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CORE ANALYSIS

Prefigurative EU law

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Abstract

Prefigurative practices aim to foreshadow the more just society a radical political transformation would bring. So far, there has been little attention for the possibility of prefigurative legal practices. Perhaps the assumption is that prefigurative law is a contradiction in terms. Given the law's structural complicity in social oppression, marginalisation, and exploitation, how can it ever be part of the solution? The idea of a prefigurative EU law may seem even more absurd. The EU and its laws are deeply entangled with capitalism, racism, imperialism, and premature deaths at its borders. Surely, EU law is beyond repair? But is it? This article suggests the opposite. It argues that a radically different EU law could become a source of hope for a society without structural oppression and marginalisation. Most concretely, it proposes to occupy the European Commission's recent plans for a 28th legal regime. To this end, it shows how the Commission's idea of a deregulatory sandbox could be turned into a prefigurative proposal, foreshadowing the legal non-regime for a radically horizontal European society without borders.

Keywords: prefiguration; revolution; intersectional justice; non-reformist reform; 28th regime

1. Introduction

Radical movements and intentional communities engage in prefigurative practices. These practices aim to foreshadow a radically different, fundamentally more just society. Prefigurative practices provide hope for a better future by showing today what a juster society could look like tomorrow. Prefiguration is normatively appealing because it puts into practice the precept of congruence of means and ends. If we want our future society to be radically democratic and without any hierarchies, then our revolutionary movement should be fundamentally horizontal and consensual too. If we reject the structural violence of oppression and marginalisation, then our revolutionary practices should also be non-violent. And if the dismantlement of overlapping and mutually reinforcing structures of oppression and marginalisation is a core aim of the movement then intersectional justice should also be central to our practices towards transformative change.

While prefiguration has recently become a subject of interest in political theory, so far there has been little attention for the idea of prefigurative law practices. At first sight, this may be unsurprising. The idea of prefigurative law may seem a contradiction in terms. The law's structural complicity in social oppression, marginalisation, and exploitation seems to disqualify it for any revolutionary role. Do we even need law after the revolution? The idea of prefigurative EU law may seem even more alienating. EU law is often portrayed – with some reason – as deeply entangled with capitalism (even essentially neoliberal), providing the constitution for a polity with thousands of racialised premature deaths at its external borders every year, and without any firm

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commitment to justice, equality, and democracy, especially in times of crisis, when it matters most. Surely, then, EU law practices cannot possibly foreshadow a radically different, more just society. And yet, that is what this article aims to argue. It sets out to demonstrate how EU law and its practices could be a part of prefigurative politics. In particular, it outlines how the European Commission's recent announcement of a 28th legal regime, understood by it as a deregulatory sandbox, could be turned into a legal non-regime for a radically horizontal society without borders.

The article unfolds as follows. Section 2 situates the argument in the present context of structural EU injustices calling for radical change. Section 3 introduces the political idea and praxis of prefiguration. Section 4 examines whether law can ever be prefigurative. Section 5 explores salient practices of prefigurative legality. Section 6 argues that legal prefiguration must be intersectional. Section 7 discusses possible prefigurative EU law practices. Section 8 proposes a prefigurative 28th non-regime. And section 9 concludes by considering and rejecting the claim that dangerous times call for liberal entrenchment rather than transformative change.

2. EU injustices and revolution

The premises of this article are that the EU is structurally unjust, that EU law specifically is a crucial agent of EU injustice, and that the only realistic way to overcome the EU's structural injustices is not reform (including Treaty reform) but radical structural change – a revolution.[1]

A. EU injustices

Social injustice is structural injustice. A society whose basic structure is unjust is a structurally unjust society.[2] The EU is a structurally unjust society because its basic structure, in particular its constitutional framework (the treaties) and its main institutions, are not justifiable towards all those subjected to them.[3] EU law – primary and secondary – co-constitutes, reproduces, facilitates, and entrenches intersecting oppressive and marginalising societal structures of domination.[4] Thus, EU law is an important agent of social injustice.[5] This includes injustices done through EU

[1]These are premises of the article. Here, I only introduce them briefly. For a fuller argument on EU injustices, see in particular MW Hesselink, 'EU Private Law Injustices' 41 (2022) Yearbook of European Law 83; MW Hesselink and LKL Tjon Soei Len, 'European Private Law and Intersectionality: Three Strategies' 4 (2025) European Law Open 1.

[2]Structural injustice of the basic structure of society is a sufficient condition, not a necessary one. There may be other cases of structural injustice, for example structural injustice of a specific dimension or section of society or structural injustice across different societies, for example along the structure of a global value chain. See IM Young, *Responsibility for Justice* (Oxford University Press 2013), Ch 5. With specific reference to EU consumer law, see C Paulesu, 'Consumer Responsibility to Remedy Structural Injustice: European Consumer Law's Capitalistic Strategy' (*Transformative Private Law*, 24 October 2024) <https://transformativeprivatelaw.com/consumer-responsibility-to-remedy-structural-injustice-european-consumer-laws-capitalistic-strategy/> accessed 12 October 2025.

[3]It follows from the pervasive impact of the EU's basic structure on the lives of those subjected to it, which is not a natural disaster, that there must be a political society responsible for it, the European society. See MW Hesselink, 'EU Private Law Injustices' 41 (2022) Yearbook of European Law 83, section 2.A. Its members may be referred to, in Rainer Forst's expression, as a 'demos of subjection'. See R Forst, 'Justice, Democracy and the Right to Justification: Reflections on Jürgen Neyer's Normative Theory of the European Union" in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 227. This article is emphatically not committed to any thicker, communitarian understanding of European society as an ethical value community. For an account of European society as held together by the values of Art 2 TEU, see A von Bogdandy, *The Emergence of European Society through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford University Press 2024).

[4]I Isailović, 'Critical Approaches in EU Law – Still a Blindspot'. (*Transformative Private Law*, 28 September 2023) <https://transformativeprivatelaw.com/critical-approaches-in-eu-law-still-a-blindspot/> accessed 12 October 2025.

[5]To clarify my use of terminology, I understand oppression, marginalisation and exploitation as the main forms of domination, and, therefore, as injustices, where injustice is understood as non-justifiability with reasons in the sense of the right to justification. However, nothing in this article turns on this specific understanding of injustice. Prefiguration can be

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law not only to Europeans but also to non-Europeans, both inside and outside Europe,[6] and especially at the EU's external borders.[7] It includes, in particular, the way the EU has constituted its internal market.[8] And given that EU law operates as a system, domination through EU law is a form of systemic injustice.[9]

Importantly, different vectors of social oppression and marginalisation (such as race, gender, class, and religion) intersect and mutually reinforce each other. Given EU law's role as an enabler and facilitator of intersecting forms of oppression and marginalisation, EU law is an agent specifically of intersectional injustice. Intersectional injustice is a core problem of social injustice because persons belonging to groups at the intersection of various oppressive and marginalising structures are 'at the bottom' of society.[10] They are among the ones most vulnerabilised by the way European society is organised.[11] It is they who bear the social costs of having the current basic structure of European society, one that prominently includes EU law, which structurally benefits other groups, but not them.[12]

B. EU revolution

This article does not presume that the EU is *essentially* unjust. EU law injustices, including the injustice of the EU's very basic structure, are contingent.[13] Therefore, this article starts from the

practiced and justified in the name of different theories of (structural) injustice – or, crucially, given its experimental praxis dimension, without any theory or other (ex ante) reasoning at all.

[6]See S Amraoui, 'Othering in EU Law: The Case of Migrants' (*Verfassungsblog*, 4 June 2025) <https://verfassungsblog.de/author/saniya-amraoui/> accessed 12 October 2025. (arguing that the structure of EU law, with its colonial legacies, actively contributes to the othering of migrants, casting them as not fully, or not yet, belonging within European communities).

[7]The number of migrants dead or missing in the Mediterranean in an attempt to reach the EU (recorded since 2014) is 32,774. See 'Mediterranean | Missing Migrants Project' <https://missingmigrants.iom.int/region/mediterranean> accessed 12 October 2025. See J Silga, '"Out of the 'Basement'": Exploring Positionality and Reflexivity in EU Migration Law Research' 15 (2024) Transnational Legal Theory 553 (powerfully exposing 'the inherent violence of EU migration law').

[8]See D Ashiagbor, 'Race and Colonialism in the Construction of Labour Markets and Precarity' 50 (2021) Industrial Law Journal 506 (highlighting the role of colonialism, race and racial capitalism in the construction of (labour) markets of the global North).

[9]The fact that the is EU structurally unjust does not exclude that it may have brought lots of possibly good things, such as prosperity, welfare and wealth. However, none of these on their own removes (or even reduces) the EU's structural injustice.

[10]In this sense, B Combahee River Collective, 'The Combahee River Collective Statement' <https://www.blackpast.org/african-american-history/combahee-river-collective-statement-1977/> accessed 12 October 2025; K Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' 1989 (1989) University of Chicago Legal Forum 139. For a causal framework for testing intersectionality claims empirically, see LK Bright, D Malinsky and M Thompson, 'Causally Interpreting Intersectionality Theory' 83 (2016) Philosophy of Science 60.

[11]Arguably, intersectional injustice is *the* core problem of social injustice and intersectional justice is *the* litmus test for a just society. However, for present purposes, and in order to avoid undue quantifying language (and oppression Olympics), it suffices that it is a core problem of social justice. Not only socialists, but also liberal-egalitarians should centre social groups at the bottom of society, be it on account of the Rawlsian 'difference principle' (which requires any 'well-ordered society' to ensure that the institutions of its basic structure also work to the benefit of its least well-off members) or of 'basic capabilities' (which every person should be assured of at least to a minimum threshold level). See, respectively, J Rawls, *A Theory of Justice* (Rev ed, Belknap Press of Harvard University Press 1999); MC Nussbaum, *Creating Capabilities: The Human Development Approach* (The Belknap Press of Harvard University Press 2013). See further, Hesselink and Tjon Soei Len (n 1).

[12]Note that unlike in Rawlsian justice, which despite its theoretical focus on 'primary goods' in practice still remains remarkably close to Marxian economic class thinking, in an intersectional understanding those at the bottom of society are not a single social class. Intersectional oppression and marginalisation, while structural, is situational and relational. Therefore, intersectional injustice is not categorical but a matter of degree.

[13]This premise is based on the wider premise that EU law has no essential characteristics (and the EU as such has no essence). Similar and explicitly against EU law transcendentalism, L Azoulai, 'Reconnecting EU Legal Studies to European Societies' [2024] Verfassungsblog <https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/> accessed 12 October 2025. For the contrary (essentially metaphysical) view, see CJEU, 16 February 2022, C-156/21 *Hungary v Parliament and Council*

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assumption that a structurally more just European political society is possible (whether or not it would be called 'European Union').

Yet, it is a premise of this article that EU reformism will not dismantle the existing structures of oppression and marginalisation. Past experience leaves little hope that directives and regulations, through the ordinary legislative procedure (Article 294 TFEU), or treaty reform, through the ordinary revision procedure (Article 48 TEU),[14] might become agents of intersectional justice.[15] Therefore, there is an urgent need to explore an alternative route towards a (European) society without the structural injustices of oppression and marginalisation through EU law. This route, I submit, is an EU revolution.

By revolution I mean a radical transformation of the basic structure of society, in particular of its current intersecting structures of oppression and marginalisation. As Rosa Luxemburg explains, the difference between reform and revolution is qualitative, not quantitative. It is 'the transformation of simple quantitative modification into a new quality, or to speak more concretely, the passage of a historic period from one given form of society to another'.[16] Put in Kuhnian terms, this amounts to a socio-economic-political paradigm shift, where the old and the new world become incommensurable.[17] Or, in the words of Gayatri Chakravorty Spivak, revolution means 'systemic change'.[18] Crucially, on this view revolution is not intrinsically violent. Indeed, for reasons of congruence of means and ends, central to this article and to be explained presently, the intersectional revolution as understood here will be radically democratic and non-violent. Insofar, this article is utopian. Whether that also makes it naïve remains to be seen (and will also be addressed further below).[19]

By EU revolution specifically, I mean a radical transformation of the EU that goes beyond the reformism of ordinary legislative procedure and treaty reform. EU reformism lacks legitimacy because it structurally denies meaningful democratic agency to persons belonging to marginalised groups.[20] Perhaps most striking is the whiteness of the EU law making process and institutions.[21]

ECLI:EU:C:2022:97, para 125, and CJEU, 16 February 2022, C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98, para 143 ('essential characteristics of EU law').

[14]The first question about treaty reform is, of course, whether there will still be any. All suggestions for treaty reform made by citizens' panels at the Conference on the Future of Europe (2020–2021) were sidelined.

[15]For European private law, see Hesselink and Tjon Soei Len (n 1).

[16]R Luxemburg, *Reform or Revolution* (Militant Publications 1986) <https://www.marxists.org/archive/luxemburg/1900/reform-revolution/> accessed 12 October 2025.

[17]TS Kuhn, *The Structure of Scientific Revolutions* (4th ed, University of Chicago Press 2012). The term 'revolution' was borrowed from astronomy. Copernicus used it to refer to the motion of celestial bodies, in particular the annual revolution of the earth around the sun (N Copernicus, *On the Revolutions of the Heavenly Spheres*, Nürnberg, 1543). The shift from the geocentric to the heliocentric understanding of the universe is often referred to as the Copernican revolution. As a result of this paradigm shift, to use the Kuhnian phrase, the normal science from before the revolution made no sense anymore after the revolution; they had nothing in common – had become incommensurable.

[18]GC Spivak, 'On Revolution' (*Uprising 13/13*, 14 September 2017) <https://blogs.law.columbia.edu/uprising1313/gayatri-chakravorty-spivak-on-revolution/?cn-reloaded=1> accessed 12 October 2025.

[19]Two types of theories of revolution can be distinguished, positive (there will be a revolution) and normative (there should be/we should start a revolution). The former refer (in more or less deterministic ways) to social facts and dynamics (causes, correlations) and are part of social theory, in particular theories of societal change. Most famous is Marx' 'scientific' theory of historical materialism (capitalism will collapse). The latter refer to reasons and are part of moral theory and (normative) political theory, in particular social justice theories and theories about duties (to sustain legitimate institutions) and rights (including the question of a right to revolution).

[20]Marginalised groups include minoritised groups but not only. Think of the *gilets jaunes* in France and their supporters.

[21]Cf I Solanke, 'Diversity and Independence in the European Court of Justice' 15 (2008) Columbia Journal of European Law 89; Hesselink, 'EU Private Law Injustices' (n 1) Section III.E and III.G. See also R Diallo, 'How Has the French Far Right Managed to Cancel a Black Anti-Racism Scholar for "Racism"?' *The Guardian* (3 December 2024) <https://www.theguardian.com/commentisfree/2024/dec/03/how-has-the-french-far-right-managed-to-cancel-a-black-anti-racism-scholar-for-racism> accessed 12 October 2025, on the cancellation of a presentation in the European Parliament by Afro-French academic expert and public intellectual Maboula Soumahoro after the French far-right MEP Marion Maréchal had criticised the invitation on account of Soumahoro being 'an anti-White speaker'.

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The aim of EU revolution is to overcome the structural injustices of oppression and marginalisation through EU law by the (self-)empowerment of currently (intersectionally) marginalised and oppressed groups through forms of radical democracy.

3. Prefiguring the revolution

If we need a revolution – that is, a radical transformation of the basic structure of society – to overcome structural injustices, in particular intersectional injustice, then the practical question arises how a radically democratic non-violent revolution can come about. What to do today? One answer is: engage in prefigurative practices.

Prefigurative practices are rooted in revolutionary thought. The idea is to organise the revolutionary movement in the image of the new society we want to establish.[22] In a somewhat wider sense, it means building today the institutions and practices we want to obtain after a radical societal transformation tomorrow.[23] Or, still wider, – and frankly more domesticating, detached from social revolution – to perform life as wished for.[24] Conversely, it also means that we can learn something important from the concrete experimental practices and institutions adopted by radical protest movements and intentional communities about what kinds of post-revolutionary societies are desirable and possible[25] – that is, about realistic utopias.[26]

Prefiguration has a long history in radical political thought and activism. Three waves can be distinguished. First, it is grounded historically in anarchist socialism. Anarchists like Errico Malatesta were committed to the idea of congruence of revolutionary means and ends.[27] In particular, they believed that a revolutionary movement aiming to overthrow the state should be internally organised in a non-hierarchical, horizontal way and should not aim to seize state power, not even temporarily.[28] Herein, they were diametrically opposed to Marxist communists who

[22]C Boggs, 'Marxism, Prefigurative Communism, And The Problem Of Workers' Control' 11 (1977) Radical America 100 ('a nucleus of a future socialist state'); 'The Sonvilier Circular (12 November 1871)' <https://panarchy.org/jura/sonvilier.eng.html> accessed 12 October 2025 ('the embryo of the human society of the future').

[23]M Maeckelbergh, 'Doing Is Believing: Prefiguration as Strategic Practice in the Alterglobalization Movement' 10 (2011) Social Movement Studies 1, 4 ('removing the temporal distinction between the struggle in the present and a goal in the future'); D Cooper, 'Prefiguring the State' 49 (2017) Antipode 335, 335 ('prefiguration refuses to wait').

[24]Cooper, 'Prefiguring the State' (n 23) ('prefigurative politics perform present-day life in the terms that are wished-for, both to experience better practice and to advance change').

[25]There are some parallels between prefigurative politics, especially when understood as radically democratic, and democratic experimentalism, which is grounded in philosophical pragmatism and – contrary to instrumentalism – assumes uncertainty about solutions *and* problems, means *and* ends. See J Dewey, *The Public and Its Problems: An Essay in Political Inquiry* (Ohio University Press 2016). Specifically for the EU context, see CF Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' 14 (2008) European Law Journal 271. Note, however, that while in theory democratic experimentalism could be revolutionary (aiming at systemic change) in practice it has been consistently reformist (remaining within the existing frame).

[26]EO Wright, *Envisioning Real Utopias* (Verso 2010). This conception of realistic utopianism differs somewhat from that of John Rawls, who understands it as 'probing the limits of the realistically practicable, that is, how far in our world (given its laws and tendencies) a democratic regime can attain complete realisation of its appropriate political values–democratic perfection, if you like'. J Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001) 13. While laudable for its radical commitment to democracy, this definition starts from too static an understanding of our world (its laws and tendencies). Cf Marx' 11th thesis on Feuerbach: 'Philosophers have hitherto only interpreted the world in various ways; the point is to *change* it'. ('Theses On Feuerbach by Karl Marx' <https://www.marxists.org/archive/marx/works/1845/theses/> accessed 12 October 2025.)

[27]E Malatesta, *Anarchy* (Freedom Press 2009). However, in their case this did not result in a commitment to non-violence. Cf Z Baker, *Means and Ends: The Revolutionary Practice of Anarchism in Europe and the United States* (AK Press 2023) 100–1.

[28]See 'The Sonvilier Circular (12 November 1871)' (n 22) ('The society of the future should be nothing other than the universalisation of the organisation with which the International will have endowed itself. We must, therefore, be careful to ensure that this organisation comes as close as possible to our ideal. How can we expect an egalitarian and free society to emerge from an authoritarian organisation? Impossible. The International, as the embryo of the human society of the future, is required in the here and now to faithfully mirror our principles of freedom and federation and shun any principle leaning towards authority and dictatorship').

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believed that the revolutionary proletariat should first seize state power before the state could gradually wither away. In the Communist Manifesto, Engels and Marx derided the anarchists as depoliticised utopians.[29] This issue was at the heart of the bitter dispute at the First International between anarchist socialists (surrounding Bakunin) and Marxist communists (led by Marx and Engels), which led to the expulsion of the former. It was also central to the controversy over the October Revolution, where Emma Goldman rejected Lenin's vanguardism. And it has kept the radical left divided ever since. A second wave came with the various protest movements and alternative communities of the 1960s and 1970s. This was when Carl Boggs coined the term,[30] tying it strongly to revolutionary democracy, thus pitting it against the bureaucratic domination characteristic of both Marxist-Leninist authoritarianism and social-democratic reformism. More recently, since the alterglobalist movement in the 2000s and the *indignados* and Occupy movements in the 2010s, there has been a revival of the concept of prefiguration in radical protest movements – against neoliberal globalisation, climate change, and most recently against the genocide in Gaza – and in intentional communities.[31] As a consequence, prefigurative politics has become a subject of interest also in political theory.[32]

Both in theory and in activist communities and movements two main types of arguments for prefigurative politics recur, that can be referred to as normative arguments (connected to political theory) and empirical arguments (grounded in social theory). The normative arguments offer reasons, in particular regarding the need for congruence between means and ends.[33] In the words of Emma Goldman (speaking against the turn the Russian revolution had taken): 'It cannot be sufficiently emphasized that revolution is in vain unless inspired by its ultimate ideal. Revolutionary methods must be in tune with revolutionary aims. The means used to further the revolution must harmonize with its purposes. In short, the ethical values which the revolution is to establish in the new society must be initiated with the revolutionary activities of the so-called transitional period. The latter can serve as a real and dependable bridge to the better life only if built of the same material as the life to be achieved. Revolution is the mirror of the coming day; it is the child that is to be the Man of Tomorrow'.[34] This can be seen as a deontological rejection of consequentialism (no one should be instrumentalised for the aims of the revolution) or simply as a matter of moral consistency. The empirical arguments focus on facts, in particular the likely

[29]See K Marx and F Engels, *The Communist Manifesto* (Samuel Moore tr, Penguin Books 2015), with reference to what they call 'utopian socialists': 'they reject all political, and especially all revolutionary action; they wish to attain their ends by peaceful means, necessarily doomed to failure, and by the force of example, to pave the way for the new social Gospel'.

[30]Boggs (n 22) ('By "prefigurative", I mean the embodiment, within the ongoing political practice of a movement, of those forms of social relations, decision-making, culture, and human experience that are the ultimate goal'.). See also C Boggs, 'Revolutionary Process, Political Strategy, and the Dilemma of Power' 4 (1977) Theory and Society 359.

[31]D Graeber, 'The New Anarchists' [2002] New Left Review 61; D Graeber, 'Occupy's Wall Street's Anarchist Roots' *Al Jazeera* (30 November 2011) <https://www.aljazeera.com/opinions/2011/11/30/occupy-wall-streets-anarchist-roots> accessed 12 October 2025 ('Zuccotti Park, and all subsequent encampments, became spaces of experiment with creating the institutions of a new society (. . .) a genuine attempt to create the institutions of a new society in the shell of the old').

[32]See, eg, P Raekstad and SS Gradin, *Prefigurative Politics: Building Tomorrow Today* (Polity Press 2020); P Sörensen, *Präfiguration: zur Politizität einer transformativen Praxis* (Campus Verlag 2023); L Monticelli (ed), *The Future Is Now: An Introduction to Prefigurative Politics* (Bristol University Press 2024).

[33]L Yates, 'Rethinking Prefiguration: Alternatives, Micropolitics and Goals in Social Movements' 14 (2015) Social Movement Studies 1, understands 'means-ends equivalence' as a qualifier in a model for describing and explaining prefiguration and for distinguishing it from other political action, and rejects it as such for lack of descriptive power. But the main aim is not (self)description. It is meant as a normative precept. The categorical imperative, for example, may have limited descriptive power in much the same way. If anything, the precept describes what prefigurative movements and communities are committed to. Thus, it helps, for example, in (self)distinguishing prefigurative politics from vanguardism.

[34]E Goldman and AK Shulman (eds), *Red Emma Speaks: Selected Writings and Speeches* (Vintage Books 1972) 404 ('Afterword to My Disillusionment in Russia'). See also Ibid., 401–2: 'There is no greater fallacy than the belief that aims and purposes are one thing, while methods and tactics are another. (. . .) No revolution can ever succeed as a factor of liberation unless the MEANS used to further it be identical in spirit and tendency with the PURPOSES to be achieved'. (emphasis in original).

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impossibility of a successful non-violent revolution overnight. People have to become revolutionaries first. And to be motivated they must first see and experience, even if only very localised, the possibility of a better society, one without hierarchy, capitalism, and racism. They must see and experience the realism of revolutionary utopias.[35] At the same time they must unlearn their capitalist, heteronormative, and racist habits. Not of course, through brainwashing but through the voluntary radically horizontal practices of these counter communities. From this point of view, the idea of an ideological blueprint to be implemented by a revolutionary vanguard after the revolution appears particularly misguided. Rather, the societal movement will have to find its way through experimentation within the cracks and at the margins of the existing society.[36] The focus is not on a revolutionary subject but on revolutionary practices, performed initially on a small scale, for example in counter-communities, and then picked up more widely in society, culminating in a paradigm shift. In sum, the empirical argument is that without prefiguration the revolution will never come.

However, from the beginning, prefiguration has also attracted severe criticism. Each of the waves of enthusiasm for prefigurative politics has led to corresponding waves of criticism along quite similar lines. And in each case the most severe criticism came from within the radical left.[37] Indeed, much of the polemic can be read as reiterations of the clash between anarchists and Marxists, although it cannot be fully reduced to this. Prefigurative politics have been portrayed as naïve (about political power, about consensus), ineffective (bringing no perceptible structural change), depoliticising (confusing politics with lifestyle), individualist (because of their commitment to strict voluntariness), self-referential or even narcissist (for their focus on the internal practices of their own small communities), quietist (because of their effective exodus from society, leaving existing oppressive structures intact), primitivist (because hospitals, banks, and smartphones are external to their practices), puritan (for their unwillingness to compromise), mystical (for their belief in the promise of a better world), and privileged (because people from lower classes or marginalised groups could never afford or risk it), among other criticisms. While some of these – partly overlapping – charges may ring true to a degree in some cases, they are largely contingent (with a strong contemporary focus on square occupations and encampments). They hardly disqualify prefigurative politics as such. At most, they caution movements and communities to be self-reflexive and self-critical when claiming their actions and practices to be prefigurative.

4. Post-revolutionary law or a post-legal society

So far, there has been little attention, in movements and among theorists, for legal prefiguration. This may not come as a surprise. Can law ever be prefigurative? Does law have any role to play in a society without hierarchies and in the movements and communities aiming to prefigure it? The very idea of prefigurative law might seem a contradiction in terms. Wouldn't the future post-

[35]There exist some parallels between prefigurative communities and deliberative mini-publics. They both share the epistemic promise that what can be agreed upon on a smaller scale might also work on the full scale of society at large. At the same time, they also both have the political agency limit of the majority of society not having themselves been part of the deliberation/experimentation. Insofar, they are both akin to (intra-societal) legal transplants. They both raise the question: can law legitimately travel? Against lottocratic conceptions of democracy for political agency reasons, see C Lafont, *Democracy without Shortcuts: A Participatory Conception of Deliberative Democracy* (Oxford University Press 2020).

[36]See E von Redecker, *Praxis and Revolution: A Theory of Social Transformation* (Lucy Duggan tr, Columbia University Press 2021) xiii ('In revolutions, everything changes, but that doesn't mean that everything is new. Change arises from the existing state of affairs, through the refunctioning of existing structures, subject to practices that are anticipated and learned in the interstices of society').

[37]See, quite prominently, N Fraser, 'Against Anarchism' (*Public Seminar*, 9 October 2013) <https://publicseminar.org/2013/10/against-anarchism/> accessed 12 October 2025; C Mouffe, *Agonistics Thinking the World Politically* (1st ed, Verso 2013), ch 6.

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revolutionary society abolish the state and its laws altogether, given their fatal complicity – past and present – in structural oppression, marginalisation, exploitation, extraction and colonisation, and become a post-legal society?[38] Much depends on what we mean by law – indeed on the meaning we decide to give it.

A. The Pashukanist challenge

A *prima facie* formidable challenge to the notion of postrevolutionary law, and by implication, to prefigurative law, is posed by Evgeny Pashukanis' Marxist theory of law.[39] Marx had argued that after the revolution, following a first phase where the proletariat takes over the state institutions ('dictatorship of the proletariat'), a second, higher phase of communism would follow where 'the narrow horizon of bourgeois law [can] be crossed in its entirety'.[40] Yet, the state and its laws would not be actively abolished. In the words of Friedrich Engels, they would simply 'wither away'.[41] In his general theory of law, published after the Russian revolution,[42] Pashukanis explained why this would happen. He argued that the legal form as such, with its core elements of the legal subject and the legal relationship, corresponds to the form of the commodity exchange which is central to capitalist society. Therefore, with the overthrow of capitalism the material basis for markets based on exchange, formalised as contracts, would fall away, which would also make contract law become obsolete. Moreover, given that the contractual relationship is at the heart of the legal form as such ('the general prototype of the legal form'),[43] the whole edifice of a legal system – that is all of private and public law – would lose its foundation. Therefore, Pashukanis claimed, after a successful Marxist revolution, there would no longer be any use for law as such, the (instrumentalist) ideas of 'proletarian law' and 'socialist legality' being contradictions in terms. The logical implication would be that there is also no room for prefigurative law. For the whole point of prefiguration is for it to foreshadow the postrevolutionary society.

Pashukanis explicitly addressed international law, which he considered nothing more than 'the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world'.[44] Of course, he could not have discussed EU law, but on the view that EU law is a hybrid or sui generis legal form, somewhere between national and international law, and certainly on the understanding that EU law is deeply complicit in capitalism (or even an essentially

[38]Cf F Quintana, 'On the Withering Away of Law: Radical Politics Beyond Legal Fetishism – Fernando Quintana' (*Legal Form*, 25 January 2024) <https://legalform.blog/2024/01/25/on-the-withering-away-of-law-radical-politics-beyond-legal-fetishism-fernando-quintana/> accessed 12 October 2025 (arguing that a communist society must also be conceived as a post-legal society).

[39]E Pashukanis, *Law and Marxism: A General Theory* (Reprint edition, Pluto Press 1987).

[40]K Marx, 'Critique of the Gotha Programme', I. See also V Lenin, *The State and Revolution* (Robert Service tr, Revised ed edition, Penguin Classics 2009).

[41]F Engels, *Anti-Dühring: Herr Eugen Dühring's Revolution in Science* (Progress Publishers 1947); Lenin (n 42) 16–20. Kelsen refers to this as an 'anarchic theory'. See H Kelsen, *The Communist Theory of Law* (Frederick A Praeger 1955); H Kelsen, *The Political Theory of Bolshevism: A Critical Analysis* (Repr, The Lawbook Exchange, LTD 2011).

[42]Pashukanis' life, work, and the revolution were intertwined in a very dramatic way. After the October Revolution, he held important academic and bureaucratic positions, but then fell out of grace under Stalin, who had very different plans for state and law than their withering away. In 1937, he was arrested as an 'enemy of the people', after which he was purged.

[43]Pashukanis (n 39) 162, n 14.

[44]EB Pashukanis, PB Maggs and JN Hazard, *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980) 169. For a more recent Pashukanist view of international law, see C Miéville, 'The Commodity-Form Theory of International Law: An Introduction' 17 (2004) Leiden Journal of International Law 271, 302 ('A world structured around international law cannot but be one of imperialist violence. The chaotic and bloody world around us *is the rule of law*'. [emphasis in original]). Somewhat less pessimistic on international law's progressive potential, drawing on the law's substantive indeterminacy and advocating a political strategy of principled opportunism, is R Knox, 'Marxism, International Law, and Political Strategy' 22 (2009) Leiden Journal of International Law 413.

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neoliberal project),[45] it is clear that after a Marxist European revolution EU law too would be expected to wither away. Indeed, in a recent article, Robert Knox, Eva Nanopoulos, and Andrew Woodhouse, advocating a Marxist approach to EU law, argue explicitly – in Pashukanist vein – that a Marxist approach 'presupposes a break with capitalism and imperialism and, hence, with EU law as a social form'.[46] Note that the categorical break with EU law is presented – correctly, from a Pashukanist point of view – as a presupposition, not a conclusion, of a Marxist approach to EU law. Similarly, the rejection of prefigurative EU law would seem a presupposition of that same approach.

There are several responses to the Pashukanist categorical rejection of the very idea of postrevolutionary legality. The first one questions its economic reductionism (or economicism): can the entire concept of law plausibly be understood as nothing more than the (ideological) reflection of the commodity exchange under capitalism?[47] While Pashukanis understands his theory as historical–materialist (about historical material conditions of possibility) it is so abstract and categorical about law as such (the legal form) that it comes close de facto to an essentialist (that is metaphysical) theory. It is difficult to match, for example, with the historical existence of law long before the rise of capitalism. Secondly, there is another problem with economic reductionism, which admittedly was not as clear at Pashukanis' time as it is today. While capitalism is deeply intertwined with other structures of oppression and marginalisation, such as colonialism, racism, sexism, heteronormativity, and ablism, those intersecting structures cannot plausibly all be reduced to capitalism.[48] It would be a distortion, in particular, to assimilate intersectional oppression and marginalisation to exploitation in commodity exchange. Thirdly, it is not clear that legality is best understood today in such a hyper-formalist sense as Pashukanis did. After the successful revolt against formalism by the legal realists and the wide acceptance of legal pluralism, it makes little sense today to regard law exclusively in such a formalistic way. In other words, even if Pashukanis were right that formal law would wither away after a successful Marxist revolution, this would still leave open the possibility that different, less formal types of legality might (re-)emerge after a successful intersectional revolution.[49] As a consequence, it may also make good sense to anticipate, imagine, and experiment with such utopian new legal forms for the postrevolutionary society, already ahead of the revolution – that is, with prefigurative legality.[50] Indeed, all self-described prefigurative communities and movements engage in norm-setting/rule-making – and often

[45]In this sense, eg, A Somma, *Contro Ventotene: Cavallo Di Troia Dell'Europa Neoliberale* (Rogas edizioni 2021); MA Wilkinson, 'On the New German Ideology' in J Komárek (ed), *European Constitutional Imaginaries* (Oxford University Press 2023).

[46]R Knox, E Nanopoulos and A Woodhouse, 'Capitalism, Imperialism and European Union Law: Towards a Marxist Approach' 4 (2025) European Law Open 290, 326.

[47]Compare the economic reductionism of today's law & economics movement, whose ideology proclaims that the law's sole aim is to maximise social welfare (often reduced even further to wealth maximisation).

[48]Rather, as AA Akbar, 'Non-Reformist Reforms and Struggles over Life, Death, and Democracy' 132 (2023) The Yale Law Journal 2360, 2509 puts it, these oppressive structures 'are entangled and co-constitutive of the unequal and undemocratic world around us'. See also OO Táíwò and LK Bright, 'A Response to Michael Walzer' (*Dissent Magazine*, 7 August 2020) <https://www.dissentmagazine.org/online_articles/a-response-to-michael-walzer/> accessed 12 October 2025: 'the actual system we struggle against … is a system in which race and capitalism are mutually supporting' (explaining Cedric Robinson's racial capitalism thesis). For the classic, trenchant critique of historical materialism's colour blindness, see CJ Robinson, *Black Marxism: The Making of the Black Radical Tradition* (Penguin Classics 2021) 9 ('The historical development of world capitalism was influenced in a most fundamental way by the particularistic forces of racism and nationalism') and passim. Cf G Johnson, M Woker and L Zevounou, 'Capitalisme Racial !? Une Introduction' 3 (2024) Marronnages: les questions raciales au crible des sciences sociales 8 (discussing also the South-African tradition in the 1970s–1980s on the connected struggles against apartheid and capitalism). On the role of race and colonialism in the evolution of the legal form, see Ashiagbor (n 8).

[49]Another way of putting this is to say that it is difficult to imagine postrevolutionary society other than as (also) a normative order of some sorts, where members consider some norms as binding in some ways, and where there will be some (gradually institutionalised) practices for resolving disputes.

[50]For a similar argument concerning the state, see Cooper, 'Prefiguring the State' (n 25).

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also dispute resolution – of some sorts, usually a consensual form. This, in turn, leaves open, in principle, also the possibility of prefigurative EU law.[51]

B. EU law abolitionism

With specific regard to intersectional injustice, the question arises whether the intersectional revolution shouldn't abolish the oppressive and marginalising legal system altogether. Radical Black thinkers in the US have long argued for abolition of the prison industrial complex and the police – in other words, the criminal law system.[52] Their reasoning is straightforward. The stated aim of police and prisons is to make people safer. In reality, however, they make racialised groups more unsafe. Given that racism in the police and prisons is structural and endemic, police and prison reform will not do. Indeed, there exist troubling continuities between enslavement and mass incarceration. Therefore, prisons and police should be abolished. Similarly, it could also be argued for EU law that it is so deeply complicit in intersectional injustice that it is beyond repair and, therefore, should be abolished too. And, given that the EU is legally constituted, EU law abolition would mean the abolition of the EU.

However, it is important to note, in this regard, that most abolitionists do not regard abolition as an end state but rather as a practice. And as Angela Davis has argued, building on WEB Du Bois' vision of US reconstruction after the formal abolition of slavery,[53] abolition ought to be understood as a radically democratic praxis, a praxis of abolition democracy.[54] As she underlines, 'it is not only, or not even primarily, about abolition as a negative process of tearing down, but it is also about building up, about creating new institutions'.[55] Similarly, EU law abolition is not necessarily an end state either. EU law abolition could mean the creation of new institutions that better serve everyone, in particular people currently at the periphery of European society.[56] This could be done through radically democratic processes that centre the agency of currently multiply oppressed and marginalised persons. Nor should EU law abolitionism be understood as a form of legal nationalism. The claim is not that any of the national laws of EU Member States does any better than EU law when it comes to intersectional injustices. Going back to national law is not the way forward. Therefore, prefigurative EU law practices could be of crucial relevance. They could show very concretely what Europe could look like after an intersectional EU revolution. In sum, abolition versus prefiguration is a false dichotomy.

5. Prefigurative law

While post-revolutionary law is thus not categorically excluded, and, therefore, the very idea of prefigurative law not a contradiction in terms, the question remains, nevertheless, what this idea of prefigurative law might mean in practice. What legal practices and institutions could give us hope for a radical transformation towards a more just society?[57]

[51]A categorical rejection specifically of a European postrevolutionary society, as opposed to a national one, would amount to a form revolutionary nationalism, which seems problematic, especially if postrevolutionary Europe were to have radically open external borders (as it should). See further below.

[52]AY Davis, *Are Prisons Obsolete?* (Seven Stories Press 2003).

[53]WEB Du Bois, *Black Reconstruction in America: 1860–1880* (The Free Press 1998).

[54]AY Davis, *Abolition Democracy: Beyond Empire, Prisons, and Torture* (Seven Stories Press 2005).

[55]Ibid.

[56]Hesselink and Tjon Soei Len (n 1).

[57]The focus here – and throughout this article – is on society as such. However, it is perfectly possible to centre interpersonal relations. See, for example, S Ashar, 'Toward Prefigurative Lawyering' (*LPE Project*, 3 July 2023) <https://lpeproject.org/blog/toward-prefigurative-lawyering/> accessed 12 October 2025, who understands as 'prefigurative projects', ones that 'suggest new institutional arrangements and help us imagine more just and equal social relations on a wider scale'. Such an understanding of prefiguration is akin to Iris Marion Young's conception of structural injustice, which also decentres society (and the state) as the main locus of unjust structures. See Young (n 2).

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A. Imaginative legalism

Amy Cohen and Bronwen Morgan have recently introduced the concept of prefigurative legality, which they define as 'efforts to use the language, form, and legitimacy of law to imagine law otherwise – *and* through various kinds of direct actions rather than primarily through appeals to courts, legislators, or other state officials'.[58] They develop their argument with reference to PARK(ing) Day, as documented by Amelia Thorpe in her sociolegal study *Owning the Street*. On PARK(ing) Day, members of the public buy a parking ticket and then use the parking space in all sorts of creative ways except for parking a car (picnic, theatre, bike repair, yoga class, barbecue).[59] Initiated in San Francisco in 2005, PARK(ing) Day has grown into a worldwide urban event. Crucially, as the initiators point out, they explicitly rely on the legality of the practice.[60] In other words, this world-wide practice of 'pop-up parks',[61] 'to take control by repurposing or redirecting what tickets do',[62] allows people to imagine and practice new understandings of property (in the common law reading) or possession and contract (in the civil law tradition) and of legality more generally.[63] Cohen and Morgan characterise PARK(ing) Day as 'a transgressive example of prefiguration because it insists that another kind of city already exists through people's experiments with state-centred legal ideas of contract and property rights'.[64] As they point out, activists participating in Park(ing) Day 'do not oppose or defy the law, or advocate for its interpretation or reform. Nor, however, do they ignore law. Rather they *play* with law, working within legal rules to transform them'.[65]

PARK(ing) Day is an imaginative instance of prefigurative law where existing legal doctrines are understood playfully 'as if' they already had the meaning they would have in a better society. Or to be more precise, they play with the well-known indeterminacy of legal concepts. Legal indeterminacy was a core tenet of the critical legal studies (CLS) movement. Duncan Kennedy famously demonstrated how for any legal rule, even the perceived most technical ones – say, contract law rules on offer and acceptance –, a range of plausible interpretations could be placed on a continuum from individualism to altruism (proxies for political right and left), thus radically politicising so-called 'merely technical issues' of contract law and, as a consequence, fundamentally challenging the viability of a law-politics divide.[66] Kennedy further showed how judges can actively pursue different political agendas in strategic interpretation.[67] Just like in the PARK(ing) Day case, the idea here is to play the (language) game of legal formalism, that is, to remain within the internal perspective of the legal form, acting 'as if' a better legal substance was already generally accepted as 'positive' law.

If we understand prefigurative legal scholarship as 'a form of legal scholarship willing to suspend skepticism about how and whether a series of tiny, temporary interventions … will

[58]AJ Cohen and B Morgan, 'Prefigurative Legality' 48 (2023) Law & Social Inquiry 1053, 1054. They use the term consistently to refer to a field of 'scholarship', 'study', or 'inquiry', but that seems too narrow. I will here follow a much wider – indeed wide open, because radically pluralist – understanding of prefigurative legality.

[59]A Thorpe, *Owning the Street: The Everyday Life of Property* (The MIT Press 2020).

[60]'Park(Ing) Day' (*Park(ing) Day*) <https://www.myparkingday.org/about> accessed 12 October 2025. See Cohen and Morgan (n 60) 1060 ('PARK(ing) Day activists do not squat').

[61]Thorpe (n 59).

[62]D Cooper, 'Foreword', *Owning the Street: The Everyday Life of Property* (The MIT Press 2020).

[63]Cohen and Morgan (n 58).

[64]Ibid., 1058.

[65]Ibid., 1054–5 (emphasis in original).

[66]D Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law' 10 (2002) European Review of Private Law 7.

[67]D Kennedy, *A Critique of Adjudication: Fin de Siècle* (Harvard University Press 1998) ch 8. Cohen and Morgan (n 60) 1074 also discuss CLS, but focus more on the idea of liberation from 'false necessity' in the work of Roberto Unger. Cf RM Unger, *False Necessity – Anti-Necessitarian Social Theory in the Service of Radical Democracy: From Politics, a Work in Constructive Social Theory* (Verso 2004) and most recently RM Unger, 'Overthrowing the Dictatorship of No Alternatives' (*American Affairs Journal*, 20 February 2024) <https://americanaffairsjournal.org/2024/02/overthrowing-the-dictatorship-of-no-alternatives/> accessed 12 October 2025.

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coalesce into structural and system change',[68] as Amy Cohen and Bronwen Morgan propose to do, this could amount to a form of epistemic prefiguration[69] and of – or akin to – epistemic resistance.[70] Yet, a note of caution seems in order. The notion of prefigurative law, especially as a scholarly practice, seems particularly susceptible – perhaps more so than other forms of critical legal scholarship – to perversion and domestication through co-optation of the radical – indeed essentially revolutionary – idea of prefiguration (prefigurative washing).[71]

B. Substantive legalism

A second type of legal prefiguration goes one step further. This is the case where activists play legality. Perhaps the best-known instances are people's tribunals, after the example of the Russell tribunal (1966), a private people's tribunal set up to determine whether the US had committed war crimes in Vietnam.[72] Here, participants are fully aware that their acts do not formally constitute or apply law. They lack the formal authority to do so. However, in their understanding, substantively it is law – or, rather, what the law should be in a better world. Put differently, this version of legal prefiguration is more utopian. As said, this can be seen as a second type of prefigurative legality (substantive legalism).[73] However, instead of setting up a dichotomy these two types could also be imagined on a continuum – in this case a continuum from more substantive to more formal prefigurative legality, or from more internal to more external to a specific legal form.[74]

C. Ambivalent anti-legalism

Finally, we can distinguish a third type that could be referred to as ambivalent prefigurative anti-legalism. This is the case where activists reject the state, its laws, and its law-making and law-applying institutions, but then replace state law, legislators, and courts with what seem largely functional equivalents but strictly of their own making, while also sometimes strategically relying on state law (eg, when invoking their constitutional rights against the police – strategic legalism). Autonomous communities often display such features of ambivalence. The ambivalence lies in the fact that they consider some of their practices *illegal* while at the same time they understand these practices as prefigurative of a different kind of (non)law, (non)legislation and (non)adjudication.

[68]AJ Cohen and B Morgan, 'Prefigurative Legality' 48 (2023) Law & Social Inquiry 1053, 1076.

[69]PC Rodríguez, 'Asymmetric Power, Asymmetric Knowledge, and Solidarity' 7 (2024) Critical Times 448; SC Motta, 'Notes Towards Prefigurative Epistemologies' in SC Motta and AG Nilsen (eds), *Social Movements in the Global South: Dispossession, Development and Resistance* (Palgrave Macmillan 2011) 178; S Themelis, 'Prefigurative Epistemologies and Precarious Ontologies: A Study of Two Movements: 21st International Conference on Alternative Futures and Popular Protest' (2016).

[70]J Medina, *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and Resistant Imaginations* (Oxford University Press 2013) ('the use of our epistemic resources and abilities to undermine and change oppressive normative structures and the complacent cognitive-affective functioning that sustains those structures'.) With specific regard to EU pushbacks, see T Davies, A Isakjee and J Obradovic-Wochnik, 'Epistemic Borderwork: Violent Pushbacks, Refugees, and the Politics of Knowledge at the EU Border' 113 (2023) Annals of the American Association of Geographers 169.

[71]Cf Ashar (n 57) ('law is exceptionally fraught terrain for radical political imagination due to its use as an instrument of social control, as well as its use to discipline and domesticate disruptive social movements').

[72]A more recent instance was the Permanent Peoples' Tribunal on Rojava vs. Turkey held on 5–6 February 2025 in Brussels. See 'Rojava Peoples Tribunal'. (*Rojava Peoples Tribunal*) <https://rojavapeoplestribunal.org> accessed 12 October 2025. Cf 'The Permanent Peoples' Tribunal on Rojava vs. Turkey Will Take Place on 5-6 February in Brussels' (*ANF News*) <https://anfenglishmobile.com/news/the-permanent-peoples-tribunal-on-rojava-vs-turkey-will-take-place-on-5-6-february-in-brussels-77294> accessed 12 October 2025.

[73]For a more sceptical view, see S Polm, 'Picking and Choosing Law: The Permanent Peoples' Tribunal Session on West Papua' (*EJIL: Talk!*, 3 September 2024) <https://www.ejiltalk.org/picking-and-choosing-law-the-permanent-peoples-tribunal-session-on-west-papua/> accessed 12 October 2025. ('Peoples' tribunals pick and choose what they want of law').

[74]For a somewhat different spectrum of prefigurative practices, understood as different forms specifically of anarchist utopianism, see R Kinna, 'Utopianism and Prefiguration' in SD Chrostowska and JD Ingram (eds), *Political Uses of Utopia* (Columbia University Press 2016).

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Take the autonomous community that flourished for almost a decade at Notre-Dame-des-Landes in the wetlands near Nantes. It was baptised a *zone à défendre* (ZAD) by its inhabitants who had occupied the area in protest against government plans for a new international airport.[75] All decisions at the ZAD were taken by consensus. It would of course be possible to understand the outcomes of the consensual decision-making *à la ZAD* – for example, about the use of land (farming or dog walking?) – as private contracts, and to interpret them in accordance with the French 'positive' (that is: state) contract law that continued to claim applicability also in this autonomous zone. However, instead of such a domesticating reading the same practices could also be read – much more radically – as an attempt from the margins to prefigure a better society.[76] The zadistes rejected any form of legal enforcement. In their dispute resolution practices their focus was on reparation for harm done, not loss of profit. And at their 'non-markets', produce was offered *à prix libre*.[77] These practices prefigured a (non)contract (non)law fundamentally different from our contract law today as it is usually understood. Such a prefigurative reading could destabilise conventional 'positivist' understandings of 'contract' and 'law'. This reading of the ZAD as a prefigurative space would definitely not fit with the needs of a capitalist economy, but it might work just fine in building a horizontal society.

6. Intersectional legal prefiguration

Such playfully subversive exercises of (non)legal (non)rights allow us to imagine the law of a better, more just society by acting as if that society had already come about. They remind us of the fact that it is not for those in power (including doctrinal legal scholars, claiming interpretative authority) to decide what the law is, let alone what it should be. A new understanding of law can be built from the bottom up and from the margins (maybe together with allies). Perhaps the time has come to occupy the law. Rather than to abandon the law as hopelessly complicit in various forms of domination, why not occupy it and make it work for all those who are currently oppressed and marginalised through legal rights and institutions?

A. Prefigurative whiteness?

Yet, the idea of occupying the law may sound naïve, especially in light of one troubling characteristic of many self-proclaimed prefigurative movements, communities, and theories: their predominant whiteness. What is the message here? That the better society we are striving for is an all-white one, a 'white utopia'?[78] As Amandine Gay, a French Afro-feminist academic and filmmaker, points out with reference to the ZAD: 'one will think twice before joining a utopia that has not been conceived for us – and with us'.[79] Indeed, had the ZAD been founded by 300 Blacks or Arabs then no doubt the government would have sent in the army on the very first day.[80] In other words, the survival of the ZAD for nearly a decade is probably best

[75]J Lindgaard (ed), *Éloge des mauvaises herbes: ce que nous devons à la ZAD* (Éditions les liens qui libèrent 2020).

[76]D Graeber, 'Préface', *Éloge des mauvaises herbes: ce que nous devons à la ZAD* (Éditions les liens qui libèrent 2020), regards the ZAD as prefigurative. He argues that the ZAD 'won' in that they have shown that a better world is possible. The main elements he emphasises are that the ZAD was an anti-capitalist place without police, organised from below, through horizontal assemblies. M Verdier, *Le commun de l'autonomie: une sociologie anarchiste de la ZAD de Notre-Dame-des-Landes* (Éditions du Croquant 2022) 16–19, offers an explicitly anarchist prefigurative reading of the ZAD, as seizing 'the concrete possibility of a social organisation without hierarchy, without government and without police' as 'a practical implementation of the revolutionary ideal'. See also Ibid., 77 and Ibid., 193.

[77]Collectif Mauvaise Troupe (ed), *Contrées: histoires croisées de la zad de Notre-Dame-des-Landes et de la lutte No TAV dans le Val Susa* (l'Éclat 2016); Verdier (n 76); M Verdier, 'À la zad, l'expérience d'une justice anti-autoritaire' 15 (2022) Délibérée 32.

[78]A Gay, 'La Crise d'une Utopie Blanche?', *Éloge des mauvaises herbes: ce que nous devons à la ZAD* (Éditions les liens qui libèrent 2020).

[79]Ibid (my translation).

[80]Ibid.

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understood as a salient instance of white privilege. Similar criticism has been addressed also to PARK(ing) Day. The possibility to experiment playfully with the boundaries of legality – to play with the master's tools, one could say – is a privilege that not everyone enjoys. What may be joyful for some is very risky for others, notably for people belonging to minoritised and vulnerabilised groups. This raises the question: in the name of which revolution exactly is the law being occupied?

B. Interlocking systems of oppression and marginalisation

Intersectional prefiguration means prefiguring the intersectional revolution. The premise of the intersectional revolution is that current forms of oppression and marginalisation are produced and reproduced, enabled, and sustained, by intersecting structures of capitalism, racism, sexism, heteronormativity, ablism, classism, and extractivism (among others). On the further premise that no one is free unless everyone is,[81] the intersectional revolution aims to overthrow these intersecting structures of oppression and marginalisation.[82] Intersectional revolution and intersectional prefiguration are inspired by the groundbreaking Black feminist idea of 'interlocking systems of oppression' or 'intersectionality',[83] abolitionist thought and organisation,[84] and the practices of queer communities.[85]

C. Non-violence and radical democracy

A further premise of the intersectional revolution is that it will be non-violent. This follows directly from its aim to dismantle the inherently violent structures of oppression and marginalisation.[86] Similarly, intersectional prefiguration is non-violent too: it shows today what better world without oppression, marginalisation, extraction or other forms of violence could exist tomorrow. Ultimately, it relies on the unforced force of better arguments and inspiring examples. A society can be turned on its head through other means than violence. There is nothing intrinsically or necessary violent in political or social revolution.

Indeed, intersectional revolution and intersectional prefiguration are radically democratic. One way of understanding prefigurative counter-movements is as subaltern counter publics, which, in the words of Nancy Fraser, are 'parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses'.[87] The aim of counter discourses is not to remain

[81]FL Hamer, 'Nobody's Free Until Everybody's Free', speech delivered at the founding of the National Women's Political Caucus, Washington, D.C., July 10, 1971. MP Brooks et al (eds), '"Nobody's Free Until Everybody's Free,": Speech Delivered at the Founding of the National Women's Political Caucus, Washington, D.C., July 10, 1971', *The Speeches of Fannie Lou Hamer: To Tell It Like It Is* (University Press of Mississippi 2010).

[82]See already Boggs (n 22) ('The prefigurative model stressed the overturning of all modes of domination, not only the expropriation of private ownership').

[83]Combahee River Collective (n 10); Crenshaw (n 10).

[84]Davis (n 56); AY Davis et al, *Abolition. Feminism. Now* (Penguin 2022); RW Gilmore, *Abolition Geography: Essays towards Liberation* (Brenna Bhandar and Alberto Toscano eds, Verso 2022).

[85]M Murgia, *God Save the Queer: Catechismo Femminista* (Einaudi 2022); E von Redecker, *Revolution für das Leben: Philosophie der neuen Protestformen* (5th edition, Fischer 2020); D Loick, *Die Überlegenheit der Unterlegenen: eine Theorie der Gegengemeinschaften* (Suhrkamp 2024).

[86]The point here is not that the oppressed and marginalised would have no right to resort to violence for overthrowing the inherently violent institutions dominating them. There exists a categorical difference between violence from above and from below. Cf W Benjamin, *Zur Kritik der Gewalt und andere Aufsätze* (16th edition, Suhrkamp Verlag 2023). The point is rather that a violent revolution would not prefigure a non-violent society. It would not strengthen hope that a society without structural violence is possible. In defence of a violent response to colonial violence, see Frantz Fanon, *The Wretched of the Earth* (Constance Farrington tr, Reprinted, Penguin Books 2001) ch 1. For a powerful case for aggressive non-violence, grounded in interdependency, see J Butler, *The Force of Nonviolence: An Ethico-Political Bind* (Verso 2020).

[87]N Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' [1990] Social Text 56, 67. Fraser introduced the concept in response to Jürgen Habermas' all too harmonious and optimistic understanding

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marginal (they are not the self-righteous echo-chambers their detractors claim). Their epistemic claim is to deserve acceptance by the wider public – indeed, more so than many of the currently accepted discourses. Insofar, counter publics and their counter discourses are properly understood as prefigurative.

Aditi Bagchi has argued that radical democracy is unlikely to bring radical change.[88] Epistemic uncertainty about the material effects of change, and normative uncertainty about the moral imperative to support it, will make people resistant against radical change. However, Bagchi's understanding of 'radical democracy' focuses entirely on majoritarian reform. Insofar, her argument converges with that of Derrick Bell, who famously argued that the current social-economic-political structure, including the law, is organised to serve the interests of white people and that real change will not happen except when also in the interest of whites.[89] Yet, this point, ie, that radical egalitarian change will not occur through majoritarian reform, can be read, it seems, as an argument against reformism and for intersectional revolution, as the only way to achieve intersectional justice, and for intersectional prefiguration, as the only way to achieve this revolution. Epistemic and moral uncertainty is exactly what prefiguration (as opposed to blueprint reformism) aims to respond to through its experimentalism as a mode of learning about means and ends. The hope is that people experiencing how it is to live in a society without hierarchies may think differently about the relative importance of privilege (material and positional) and equal freedom than current majorities in current systems of representative democracy. Still, it remains important to acknowledge that we do not know the substantive outcomes of radical democracy, given its radically open-endedness. But that is hardly a flaw. Indeed, it is the main virtue of a process whose point it is the ensure equal political agency. In the words of Kimberle Crenshaw, the goal should be 'the inclusion of marginalized groups for whom it can be said: "When they enter, we all enter."'[90]

D. The epistemic superiority of the oppressed

The question of epistemic and moral uncertainty brings us to a third premise of intersectional prefiguration: the epistemic and moral *superiority* of communities of oppressed and marginalised people struggling for liberation.[91] Counter-communities and counter-publics know better which radical changes are needed to bring about a society without hierarchies and how this can and should be achieved. Think historically of the Maroons and today, for example, of queer communities.[92] Their practices and institutions are particularly important in showing the way to us all. This is the exact opposite of Leninist–Marxist vanguardism. The oppressed and marginalised do not need leaders to understand the injustice of their own predicament or the best way to change it. On the contrary, revolutionary hope can be found in the practices and institutions in the counter-communities and movements of those currently kept at the margins of society.[93]

of the public sphere. As a striking instance, see G-U Charles and L Fuentes-Rohwer, 'Habermas, The Public Sphere, and The Creation of A Racial Counter Public' 21 (2015) Michigan Journal of Race and Law 1, recounting how the Michigan Journal of Race and Law was founded by students of colour as a response to the structural whiteness of the flagship law journal of their university. That new journal could just as well be understood as a prefigurative space.

[88]A Bagchi, 'The Challenge of Radical Reform in Pluralist Democracies' 1 (2022) European Law Open 374.

[89]D Bell, 'Foreword: the civil rights chronicles' 99 Harvard Law Review (1985) 4–83.

[90]Crenshaw (n 10) 167.

[91]Loick (n 85); D Loick, 'The Ethical Life of Counter-Communities' 4 (2021) Critical Times 1–28 ('superiority of the subjugated').

[92]On the moral practices of Maroons in Surinam, contrasting them with the brutal violence of Dutch colonisers, see A de Kom, *Wij slaven van Suriname* (31st edn, Uitgeverij Atlas Contact 2025) 87 ff and passim.

[93]In this regard, scavenging seems particularly pertinent. It was recently proposed by Sophie Marie Niang as a research method at the boundaries of current academia that looks at what is already there at the margins of society and at its own terms. As she explains, anchored in black studies, black feminist thought, queer studies and indigenous studies, the method is grounded in the belief that 'the valuable knowledges created and shared by marginalised groups outside the bounds of academia need to be meaningfully engaged with'. While a methodology of refusal (of the colonial logics underpinning

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By the same token, people not belonging to any marginalised or oppressed groups – that is (multiply) privileged persons – have an epistemic disadvantage when it comes to social injustice.[94] The point here is not to romanticise or exoticise conditions of oppression and marginalisation or to suggest that the privileged should extract valuable knowledge from the oppressed, mining their experiences, so they can maintain their positions of power through strategies of co-optation.[95] As Olúfémi O. Táíwò underlines, the main question is not who are listened to inside the room, but who are present in the room in the first place. So, it is not merely about epistemic humility from those currently at the centre, although that is urgently necessary. It is, quite materially, about which bodies are in the room where decisions are made and how to rebuild the room together – and ultimately the entire house.[96]

E. Beyond reformism

This is why prefiguration – or at least intersectional prefiguration – is categorically distinct from reform. Even 'radical' or 'transformative' reform cannot prefigure the intersectional revolution. This is not – in some consequentialist vein – about whether reform can deliver certain good outcomes, say, in terms of prosperity.[97] It is a matter of means and ends and the necessary close link between the two. It is about centring the experiences, agency, and imagination of those who are currently marginalised and oppressed. Audre Lorde's famous saying, that 'the master's tools will never dismantle the master's house',[98] perfectly captures the justified revolutionary scepsis of the subalternised towards reformism.

But do reforms necessarily have to be reformist or could they also be revolutionary? In the 1960s, André Gorz discussed the possibility of 'revolutionary reforms', that is 'reforms leading to a radical transformation of society'.[99] He argues that what he calls 'non-reformist reforms' can be revolutionary in this sense. While reformist reforms understand the horizon of possibility and realism in terms of the given system and its power structures, non-reformist reforms set out to challenge the system and to overcome the existing power structures.[100] Gorz' focus was on the capitalist system and the struggle of workers, but the idea of revolutionary non-reformist reform

knowledge production in the social sciences), it is at the same time also a methodology of worldmaking in that it 'conjures up and enacts impossible futures in the present, rendering them possible'. See SM Niang, 'In Defence of What's There: Notes on Scavenging as Methodology' 136 (2024) Feminist Review 52.

[94]See CW Mills, 'White Ignorance', *Black Rights/White Wrongs* (Oxford University Press 2017).

[95]OO Táíwò, *Elite Capture: How the Powerful Took over Identity Politics (and Everything Else)* (Haymarket Books 2022).

[96]Ibid., 107. At first sight, prefigurative politics may seem utopian in the sense of pure idealism. But in reality, it is very much about material facts on the ground (albeit on a small scale). Indeed, the very idea of interstitial revolution – radical change brought from within the cracks of the existing society – is exactly about immanence, that is to remain materially grounded in the here and now. Also, the 'scaling up' claim, ie, that what works in a small prefigurative community can be expanded to the whole society, is not idealist or utopian. At most it is optimistic, but not more, say, than the idea of legal transplants. What it is not though is economicist. Indeed, prefigurativism can be understood as a form of materialism beyond economic reduction.

[97]M Bartl, *Reimagining Prosperity: Toward a New Imaginary of Law and Political Economy in the EU* (Cambridge University Press 2024).

[98]A Lorde, *Sister Outsider* (Penguin Books 2019).

[99]A Gorz, *Stratégie Ouvrière et Néocapitalisme* (Éditions du Seuil 1964) 12 ('la possibilité de "réformes révolutionnaires", c'est-à-dire de réformes allant dans le sens d'une transformation radicale de la société').

[100]A Gorz, *Strategy for Labor: A Radical Proposal* (Beacon 1968) 13 ('These changes can be sudden, just as they can be gradual. But, in any case, they assume a modification of the relations of power; they assume that the workers will take over powers or assert a force (that is to say, a non-institutionalised force) strong enough to establish, maintain, and expand those tendencies within the system which serve to weaken capitalism and to shake its joints. They assume structural reforms'.). See also A Gorz, 'Reform and Revolution' 5 (1968) Socialist Register 124 <https://socialistregister.com/index.php/srv/article/view/5272> accessed 12 October 2025.

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should be expanded to other structures of oppression.[101] Revolutionary reforms, then, are not about what is possible under the current intersecting structures of oppression and marginalisation but what must be made possible in terms of intersectional justice.[102] Or, put in the epistemic terms introduced above, non-reformist reforms are revolutionary in that they aim at a paradigm shift. These reforms may not make sense in terms of the existing society but all the more so in terms of the future more just one.

The idea of non-reformist reforms was taken up recently, by Ruth Wilson Gilmore for the context of prison abolition,[103] and by Amna Akbar, as a wider framework. As Akbar puts it, 'non-reformist reforms aim to undermine the prevailing political, economic, social order, construct an essentially different one, and build democratic power toward emancipatory horizons. They seek to redistribute power and reconstitute who governs and how. Today's thinking about non-reformist reform is both an effort to rethink the kinds of laws, policies, norms, relationships, and modes of organisation that we might build to govern society, and an effort to democratise relations of power: to have fundamentally different people at the helm'.[104] Saniya Amraoui has recently advocated non-reformist reform for EU migration law, arguing that 'it is time to move beyond reformism and to critically examine the foundational principles of the EU legal framework on migration'.[105] The aim would be to create a shift in power dynamics away from the profoundly marginalising and othering status of 'third-country national' (lower than second-rate citizenship) which is deeply embedded in the structure of EU free movement law central to the basic structure of the EU.

Clearly, there are significant overlaps between non-reformist reform as understood by Amna Akbar and Saniya Amraoui and intersectional legal prefiguration as outlined here.[106] In particular, both are about bringing the post-revolutionary society into the present, sharing the paradigm shift and the temporality aspects as well as the intersectionality aspect of mutually reinforcing structures of domination.[107] Perhaps the main difference is in scale: prefiguration is about trying out on a small scale (a microcosmos) while non-reformist reforms are directly at full scale (the whole society) albeit always for a specific aspect of it (for example, the category of 'third-country nationals').[108]

[101]Cf D Ashiagbor, 'Decentring Europe in EU Social Law Scholarship' (2023) 2 European Law Open 479 ('move beyond the labour/capital relation as a central faultline'); Isailović (n 6) ('critical engagements have a tendency to under-theorise the concept of 'power' and very often fail to engage with concepts such as race, gender, the center-periphery or the Global South/Global North divides').

[102]Interestingly, Gorz used the language of prefiguration well before Boggs defined the term. See Gorz, *Strategy for Labor* (n 100) 11 ('Instead of dichotomizing the future and the present – future power and present impotence, like Good and Evil – what must be done is to *bring the future into the present*, to make power tangible now by means of actions which demonstrate to the workers their positive strength, their ability to measure themselves against the power of capital and to impose their will on it'. [emphasis added]) and Gorz, *Stratégie Ouvrière et Néocapitalisme* (n 99) 10 ('Plus que jamais, il est nécessaire de définir tout à la fois une alternative globale positive et des « objectifs intermédiaires » (des médiations) qui en *préfigurent* dès a présent le sens'. [emphasis added]).

[103]RW Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (University of California Press 2007) 242 (considering 'the possibilities of nonreformist reform – of changes that, at the end of the day, unravel rather than widen the net of social control through criminalization').

[104]Akbar (n 48) 2507.

[105]Amraoui (n 6).

[106]For a different, instrumentalist reading of non-reformist reforms in the European context, in terms of an overarching material agenda and centralised top-down planning, see I Kampourakis, 'Legal Theory in Search of Social Transformation' 1 (2022) European Law Open 808.

[107]For a non-reformist reform proposal (albeit not using this terminology) for a radically democratic progressive private law code, see MW Hesselink, 'Reconstituting the Code of Capital: Could a Progressive European Code of Private Law Help Us Reduce Inequality and Regain Democratic Control?' 1 (2022) European Law Open 316. For a more outcome-focused – and, hence, reformist – version of that idea, see K Pistor, *The Law of Capitalism and How to Transform It* (Yale University Press 2025) chapter 7.

[108]Another difference may be the rejection of revolution. See Akbar (n 48) 2517 ('The turn to non-reformist reform emerges out of a sense that revolution is neither desirable nor viable'.). But here the issue may be merely semantic if revolution, as in this essay, is understood as radically democratic and non-violent. (The question may go deeper though. If revolutions are

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One question that is often asked with regard to prefiguration is whether it can be combined with other strategies, including ones that involve state institutions.[109] The answer is yes, as long as these other actions are indeed *strategies*, aiming at longer term structural change in the basic structure of society, empowering the currently oppressed and marginalised (revolution), not mere *tactics*, geared towards short term substantive gains without undermining the existing power structures, instead reproducing and entrenching them, like for example, EU consumer law does – a paradigmatic example of EU reformist reform.[110] Finally, of course, legal prefiguration can be combined, as a strategy, with non-legal (not to be confused with illegal) prefigurative practices. Indeed, it is by no means a claim or premise of this article that prefigurative practices as a strategy for radical change necessarily must include legal prefiguration. The claim is much more modest: prefigurative practices, as part of a revolutionary strategy, could also include or consist of practices of legal prefiguration.

7. Prefigurative EU law

A. EU revolution

The intersectional revolution cannot happen top down, only bottom up. The central idea is that radical, transformative changes – at least the kind that are non-violent – occur from the margins and interstitially: the new society is built from within the cracks of the old one.[111] This is why the 'ordinary legislative procedure' (Article 294 TFEU) will not achieve social justice in the EU, at least not in the sense of including prominently the overcoming of intersectional oppression and marginalisation through radical democracy. EU directives and regulations are not where structural change in terms of social justice and democratic agency can realistically be expected.[112] They are not sites for revolutionary hope. There is no reason to believe, for example, that people most at risk of digital exploitation and marginalisation will have a central voice and decision-making power on a Digital Fairness Act, the likely next step after the Digital Fairness Fitness Check.[113] Stakeholder consultation is not democratic empowerment. Yet, when it comes to the future of the EU, most of critical EU law scholarship, just like the general public, is either in

inherently violent then the non-violence stance taken here may be anti-revolutionary after all. This issue cannot be pursued any further here.)

[109]Raekstad and Gradin (n 34) ch 6.

[110]On the importance of the difference between strategy and tactics, see R Knox, 'Strategy and Tactics', 21 (2010) *Finnish Yearbook of International Law* 193. Strategy is concerned with the long-term aim of changing the basic structure of society and insofar revolutionary, while tactics is about achieving short-term aims without questioning society's basic structure and, thus, is reformist. As Knox argues, it does not follow that the revolutionary, who envisages systemic change, should reject reform, as long as the reform is a tactics for achieving systemic change, for example by building a movement within struggles for reform. This sounds relatively close to Amna Akbar's understanding of non-reformist reforms. However, there is a crucial difference. For Knox, the ultimate aim is the abolition of all law. As a result, from his (Pashukanist) point of view, it seems, non-reformist reforms can never be prefigurative since there is no post-revolutionary law to prefigure. In his 'principled opportunism', legal reforms are instrumentalised – mostly for building a revolutionary movement with class consciousness – for the ultimate abolition of all law. See also Knox (n 44).

[111]Redecker (n 36).

[112]As Iyiola Solanke points out, the Race Directive (2000/43) remains underutilised, with less than ten cases brought in 15 years. See I Solanke, 'Conclusion: Embedding Decoloniality in Empirical EU Studies' in A Vauchez, F Nicola and M Rask Madsen (eds), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022) 343.

[113]European Commission, 'Fitness Check of EU Consumer Law on Digital Fairness' (European Commission 2024) Commission staff working document SWD(2024) 230 final. In its recent 'Call for evidence for an impact assessment' (Ref. Ares(2025)5829481 – 17/07/2025), the European Commission only singles out minors as a group of vulnerable consumers considered in particular need of protection ('Young people are an important consumer segment . . . The protection of minors will be a key and transversal priority'.). See <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14622-Digital-Fairness-Act_en> accessed 12 October 2025.

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rejection mode or reformist (in particular treaty-reformist).[114] This applies also for the recent academic focus on constitutional imaginaries, which usually do not go beyond reformism.[115] It is time to overcome this false necessity and consider the possibility of a bottom up EU revolution beyond the imaginaries of EU law scholarship.[116]

Bottom-up intersectional revolution does not necessarily mean small-scale or local in any geographical sense. Indeed, some of the main self-consciously prefigurative movements have been radically internationalist. For example, the aim of the alter-globalist movement was to show, through their decentred horizontal practices, how transnational radical democracy is possible.[117] It is true that these movements have challenged not only borders but also the state. However, as Davina Cooper has highlighted, prefiguration can also mean challenging prevalent ideas of what it means to be a state (conceptual prefiguration).[118] While her main focus is on prefigurative local government, especially the example of radical left municipal administrations in the 1980s, she intends the prefigurative state explicitly as plural, 'taking shape as micro, city, regional, national, and global formations'. In other words, there is no intrinsic localist or nationalist bias in the idea of prefiguration – with or without the state. Prefiguration means practices on a smaller scale than the whole of society, but this scale does not have to be geographically bounded, certainly not by nation state boundaries.[119]

At Ventotene, a small island off the Italian coast near Naples used by the fascist government as an open-air prison for its political prisoners (*confine*), Altiero Spinelli, Ernesto Rossi, and Eugenio Colorni wrote in 1941–1942 *Towards a free and united Europe: project of a manifest*, better known as 'The Ventotene Manifesto'.[120] The Manifesto became a legendary source of inspiration for European integration, especially for European federalists.[121] Less well known is that the manifesto explicitly called for 'the European revolution'.[122] In particular, it stated that 'in order to respond to our needs, the European revolution must be socialist, ie, its goal must be the emancipation of the working classes and the creation of more humane conditions for them'.[123] The Ventotene

[114]Similar, PJ Neuvonen, 'A Way of Critique: What Can EU Law Scholars Learn from Critical Theory?' 1 (2022) European Law Open 60. ('rejectionist' or 'revisionist').

[115]See, explicitly, J Komárek, 'European Constitutional Imaginaries: Utopias, Ideologies, and the Other' in J Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 5 (emphasising 'the reformist potential' of European constitutional imaginaries). Also, the – at times radical – critique of EU constitutionalism in Paul Linden-Retek, *Postnational Constitutionalism: Europe and the Time of Law* (Oxford University Press 2023) remains explicitly reformist. See esp ibid, 254ff. ('Towards postnational constitutional reform'). Cf J van de Beeten, 'Unfulfilled Promises: Reconstructing EU Constitutionalism in Times of Crisis and Contestation' 21 (2025) European Constitutional Law Review 164 (questioning the realism of Linden-Retek's reformist agenda and attributing this to the critique's lack of immanence).

[116]Cf MK Reymann, 'National Imaginaries for a Transnational EU?' (2024) European Journal of Legal Studies 73, 77 (expressing doubt about the emancipatory potential of constitutional imaginaries coming from a purely academic or institutional context).

[117]Maeckelbergh (n 25) ('Prefiguration is outward-looking with the political goal of transforming governing structures on a global scale, and showing people through doing that this is possible'.); Graeber, 'The New Anarchists' (n 33) 65 ('the main achievement of the nation-state in the last century has been the establishment of a uniform grid of heavily policed barriers across the world. It is precisely this international system of control that we are fighting against, in the name of genuine globalization').

[118]Cooper, 'Prefiguring the State' (n 25); D Cooper, 'How Concepts Do Activism: As Worlds, Aids, Cells, and Currents' 0 (2025) Cultural Studies 1.

[119]Nor is there a nationalist bias (including EU nationalist) specifically in intersectional justice. Quite the contrary: given that intersecting structures of oppression and marginalisation are transnational, the struggle to overthrow them must be transnational too. For a transnational understanding of prefigurative EU law, see below.

[120]'The Ventotene Manifesto – Union of European Federalists' <https://federalists.eu/federalist-library/the-ventotene-manifesto/> accessed 12 October 2025.

[121]The main building of the European Parliament in Brussels is named after Altiero Spinelli.

[122]'The Ventotene Manifesto – Union of European Federalists' (n 120).

[123]Ibid.

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Manifesto has various passages that should not inspire us today.[124] It envisages 'a European arrangement of colonial possessions'.[125] It understands the envisaged European federation as a prelude to – or the nucleus for – a global federation (Eurocentric prefiguration).[126] And it is profoundly vanguardist in its deep scepticism of democratic revolution.[127] By contrast, the European revolution envisaged here is radically democratic, anti-Eurocentric, decolonial and – what amounts to the same – for open borders. Yet, the fundamentally post-nationalist vision of the Ventotene Manifesto can still inspire us today. The Manifesto sets a clear priority: 'The question which must be resolved first, failing which progress is no more than mere appearance, is the definitive abolition of the division of Europe into national, sovereign States'.[128] There is nothing in this call for the abolition of borders necessitating Europe to close and entrench its external borders, effectively turning the EU into just another national, sovereign state. Quite the contrary, on the same ground Europe should strive for an ever more open Union. It could do so by progressively opening its external borders, in particular towards the Global Souths, also as a way to start addressing a shared history of colonialism.[129]

So, what can be done today? In particular, which legal practises could prefigure a fundamentally more just EU? What could a prefigurative EU law look like? And how can academics contribute to leftist reworlding of the very idea of european union (decapitalised)?[130] While the last thing we need is an EU revolution from the centre – and the European University Institute may seem a particularly unlikely place to start a radical movement – and while my own legal imagination may be severely limited by years (indeed, decades) of training and scholarship in EU law, I will nevertheless hazard some suggestions, if only to make the abstract idea of prefigurative EU law somewhat more concrete. To start with, drawing on other experiences, prefigurative EU law practices could include radical rewrites and the drafting of utopian principles of EU law.

B. Radical CJEU rewrites and prewrites

Following the inspiring examples of feminist rewrites,[131] queer rewrites[132] and the Anthropocene Judgment Project,[133] a community of European activists, practitioners, and academics recently

[124]Somma (n 45) rejects the Manifesto altogether, as a neoliberal Trojan horse. While he points to striking textual and personal links to ordoliberals (Spinelli corresponded with Wilhelm Röpke), this reading of the Manifesto as essentially neoliberal seems far too strong. See A Caputo, 'Spinelli Ordoliberale? Riflessioni Critiche Su Un Libro Di Alessandro Somma' [2023] Federalismi (considering the neoliberal reading of the manifesto reductive).

[125]'The Ventotene Manifesto – Union of European Federalists' (n 122).

[126]Ibid ('And, once the horizon of the old Continent is superseded, and all the peoples who make up humanity are included in a single design, it will have to be recognised that the European Federation is the only conceivable guarantee ensuring that relationships with American and Asiatic peoples will work on the basis of peaceful co-operation, writing for a more distant future when the political unity of the entire world will become possible').

[127]Ibid ('During revolutionary times, when institutions are not simply to be administered but created, democratic procedures fail miserably. The pitiful impotence of democrats in the Russian, German, Spanish revolutions are the three most recent examples').

[128]Ibid.

[129]GK Bhambra, 'A Decolonial Project for Europe' 60 (2022) JCMS: Journal of Common Market Studies 229.

[130]On the re-worlding of concepts as an explicit aspect of conceptual activism, see Cooper, 'How Concepts Do Activism' (n 120).

[131]See notably the 'decisions' of the Women's Court of Canada. Cf D Majury, 'Introducing the Women's Court of Canada' 18 (2006) Canadian Journal of Women and the Law 1, 5 ('We write these decisions in response to the pressing equality issues that women have brought to the courts for redress and been denied; we write these decisions to build a vision of an equal society in which such inequalities are unimaginable'.). See also Rosemary C Hunter et al (eds), *Feminist Judgments: From Theory to Practice* (Hart 2010).

[132]See <https://www.queerjudgments.org> accessed 12 October 2025, stating as the main aim of the project, 'to re-imagine, re-write and re-invent, from queer and other complementing perspectives, judgments related to sexual orientation, gender identity and expression, and sex characteristics'.

[133]N Rogers and M Maloney, 'The Anthropocene Judgments Project: A Thought Experiment in Futureproofing the Common Law' 47 (2022) Alternative Law Journal 173; N Rogers and M Maloney (eds), *The Anthropocene Judgments Project:*

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launched a promising project, called 'Intersectional Rewrites: European Court of Human Rights Judgments Reimagined'.[134] What these rewrite projects have in common is their aim to show what a better, juster law could look like, thus expanding the horizon of what seems legally possible.[135] Another salient common feature is that they are collaborative projects, bringing together activists, practitioners, artists and academics. Thus, they also understand the rewriting of judicial opinions as a praxis, to change and expand legal reality, not merely to better understand its current potential and limits. Most of these projects aim at structural change in that they seek to transform society from within, at the interstices of the core legal practice of judgment writing. Insofar, they are not reformist but revolutionary.[136] Some participants explicitly self-describe what they are doing as a prefigurative practice. See, for example, Zoe Nay and Julia Dehm, when they observe: 'In donning our "imaginative robes", we *write to prefiguratively enact* the types of normativities and legal adjudicative practices that will be needed to address the structural injustices of the Anthropocene'.[137] Or, they understand the judgments themselves as prefigurative, as Hilary Charlesworth does: 'The prefiguration of feminist judgments, as illustrated in this volume, offers a powerful method of engaging with the gendered form of the international legal system, enacting changes that feminist theorists have long argued for'.[138]

Along the same lines, and inspired by these projects, in particular the one on intersectional ECHR rewrites, a creative prefigurative EU law practice could be the rewriting of leading cases of the Court of Justice of the European Union (CJEU rewrites). Past experiences (direct effect, supremacy) and more recent ones (the value turn) show how activist the case law of the court can be, often with scant textual support in the Treaties. Yet, while often referred to as 'revolutionary',[139] in reality the CJEU's landmark rulings have done nothing to transform the basic structure of European society. Rather, they maintain and further entrench the status quo of structural injustices and disempowerment (while empowering the CJEU).[140] What has the so-called 'value turn' done for oppressed and marginalised people in Europe?[141] A CJEU rewrite

Futureproofing the Common Law (Routledge 2023) (participants 'embark upon imaginative forays into future law, or law as it could be, rather than adopting the more conventional methodology of rewriting existing judgments using accepted legal principles').

[134]See <https://intersectionalrewrites.org> accessed 12 October 2025 ('The book project "Intersectional Rewrites: European Court of Human Rights Judgments Reimagined" imagines a jurisprudence that rises to the challenge of responding to intersecting forms of oppression').

[135]So, while rewrites are always ex post, and insofar backward looking, they are still prefigurative because they tell us not only what the courts could have decided yesterday but also what they could still decide tomorrow. In other words, prefigurative rewrites are always also prewrites – foreshadowing (radical) legal change.

[136]See Redecker (n 36).

[137]Z Nay and J Dehm, 'The Truth and Reparations Commission: Climate Reparations for the Anthropocene', *The Anthropocene Judgments Project* (Routledge 2023) 117 (emphasis added).

[138]Cf H Charlesworth, 'Prefiguring Feminist Judgment in International Law' in Loveday Hodson and Troy Lavers (eds), *Feminist Judgments in International Law* (Hart Publishing 2019) 479.

[139]JHH Weiler, 'The Transformation of Europe' 100 (1991) The Yale Law Journal 2403. On the Court's 'legal revolution' in the 1960s and 1970s, see most recently William Phelan, 'Europe's Legal Revolution and France's Article 49–3: The Constitutional Audacity of Robert Lecourt' 3 (2024) European Law Open 226. See also M Everson and C Joerges, 'Facticity as Validity: The Misplaced Revolutionary Praxis of European Law' in E Christodoulidis, R Dukes and M Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar Publishing 2019) 407–27, 423 ('European law is revolutionary in character').

[140]The Court's 'legal revolutions' are perhaps best understood as 'passive revolutions' in the Gramscian sense, that is a transformation of the political structure (in this case especially the legal structure) in such a way that it preserves the existing power structures. See A Oleart, *'Democracy without Politics' in the EU Citizen Participation: From European Demoi to Decolonial Multitude* (Palgrave Macmillan 2023) 3ff.

[141]Cf N Nosrati and D Tomaselli, 'Whose Values?' [2025] Verfassungsblog <https://verfassungsblog.de/ecj-western-values-gender/> accessed 12 October 2025 (arguing that by making protection conditional upon subjective identification with "European values", 'value-based reasoning, even when it appears to support progressive outcomes, undermines the universality and legal clarity of refugee law provisions').

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project could show how to imagine genuinely revolutionary CJEU rulings, with a very different political agenda and understanding of revolution.[142] A specific focus could be given to intersectional rewrites, transforming the EU towards intersectional justice, or decolonial rewrites, confronting the EU seriously with its colonial past and present,[143] thus prefiguring intersectional and decolonising revolutions in EU law.[144] Examples of the former, emulating the ECHR intersectional rewrites project, could include intersectional rewrites of the CJEU's (structurally racist) rulings in the headscarf cases,[145] while an instance of the latter could be pre-writes (following the example of the Anthropocene judgments project) of imagined future CJEU cases on material reparations for historic and ongoing colonial wrongs. A crucial feature of feminist rewrites is that they are written by women, as evoked by the name of the seminal 'Women's Court of Canada'.[146] Similarly, the ECHR Intersectional Rewrites project centres the political agency of people with lived experience of intersectional oppression and marginalisation.[147] A prefigurative CJEU rewrites project could similarly start, through its authorship, overcoming the CJEU's startling whiteness – which epitomises what Nozizwe Dube aptly calls 'the unbearable whiteness of EU law'[148] – and make visible the struggles of Black and other racialised European women.[149]

However, an important limit of such rewrite and prewrite projects, especially from the point of view of democratic agency, is that they still focus on courts, thus further entrenching the idea, widely accepted among legal scholars, that legal change should come from the judiciary. Yet, it is far from clear how this would prefigure a better society. The idea of a society ruled by judges seems hardly utopian (except maybe for judges). It would amount to (legal) expert government rather than radical democracy, a form of domination (rule by others) instead of emancipation

[142]Insofar, while sharing the same critical agenda of exposing the contingency of 'positive' EU law and of prevalent understandings thereof, this project would be the mirror image of F Nicola and B Davies, *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).

[143]Bhambra (n 129); J Miller and FG Nicola, 'The Failure to Grapple with Racial Capitalism in European Constitutionalism' in J Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 320. On how the Treaty of Rome, the founding legal text of what today is the EU, was shaped by colonialism, see H Eklund, 'Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome' 34 (2023) European Journal of International Law 831. On the risk of green neocolonialism through EU Deforestation Regulation (2023 /1115), see G Aty-Biyo, 'How the EU Can Avoid Green Colonialism' (*Transformative Private Law*, 22 October 2024) <https://transformativeprivatelaw.com/how-the-eu-can-avoid-green-colonialism/> accessed 12 October 2025 (pointing to the EU's unilateralism, its neglect of issues of consent and agency, especially for marginalised and vulnerabilised communities).

[144]On the need to decolonise EU legal studies, see Solanke, 'Conclusion' (n 114) (arguing that 'the Black European population remain invisible in EU law and EU studies') and I Solanke, 'Reimagining EU Law and Legal Institutions; EUI Law Working Paper 2025/11' (2025). For a call to 'engage meaningfully with the legacies of colonialism as central elements of social law and labour markets', see Ashiagbor (n 103). For a compelling plea for a postcolonial approach to EU law, see L Zevounou, 'For a Postcolonial Reading of the EU' [2024] Verfassungsblog <https://verfassungsblog.de/postcolonial-reading/> accessed 12 October 2025 ('one cannot understand the history and law of the European Union if one fails to understand and acknowledge colonialism'). Pathbreaking on decolonising legal studies and practice, F Adébísí, *Decolonisation and Legal Knowledge: Reflections on Power and Possibility* (Bristol University Press 2023).

[145]On the Court's obstinate refusal to recognise intersectional discrimination, see N Dube, 'Not Just Another Islamic Headscarf Case: LF v SCRL and the CJEU's Missed Opportunity to Inch Closer to Acknowledging Intersectionality' [2023] European Law Blog <https://www.europeanlawblog.eu/pub/not-just-another-islamic-headscarf-case-lf-v-scrl-and-the-cjeus-missed-opportunity-to-inch-closer-to-acknowledging-intersectionality/release/1> accessed 12 October 2025.

[146]Majury (n 131). For feminist judgments in international law, see Charlesworth (n 128) ('The most obvious element of feminist prefiguration in the judgments included in this volume is that of participation of women judges in equal or greater proportions compared to men in international judicial institutions').

[147]See <https://intersectionalrewrites.org/authors-editors/> ('The community of authors and editors of the Intersectional Rewrites project is made up of activists, practitioners, and academics who bring their knowledge, practice, and lived experience to reimagining a European Court of Human Rights jurisprudence that is based on key learnings of intersectionality theory and praxis').

[148]N Dube, '"The Unbearable Whiteness of EU Law"; EUI Law Working Paper 2025/12' (2025).

[149]For European academia, see I Solanke, 'Where Are the Black Female Professors in Europe? | Gunda-Werner-Institut | Heinrich-Böll-Stiftung' (*Heinrich Böll Stiftung, Gunda Werner Institute, Feminism and Gender Democracy*, 27 May 2019) <https://www.gwi-boell.de/en/2019/05/27/where-are-black-female-professors-europe> accessed 12 October 2025.

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(towards collective self-rule), failing to shift political power from the centre to the periphery of European society. Under (consequentialist) revolutionary instrumentalism the revolutionary ends may justify the means. It, then, suffices that the oppressed and exploited receive what they need, whether they are themselves agents of change or not.[150] However, prefiguativism's deep commitment to the congruence of means and ends, and to horizontal decision-making, should mitigate any revolutionary enthusiasm for rewrites and prewrites as a form of prefiguration, including CJEU rewrites and prewrites as forms of prefigurative EU law.[151]

C. Utopian principles

At the beginning of this century, several international teams of legal academics (and a few judges) engaged in the drafting of various sets of principles of European private law, most prominently the Principles of European Contract Law (2000) and the Draft Common Frame Reference (2008).[152] These projects were at the heart of the European private law movement, which was driven by strong (post-nationalist) European idealism.

In retrospect, it is astonishing how positivistic (and in some respects outright conservative) these projects were.[153] Their explicitly stated aim was to show what a future common private law for Europe could look like – in other words, to prefigure European private law. This could have been the private law of an ideal European society – or at least a radically better one. Yet, the PECL and especially the DCFR look remarkably similar to the lowest common denominator (the 'common core') of the existing private laws of the EU Member States at the time, with only a shy inclination here and there towards social justice reform. Given that these sets of principles were products of academic freedom, not constrained in principle by anyone or anything, why were they not much bolder, more utopian?[154] Why did the proposed European private law for the 21st century look so much like the nationalist and bourgeois civil codes of the 19th century?

Two decades later, it is perhaps time to try again and do better. Just like a new generation recently came together in Amsterdam to draft a new manifesto on social justice in European

[150]See Marx (n 40), where he outlines the post-revolutionary society. During a first phase of socialism, individuals would receive certificates for the amount of labour they contributed, for which they would, then, receive an equivalent amount of goods. Then, 'in a higher phase of communist society', will society inscribe on its banners: 'From each according to his ability, to each according to his needs!' Against (consequentialist) recipient-oriented justice in terms of mere fair outcomes, and for an emancipatory understanding of justice in terms empowered agents of justice, see R Forst, *Justification and Critique: Towards a Critical Theory of Politics* (Ciaran P Cronin tr, Polity Press 2014) chapter 1; Hesselink, 'EU Private Law Injustices' (n 1) 90; WM Paris, *Race, Time, and Utopia: Critical Theory and the Process of Emancipation* (Oxford University Press 2025) 177.

[151]Again, the point here is not that strategic judicialism is illegitimate, only that it does not prefigure a radically horizontal and democratic society. Or, to be more precise, the precept of congruence of means ends being a matter of degree, not a categorial imperative or a puritan virtue, the more prefigurative legalism is judge-focused the less it seems prima facie radically democratic. Yet, judicial law-making can also be less or more democratic. And especially the judgment-writing in the ECHR Intersectional Rewrites project is radically more participatory and democratic than in the ordinary judiciary. Indeed, one way of looking at the project is as occupying the ECtHR.

[152]O Lando and HG Beale (eds), *Principles of European Contract Law: Parts I, II and III* (Student edition, Wolters Kluwer 2019); C von Bar et al, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Outline ed, Sellier, European Law Publishers 2009).

[153]Perhaps not fully astonishing if critics at the time were right that the drafters were driven by personal ambition (to become the European Portalis), and probably also not given the composition of the groups, which included both conservatives and reformists but no revolutionaries.

[154]For transparency reasons, I declare that I was a member of the co-ordinating committee of the Study Group on a European Civil Code (1999–2009), which did most of the drafting of the DCFR, and of the European Commission Expert Group on a Common Frame of Reference in the area of European contract law (2010–2013), which prepared the Commission's Common European Sales Law (CESL) proposal.

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private law,[155] a much more radical one than its now two decades old original,[156] so too could a new generation of more radical EU (private) law scholars unite to draft sets of principles prefiguring the basic structure of a more socially just EU.

These new principles, for example, could de-constitutionalise EU competition law and the market freedoms and add new legislative competences based on principles of intersectional justice and free movement into the EU. They could proclaim the freedom *for workers* to conduct their business,[157] introduce an internal non-market, based on the non-binding force of contract and *prix libre*. And they could replace 'representative' in Article 10 TEU with 'radical' or 'empowered participatory' democracy.[158]

At a conceptual level, they could radically alter the meaning of existing core EU law concepts by formally defining them quite differently, such as internal market (as a space for fair trade), common values (love, care), principles (anti-racism, anti-colonialism, degrowth), and property (as a non-exclusive right). They could also introduce new ones, more in line with the experiences of those currently at the margins of European society. To be sure, there are limits to what conceptual activism can achieve materially (that is, beyond imagination).[159] And we should guard for pure conceptual instrumentalism. But a radically different conceptual frame seems an indispensable part of truly transformative EU politics. And prefigurative conceptual activism would mean to act as if the existing concepts already had a new meaning or as if new concepts already were part of our common frame of reference, hoping to bring – through legal imagination – an onto-epistemic shift in our understanding and the reality of Europe.[160] Crucially, as Iyiola Solanke stresses, for re-imagining EU law 'the pool of valued knowers and knowledge needs to be widened'.[161] Therefore, the group of principles drafters it the room cannot be anything like the Study Group on a European Civil Code, which did not so badly on gender balance, but was all-white.

Yet, even principles and common frame of reference projects as we know them also have their intrinsic limits. They evoke the legal imaginaries of hyper rationalism and systematicity.[162] But their most important limit is that they are expert projects. This means that at best they could be vanguardist exercises, where a group of professional (professorial) EU law revolutionaries would show the way.[163] But at worst, it could easily become another instance of elite capture, where those in the room have little interest in rebuilding the room, let alone the entire house.[164] From the point of view of a radically democratic revolution that would seem anything but prefigurative. Having said that, it is not intrinsic to the idea of drafting imagined legal principles that this should be done by (or even involve) legal scholars – quite the contrary.

[155]For a preview, see the 33 inspiring blogposts at the 'Symposium Social Justice '44' <https://transformativeprivatelaw.com/category/symposium-social-justice-44/>.

[156]Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' 10 (2004) European Law Journal 653.

[157]Amending the current Art 16 CFREU (Freedom to conduct a business).

[158]Current Art 10 Para 1 TEU: 'The functioning of the Union shall be founded on representative democracy'.

[159]On the materiality of concepts and more generally on conceptual activism, see Cooper, 'How Concepts Do Activism' (n 120).

[160]Of course, the original use of the term 'common frame of reference' in the DCFR was itself mostly aspirational.

[161]Solanke, 'Reimagining EU Law and Legal Institutions; EUI Law Working Paper 2025/11' (n 144).

[162]For a trenchant critique of 'Euro-modern law's pretensions to objectivity, neutrality, and universality', see Adébísí (n 146) 6 and passim.

[163]See Lenin (n 40); V Lenin, *What Is to Be Done?* (Tim Delaney tr, Chris Russell for the Marxists Internet Archive 1902) <https://www.marxists.org/archive/lenin/works/download/what-itd.pdf> accessed 12 October 2025.

[164]Táíwò (n 95).

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8. A revolutionary 28th non-regime

This brings me to my final and main suggestion for EU legal prefiguration: drafting a revolutionary 28th non-regime through a radically democratic process.

A. Deregulatory sandboxes

In her 'Special Address' to the World Economic Forum in Davos the President of the European Commission von der Leyen recently stated the following:[165]

> Today, the European Single Market still has too many national barriers. Sometimes companies are dealing with 27 national legislations. We will offer instead to innovative companies to operate all across our Union under one single set of rules. We call it the 28th regime. Corporate law, insolvency, labour law, taxation – one single and simple framework across our Union.

The Commission President was not shy about her agenda. She said that 'we must make business much easier all across Europe', denounced 'unnecessary red tape', announced a 'far-reaching simplification of our sustainable finance and due diligence rules' and then went on to propose the 28th regime as the way to 'bring down the most common barriers to scaling up all across Europe'. A week later, the Commission presented its 'Competitiveness Compass for the EU'.[166] It proclaimed that 'making it possible for innovative companies to benefit from a single, harmonised set of EU-wide rules wherever they invest and operate in the Single Market, instead of facing 27 distinct legal regimes, would represent a real game changer',[167] and announced its proposal for a 28th legal regime as a 'flagship action', for Winter '25–'26.[168] Most recently, in her 2025 State of the Union address, President von der Leyen reaffirmed: 'For innovative companies, we are preparing the so-called 28th regime'.[169]

Some European private lawyers will have taken the Commission's announcement as a blast from the past. The language of the 28th regime dates back to 2011, when the Commission proposed the Common European Sales Law (CESL) as an 'optional instrument',[170] a '28th system'.[171] That proposal was quite limited in its substantive scope: only sales contracts. Similarly, another instrument referred to at the time as a 28th regime, the regulation on a Societas Europea, only offered a legal form of business, the European company.[172] What the Commission seems to have in mind today is much bigger: a single framework comprising corporate, insolvency, labour, and tax law, thus crossing the boundaries between mandatory and default rules as well as between public and private law. In sum, an optional instrument on steroids – definitely a game changer.

Taking these elements together, what the Commission seems to envision is an optional Free Trade Zone, not offshore with fences around it, but across the European Union. A 'regulatory

[165]U von der Leyen, 'Special Adress by the President: World Economic Forum (Davos, 21 January 2025)' (*European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/speech_25_285> accessed 12 October 2025.

[166]Communication 'A Competitiveness Compass for the EU', Brussels, 29.1.2025, COM(2025) 30 final.

[167]Ibidem, 4.

[168]Ibidem, 8.

[169]'2025 State of the Union Address by President von der Leyen' (Strasbourg, 10 September 2025).

[170]Proposal for a regulation on a Common European Sales Law, Brussels, 11.10.2011, COM(2011) 635 final.

[171]In particular, then Vice-President of the Commission Viviane Reding was fond of the idea of a 28th legal system. Cf J Brundsen, 'Call for Single Contract Law System' *POLITICO* (16 June 2010) <https://www.politico.eu/article/call-for-single-contract-law-system/> accessed 12 October 2025: 'Reding's preference at this stage is to create an additional pan-European legal regime that businesses could use on a voluntary basis. It is referred to as a "28th system", as it would complement the existing systems in the 27 member states'.

[172]Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

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sandbox allowing innovators to develop and test new ideas',[173] a protected playground where aspiring capitalists can play free market. Originally coming from the fintech industry,[174] where they provide a 'safe space' for financial institutions to test their innovations on real persons and prepare the next financial crisis, regulatory sandboxes recently have been embraced by the EU as a means for boosting innovation and, of course, economic growth, the EU's highest value.[175] Perhaps the direct aim of the 27th regime is to compete with China, which has been referred to as 'a sandbox on a national level'.[176] Quite appropriately, the proposal was announced first at the World Economic Forum in Davos, the annual gathering of the global neoliberal movement. A further element could be added. The 28th regime seems a promising candidate for the Brussels effect, where businesses outside the EU would 'voluntarily' opt into the new legal regime made in Brussels.[177]

B. Occupying the 28th regime

Clearly, the 28th regime is where the action in the EU will be in the coming years when it comes to creating new structures of marginalisation, oppression and exploitation. Therefore, in line with what was said before, this seems an appropriate site for prefigurative EU law practices. Occupy the 28th regime! What I have in mind is a bottom-up proposal for a revolutionary 28th non-regime ('regime' sounds far too authoritarian). This non-regime would be radical on several levels: the way it comes about, the opt-in mechanism, and its content.

Radically democratic drafting

The revolutionary 28th non-regime would be drafted through a radically democratic process. One way this could be done is through a deliberative assembly. The assembly members could be selected randomly. Insofar, it could follow the model of the Citizens' Panels at the Conference on the Future of Europe (CoFE).[178] However, this time there would be the crucial difference that random selection should be radically stratified. In the absence of radically stratified sortition the assembly would simply reproduce existing power structures and dynamics, as was confirmed by the CoFE's colour-blind vision of the future of Europe.[179] The stratified selection should be in proportion roughly to the relative degree of marginalisation and oppression of racialised and

[173]Communication 'A Competitiveness Compass for the EU', 4.

[174]D Zetzsche et al, 'Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation' 23 (2017) Fordham Journal of Corporate & Financial Law 31 ('In finance, a regulatory sandbox refers to a regulatory "safe space" for innovative financial institutions and activities underpinned by technology').

[175]Council Conclusions on Regulatory sandboxes and experimentation clauses as tools for an innovation-friendly, future-proof and resilient regulatory framework that masters disruptive challenges in the digital age (Brussels, 16 November 2020, 13026/20) ('underlines that regulatory sandboxes can offer significant opportunities particularly to innovate and grow for all businesses'); European Commission, *Better Regulation Toolbox* (July 2023) <https://commission.europa.eu/law/law-making-process/better-regulation/better-regulation-guidelines-and-toolbox_en> tool #69 (pp 599–604). 'AI regulatory sandboxes' were recently introduced by the AI Act as 'measures in support of innovation'. See Arts 57–9, Regulation 2024/1689 of 13 June 2024 (Artificial Intelligence Act). Cf OO Cherednychenko, *Market Regulation and Private Law: The Quest for Reconciliation in European Private Law* (Cambridge University Press forthcoming) Section 2.3.4.

[176]Zetzsche et al (n 176) ('China is often applauded for adopting a laissez-faire approach before designing a comprehensive regulatory system approach for the new environment. The approach allowed market participants to test without immediate repercussions from the regulator. In practice, this meant that China's need for regulatory sandboxes was limited, as China itself represented a sandbox on a national level').

[177]A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

[178]European Commission, 'Conference on the Future of Europe – European Commission' <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/conference-future-europe_en> accessed 12 October 2025.

[179]Cf MW Hesselink, 'Private Law Subjects in European Mini-Publics' 22 (2024) International Journal of Constitutional Law 971, 990–2.

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otherwise minoritised social groups, with a special focus on intersectionality, on the one hand, and the degree of unjustified privilege of other groups, on the other.[180] Concretely, this would mean, for example, that women of colour and from minoritised ethnicities would be statistically overrepresented in the assembly, while white men of a certain age would be statistically underrepresented or even excluded from the room.[181]

Moreover, limitation of membership to EU citizens would be unjustifiable given that any 28th regime or non-regime is bound to affect both citizens and non-citizens.[182] Rather than through the framing of the citizen-centric notion of a European demos, a more fitting way to address the transnational reality might be through the notion of a 'decolonial multitude'.[183] As suggested by Alvaro Oleart, who coined it, 'the advantage of the "decolonial multitude" as a concept is that it allows to transcend the statist and Eurocentric perspectives when imagining democracy, and thus avoids the replication of the national statist thinking at the EU level'.[184] In this way, the concept could help us to make sense of the political reality of actors cooperating intersectionally across different but related struggles.[185] Mindful of Amandine Gay's warning,[186] intersectional representation should be the litmus test for any attempt to prefigurative transnational democracy.

This brings us to another major flaw of the CoFE. It was designed to insulate the citizens' deliberation within the panels from the wider public sphere outside, notably civil society organisations and political parties. Instead, they got 'neutral' advice from 'experts'.[187] The intent to prevent capture by resourceful lobbyists may have been laudable. However, the result was strong individualisation (participants as unencumbered atoms) and depolitisation (wishlist drafting rather than struggle over political trade-offs) of European (constitutional) politics. This, in turn, produced a disconnect between the deliberative panels and the wider European public.[188] The (predictable) result was a panel that reproduced the existing power relations in the EU. Instead, the drafters of the 28th non-regime should be encouraged to remain actively connected with civil society organisations and movements whose consultation should be facilitated throughout. In this respect, the Irish experience with a citizens' assembly provides a more inspiring example.[189] There, the process remained highly political throughout, from the agenda setting (the highly politically divisive issues of abortion, same sex marriage, and climate change), to the inclusion of civil society (presentations by advocacy groups), through to the outcome (concrete recommendations, not wish lists of conflicting or aims).

Alternatively, and perhaps more in line with familiar prefigurative practices, the revolutionary 28th non-regime could be drafted by representatives of a counter-public that would remain in full

[180]A fair compensation should be offered for participation in the democratic assembly. This might be achieved through crowdfunding.

[181]See Akbar (n 548) 2577 ('if we understand the problem to be domination, exploitation, dispossession, and exposure to premature death – and if we link this violence to racism and capitalism – then it becomes clear we must do a lot more than champion better demands. We must build popular power, and that requires we diminish our own').

[182]A CoFE citizens' panel spoke about migrants and asylum seekers, however without any of them in the room. On the crucial importance of being in the room when it comes to changing the room (or the entire building), see Táíwò (n 95).

[183]Oleart (n 140).

[184]Ibid., 36.

[185]Ibid., 17.

[186]Discussed above, in Section 6.

[187]Cf S Chambers, 'Rhetoric and the Public Sphere: Has Deliberative Democracy Abandoned Mass Democracy?' 37 (2009) Political Theory 323 ('The groups regularly identified as lacking sufficient neutrality in speech have been overwhelmingly drawn from the marginalized or less powerful in society').

[188]On the risk of elite capture in contexts of epistemic representation of marginalised and oppressed groups, see Táíwò (n 97) (considering a strong connect between those already 'in the room' and those still 'outside the room' to be the crucial test for any meaningful change).

[189]G de Búrca, 'An EU Citizens' Assembly on Refugee Law and Policy' 21 (2020) German Law Journal 23; DM Farrell, J Suiter and C Harris, '"Systematizing" Constitutional Deliberation: The 2016–18 Citizens' Assembly in Ireland' 34 (2019) Irish Political Studies 113.

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contact with its counter-public sphere. This would have the advantage that the drafting would be shielded to a degree from the societal forces of intersectional oppression and marginalisation. The downside would be that re-connecting with the wider public and its public sphere might prove more difficult. This is a dilemma that mini-publics and prefigurative communities/movements have in common. The more they are cohesive the more difficult it will be for them to scale up to the wider society. If the aim is not exodus but social revolution this is indeed a problem. The scaling question is intrinsic to the very nature of prefiguration and deliberative mini-publics – and to prefigurative mini-publics –, which are about the spatial-temporal dimension of prefiguring today on a small scale the full-scale society of tomorrow. There are no easy solutions other than trying. Neither a prefigurative community nor a mini-public nor indeed a prefigurative mini-public will ever be 'descriptively representative' of the wider public or multitude for the purposes of democracy because democracy, and any meaningful description thereof, is fundamentally about political agency. There are no shortcuts to democracy – or to revolution. Nor do prefigurative politics claim that. The scaling up from the prefigurative practice, movement, or community to the wider society and its practice and institutions – the revolution – has to happen (on the view defended here) through democratic political struggle, starting from the margins of society.

Choice to workers and stakeholders

President von der Leyen promised the Commission 'will offer innovative companies to operate all across our Union under one single set of rules'.[190] Leaving to one side for the moment the questions of why this privilege will be offered only to innovative companies and how this criterion can be operationalised legally (that is *ex ante*), the crucial point here is that the choice will be given to 'companies'. Presumably, the Commission relies here on the familiar legal idea that 'companies' across Europe are 'legal persons', assimilated to human persons, who can carry rights and obligations, conclude contracts, and indeed opt into a legal regime as a form of choice of law. The further assumption then is that legal persons act through their representatives, which in the case of a company would be its management. But what if the radically deliberative assembly decided that this choice should be made, not by the management, but by the workers, perhaps combined with a council of people representing all those on whom the company is imposing social costs ('externalities'), including from the Global Souths? Perhaps such a more radical opt-in regime might make companies' choice for a structurally just 28th non-regime more likely. In this regard, inspiration could be sought from the prefigurative socialist practices of workers' councils.[191]

Non-citizens' initiative

Crucial in deliberative participatory democracy is that it must be empowered. For it to be real, there must be some kind of ex ante political commitment to the outcomes of the deliberation. It seems unlikely that President von der Leyen and her Commission would make such a commitment in this case. Second best within the current EU frame might be that the organisers of the democratic assembly on a revolutionary 28th non-regime commit themselves to turning the outcome of their deliberations into a European Citizens' Initiative (ECI). The ECI is a direct way for citizens to take some control over the Commission's exclusive right of initiative when it comes to European legislation.[192] For now, the democratic space offered by the ECI is very limited and

[190]von der Leyen (n 165).

[191]G Landauer, 'A Free Workers' Council' in G Landauer, *Revolution and Other Writings: A Political Reader* (PM Press 2010); Anton Pannekoek, *Workers' Councils* (1950) <https://theanarchistlibrary.org/library/anton-pannekoek-workers-councils> accessed 12 October 2025.

[192]Regulation 2019/788 of 17 April 2019 on the European citizens' initiative (ECI Regulation).

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hardly radical. All the Commission must do is respond. But more empowering proposals have been made recently.[193]

Yet, one current limitation may prove unsurmountable: its restriction to EU citizens. It is true that the non-regime proposed here would be drafted by citizens and non-citizens alike. Still, mindful of prefiguration's commitment to congruence of means and ends, as long as non-citizens are barred from proposing EU legislation this would preclude any 28th non-regime-ECI from being prefigurative of a radically democratic European society or transnational multitude.[194]

The 28th non-regime has to be conceived beyond the citizen/non-citizen binary. As Hanna Eklund has shown, the legal framework of the EU has racialised the categories of people, state and person right from the beginning. The well-known aspiration, expressed in the preamble of the Treaty of Rome (1957), to create 'an ever closer union among the European peoples',[195] was meant to include only persons who were considered ethnically and racially Europeans. Today, the difference between EU citizens and non-citizens still co-constitutes racial and ethnic hierarchies.[196] Therefore, the 28th non-regime-ECI would have to be proposed deliberately by 'non-citizens' and 'citizens' together, beyond the citizenship line, as if this could constitute already a valid E(non)CI.[197] This could be seen as a form of imaginative legalism, as discussed above, which relies on the well-known indeterminacy of legal concepts. The claim here would be that, as a matter of interpretation, read in light of the EU's founding values stated in Article 2 TEU (in particular, democracy, equality, respect for human rights, including the rights of persons belonging to minorities, in a society in which non-discrimination and justice prevail), 'citizens' in the ECI regulation of course should be read as including 'third-country nationals'. Alternatively, it could be understood as the occupation of the ECI by a decolonial multitude.

Hijacking the political agenda

Another crucial element, at least as important, is that the deliberative assembly should set its own agenda. In this case, this means that the deliberative assembly might not want to limit the substantive scope of the 28th non-regime to corporate, insolvency, labour, and tax law. Perhaps it wishes to add rules against intersectional discrimination, for corporate tort liability for climate harm, or declare unfair core contract terms (including price terms) non-binding,[198] et cetera.

Hijacking the political agenda could mean, in particular, shaking off the shackles of Article 114 TFEU, the current go-to basis for internal market reductionism. This economicist and consumerist gaze, and the ensuing framing of European society and its members, leads not only to undue substantive limits of possibility but also to epistemic injustices and alienation where addressees of EU law are prevented from making make proper sense of their life world. A salient

[193]A Poznańska, *The European citizens' initiative as an instrument of deliberative democracy* (EUI PhD thesis, 2024).

[194]It would also not be a non-reformist reform. Instead, even though possibly radical in content it would remain squarely situated within reformism.

[195]Treaty establishing the European Economic Community (Rome 1957): 'determined to establish the foundations of an ever closer union among the European peoples'. Now, see Art 1 TEU.

[196]The CJEU's recent ruling in CJEU, 29 April 2025, *European Commission v Republic of Malta*, C-181/23, ECLI:EU:C:2025:283, while laudable in its stance against the commodification of citizenship, takes an undue ethical (albeit not explicitly ethnic) turn in its motives, when it states that 'Union citizenship is based on the common values contained in Art 2 TEU' and that 'the bedrock of the bond of nationality of a Member State is formed by the special relationship of solidarity and good faith between that State and its nationals', which degrades de facto (aspiring) EU citizens with different values and bonds of solidarity.

[197]See above, Section 5A.

[198]Contrast, for consumer contracts, the current Art 4 Para 2, Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

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example is the framing of various entitlements as 'consumer rights'.[199] The drafters of a 28th non-regime have nothing to lose but their internal market chains. They have a world to win.

Yet, even within the scope the Commission has in mind, there is a lot of room for radical structural change – indeed for a revolutionary 28th non-regime. Corporate law could abolish limited liability, a 'legal privilege for shareholders', as Katharina Pistor puts it.[200] This would prevent them from being socially and environmentally harmful while hiding behind a corporate veil, much more effectively so than 'corporate sustainability' reporting and due diligence.[201] It could also introduce radical workers democracy and require intersectional balance on boards (if there are going to be any boards). Insolvency law could give workers' claims super priority in case of bankruptcy. Labour law could become labour law. Taxation could tax socially and environmentally unsustainable production. Et cetera.

Legal form

The idea would be for the proposal to have the usual format and style of EU legislation (in this case, probably a regulation), with preliminary recitals, the (potentially pseudo) legal basis, articles, deadlines, etc. This would reinforce the imaginative prefigurative capacity of showing what EU law could look like, also in a very visual sense. That would be a part – perhaps the only one – where (EU) legal experts could play an important role. By occupying the legal form, the authors of the 28th non-regime could show how a structurally more just Europe could be constituted through a radically different EU law (prefigurative European legality). Instead of materialist categorical post-legality it would prefigure a more ambivalent materialist-idealist intersectional (non)legality.

Form is a distinctive aspect of what law has to offer – also when it comes to prefiguration. It is for this reason that prefigurative legal practices play with the form, formalism, and formalities of law. Mere substance would not be prefigurative *law*, just prefigurative politics (which are important, and perhaps all we need, but outside this article's explorative scope). However, it is important to note that the playfulness of prefigurative legality is not meant to deny that the stakes are high – or that the stakes are lowest for those privileged enough to feel safe when playing with the master's tools. The aim – and legal scholars' possible contribution and responsibility – is to dereify and desacralise the legal form by occupying it and making it do different things – indeed turning it into its opposite, from a new legal regime for venture capitalist domination into a non-regime for a radically horizontal society beyond racial capitalism. While playful in form, it is very serious in its refusal to accept full legitimacy of the existing European legal order,[202] and in its hope that a radically different legal (non)order is possible in Europe through different forms of (non) legality.[203]

A new compass

Finally, the proposal could be presented as part of a 'Collaborativeness Compass' for the EU. This compass might be closer to the moral compass of EU (non)citizens than the Commission's 'Competitiveness Compass',[204] which was heavily inspired by the report of former European

[199]MW Hesselink, 'Alienation Commodification: A Critique of the Role of EU Consumer Law' 2 (2023) European Law Open 405.

[200]Pistor (n 107).

[201]Directive (EU) 2022/2464 of 14 December 2022 corporate sustainability reporting (CSRD) and Directive (EU) 2024/1760 of 13 June 2024 on corporate sustainability due diligence (CSDDD).

[202]Legitimacy, in both its empirical and its normative aspects, is a matter of degree. As to the latter, the EU legal order lacks full normative legitimacy, because of its structural injustice and its non-justifiability towards all those subjected to it. On the normative dependence of legitimacy on justice, see R Forst, 'Legitimacy, Democracy, and Justice: On the Reflexivity of Normative Orders' in R Forst (ed), *Normativity and Power: Analyzing Social Orders of Justification* (Oxford University Press 2017).

[203]On this last point, as stated in Section 4A, this article diverges from Pashukanist views.

[204]Communication 'A Competitiveness Compass for the EU', Brussels, 29.1.2025, COM(2025) 30 final.

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Central Bank President Mario Draghi, 'The future of European competitiveness' of September 2024. The Draghi report is obsessed with 'the productivity gap between the EU and the US' and treats the United States as prefiguring the better society the EU could become through a radical transformation (a Draghi revolution).[205]

Instead of emulating the US, the EU could be inspired by relevant experiences, practices and understandings already existing in the Global Souths. Ubuntu or Buen Vivir might provide better guidance as a compass than competitiveness. Rather than running after the US the EU could try to catch-up with inspiring communities in the Global Souths.[206] And instead of seeking a Brussels effect the EU should try epistemic humility.

Prefigurative constitutionalism

Readers might consider this a utopian proposal. Perhaps it is, but maybe one for a realistic utopia. Perhaps drafting a revolutionary 28th non-regime could be prefigurative and bring us some hope for the possibility of a more radically democratic and socially just European Union, where intersectional justice and political (self)empowerment become the litmus tests for justice.[207]

The optionality of the 28th non-regime may be regarded as the weakest link in the idea. However, the opposite may be true. If the 28th non-regime becomes a comprehensive fair-trade regime, then maybe there will be interest from alternative businesses, cooperatives et cetera. And once it works others may follow. That is the whole point of prefigurative politics.

The more comprehensive the substantive scope of the legal non-regime the more it could de facto become the constitution of a new, more just society. And, crucially, that would be de facto a society not locked up in one state but across borders, including the EU's external borders. This, in turn, could de facto contribute to opening up these borders.[208] In other words, the 28th non-regime could be a distinct, radically open prefigurative transnational space.[209]

The spectre of EUtopia

Prefiguration and radical democracy have in common – or rather prefiguration understood as radically democratic entails – a rejection of blueprint utopianism.[210] However, the rejection of blueprints is perfectly compatible with starting from scratch (tabula rasa), exactly through prefigurative practices. The idea is to bring about in the shell of the old society the new institutions for a more just society through radically democratic experimentation.[211] This poses obvious limits to how substantive (outcome oriented) a fundamentally procedural (practice oriented) proposal for a prefigurative 28th non-regime can be. Therefore, the concrete suggestions made here for the content of a 28th non-regime as well as for how to bring it about should be understood merely as a modest attempt (still very much from the centre) at imagining how to reconstitute the European

[205]Ibidem, 5 and passim. Draghi envisages the process as top-down: 'Leaders and policymakers should engage with all actors within their respective societies to define objectives and actions for the transformation of Europe's economy'. (Ibidem, 19).

[206]The Zapatistas in Chiapas and the Kurds in Rojava are often invoked, but there are many others.

[207]Contrast the radically technocratic understanding of the 28th regime as expressed by the current president of the European Central Bank and president of the European Commission (both unelected officials) in their joint op-ed, 'Lagarde and Von der Leyen: Europe has got the message on change', *Financial Times*, 31 January 2025.

[208]For the idea of a bridge between Europe and North Africa ('The Jean Monnet Bridge'), see <https://politicalbeauty.com/rescue.html> accessed 12 October 2025: 'It will be nothing less than a landmark achievement of humanity: a bridge from North Africa to Europe, a lifeline between two continents and the largest economic stimulus package in the history of the European Union'.

[209]Contrary to the 28th regime von der Leyen has in mind, which is just a 'business code', as Politico rightly calls it. See 'What's in von der Leyen's Plan to Save the EU Economy?' *POLITICO* (30 January 2025) <https://www.politico.eu/article/wheres-the-eu-competitiveness-compass-pointing/> accessed 12 October 2025.

[210]Kinna (n 74).

[211]Graeber, 'Occupy's Wall Street's Anarchist Roots' (n 31) ('attempt to create the institutions of a new society in the shell of the old').

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space starting on a small scale – emphatically not as a blueprint for EUtopia.[212] Yet, it also aims to avoid the opposite: a dystopian vision of the EU, which allows no room for EU prefiguration, only exodus into communities who understand a better society as being necessarily outside the EU.

9. Serious times

To be a meaningful alternative, legal prefigurativism must be sufficiently distinguishable from legal reformism, on the one hand, and merely political prefiguration, on the other. This is a challenge. At the same time, for EU law prefigurativism there is the specific circumstance that the EU is legally constituted.[213] This offers an opportunity. Much more than states the EU is a legal artefact. This suggests that any successful EU revolution would be a revolution in its very legal structure. Radical change in the EU means radical legal change. This, in turn, suggests that any prefigurative actions in the EU are most likely to be effective when they target its legal structure. Perhaps a revolutionary 28th non-regime, drafted in a radically democratic way, and targeting intersectional EU injustices, including those done by the EU at its external borders, could show concretely what a better and more just European society could look like, thus providing a glimpse of hope for a better future.

However, it might be objected that our times are too serious for talk about revolution. Faced with the far right's recent shift towards a strategy to 'occupy Brussels',[214] it might be argued, we need to protect and entrench liberal values and institutions against the fascists. This is not the right moment, the argument might go, for radical, transformative change, an EU revolution. And certainly not, it might be added, in the name of intersectional justice, which is unnecessarily polarising.

This can be understood as either a principled or a strategic argument. As to the latter, there exists little historical or contemporary evidence that liberal entrenchment is an effective political strategy to stop the rise of fascism. As to the principled argument, it is submitted that if contemporary liberals took their own principles seriously (especially the Rawlsian difference principle, which is very demanding) then they too should be revolutionaries and engage in prefigurative politics to finally realise for everyone the liberal rights they nominally support. In the words of Emma Goldman, 'no real social change has ever come about without a revolution'.[215]

There is another crucial reason why now is the time for intersectional prefiguration. The far right is racist and anti-queer at heart. People who are racialised or belong to minoritised ethnicities, religions and genders are the ones most under attack and vulnerabilised by their verbal and physical violence. In other words, the far-right revolution is the exact opposite of the intersectional revolution.[216] This has strategic (self-regarding) as well principled implications. As to the former, no one is free unless everyone is. The opposite of domination (eg, the risk of arbitrary arrest) is effective *equal* freedom.[217] The principled side is that in times of threat the safety of those most threatened should be society's first concern.

[212]K Nicolaïdis and R Howse, '"This Is My EUtopia . . . ": Narrative as Power' 40 (2002) Journal of Common Market Studies 767.

[213]For a (too) strong version of this thesis, see Antoine Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (1st edn, Cambridge University Press 2015) 4 ('in the European Union, even more than anywhere else, there is no possible distinction between the 'law' and the 'society'. . . . Legal Europe is co-extensive with Europe itself'.)

[214]S Lynch, 'Occupy Brussels! Viktor Orbán's Plan for Europe' *POLITICO* (8 April 2024) <https://www.politico.eu/article/viktor-orban-plan-europe-hungary-council-presidency-election/> accessed 12 October 2025.

[215]E Goldman, 'Anarchism: What It Really Stands For' in H Havel (ed), *Anarchism and Other Essays* (second revised edition, Mother Earth Publishing Association 1911).

[216]Indeed, in many respects it is a counter-revolution against intersectional justice. The term 'intersectionality' figures prominently among the words banned by the current US administration. For a list of forbidden words, see K Yourish et al, 'These Words Are Disappearing in the New Trump Administration' *The New York Times* (7 March 2025) <https://www.nytimes.com/interactive/2025/03/07/us/trump-federal-agencies-websites-words-dei.html> accessed 12 October 2025.

[217]Keeping in mind Martin Niemöller's poem, often cited these days, 'First they came'. ('Als die Nazis die Kommunisten holten, habe ich geschwiegen; ich war ja kein Kommunist. . . . Als sie mich holten, gab es keinen mehr, der protestierte').

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But what about protecting democratic laws? In a recent comment, leading voices from the Law & Political Economy movement thoughtfully stated the issue as follows: 'LPE scholars emphasise how law both enables and constrains democratic aspirations and liberation movements. But law's repressive face dominates in times of authoritarian crisis. At those moments it falls to organisers, activists, lawyers, and community-members of all kinds to sustain law's democratic potential. We are committed to ensuring that LPE continues to be a space that fosters those sorts of efforts and movements'.[218] I could not agree more. And it is in this same spirit that this article has tried to show how different forms of radically democratic law can prefigure a society without structural violence or hierarchies. It is important, in this regard, not to conflate democratic legitimacy with existing institutions. Indeed, the LPE statement rightly emphasises law's democratic *potential*.

In addition, it might be thought, we must now unite and stand together against existential threats coming from without. In this historical moment, we must protect what we have and stand united. Indeed, now that Europe is finally uniting, in response to external threats, the argument might go, we should seize this unique occasion of widely felt European unity and move fast forward on the path of integration. This second, and partly relatedly, objection brings us back to the question of violence. Is prefiguration possible under conditions of (perceived) violent threats and attacks? Today, the European Union is back into full crisis mode, where Commission and Council take the lead and the European Parliament is bypassed as usual, but this time *in the name of defending democracy* against external enemies. A semi-permanent crisis modus, where rearmament is presented as militant democracy, may well be predictive of where the EU is heading in the new world order in which the EU's democratic deficit is perceived as minor compared to the authoritarian regimes surrounding it. Yet, it is decidedly non-prefigurative of a radically democratic society. Indeed, the very idea of congruence of means of ends would require a radically democratic defence of democracy. And where this is lacking, radically democratic prefigurative practices and institutions could provide a source of hope, which seems needed more than ever in troubling times. It should be noted, finally, that wherever the external threats to the EU come from it is not the countries in the Global Souths. This suggests there is all the more reason for the EU to start seeing these countries as they are and open up towards them.

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[218] AÜ Bâli et al, 'Statement on Recent Events' (*LPE Project*, 13 March 2025) <https://lpeproject.org/blog/statement-on-recent-events/> accessed 12 October 2025.

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