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Prefigurative Legality

Amy J. Cohen and Bronwen Morgan

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Since the early 2000s, many of the left groups that spurred the alt-globalization movement have embraced directly democratic organizing and the creation of ethical relationships and subjectivities far more than they have pursued projects to reform legal and political institutions. These practices are often described as prefigurative because people are working to build alternative possible futures in the here-and-now outside of dominant statist and capitalist rationalities. In this essay, we ask if prefiguration can also involve imagining legal forms anew. Drawing on Amelia Thorpe, Owning the Street: The Everyday Life of Property (2020), we discuss contemporary efforts to use the language, form, and legitimacy of law to imagine it otherwise, efforts that occur through various kinds of direct actions rather than primarily through appeals to courts, legislators, or other state officials. In so doing, we point to an emergent field of critical and sociolegal scholarship that we call prefigurative legality.

INTRODUCTION

Have left social movements turned away from law? Since the early 2000s, many of the groups that have spurred the global justice or alt-globalization movement have "rejected top-down organisation, lobbying and programmes to seize state power" (Gordon 2018, 523). These actors do not propose to transform state institutions through litigation, legislation, and electoral politics.[1] Rather, they embrace long-standing antihierarchical and anticapitalist practices: "decentralised organisation in affinity groups and networks, decision-making by consensus, voluntary and non-profit undertakings, lower consumption, and an effort to identify and counteract regimes of domination and discrimination … in activists' own lives and interactions" (Gordon 2018, 523; see also Yates 2015). Here, social change does not entail a great rupture miraculously coordinated from above or a revolutionary ground swelling from below. Rather, it

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1. Eve Darian-Smith compares the Occupy movement of the aughts to the American civil rights movement of the 1960s and 1970s. Occupy activists, she ventures, did "not typically [embrace law] for its emancipatory potential or [see it] as a strategy by which to resist or change the status quo" (2013, 16).

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entails the accumulation of millions of everyday practices that presuppose current socioeconomic structures and yet call forth new social worlds.

These practices are often described as *prefigurative* because people are "creating a vision of the sort of society [they] want to have in miniature," and they are endeavoring to proliferate and diffuse their desired visions among others (Graeber 2011; Yates 2015). As such, people do not make demands of the powerful political and legal institutions they deem illegitimate. Instead, they proceed as far as possible *as if* these institutions did not exist (Graeber 2009, 203).[2]

Albeit perhaps not entirely. As this essay will explore, actors practicing prefiguration today are experimenting with state forms and institutions, including by playing with legal concepts such as property and ownership. The activists we describe in this essay do not proceed primarily by lobbying the state to alter formal legal frameworks. And yet some use legally inflected tools and forms to enact in the present, and anticipate for the future, their own desired understandings of legality—understandings that exceed what is officially available to them now.

We offer the term "prefigurative legality" to describe 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. In keeping with the structure of a review essay, we anchor our discussion of prefigurative legality in a book that articulates a rich empirical foundation for the ideas and propositions we draw out and extend: Amelia Thorpe's monograph *Owning the Street: The Everyday Life of Property*. *Owning the Street* describes PARK(ing) Day—a day that, since 2006, has occurred in cities around the globe when activists claim spaces designated for car parking and repurpose them to meet very different social needs, for example, a parklet where people can sit and read or establish a temporary micro vegetable garden with a seed giveaway. Participants frame these interventions "as legal" (Thorpe 2020, 2). They engage with government claims to control the space: by paying the parking meter and receiving a ticket, people hold themselves out as entitled to repurpose spaces otherwise devoted to cars. In colloquial terms, they insist they have "leased" the space and are therefore free to put it to new uses—uses that enact in the present, at the same time as they limn for the future, a vision of a society with very different public streets.

Readers may be surprised by our choice of Thorpe's book to ground our discussion. Leasing a parking spot through a meter for a short period of time may seem like a tiny gesture on which to build a theory of prefigurative legality—indeed, it is a gesture about which it may seem difficult to imagine that someone wrote an entire book. *Owning the Street*, however, is not about parking spaces as much as about how temporary, bounded moments can reveal long-standing efforts to reimagine a social order (and here its rules of property) in common—and in ways that confound conventional categories for legal action. Thorpe's interlocutors 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. As sociolegal scholars have long observed, it is often in moments of such alternative

2. In David Graeber's words: "[O]ne does not solicit the state. One does not even necessarily make a grand gesture of defiance. Insofar as one is capable, one proceeds as if the state does not exist" (2009, 203).

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play that new transformative worlds and strong critiques of the current order are imagined and sustained (Cooper 2014; Gershon 2019). We therefore suggest that even (or especially) in PARK(ing) Day's small and organized performance of the "as if," there is much to understand about prefigurative legality.

This essay proceeds in two sections. First, we briefly introduce readers to the idea of prefiguration, turning to *Owning the Street* to sketch how the book represents, for us, a significant exploration of prefigurative legality. In the second section, we reach beyond PARK(ing) Day to elaborate prefigurative legality, first, through other forms of reimagining, such as peoples' tribunals and alternative judgment projects, and then by putting prefigurative legality in dialogue with two left critical traditions in law—sociolegal studies and critical legal studies—to make it more legible, and in ways we hope will encourage debate about its distinctiveness and potential as a field of study and legal practice.

PREFIGURATION AND *OWNING THE STREET*

What Is Prefiguration?

Social movement scholars have popularized the term "prefiguration" to describe "a broadly anti-authoritarian, horizontal, participatory style of organising" that increasingly characterizes left social movements today (Yates 2021, 1034). Movement actors practicing prefiguration typically share the following commitments: an attention to one's own and others' consciousness, interactions, and social relations ("How do you expect people to build an alternative society if they never have the chance to live it?" (Swain 2019, 51)); a correlative insistence that means should reflect ends (e.g., "be the change you want to see"); the idea that means and ends should enact particular left values including antiauthoritarianism, antihierarchy, anticapitalism, and antipaternalism; and finally, a poststructuralist sensibility. This last point is to say that activists do not envision "a core where power is concentrated … [where] there will be people who are 'particularly well placed'" to bring about structural change on behalf of others (Maeckelbergh 2009, 91, quoting May 1994). Instead, "everyone has to take responsibility for bringing about the change they desire" (Maeckelbergh 2011, 14; see also Franks 2003) and everyone, as one popular book title puts it, can aspire to "change the world without taking [scaled-up, centralized] power" (Holloway 2002).

As a social movement practice, the term prefiguration is often attributed to Carl Boggs. In 1977, Boggs drew on the work of nineteenth-century anarchists to define prefiguration as "the embodiment, within the ongoing political practice of a movement, of those forms of social relations, decision-making, culture, and human experiences that are the ultimate goal" (1977a, 100). But whereas nineteenth-century anarchists engaged their Leninist-Marxist adversaries in debates about how to pursue revolutionary social change, Boggs was writing in a moment when leftists in Western states increasingly eschewed revolutionary struggles in favor of "structural reformism." Structural reformers proposed to use national and local governments, elections, and trade unions to enact socialist goals from within. Boggs, however, argued that classical Leninism and structural reformism shared the same problem. There could be no "anticipation of the future

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in the present" in either approach to social change because both depended on instrumental rationality and hierarchical forms of authority to effectively obtain or reform centralized state power (Boggs 1977b, 363).

Boggs offered prefiguration as a partial solution—as a means of radically democratizing "a revolutionary praxis that would avoid reproducing in some way the values and institutions of bourgeois society" (1977b, 363). Prefigurative struggles, he explained, are closer to worker consciousness and everyday life—in them, the state is not the primary actor or "the main arena of participation" (1977b, 381, 383–84). For example, Boggs described: "local, collective small-scale organs of socialist democracy (e.g., workers' councils, soviets, action committees, neighborhood associations) that can give expression to the spontaneous and total energy of popular struggles because they are more closely merged with such struggles" (1977b, 363). Today, activists likewise insist that people can build new communitarian social relations and institutions "*to some extent*, despite capitalism and within the struggle against it" (Raekstad and Gradin 2020, 71; see also Gibson-Graham 2002, 2006; Wright 2010). Indeed, proponents insist that "developing new patterns of social interaction and dismantling others over time" *is* a process of changing social structures (Raekstad and Gradin 2020, 55).

Boggs, however, also described approaches to political action where a struggle for state power was not "contemptuously dismissed" even as it "was never defined as the overriding goal, nor viewed in vanguardist or electoral terms" (1977a, 105). Paul Raekstad and Sofa Saio Gradin (2020, 125) thus read Boggs as advocating for a diversity of approaches—that is, for proposing to combine prefigurative politics, on the one hand, with confrontational and reformist strategies, on the other hand, as actors endeavor to transform state power without being transformed by it. Or, in Raekstad and Gradin's words, as actors engage with the following dilemma: "[Y]ou accept that taking existing state power inevitably corrupts you, yet if you don't take state power, it will be used to crush you" (2020, 125–26).

Today, many people practicing prefigurative politics appear increasingly unwilling to cede reform of the state entirely to others, and hence they propose to combine prefiguration with other kinds of non-prefigurative strategies. As Marianne Maeckelbergh argues in her widely cited ethnography of alterglobalization movements:

> Prefiguration is the ideal strategy for the construction of an alternative world without engaging with the state or other powers that be, but movement practice must also incorporate a confrontation with these powers, which cannot always be prefigurative. (2009, 95; see also Cornell 2011[3])

Or as Raekstad and Gradin elaborate:

> [A]lternatives to prefiguration include protest marches and demonstrations . . . ; parliamentarism . . . ; winning legal battles in courts; subversion and

3. Cornell (2011, 163) describes how in the 1970s, the Movement for a New Society based in Philadelphia "sought to balance the development of prefigurative counterinstitutions with adversarial organizing campaigns."

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> parody . . . ; many forms of separatism; and armed uprisings. These . . . tend to be measures that are considered necessary in the current context to enable or promote social progress. (2020, 37–38)

As these quotations suggest, there are a variety of strategies available to those who promote left reflective transformation (we could add civil disobedience and utopianism to Raekstad and Gradin's list). Without becoming overly mired in definitions, the point we wish to stress is that left activists today typically distinguish between prefigurative and non-prefigurative strategies based on their engagement with the state. Non-prefigurative strategies are pursued for their potential to engage with state power in a transformative fashion—a confrontation that, in turn, requires actors to operate according to a means-ends rationality. Amna Akbar (2020), for example, characterizes some of these actions as nonreformist reforms, drawing on the work of Bogg's interlocutor Andrew Gorz. Nonreformist reforms are *means* desirable under certain conditions for the transformative nature of the ends they aim to advance, progressing society closer to communal ideals. Akbar gives the example of lobbying to abolish the death penalty, which could be a nonreformist reform when it contributes to undermining the carceral state but not when it legitimates life sentences (Akbar 2020, 102–03).

By contrast, for many activists, prefiguration entails withdrawal from the state, not least because they understand "the state" not simply as a set of political institutions but more fundamentally, as anarchist theory teaches, as a set of internalized self and social relations (Day 2005, 124–25; Landauer 2010, 214; Cooper 2019, 20). As such, prefiguration—constructing self and social relations otherwise—is understood to happen outside of these state hierarchies and rationalities: for example, in autonomous social groups that practice radically egalitarian forms of decision making, self-governance, and dispute resolution (see, for example, Cohen 2013). It follows that prefiguration also entails rejecting the temporal means-ends rationality that governs in most statist/capitalist systems for a form of social action where people "[implement] desired future social relations and practices" in the means of struggle (Raekstad and Gradin 2020, 38).[4]

Recent work by sociolegal scholars, however, is turning up different approaches to prefiguration that combine action in the here-and-now with intentional efforts to change state political and legal institutions. In her pioneering analysis, Davina

4. We should add this temporal orientation takes different forms. For some, "the revolution exists in the present," so to speak; hence, means must mirror ends directly. For example, some Occupy activists experienced the occupation of public space as its own end: "a portal to a world where public space is (already) deprivatized" (Wagner-Pacifici and Ruggero 2020, 692). For many others, ends are not knowable in advance. Hence, means must enact nonhierarchical, communal, social relations while advancing a new future through collective action. In this spirit, other Occupy activists occupied public space building alternative societies in miniature that were not only ends but also means to pursue a wider range of struggles (e.g., "corporate influence in government, public education funding, mass incarceration, environmental issues, etc.") (Wagner-Pacifici and Ruggero 2020, 686). For another rich analysis of how different temporal logics animate prefigurative politics, see Gordon (2018). Gordon contrasts what he describes as contemporary generative experimental approaches to means-ends unity with "prefiguration as a recursive temporal framing central to Christian theology" where glimpses of a preordained future emerge in the present (i.e., "a figure of things to come") (2018, 522, 524).

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Cooper ventures that people are "prefiguring the state" (2017, 335) through interventions that "do not depend on taking ownership of its apex but instead involve dense, repeat efforts to re-perform governing practices and systems, and the connections between them, differently" (2019, 109; see also Cooper 2020). Some of Cooper's (2021) examples: "[L]ocal councils may respond to civil society urgings that their policies treat gender as self-determined and no longer binary. Councils may act as if they are entitled to engage in foreign relations, exercising international solidarity, for instance, by participating in the pro-Palestinian boycott of Israel."[5] Likewise, Mohammad Afshary (2018) explores how during Egypt's 2011 uprising, lawyers defended arrested revolutionaries in openly hostile and oppressive spaces, such as police stations, courts, and detention facilities, as if these institutions embodied a radically different legal-political culture. Afshary describes this activist lawyering as both an act of solidarity based on shared revolutionary commitments and as an effort to prefigure a postrevolutionary idea of legality as a common egalitarian value.[6]

It is here that we turn to *Owning the Street*. We read Thorpe's rich empirical text alongside this literature because it illustrates an amalgamated practice—one that is not easily characterized *either* as an effort to confront-and-reform state power toward radical ends *or* as about creating radical alternatives in the present without engaging the state.[7] To be sure, readers familiar with PARK(ing) Days may already understand it as a familiar example of DIY urbanism: practices such as guerrilla gardening, community gardens, repair cafés, and clothing swaps that scholars have characterized as prefigurative because they create alternatives in the present linked to different imagined futures (see Deflorian 2021). But what makes Thorpe's case distinctive and significant are the playful, even "polite," ways (Thorpe 2020, 264) that PARK(ing) Day proponents act as if they have a legitimating contractual arrangement with local state authorities, and how they use legal logics to render property more social, sustainable, and common.

In what follows, we characterize 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-centered legal ideas of contract and property rights. More specifically, we describe Thorpe's overarching claim—that PARK(ing) Day translates

5. Cooper's works from 2021, 2019, and 2017 have their own intellectual provenance in a much earlier article by her (Cooper 2001). This earlier work, however, separates prefigurative community practices from de jure legal-governance pathways for change, while the later work articulates a nuanced interplay between state, law, and community practices that helps motivate our investigation of prefigurative legality.

6. For other recent examples of scholars exploring how prefigurative practices can merge with more traditional forms of political and legal governance, see Ceric (2020), Monticelli (2021), and Clarence-Smith and Monticelli (2022). In brief, Ceric (2020, 265) submits that legal collectives that provide jail support for protestors in North America advance a "prefigurative legal imagination" through practices of mutual aid that are "accountable to other movement participants and [resist] (if not always successfully) the professionalization and service- provision models of lawyering from above." Monticelli (2021, 115) more broadly argues that "some of the most recent social movements, such as Black Lives Matter, Extinction Rebellion and the Sunrise Movement, are … blending prefigurative practices with conventional counter-hegemonic tactics" as a pathway for progressive politics. Clarence-Smith and Monticelli (2022) describe how the intentional community of Auroville has developed its own prefigurative economic and political arrangements while simultaneously forging a cooperative relationship with the Indian state.

7. Cooper's work has influenced Thorpe; Cooper wrote the preface describing PARK(ing) Day as an example of "coming into being through being done" (Thorpe 2020, x).

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familiar, everyday understandings of property into "deeper social claims about ownership" (2020, 23)—as an example of prefigurative legality.

Owning the Street

Owning the Street begins as the story of a design collective called Rebar that, in 2005, built a parklet in a metered parking space in San Francisco. Images of the parklet circulated widely through burgeoning online networks, engaging activists and creative class professionals, prompting Rebar to publish a free open-source template with DIY instructions. These instructions included directions for would-be creators to research their local road rules and to arm themselves with legal arguments, alongside appeals to civic pride, should they be confronted by police. Thorpe explains that Rebar "placed considerable emphasis on the legality and legitimacy of their method"—namely, using a parking meter to create a "lease" (2020, 93–94). Via detailed case studies of San Francisco, Montreal, and Sydney, *Owning the Street* illustrates how this "lease logic" motivated popular adaptations of PARK(ing) Day interventions, propelling people to action even as no official interpretation of parking ordinances would likely justify such broad rights of possession. Following Rebar's example, early adopters leased parking spaces to make pop-up parklets, perhaps constructed modestly from Astroturf and folding chairs. Other activists soon innovated to create a range of public offerings: free health checks, small vegetable gardens, seed giveaways, play spaces with community games, libraries, wedding vow renewal ceremonies, murals, free lunches, food for migrant laborers, yoga classes, bike repair stops, petting zoos.

Over the course of a decade, these temporary and ambiguously lawful occupations of public space—"playing in the rules but you're not," as one activist put it (Thorpe 2020, 93)—diffused globally among diverse actors. These included loosely organized groups involved in traffic calming as well as other social and environmental struggles, but also nonprofits, foundations for arts and architecture, university initiatives, owners of small businesses such as cafés and bike shops, design and built environment professionals and the firms that employ them, artists, some lawyers, and even public planners and officials intrigued by these endeavors, including their liminal legal status. Actors, in turn, linked PARK(ing) Day events to a diverse set of issues: "from statements about gay rights to challenging the dominance of big oil, from providing services for vulnerable communities to raising awareness about local environmental issues" (Thorpe 2020, 85). And yet, Thorpe argues, when people come together on the street even without "a clear or unified message," they advance a collective claim about "the kinds of activities for which the street should be used, and the kinds of processes through which these should be decided" (2020, 122). Through physical actions on the street—through "(re)inserting noncommercial spaces into increasingly privatized cities where people can feel unwelcome—even barred—if they are not purchasing something" (2020, 149)—PARK(ing) Day "succeeds in drawing people to think not just about how the city *could* or *should* be, but how it already *is*" (2020, 127–28).

Thorpe, we must acknowledge, does not describe the accumulation of these temporary events as a social movement, even as some of her interlocutors use this term. Rather, she describes PARK(ing) Day as a "vehicular idea," borrowing McLennan

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and Osborne's (2003) phrase to describe an open-ended practice that mobilizes diverse actions and here hooks up to the larger ways people attempt to transform urban spaces (2020, 79). Thorpe hesitates to use the label "social movement" because the actors in her case studies do not necessarily share a collective identity that unites them in, say, left anticapitalist environmental struggles. What they do share, Thorpe repeatedly stresses, is a lay logic about *legality*: "Central to the vehicularity of the PARK(ing) Day idea is its invocation of legality" (2020, 79).

PARK(ing) Day activists do not squat. As one explained: "It was important to me that it was allowed" (Thorpe 2020, 145). Or another: "As long as you paid the meter you're technically entitled to use the space as you wish" (Thorpe 2020, 194). Nor, however, do activists protest municipal governance or call for its reform. One contrasted PARK(ing) Day with his more "draining" forms of activism "focused on challenging power" (Thorpe 2020, 189). Rather, PARK(ing) Day participants use the legitimating purchase of possessory rights via a meter to disrupt and redistribute people's commonsensical ideas about how to see and use the city. Law itself, Thorpe argues, "becomes the vehicular idea" that "creates a new space for intervention in the city" (2020, 94). And an idea, we delight to add, that law enforcement sometimes participated in. For example, Thorpe reports one officer asked a group to move their parklet when a meter expired; another traffic cop asked a group to move their event from a free to a paid parking space, participating in the idea that alternative uses are rendered lawful through the contractual act of offer and acceptance mediated by a parking meter (2020, 99). PARK(ing) Day, Thorpe argues, offers "'a tactic at once radical but superficially unthreatening to the system of spatial commodification it critique[s]'" (2020, 92, quoting Rebar).

Thorpe's central claim is that PARK(ing) Day accomplishes a measure of decommodification by playing with property and thus "[c]onnecting what might seem a frivolous activity with deeply felt human needs" (2020, 131). More specifically, Thorpe shows how her interlocutors mobilize lease logic to construct alternative understandings of ownership. When PARK(ing) Day activists talk of ownership, they reference but simultaneously rearticulate formal legal categories such as title ("the city owns the street. The city though is also made of people" (Thorpe 2020, 135)). They also describe a moral or social feeling of belonging to a specific place that authorizes their agency and legitimates their actions. For that reason, people typically created PARK(ing) Day events in the places where they themselves lived, worked, or studied, and they often argued to restrict future events to places where participants experience familiarity and local connections. Likewise, many felt that being seen by local others—engaging passersby in a snack, a seat, a game—was crucial to building the experience of place-based belonging that animated and justified their claims to exercise voice and control over the use of urban land.

To now translate Thorpe's analysis into the language of the argument we are suggesting: PARK(ing) Day activists advance a claim about property and power, indeed, one that depends on material objects such as streets, meters, and building materials, as Thorpe richly illustrates (2020, 177–81). However, the property claim they are advancing is not to a thing or to a territory, let alone a claim to exclusive control over things or territories. Instead, it is a claim to a place—legitimated by people's shared experiences of belonging to that place—produced through their interdependent, overlapping, and

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shared interests, collective labor, and expressions of identity.[8] People are thus using existing forms of legality (and the social legitimacies legality offers) to construct alternative communitarian understandings of property through temporary, playful experiments in the here-and-now. Hence our descriptor: *prefigurative legality*.

Part of what makes this collective reconstruction possible, Thorpe explains, is a matter of affect. People experience their interventions as joyful and fun: "Ownership is something that people choose to take, and play, pleasure, delight, and even love are key drivers of that choice. The fun and frivolous aspects of PARK(ing) Day are not simply enjoyable, but productive" (Thorpe 2020, 158). Social movement scholars similarly argue that prefigurative politics appeal for the pleasurable experiences of meaning-making they enable in the present. "Social change isn't deferred to a later date by demanding reforms from the state, or by taking state power and eventually instituting these reforms," Maeckelbergh stresses (2011, 4, citing Sitrin 2006). "In this way," an anarchist collective explains, "we ... avoid the feelings of worthlessness and alienation that result from believing it is necessary to 'sacrifice oneself for the cause', and instead live to experience the fruits of our labours ... in our labours themselves" (Gordon 2007, 42). Or, as one of Thorpe's interlocutors put it: "[L]et's transform the world, let's do it together right now and do something, and create something together" (Thorpe 2020, 188).

Thorpe repeatedly describes the everyday legality at work in PARK(ing) Day as both pleasurable and performative: throughout the book, she examines "the lease" for what it does, how it organizes people, and animates their actions.[9] But she also makes clear that some of her interlocutors approached PARK(ing) Day with an entirely instrumental, means-ends oriented (not at all prefigurative) sensibility. For example, some flatly dismissed their own PARK(ing) Day events as too small to influence decision makers (2020, 227) or as generally not worth the effort: "If I thought I could kill a motorway by having a parklet there for one day I'd be out there doing it every day! For what I thought I could get out of it, I wasn't putting the effort in" (2020, 228).

Attentive to these sorts of criticisms, *Owning the Street* ends with a discussion of PARK(ing) Day's strategic implications as well as some of its political dangers. On the one hand, Thorpe emphasizes how PARK(ing) Day has produced transformations in self and social relations—the kinds of changes that, if broadly diffused, would mean people share radically different social and legal understandings of ownership and a right to the city. She also catalogs some of the more discrete and immediate policy changes that readers can interpret as following from PARK(ing) Day's zeitgeist: for example, an ordinance in San Francisco facilitating parklets, "build outs" in Montreal where planners extend the curb to create more pedestrian and green space, and other changes in planning toward pedestrian-centered design (2020, 224–33).

On the other hand, Thorpe is mindful of those who argue that experiments in DIY urbanism fail to reimagine the city in the interests of low-income, nonwhite, immigrant,

8. We are indebted to conversations with Ileana Porras for this description.

9. Following Ewick and Silbey (1998), Thorpe also links this description of collective action to legal consciousness studies. Legal consciousness, she reminds readers, is "produced and revealed in what people *do* as well as what they *say* .... [It] is always a collective construction that simultaneously expresses, uses and creates publicly exchanged understandings" (Thorpe 2020, 114, quoting Ewick and Silbey 1998 (emphasis in original)).

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working-class people and instead unwittingly produce opportunities for gentrification and co-optation by clever corporations and governments. These opportunities are perhaps especially enticing for an intervention like PARK(ing) Day—a form of polite activism, as her interlocutors themselves reflect, not equally accessible to all. Thorpe often describes PARK(ing) Day activists as relatively privileged young professional-class "could haves" (2020, 209), who already feel a measure of belonging to a place even as they simultaneously feel some precarity and alienation, not least because property ownership appears out of reach. White American men acknowledged that they, but not others, could occupy a parking space without fear of police violence (2020, 210). Other activists noted how a certain level of community stability and safety preceded and enabled their interventions ("[I]f you don't feel part of a community or if you don't feel like you belong somewhere, then there's not much motivation to get involved" (2020, 209)).

Thorpe's conclusion is double-edged: "To suggest that PARK(ing) Day should do more to address wider structural issues like neoliberal enclosure, colonial dispossession or the right to the city for vulnerable groups is perhaps hopeful in suggesting that tiny, temporary interventions *could* make a difference in the face of systemic challenges such as these" (2020, 261). That is, Thorpe declines to relinquish the political value, creativity, and pleasure of small-scale prefigurative organizing. At the same time, she implicitly expresses some skepticism about what these actions can *do*, especially given the wider structural issues that can make significant social and political change feel impossible. Or put another way, if there is joy in working through distributed, present-tense direct actions, there are also intense "emotional challenges" (Raekstad and Gradin 2020, 102). As Raekstad and Gradin explain, in a world riven by inequality, exploitation, and oppression, "prefigurative organising is by design a constant failure, always falling short of the desired future society towards which one is working" (Raekstad and Gradin 2020, 102).

We turn now to a consideration of other efforts by actors for whom "demanding the impossible becomes the very opening of possibility as such" (Arditi 2003, 89, cited in Afshary 2018, 59). We begin by sketching prefigurative legality conceptually, building on PARK(ing) Day as well as two further examples: the convening of peoples' tribunals and the writing of alternative judgments. Then, we illustrate how prefigurative legality resonates with sociolegal scholarship and critical legal studies, in part to frame the contours of what we view as an emerging field, and in part to encourage interventions and responses from diverse yet related areas of scholarship. Both these objectives are invitational, underpinned by a conviction that theorizing in a prefigurative mode—imagining and enacting different possible futures in the here-and-now—is an important practice and orientation in a time of overlapping ecological, political, social, and economic crises and imminent tipping points.

PREFIGURATION AND LAW

What Is Prefigurative Legality?

Prefigurative legality is not, as far as we know, a term of art describing a current field or practice in sociolegal scholarship. Its orientation toward law is not fully captured

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either by theories of "strong legal pluralism" (Griffiths 1986) that explain how parallel nonstate and state legal systems differentially govern in the same social field (for example, Moore 1973), or by theories of illegality that link civil disobedience and explicit rule violation to legal change (for example, Peñalver and Katyal 2010; see also Thorpe 2020, 145–46). But prefigurative legality may be an emerging field shaped by legal scholars writing in directions that engage with prefigurative thinking.[10] It may also capture some of the work advanced by scholars and practitioners who—without using this language explicitly—bring prefigurative practice to traditional legal forms and structures.

In this section, we sketch four characteristics of prefigurative legality. But first, a caveat is in order. As we have seen among PARK(ing) Day activists, the lines between prefiguration (enacting a desired future in the present) and reform (e.g., persuading official decision makers to "kill a motorway") may blur easily—and sometimes purposefully—in participants' intentions, interpretations, and practices. Likewise, participants may engage in PARK(ing) Day (or in the following examples) with multiple understandings of legality, including traditional ones. For some, prefiguration may be a partial and tentative strategy; for others, it may not be an entirely explicit or even fully conscious undertaking. What follows, then, is our effort to bring more consciousness to what we see as a distinctive, if also potentially incomplete and transient, transformative legal practice.

The first characteristic, which we shorthand as *pluralism*,[11] describes how actors use the diverse meanings, powers, and performative capacities embedded in law by bending them toward new and unexpected arcs. As we saw vividly with Thorpe's interlocutors, people may exploit the fact that what sounds like a singular or unambiguous meaning of a legal term ("a lease")—governed by an official statutory or adjudicatory interpretation—has different social meanings and practices responsive to this term. Of course, this idea—that law *is* what people *do* with it on the ground—is a basic realist insight (Holmes 1897; Pound 1943). Sociolegal scholars built on this insight to develop nuanced analytical tools to study law-in-action (Silbey 2002). With a more normative bent, critical legal scholars popularized the term "indeterminacy" to argue that things could be otherwise; indeed, "to displace the feeling of complacency, or resigned necessity to an unpalatably conservative legal regime with a sense of possibility" (West 2011, 157). It is how people use this sense of possibility to enact desired futures in the present through drawing on legal techniques, meanings, and practices that prompts us to describe their interventions as examples of prefigurative legality.

The second characteristic, *acting "as if,"* closely follows. It is about cultivating different ways of being and of relating to law—and simultaneously insisting that these ways

10. Cooper (2001, 2017, 2019, 2021); Davies (2007, 2017, 2022); Enright, McCandless, and O'Donoghue (2017); Houghton and O'Donoghue (2020); Morgan, Thorpe, and Cooper (2021); Thorpe and Morgan (2022); and Thorpe (2022) all provide indicative starting points, and are all members of a Collaborative Research Network convened by Bronwen Morgan, Davina Cooper, and Amelia Thorpe, under the umbrella of the Law and Society Association (LSA). Entitled *Utopian Legalities, Prefigurative Politics and Radical Governance*, the network has hosted two online workshops (on conceptual prefiguration and on failing utopias) and eight panels across the 2021 and 2022 LSA conferences. For other generative examples, see Afshary (2018); Kinna (2019); Ceric (2020); Sheikh (2021); White (2022); Clarence-Smith and Monticello (2022); Canfield (2022); and Ashar (2023).

11. With the word pluralism, we do not mean to invoke the literature of legal pluralism, particularly not of strong legal pluralism and its investigation of nonstate forms of legal ordering (as indicated above), although there are certainly conceptual affinities with legal pluralism's basic idea that multiple legal meanings and systems coexist in nearly all societies (Merry 1988).

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of being already exist (and perhaps have for a very long time).[12] It likewise blends sociolegal and critical legal insights. If, as sociolegal scholars argue, law is a tool that helps constitute the identities of its users (see, for example, Silbey 2002), then we wish to capture something of the phenomenology of liberating oneself from the felt constraints of "false necessity" (Unger 1987). That is, with the phrase *acting "as if,"* we wish to depict how people deploy legal logics and thoughtways as an experience of individual and collective self-constitution. When people engage law in ways that transcend or transform any likely official authorization or application, they are acting as legal subjects oriented not, or not only, toward making demands on the state but proceeding *as if* they already have legal power.

To be sure, this is a tricky characteristic to capture (let alone to anticipate or predict). People sometimes describe experiencing a kind of alchemy when, acting with others, they feel relationships shift and see possibilities anew.[13] Others describe a practice more akin to survival—a way, quite literally, to live within a violent colonial legal system. As Indigenous Australian scholar Irene Watson explains, "[T]hough I am dispossessed and assimilated .... I still belong to country .... Belonging to country is an old idea that keeps us alive and in which we live to pass onto our children and theirs to come" (Watson 2008, 107). In Australia, belonging to country may entail playing with legality to rearticulate the legitimate possession of territory—the Aboriginal Tent Embassy and the "pay the rent" movement are two fertile examples.[14]

The third, again closely related, characteristic describes how people may *act "notwithstanding"* their own skepticism of progressive legal change. *Acting "notwithstanding"* is thus our effort to describe how actors will themselves to have legal power—and to invest energy and activism into legal forms and logics—notwithstanding their dissatisfaction, and sometimes deep loss of faith, in the capacity of traditional state-based modes of law reform to secure progressive material effects, at least in the short term. Here people temper their loss of faith with an enduring hope that legality remains a desirable pathway toward institutionalizing new, if uncertain and open-ended, progressive modes of social organization. For this reason, people may bring a playful ethos or a

12. Of course, there is extensive theorization of the "as if" in legal and social thought. Margaret Davies reminds readers that Hans Vaihinger's *The Philosophy of As-If* (1925) informed Han Kelsen's eventual description of the basic norm as a fiction, and she argues more broadly that the entirety of law is upheld by thinking and acting "as if" it is valid (Davies 2017, 123). See Riles (2017) as well as, more generally, Nancy (1996); Appiah (2017); and Yngvesson and Coutin (2023).

13. See, for example, the excerpt from the *Permanent Peoples' Tribunal Ruling on Free Trade, Violence, Impunity and Peoples' Rights in Mexico* (2014), quoted in the next subsection of this essay.

14. The Aboriginal Tent Embassy was established in January 1972 as a protest site outside the then Parliament House building to highlight the illegitimacy of the settler government. As Paul Muldoon and Andrew Schaap (2014, 219–20) elaborate:

> The demonstrators act, on the one hand, as Australian citizens who are made alien in their own land by the continuing process of colonial dispossession with which the constitutional order is complicit. On the other hand, they act as members of a pan-Aboriginal sovereign nation, whose recognition the constitutional order requires to become legitimate.

The "pay the rent" movement also emerged in the 1970s (though with longer roots stretching back to 1837) as a call to recognize Aboriginal sovereignty by encouraging financial and other transfers among citizens to fund institutions such as community-controlled health or legal services (Leah and Thorpe 2018).

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sense of open-ended experimentation to their legal interventions—sometimes their play is lighthearted, sometimes it carries the intergenerational pain of colonial dispossession. But they continue to draw on legality's specific modes of legitimacy, statuses, and logics. Like Thorpe's interlocutors, people may engage in transgressive interpretations of law *but* without seeking to break law or to fundamentally undermine its social authority as a governing principle—and yet at the same time, without seeking or inviting permission from authoritative interpreters or official decision makers (see Kinna 2019, 148).

The final characteristic, *acting "anyhow and in case,"* captures a distinctive approach to strategic goal-orientation and imagination. As we suggested, people engaged in prefigurative projects aim to create alternative desired futures in the here-and-now. As such, they do not operate according to tightly calibrated instrumental calculations between their social interventions, on the one hand, and desired law reform, on the other. To the contrary, they work to dismantle clear distinctions between means and ends. And yet, such actors also often "anticipate something more, something beyond and other to what they can currently realize" (Cooper 2014, 4).[15] As Vanessa Machado de Oliveira suggests, this something beyond or this "something genuinely different" follows, if at all, from the relationships and practices that people build in the present (2021, 135, 121). So they "exploit[] the fact that legal change is never linear . . . straightforwardly progressing towards some endpoint" and labor together in the present "to amplify the constructive meanings that are possible" (Davies 2021), at the same time as they expect that what will happen next is unknown and not at all guaranteed, and perhaps even likely to be overtaken by events. Yet they act anyway —in case the seeds they are planting will bear fruit of some sort in time.

Peoples' Tribunals and Alternative Judgment Projects

To illustrate these characteristics, we first describe a practice whose roots stretch back to an earlier era of legal thought—one in which, as Darian-Smith (2013) suggests, the gap between legality and legitimacy was perhaps smaller among progressive reformers in the West than it is today. In 1967, the mathematician and philosopher Bertrand Russell coconvened the first major international peoples' tribunal to try the United States and other countries for acts of aggression in Vietnam (Duffett 1968). The tribunal held two sessions and a twenty-five-strong "jury of conscience" unanimously found the United States guilty under international law of genocide and other crimes of violence. Across 1974 and 1975, a second Russell Tribunal focused on violations of human rights by a range of Latin American states, and three more since then on freedom of opinion and public sector work in West Germany (1978–79), the rights of the "Indians of America" (1980), and human rights violations in psychiatry (2001) (Borowiak 2008, 171). In 1979, Italian Senator Lelio Basso created the Permanent Peoples' Tribunal (PPT), which has since issued several dozen judgments about issues ranging from fracking to food sovereignty to climate change (Borowiak 2008, 171–72). Additional tribunals have been created in the spirit of the original Russell Tribunal

15. For more elaboration of the temporal dynamics of prefigurative politics, see note 4.

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(Iraq (2003–05) (Borowiak 2008); Palestine (2009–14) (Winstanley and Barat 2011); and migrant justice in Europe (2012) (Dehm 2018)).

By acting "notwithstanding," international peoples' tribunals combine a lack of faith that "'law and justice could be entrusted to the State and their institutions'" (Icaza 2018, 185, quoting an unpublished PPT document) with a "desire for law" and legalistic forms of accountability (Byrnes and Simm 2013, 743). The first Russell Tribunal applied orthodox principles of international law to hold states accountable for the unauthorized use of force. As Russell's collaborator, Jean-Paul Sartre, explained, legality—more than political argument—could galvanize the masses: "'[I]t is by means of legalism,' he insisted, 'that their eyes can be opened'" (Sartre 1966, from an interview in *Le Nouvel Observateur*, quoted in Krever 2019). Here, the forms and practices of legality mirrored those used by states and international courts—reasoned elaboration of well-established legal principles—and lacked only the chain of authorized command underpinning those practices (see, for example, Byrnes and Simm 2013, 726–27).

But as peoples' tribunals pluralized *who* could participate in international adjudication, they also constructed alternative communities that, in turn, pluralized substantive ideas of justice by acting "as if" these communities and ideals already pertained. In 1976, members of the Russell Tribunal helped craft the *Universal Declaration of the Rights of People* (Tognoni 2018),[16] which the PPT adopted as its authorizing statute to "challenge[] the idea that governments and their institutions enjoy a monopoly over lawmaking" (Byrnes and Simm 2013, 741, quoting a 1980 judgment). As it elaborated in an early judgment, "the Tribunal seeks to bring international law back to its true source: peoples and their desire for a more just world" (Byrnes and Simm 2013, 732, quoting a 1980 judgment). And as tribunals reimagined what "peoples" count as subjects, lawmakers, and adjudicators of international law in ways that defied official categories, they suggested that it was possible to refashion the master's tools for radical ends (see Tognoni 2018).

Consider the World Tribunal on Iraq (WTI), which Wilder (2019) describes as an effort to "act as a global political subject for a planetary politics whose framework, language, and institutional arrangements does not yet exist (and perhaps can never fully exist)." Inspired by the Russell Tribunal, the WTI formed in 2003 as a horizontal, consensus-based "network" of hearings—embodying participants' ideals of democratic polity into the means used to prosecute it (Çubukçu 2018). The WTI found, among other things, that the United States and United Kingdom had committed a "crime against peace by violating the will of the global anti-war movement" (*Declaration of the Jury of Conscience of the World Tribunal on Iraq*, reproduced in Çubukçu 2018, 172). Its members explain that it formed to negotiate a paradox:

> [W]e want to end impunity but we do not have the enforcement power to do so, we have to follow a middle way between mere political protest and

16. The Declaration articulated legal principles aligned with the New Economic World Order in its struggles for decolonization, for example, that "[e]very people has the right to a fair evaluation of its labour and to equal and just terms in international trade." See *Universal Declaration of the Rights of the Peoples*, Algiers (adopted July 4, 1976). https://www.algerie-tpp.org/tpp/en/declaration_algiers.htm.

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> academic symposiums without any judicial ambition on the one hand, and on the other hand procedural trials of which the outcome is known beforehand. This paradox implies that we are just citizens and therefore have no right to judge in a strict judicial way and have at the same time the duty as citizens to oppose criminal and war policies, which should be our starting point and our strength. (*World Tribunal on Iraq: The Platform Text*, reproduced in Çubukçu 2018, 164–65)

As this quotation suggests, many WTI members advocated for a legalistic approach to organize the hearings (i.e., "to judge in a strict judicial way") (albeit not without internal tensions).[17] These advocates wanted the legitimating effects of working from within liberal legal procedures and substantive rules of international law—an apt example of how acting "notwithstanding" can prompt complex questions about how to disentangle "imperial mobilizations of international law [and] human rights" from "anti-imperial ones," as WTI organizer and ethnographer Ayça Çubukçu (2018, 12) elaborates.[18] Rosalba Icaza (2018) likewise observes how the PPT may translate and constrict peoples' diverse understandings of justice and harm into representations intelligible within the very legal forms it aims to pluralize. And yet, she also sees in its reports (one, for example, draws on the Andean Indigenous idea of *el buen vivir* or the fullness of life) "a crack, a fissure in the supposedly all-encompassing and homogenised modern/colonial system of international law" (Icaza 2018, 207; see also Dehm 2018).

Today, peoples' tribunals have proliferated and now operate in domestic as well as international fora. For example, in 2014, a civil society organization called the Australian Earth Laws Alliance brought a case before the Regional Chapter of the International Rights of Nature Tribunal to hear a case brought by the Great Barrier Reef against the government of Queensland. The tribunal accorded full legal personality and agency to the nonhuman being of the Reef, acting "as if" a radical new ethic of legal subjectivity already existed. As one of us who witnessed the trial observed, the tribunal rapporteur mixed wry humor and stunning visual imagery to take on the literal voice of the Reef. The Reef, in turn, advanced a suite of environmental protections and economic arrangements to catalyze its own regeneration in a spirit of open-ended

17. Çubukçu describes "for lack of a better characterization" tensions between "legalist" and "political" perspectives, particularly as WTI members debated what legitimated their actions to adjudicate as a tribunal. During the hearings, WTI organizers recounted such debates and presented testimony for jury (and audience) deliberation:

> What we are doing is directly concerned with the act of reclaiming justice. At this point, we do not solely turn to superior authorities for a judgement and action pertaining to justice. We believe we have the power and authority to do this … They violated everything so flagrantly … It was, in fact, this naked injustice … that gathered together jurists and people who shrink back at the world "tribunal" and whose relationship with the "laws" consisted solely of appearing before courts on the occasion of breaking various laws … to evaluate and act as active subjects in reclaiming justice. (Çubukçu 2018, 73)

18. For criticism, see Krever (2019). He asks: "Would not the tribunal simply valorize international law, encouraging faith in an institution that has historically served to legitimate oppression and justify violence?"

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playfulness and experimentation. For a moment during that process, legality and social innovation coconstructed each other as participants brought to life a trajectory of the opportunities that could emerge were the Reef's proposals implemented. In the aftermath, participants commented that they "could imagine an Earth-centered legal system, and they could see how the rights of nature could work in practice" (Maloney 2016, 142).

In 2016, the Australian Earth Laws Alliance created the Australian Peoples' Tribunal for Community and Nature's Rights, a citizen's tribunal "made up of First Nations Peoples, lawyers, community representatives and eminent scientists [that] hears Inquiries and Cases, and makes recommendations for restorative justice, innovative law reform and socio-political reforms that will Care for Country and protect Community and Nature's Rights … [without] the force of government-sanctioned law" (Australian Earth Laws Alliance, N.d). By holding hearings on the health of rivers, the impact of industrial-scale agriculture community, and recent bushfires, the tribunal acts "anyhow and in case." It combines hope and strategic action, including by issuing policy recommendations that directly request state officials to act in certain ways. But these recommendations are offered as part of a larger conscious entanglement that collapses desired futures into present-tense practices, which, in turn, depend on the quality of social relations that members weave together, including with nonhuman participants (cf. Machado de Oliveira 2021, 121). A ruling from a PPT in Mexico (considering, among other things, violence against corn) captures this spirit precisely, so we quote from it at length:

> The Tribunal became a community space, not because it defined an overarching plan and a new faith to follow, but above all because it began a real process of communication, a procedural process, which allowed those of us who participated in this experience each to be transformed. In that experience we recreated each other, restoring our hope in the role of words, arguments and fair reasoning based on ethical principles. Therefore, even if only momentarily, we restored trust in the other. The Tribunal also gave scope for learning from each other. In short, it created a new kind of space in which to demand our right to a different Mexico and our right to define our own rights. *It succeeded in doing so in a way which made it a very nascent real life demonstration that this better Mexico is something which is already here and now, as something immediately practical and ready for those of us who want things to be that way to keep working at it.* (Permanent Peoples' Tribunal 2014, emphasis added)

In sum, peoples' tribunals meld the qualities of acting "as if," acting "notwithstanding," and acting "anyhow and in case," constituting a subject identity that part-imagines and part-brings-into-being an alternative institutional framework for collective action.

Scholars and practitioners who write "alternative judgments" sometimes advance a similar prefigurative legal sensibility. In 2008, a group of Canadian feminists constituted themselves as the Women's Court of Canada. Members of the Court did not hold hearings but they did collectively share and debate draft judgments (Hunter 2012), culminating in the launch of a slate of rewritten judgments at a live event with an operatic aria rendition of section 15 of the *Canadian Charter of Rights and Freedoms* and an

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interpretive dance backgrounded by prerecordings of members reading out their judicial opinions (Peters 2011).[19] They made clear that they did not wish to appear as a "bunch of angry radicals" (Peters 2011). Instead, they used the technical and professional quality of the craft, working with the judgment form to subvert it (see Rackley 2012; Golder 2022), and to reimage legal doctrine as if feminist critiques of liberal equality were already fully integrated into law.

The Canadian project to rewrite judgments quickly diffused across the English-speaking legal academy, from the first full-length edited book in the United Kingdom in 2010 (Hunter, McGlynn, and Rackley 2010) to a range of feminist judgment projects in Australia (Douglas, Bartlett, and Luker 2014), New Zealand (McDonald et al. 2017), Ireland (Enright, McCandless, and O'Donoghue 2017), Scotland (Cowan, Kennedy, and Munro 2021), the United States (Stanchi, Berger, and Crawford 2016; Capers et al. 2022), and others focusing on international law (Hodson and Lavers 2019) and the International Criminal Court (Grey, McLoughlin, and Chappell 2021).[20] Working under a general banner of critical judgments projects, scholars have now published judgments in areas such as human rights (Brems and Desmet 2017), children's rights (Stalford, Hollingsworth, and Gilmore 2020), and medical rights (Smith et al. 2017). These judgments often take structural criticisms of the status quo articulated by voices outside of formalized institutional power, and then use familiar legal techniques to translate criticisms into rules and doctrines that act as if the normative implications of alternative worldviews have already been accepted. An apt example occurs where scholars and practitioners have published judgments that introduce the idea of "wild law," which undoes the dominant human-centered focus of the common law and enacts nonanthropocentric forms of legality (Rogers and Maloney 2017).

We have suggested that peoples' tribunals and alternative judgments illustrate some of what we are calling prefigurative legality. And yet we must stress that, as with PARK(ing) Day, participants have varying understandings of the purpose and meaning of their interventions, not all of which are prefigurative. For example, legal scholar Dianne Otto, who served as a panel member on two women's tribunals, explains that she understands "the choice of a tribunal format as a sign of the intention to reflect critically on existing legal rules and practices in order to foster change, rather than signaling an intention to pronounce or substitute 'law'" (Otto 2017, 230–31). Likewise, at the launch of a website collecting feminist and critical judgment projects across the globe, Australian Justice Margaret McMurdo ventured that the process of writing alternative judgments could inspire disenchanted law students "to dream about how a

19. We should add that at least one US scholar had rewritten an iconic judgment well before this (*Roe v. Wade*: see Regan 1979), and a two-phase collective project in the United States in the early 2000s rewrote *Brown v. Board of Education*, the US Supreme Court's 1954 landmark opinion ending the racial segregation of public schools (Balkin 2002) and later *Roe v. Wade* (Balkin 2005). But as Ben Golder (2022, 289n23) notes, "whilst clearly a precursor of sorts to the current wave of Feminist Judgments Projects, both the more individualistic style of judgment writing [in Balkin 2002] and also the particular claim to expertise in the earlier project differs in important respects from the Feminist Judgments Projects."

20. See also, for the last, a website on a larger project in progress: https://www.humanrights.unsw.edu.au/research/current-research/reimagining-judging-international-criminal-courts-gendered-approach.

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capable lawyer can use critical legal thinking to effect positive change to the law for the betterment of the community" (quoted in Appleby and Dixon 2021).[21]

These interpretations are not prefigurative: they separate "social change" and "legal change" temporally along a linear timeline and they distinguish ontologically between practices that constitute and authorize social change, on one hand, and legality, on the other hand. In sum, they identify practices and forms of reflection that might ultimately reform "the law." In a different variation of these interpretations, some scholars describe the radical social effects of peoples' tribunals as beyond legality. For example, Leah Bassel (2022, 36) discusses how a 2018 PPT hearing in London "open[ed] different understandings of migrant justice," which she characterized as the production of new social relations "instead of a legal remedy." Otto (2017, 243, 230) similarly describes how tribunal participants created an "affective sense of shared responsibility" that exceeds what is possible through "legal justice." Contrast all these interpretations with that of Megan Davis, an Indigenous professor of constitutional law. Articulating a perspective that blurs the dichotomies between legality and social change in the present *and* that persists in imagining law as a tool of radical change, she asserts: "Through this exercise [of writing alternative judgments], and through these chapters, we empower our people. It *is* an expression of self-determination" (quoted in Appleby and Dixon 2021, emphasis added).

Prefigurative Legality and Left Legal Theory

We have used our description of peoples' tribunals and alternative judgments to extend the understanding of the prefigurative legality that we extrapolated from Thorpe's book. These examples differ in an important sense: they operate largely in a discursive mode, whereas PARK(ing) Day activists respond to and reshape a specific physical place and mode of being in that place. Reliance on written judgments, however alternative, invokes the hierarchy of authorized words "from on high" and, with them, specific forms of professional expertise. By contrast, the prefigurative legality emergent in PARK(ing) Day is embedded in a public space—and one in which everyone already likely knows the rules of metered parking. It is therefore more broadly accessible and horizontal in its enactment, legitimation, and imagination of social change. And yet, we would ultimately submit that to produce alternative worlds in the here-and-now, PARK(ing) Day activists and popular jurists—as well as the local government officials described by Cooper and the Egyptian lawyers described by Afshary—all approach legality in a similar way. Not as something to move beyond to engage in "genuinely" radical social and political action, nor as a tool that requires the permission of state officials (moved by popular protest or elite calls for reform) to enact social change. Instead, these activists all use legal form to "'construct[] another as if'" (Thorpe 2020, 92, quoting Rancière 2009).

In this final part, we ask if these diverse threads begin to constitute an emergent field of inquiry, one that resonates with key aspects of sociolegal studies (SLS) and

21. One member of the Women's Court of Canada described her work as "an academic exercise dressed up as judgements" (Peters 2011). But see also Hunter (2012, 137), who argues that both the English and Wales Feminist Judgments Project that she cofounded and the Women's Court of Canada were "not done simply as an academic exercise or for an academic audience."

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critical legal studies (CLS) but that is not fully envisioned by either. We take three of prefigurative legality's characteristics—acting "anyhow and in case," acting "notwithstanding," and acting "as if"—and put them in dialogue with SLS and CLS as we explore what it could mean to take prefigurative legality seriously as a field of sociolegal and critical legal inquiry.

Acting "Anyhow and In Case"

With this phrase, we have suggested that prefigurative legality challenges the linear, goal-oriented, instrumental temporality at work in mainstream positivist approaches to law reform. And yet we have also suggested that despite endeavoring to collapse means and ends and to enact alternative futures in the here-and-now, prefigurative legality also embodies future-oriented strategic action. The cumulative effects of open-ended play, acting as if formal legal barriers were otherwise, and advancing new ways of constituting self and collective identity, together constitute strategies aimed at social change.[22]

SLS anticipates an approach to legality that functions strategically rather than instrumentally. SLS has a long tradition of exploring how legal forms can help to shape, and even intentionally generate, changes in "nonlegal" (environmental, economic, social and political) practices and institutions. This inquiry grew from early realist interest in a "gap" between "law on the books" and "law in action." Early "gap" studies and their intellectual progeny (Suchman and Mertz 2010) assumed a relatively linear causal effect of law on society, however sophisticated (Gould and Barclay 2012). Other strands of SLS scholarship, by contrast, prioritized interpretive rather than positivist methodologies to capture how law acquires meaning and power in practice. Specifically, these strands sought to go beyond (or step aside from) models of causation that were "instrumental, linear and unidirectional" in favor of incorporating participants' reflexively understood motives, reasons, and intentions (McCann 1996, 459). They also departed from an analysis of context as an aggregate of discrete separate variables, focusing instead of "complex webs of multiple dynamically interactive, contingent 'social' *relations* that both constrain and facilitate the reflexive actions of research subjects" (McCann 1996, 462, emphasis in original). Diverse interpretive perspectives including constitutive approaches (see for example, Harrington and Yngvesson 1990; McCann 1994) and legal consciousness scholarship (Ewick and Silbey 1998; Cowan 2004; Nielsen 2006; Hertogh 2018) thus theorized a more entangled relationship between not only law and society, but also among those who exercise agency in constituting law.

22. Describing the alt-globalization movement, Marianne Maeckelbergh (2011, 1, 4) likewise argues that "we have to understand prefiguration itself as strategic" against those who would associate prefigurative politics with astrategic shifts in "personhood, identity, and culture." She also rejects Todd May's distinction between strategic and tactical political philosophies. In May's analysis the strategic—unlike the tactical—"'involves a unitary analysis that aims towards a single goal'" (Maeckelbergh 2009, 91, quoting May 1994). But why, Maeckelbergh asks, "does strategy necessarily have to be singular? Why does it have to have a core .... [or] to be a process towards a centralised goal?" (92). We use the term "strategy" broadly in the spirit articulated by Maeckelbergh.

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For these scholars, the purpose of empirical research is therefore not to ask how to close the "gap" between doctrinal law and its social effects. Instead, a welter of opportunities emerges to examine how diverse forms of legality and social dynamics interpenetrate (and come apart at their seams). As a result, the temporality of whether and when a particular law leads to a particular form of social change is much harder to pin down.

Prefigurative legality builds on these openings. As a potential field of inquiry, it invites sociolegal scholars to trace how people unsettle the shared assumptions and physical infrastructure (e.g., a parking meter) that support the legal-political "structures" that oppress them. It also invites scholars to track how localized instantiations of legality can suggest the prospect of institutionalizing different assumptions that, in turn, may help develop alternative political arrangements. For both forms of investigation, direct action matters.[23] When people actively embody an imagined future in a material context, they both perform the conflict with settled assumptions (thus unsettling them), and they pull the imaginary alternative into the present in a concrete way, rather than simply pointing toward a hoped-for future via a verbal command. Empirical analysis of prefigurative social change thus does not rely on a future projection to orient social action and normative evaluation. Rather, it aims to understand how people produce shifts in possibilities and new ways of interacting in the present, often based on a healthy suspicion of their current desires (Machado de Oliveira 2021, 121, 135).

Acting "Notwithstanding" Skepticism of Progressive Legal Change

We have also endeavored to describe prefigurative legality's insistence that *law* remains an important site for strategic intervention. This insistence resonates with SLS and CLS's shared attention to how legal rules are, on the one hand, unstable and manipulable and, on the other hand, partly responsible for distributive effects. Here, the familiar idea from CLS is that the meaning of a legal rule is underdetermined and therefore capable of producing and legitimating diverse (socially undesirable as much as desirable) outcomes depending on how it is used and by whom (Kennedy 1997; Schlag 2009). And yet, despite this "indeterminacy," the idea is also that legal rules function meaningfully to constitute winners and losers within a social order, and hence, they remain an important mechanism for social change.

To unpack how law is simultaneously open-ended and yet constitutive, early sociolegal scholars asked how the generalized interests held by different groups influence how law is made operative on the ground. And they studied how different groups jostle for legal rules that, in turn, entrench their interests (see, for example, Galanter 1974; Black 1976). Around the same time, CLS scholars, drawing on legal realists (Hohfeld 1917; Hale 1923), similarly explored how legal rules create bargaining endowments among groups and individuals (Kennedy and Michelman 1980; Kennedy 1982;

23. With the phrase "direct action," we in part imply a degree of embodied, materially embedded practice likely carried out collectively, but we also aim to capture a shared intention that motivates action in an anarchist spirit. As Rob Sparrow explains: "The distinguishing feature of direct action is that it aims to achieve our goals through our own activity rather than through the actions of others. Direct action seeks to exert power directly over affairs and situations which concern us. Thus it is about people taking power for themselves . . . . Direct action is not only a method of protest but also a way of 'building the future now'" (Sparrow 1997).

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Kennedy 1985; Singer 1988). These scholars generated a method of "distributional analysis" that has arguably increased in relevance today. Contemporary writers affiliated with the CLS movement are trained to ask how background legal rules accomplish economic distribution, so that they can imagine how changing these rules could distribute resources in different ways (IGLP 2016; Kennedy 2016; Halley 2018; Harris and Varellas 2020[24]). Often, legal scholarship in this vein analyzes law at a level of national or global power, asking, for example, how "tax law, IP law, labour law and the plethora of legal structures that have enabled financialization" shape global production and trade (IGLP 2016, 70). This scaled-up level of analysis can generatively destabilize established pathways of reasoning and argument, producing significant insights about exploitation and inequality. And yet, we ask readers also to consider how it can make prefigurative experiments appear marginal against dominant structures of authority.

To be sure, CLS scholars have long endorsed thinking with poststructuralism as well as legal realism—examining how law governs alongside other social and moral systems, and how law distributes not only incomes but also social meanings, knowledge, identities, valuations, and modes of legitimation that, in turn, shape people's contests over legal rules (Kennedy 1991). But it was primarily interpretive SLS scholars who illustrated, via intensive socially embedded empirical studies, how the levels of scale at which power operates necessarily shift and converge.[25] Through nuanced qualitative inquiry into tacit cultural practices and orientations, sociolegal scholars showed how law cannot be understood separately from the affective, performative aspects of everyday life (Friedman 1994; Nelken 1997). They also illustrated how ethically infused habits and customs are often not the "context" for state-based positivist law but instead, part of an order of multiple legalities existing alongside and in dialogue with that formal law (Moore 1973; Merry 1988).

A sociolegal approach that decenters the state and pluralizes legality (Darian-Smith 2013) offers analysts interested in prefiguration tools to retain *and* rescale (or perhaps multiply scale) the critical legal impulse to use law to unsettle "necessary" institutional arrangements. It also attempts to seduce analysts and practitioners into experiencing some hope and optimism about "the *constitutive* power of small and local processes" (Gibson-Graham 2002, 51, emphasis in original). This is a kind of hope that requires one to relinquish a singular, instrumental understanding of law that emanates from a consolidated source of state (or corporate) power that only mass-organized resistance can therefore bend (Gibson-Graham 2002, 51). Instead, it pulls into focus people's localized efforts to assume new legal identities, which are a crucial component of acting "as if."

24. Harris and Varellas root the recent turn to "law and political economy" in this tradition. They write: "LPE scholars often begin their lineage with the American Legal Realists, especially Robert Hale, whose essay 'Coercion and Distribution in a Supposedly Non-Coercive State' is as fresh and pertinent today as it was when originally published in 1923 … This [realist] critique, sidelined by World War II, the New Deal, and the emergence of legal process theory … was taken up again in the 1970s by scholars in the Critical Legal Studies (CLS) movement" (2020, 8).

25. Pierre Schlag (2009, 297) observes that "[o]n the whole CLS borrowed heavily, but selectively, from the realists. The crits accepted and incorporated legal-realist critiques but disregarded the functionalist, socially situated, and empiricist prescriptions also common to realists such as Cohen and Llewellyn."

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Acting "As If"

In expressing the spirit of acting "as if," prefigurative legality once again corresponds with ideas grounded in CLS and SLS: namely, an early and perhaps underappreciated strand of the former and a nascent body of the latter. In the early effusions of the CLS era, some prominent scholars described the cultivation of subjects who experience themselves as free from liberal individualism as the core of legal-institutional change. A basic idea, to summarize Peter Gabel, is that how law distributes resources and recognition reflects the degree of social alienation in a society. What is needed, therefore, is an undoing of the "pact of withdrawn selves" so that people can reconnect to their natural desires to live in common (Gabel 1984, 2021). Roberto Unger (1983) described this relationship between interpersonal and legal-institutional change as a paradox: "Reconstructed forms of solidarity and subjectivity," he submitted, must be "thought out in legal categories and protected by legal rights" to withstand entrenched patterns and interests. And yet, he continued, "the received ideas about the nature of rights and the sources of obligation cannot readily inform even the existing sorts of communal existence, much less the ones to which we aspire" (1983, 593). Patricia Williams, alongside other critical race scholars, breathed life into this paradox by describing lived Black experiences of rights assertion as a praxis of "both solidarity and freedom" and, in turn, reimagining rights as potentially enabling "a drawing near, an overcoming of market-placed distance" among humans, as well as nonhumans animals, "rivers and rocks" (Williams 1987, 414, 427, 433, referencing Stone 1972; see also Matsuda 1987; Hanne 2018).

Today, sociolegal scholars increasingly challenge not only the individualism of legal liberalism but also, with Williams, its humanism. We therefore wish, finally, to propose that as an emergent field of sociolegal inquiry, prefigurative legality would encompass and contribute to a larger contemporary ecological and materialist turn in sociolegal studies (see, for example, Graham 2010; Braverman 2018; Cloatre and Cowan 2018). Margaret Davies's work is an apt illustration. Davies has long considered how "practical, localised, and often tentative efforts [can] model new forms of legality in practice and also in theoretical debates" (2007, 166 drawing on Cooper 2001, 139). Her most recent book on "ecolaw" explores how "'nature' – animals, plants, the Earth, and so forth – produces its own values and norms, and [how] human norms are part of this natural [normative universe]" (2022, 1). We would venture that peoples' tribunals on the rights of nature and alternative judgments on "wild law" described above constitute such localized efforts to reimagine, in Davies's terms, "what we understand the law to be" in ways that exceed, even as they shape, human intentions (2007, 159–60). This reimagining intensifies the tension between interpersonal and legal-institutional change. Interpersonally, the eco-legal subject radically reworks anthropocentric subjectivity by extending solidarities to the nonhuman world. Yet, encoding these solidarities in formal legal-institutional garb happens—if at all—only in hyperlocal, thinly institutionalized settings. Despite this constraint, and recalling the ripple effects of second-wave feminist consciousness-raising in the late twentieth century, prefigurative legality builds, perhaps above all, on scholarly traditions that insist on the power of shifts in subjectivity to catalyze changes in ecological, economic, and political systems (Williams 1991; Hanne 2018; Liu et al. 2020; Miller 2020).

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CONCLUSION

By weaving examples of prefigurative legality into left sociolegal and critical legal traditions, we have endeavored to describe contemporary legal practices that "cross the divide between the legal present and our legal futures" in partial and diffuse yet also in material and sustaining ways (Davies 2007, 166–67; 2017, 17; see also Gibson-Graham 2002, 51). As Davies suggests, prefigurative legal practices "enact possible futures in the present and leave indelible traces of what is to come in the here and now" (Davies 2017, 17). These traces are indelible to a degree because, to recall PARK(ing) Day, when people play with law they transform places, material objects, and themselves through collective experiences. Tellingly, Thorpe ends *Owning the Street* with a vignette about building a parklet with her neighbors that helped "to shape [her] understanding of the city and [her] place within it" (2020, 259).

And yet, we know that to a usual way of thinking about law and law reform, prefigurative legality is ephemeral. We anticipate objections about prefigurative legality's efficacy among analysts and legal scholars who hold more familiar views of what makes activism (and, dare we add, legal scholarship) of significance. Some legal scholars committed to structural reform may expect that state law will directly repress efforts to act as if people have the legal power to experiment otherwise—and especially repress experiments by vulnerable and disadvantaged groups. Other scholars may observe the ontological limits of imagining another world by working from within the taken-for-granted material of the master's tools—be it by paying a parking meter to decommodify public space or by invoking the language of state responsibility and human rights to indict imperialism. Indeed, in a recent alternative judgments project organized by Indigenous legal scholars, Osca Monaghan (2021) argued that contesting the colonial legal order cannot happen in its courts or on its terms; he concluded that writing an Indigenous judgment within Australian law is "an impossibility." Alison Whittaker (2021, 184) offered a poem of fragmented phrases from an original judgment to avoid the "sense of unwanted complicity" she felt in acting as if she were a judge. By contrast, Nicole Watson's alternative judgment embraced the spirit of acting "notwithstanding" by writing into being a future bound by a treaty between the Australian state and Indigenous Australians and a First Nations Court with a profoundly different jurisdictional brief from Western colonial law (Watson 2021).

Other analysts may point out how prefiguration is potentially open-textured in dangerous ways, opening up to regressive forms of social life, just as much as to progressive ones, so that the energy of "as if" becomes, in a sense, a figure of warning to be careful what one wishes for. As Cooper aptly cautions, the authoritarian and neoliberal right can act prefiguratively as well, at least "to the extent the concept foregrounds the practice of enacting hoped-for aspirations in the present" (2019, 189n62). Indeed, it now seems that a version of prefigurative politics is not simply possible but today deeply compelling on the political right: we know well that we have written this essay in a moment when millions of Americans appear willing to live as if an election was stolen—enacting a kind of wish fulfillment of a highly specific substantive vision. Even more, neoliberalism and the rise of the (then) new right over the latter part of last century was arguably as creative as it was destructive in its efforts to illuminate

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taken-for-granted structures, norms, and practices to imagine them in new ways (Peck and Tickell 2002; Greenhouse 2010), albeit backed by hierarchically applied financial resources at critical turning points.[26] We have here described an approach to prefigurative legality marked by distinctively left commitments to pro-egalitarianism and anti-authoritarianism and by ongoing, open-ended experimentation. And yet we think there are pressing analytical and empirical questions to ask about why and how prefiguration today animates the political right.

As analysts, we too are acting anyhow and in case. We offer this essay to "creat[e] space for identification" among sociolegal scholars and others engaged in developing a shared language and set of practices for left prefigurative projects (Gibson-Graham 2002, 41, 53). Throughout *Owning the Street*, Thorpe shows how ordinary people rely on common understandings of property to bring new understandings into being. We think this is a significant and fertile achievement—both in sociolegal analysis and in city building. And it is one that rests on a form of legal scholarship willing to suspend skepticism about how and whether a series of tiny, temporary interventions that play with law will coalesce into structural and system change. We sketched how Indigenous scholars writing alternative judgments responded variously to this challenge, with reasoned silence, a poem, and a fictional future scenario. Eliciting an equally wide array of interventions into this emerging field is, we suggest, a worthwhile goal and hope, and so we write as if those engagements will be made, prefiguring that hope in so doing.

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26. As Carol Greenhouse (2010, 4) observes,

> The "politics of interpretation" … under neoliberalism is easily missed or evaded by participants and observers alike, given a marked tendency for neoliberal political restructuring and resignification to borrow from older social forms—for example, borrowing the language of rights to sustain markets, citizens' forums to deflect social movements, public office for pursuit of private interests, and credit relationships as channels of social control.

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