

The conceptualization of fact is in looking at all of the vast changes that humans have brought upon the world, looking at this domination over nature that is really quite complete when we consider how we have changed ecosystems for our own purpose and looking at how these changes are locked into time now. It is thinking about human activity as being so impactful that it will leave a remarkable trace upon the earth just as each sedimentary layer of the different geologic ages left their mark. What traces will be found in the sedimentary layer of the «anthropocene» in the future? Changes to atmospheric composition, mass extinctions of

<sup>9</sup> CRUTZEN PAUL J./STOERMER EUGENE F., The «Anthropocene», in: [Global Change Newsletter 2000/41](#), p. 17 ff.



mammals, temperature rises, desertification, and submergence?

It is a strategy in the sense that it forces us out of the perspective of the present and into a way of looking at the consequences of our present from the perspective of the future. This is something remarkable about how the way we tell stories can give us some sort of access to imagining other lives and times, forcing us out of our immanent patterns and gaining a critical distance in our perspective.

This is part of the broad project of contemporary law and the humanities work that APM engages with – what is it about the way that law tells its story that can prevent getting to a different relationship between humanity and nature and what acts of imagination are necessary to change it? That is what I mean by the «anthropocene» as a fact and a strategy.

As lawyers and legal scholars, we are locked in by certain frames of time, space, and personhood. APM, amongst others, is trying to offer up a set of techniques that will trick us out of the line of thinking that has come before. The other thing the «anthropocene» does is to place us into a future in which «we» may no longer exist. Here is the sense of the post-human: as well as being about the possibilities of AI or of environmental personhood or some sense in which humans reintegrate their mode of being as interdependent with other lifeforms and world systems, there is also the possibility of history without humans. We must induce the vertigo of looking through the conditions of our annihilation.<sup>10</sup>

On the other hand, I would add that the effects of climate change are already not just abstract whatsoever for many places in the world. I am thinking of places like the low-lying islands of Kiribati, of intensified and recurring storms, of the last fire season in Australia, and how it was so intense and extensive that it created a smoke cloud that drifted across the world.<sup>11</sup> The «anthropocene» is about effects that are already here. We can think of it as also about inducing a historical perspective on what is happening now.

## B. ...and the Role of the Law and Legal Science

*Haux:* So, we now deal with another term in this publication, which at the same time remains multifaceted. As legal scientists, we must ask: what is the role of the law? When I think about «anthropocene and the law» from a normative, classic legal point of view, in terms of public law I think of the constitutional duty to act sustainably (e.g., in Germany, in [art. 20a Basic Law for the Federal Republic of Germany](#)). From a private law perspective, [existing approaches regarding the liability for «future generations»](#) or the approach from a more technical point of view, that promises that thanks to new machines and technologies, we will be able to prevent or at least to attenuate the climate change. However, if I understand APM correctly, he is not trying to negate, but at least to question these approaches – I especially think of page 132 where he is criticizing the «green economic agenda», «entrusting the future of the planet to more technology, stronger (‘but cleaner’) industry, aggressive geoengineering...».<sup>12</sup> What should the law then do?

<sup>10</sup> See POON JUSTINE, A Letter to the Land, Commissioned by the Australian Centre for Contemporary Art (Melbourne) for Bik Van der Pol, as part of the exhibition «Greater Together», 2017, as a productive use of mourning, available at: [www.bikvanderpol.net/38/letters\\_to\\_the\\_land](http://www.bikvanderpol.net/38/letters_to_the_land).

<sup>11</sup> «Australia fires: Smoke to make ‘full circuit’ around globe, Nasa says», available at: [www.bbc.com/news/world-australia-51101049](http://www.bbc.com/news/world-australia-51101049).

<sup>12</sup> PHILIPPOPOULOS-MIHALOPOULOS (Fn. 1), p. 132.

*Poon:* There is questioning or critique of these ways of framing the role of law as making reforms to ameliorate its worst impacts, bringing future human legal subjects into the present for consideration or enabling the technological revolution that will save us.

This is partly because they all seem to more or less reside in the same logic of the norms that led us here and repeat them, just with a slightly better version. We will replace dirty coal with clean coal but still, it is coal. The norms we have today are part of the problem because they enabled the situation that we find ourselves in. However, this is not necessarily a reason to abandon the law. APM writes: «Things end up in law, and for that reason, law carries the weight of confirming societal expectations.»<sup>13</sup> Because of this reflexive relationship between law and societal norms, law and jurists have a role to play in being reflective and proactive about how laws conditions the world. We can intervene with arguments. We can also imagine a legal science that articulates how legal norms emerge through quite dynamic processes, such as community action, assent and repetition. Legal institutions are not the end of the story.

*Haux:* Already at the beginning of the text, on page 131, he writes that «environmental law is more than the sum of its human parts» and that the law must «assume a much more active role in what is currently happening on the planet».<sup>14</sup> At the same time, APM claims that there would not – yet? – be a legal, but more an ethical obligation to act. If I understand him correctly, he is trying to build some kind of collective responsibility, without individual agency? A bit like GUNTHER TEUBNER's concept of the «cupola»<sup>15</sup> or the

charge which is now applied to flights in Switzerland. Is this what he is referring to with his concept, e.g., on page 151: «the juridical responsibility of situating ones body within an assemblage?»<sup>16</sup>

*Poon:* This is probably not the way he means it, or it is a simplification, but laws are distilled norms, and we have the responsibility to think and make new norms. These would be norms that de-center the human whilst using our human capacities and various technologies to achieve the decentering.

«Environmental law is more than the sum of its human parts.»

*Haux:* Maybe it is not the adequate conclusion for describing such a well-written, sometimes even a bit «ironical»<sup>17</sup> text: for me, one of the main results is the invitation to act and think creatively within the law, in order to really understand and trace the problems and challenges we are facing. In this way, APM is also highlighting the importance of the language we use, why and which terms – he is referring to «the grammars (of climate change)»<sup>18</sup> – so who speaks and how to speak.

Of course, also many other topics, such as his criticism of the present understanding of private property,<sup>19</sup> that he underlines the importance of environmental law to care

<sup>13</sup> PHILIPPOPOULOS-MIHALOPOULOS (Fn. 1) p. 152.

<sup>14</sup> PHILIPPOPOULOS-MIHALOPOULOS (Fn. 1), p. 131.

<sup>15</sup> TEUBNER GUNTHER, *The Invisible Cupola: From Causal To Collective Attribution in Eco-*

*logical Liability*, in: Teubner, Gunther/Farmer, Lindsay/Murphy, Declan (eds.), *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization*, Chichester 1994, p. 17 ff.

<sup>16</sup> PHILIPPOPOULOS-MIHALOPOULOS (Fn. 1), p. 151.

<sup>17</sup> «They require a focus that zooms out rather than in, observing humanity *and its shenanigans* from a distance», PHILIPPOPOULOS-MIHALOPOULOS (Fn. 1), p. 135.

<sup>18</sup> PHILIPPOPOULOS-MIHALOPOULOS (Fn. 1), p. 135.

<sup>19</sup> PHILIPPOPOULOS-MIHALOPOULOS (Fn. 1) p. 145.

more about the environment rather than the law,<sup>20</sup> or that we are all in an assemblage,<sup>21</sup> are of relevance and interest. However, as a starter for a discussion, in October we two thought that it would be interesting to think about the space that opens up when normative legal approaches and APM thinking come together. What are the expectations, that «the law» is trying to determine?

*Poon:* You know, I think my favorite thing about this work is that it feels like permission and an invitation. It is permission to be creative and to make connections between the law and other disciplines. We lawyers and scholars have some agency still. If the law is inadequate or getting in the way of tackling climate change, we should argue a case for change, or make art about it, or engage in our various communities, or collaborate with mathematicians to generate new ways of understanding the law.

I like to think of that story about how The Sex Pistols played their first gig in Manchester to a tiny audience, but everyone in that audience started bands, and those bands in turn inspired other bands. It's a fractal moment in the history of British music. Okay, maybe lawyers and academics are not very punk, but we could use a bit of that experimental energy.

It's a complex question as to how we bridge the normative approaches that are currently embedded in the law and the critical environmental law that APM advocates for, which we have really condensed and simplified in the course of this conversation. As a starting point: here is an invitation to see the law as something that is not static, but can be responsive to the challenges of climate change, and to work together to create

new norms and the kind of worldbuilding that that entails. Let's make art and laws.

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<sup>20</sup> PHILIPPOPOULOS-MIHALOPOULOS (Fn. 1), p. 144.

<sup>21</sup> PHILIPPOPOULOS-MIHALOPOULOS (Fn. 1), p. 141.