ON THE STAKES OF LEGAL PERFORMATIVITY

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(2018) 43 *Australasian Journal of Legal Philosophy*
[2019] *UNSWLRS* 61

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UNSW Sydney NSW 2052 Australia

Book Symposium: Margaret Davies' *Law Unlimited: Materialism, Pluralism and Legal Theory*

On the Stakes of Legal Performativity

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One of the many distinct merits of Margaret Davies's intensely imaginative and unassumingly provocative new book, *Law Unlimited: Materialism, Pluralism, and Legal Theory* ('*Law Unlimited*'),[1] is the emphasis that it places upon questions of performativity and prefiguration in law and legal theory. In this essay, I want to pose some questions about the effect of thinking about law and legal theory in these terms. What does thinking about legal theory as a performative exercise help us to appreciate both about the nature and possibilities of law, but also about the nature and possibilities of legal theory itself? What might thinking about the practice of legal theory as a performative exercise (that is to say, as an embodied and regulated practice that takes place in certain ways and under certain conditions, according to certain norms, and that produces an account of law in the process of claiming merely to describe it) say about what it means to be a legal theorist today? These kinds of questions all attempt to tease out some of what I take to be the intellectual and political stakes of this performative understanding of legal theory (exemplified and reflected upon) in Davies's *Law Unlimited*. This is an intellectually capacious book, simultaneously demanding of the *cognoscenti* and generous towards the newcomer. With so much of substantive value and interest upon which to comment in a book such as this — a book that ranges almost the full gamut of contemporary legal theory from Austin and Althusser to Waldron and Wittgenstein — it might seem churlish or evasive to dwell on the merely methodological. However, I hope, in what follows, to show that method matters (figuratively and non-figuratively), and that the question of performativity is properly political. Let me start by explaining what performativity means for Davies.

For Davies, theorizing about law is 'performative because it is an act and a process'.[2] To say that legal theorizing is an act is to say that it is a practice, a form of *doing* in the world rather than simply a way of saying things *about* that world

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1 Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (2018) ('*Law Unlimited*').

2 Ibid 16.

(from a position of Archimedean estrangement, perhaps). Davies's legal theorist is productively entangled in the world. To say, moreover, that legal theorizing is process is to say that the act of theorizing is not something done once and for all but rather something done repeatedly; that is to say, iterated over time. Furthermore, and to be a little more precise about the characterisation of legal theory as a performative act, it is a particular *kind* of act — it is a saying that is at once a doing — a speech act that has an effect in and upon the world. In his *How to Do Things with Words*, the ordinary language philosopher, J L Austin, makes a distinction between constative statements about the world (that can be adjudged true or false) and performative utterances (or, simply, performatives) that do not so much make claims about the world as seek to intervene into, and to have an effect upon, it (and hence are neither true nor false bur rather efficacious or, in Austin's terms, 'infelicitous').[3] Performatives, for Austin, are speech acts that do as they say (such as, in the oft-cited and circulated heteronormative example for which I shall shortly atone with a countervailing reference to Butlerian queer theory, the woman who says to the man, in the presence of a properly constituted marriage celebrant: 'I take this man as my lawfully wedded husband'). 'Done deal', we might say. If for Austin performatives do things in the world they also — to take things a step further (analytically and politically) with more contemporary theorists of the performative — construct that very world, even as they claim merely to be referring to it. For Judith Butler, in her 1990 book, *Gender Trouble: Feminism and the Subversion of Identity*, for example, it is precisely the reiterated and constrained performance of gender that fabricates the sense of an inner gender identity that is said to precede its articulation and performance.[4] What we take to be the subject of the performance (woman or man) is neither a stable essence nor something anterior to the performance. Rather, and in this Butler follows Friedrich Nietzsche (among others), it is the very deed (in Butler's temporal emphasis, *deeds*) of gendered performance that produces the putative doer of 'man' or 'woman'.[5]

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3 JL Austin, *How to Do Things with Words* (1975) 14. Although perhaps it would be more accurate to say that Austin *starts* with such a distinction (between the constative and the performative) at the beginning of his William James Lectures (published as *How to Do Things with Words*), before problematising that distinction throughout the lectures and finally 'abandon[ing it] in favour of more general *families* of related and overlapping speech acts': at 150 (emphasis in original).

4 Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990). Butler is not the sole theoretical reference that Davies uses to construct her methodological framework of performativity. Important references for her also include John Law and John Urry, 'Enacting the Social' (2004) 33(3) *Economy and Society* 390; Nicholas Blomley, 'Performing Property: Making the World' (2013) 26(1) *Canadian Journal of Law and Jurisprudence* 23. Both of these texts engage centrally with the epistemological and political stakes of understanding knowledge claims as performative (in the context of social science, for Law and Urry, and the study of markets in economic sociology or property theory, for Blomley).

5 Butler, above n 4, 25. For the Nietzsche reference, see Friedrich Nietzsche, *On the Genealogy of Morals*, (Walter Kaufman trans, 1969) 45: 'there is no "being: behind

This post-structuralist conceptualisation of performativity poses profound questions about law, about subjectivity and about agency (all of which are absolutely within the province of jurisprudence howsoever determined) but sadly I do not have the space to pursue these questions fully here.[6] So let me instead return to Davies and her claim about legal theorizing as a performative act (with Butler in mind) and simply say that I take Davies to be making a similar claim to Butler when she argues that legal theorizing performatively constructs the domain of law. (As Michel Foucault, one of Butler's key theoretical references, himself puts this point, 'discourses [such as law and legal theory] …[are] practices that systematically form the objects of which they speak'.[7]) Here is Davies: 'If I say "law has the qualities a, b, and c"', she argues, 'that is to say you should not regard something without those qualities as law. It is normative as well as descriptive because it lays down a rule of interpretation. If said compellingly and reiterated sufficiently often, the description prescribes the thought … and the thought influences subsequent action'.[8]

Now, it seems to me that the claim that legal theory is a performative act-cum-process can itself, and perhaps should, be judged performatively; that is to say, such a claim should be assessed not so much with regard to whether it furnishes a true or a false account of legal thinking but rather as to what it does to and for certain conceptions of legal theory, those who practice it, and the questions and statements they might make within such a conception of legal theory. What does this claim of Davies's do, then? I would suggest that the stakes of such a redescription of legal theory as performative are (at least) threefold. Let me put these in terms of *an ethics of description*, *a problematisation of subjectivity*, and *a*

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doing, effecting, becoming; the 'doer'" is merely a fiction added to the deed – the deed is everything'.

6 Although others have done so at length, often (but not exclusively) drawing upon the work of Butler in order to do so. For a good survey, see Julie Stone Peters, 'Legal Performance Good and Bad' (2008) 4 *Journal of Law, Culture and the Humanities* 179. See also Martha Merrill Umphrey, 'Law in Drag: Trials and Legal Performativity' (2011) 21(2) *Columbia Journal of Gender and Law* 114 (indeed, see the entire Symposium issue dedicated to Butler's work); Heather Schuster, 'Reproduction and the State: Between Bodily Performance and Legal Performativity' (1999) 4(1) *Angelaki* 189. The book of Butler's in which she addresses law most centrally is *Excitable Speech: A Politics of the Performative* (1997).

7 Michel Foucault, *The Archaeology of Knowledge* (Sheridan Smith trans, 1972) 49.

8 Davies, above n 1, 39. Davies is condensing the point here, obviously, and the presentation is schematic and temporally too linear. When Davies says that the saying must be 'compelling' we might take that to include the spatial, embodied and material conditions for the saying to take and have effect as a performative (for not just anyone saying anything repeatedly about law, with neither warrant nor authority, makes it so). There are also questions to be asked about the subject's internalisation of the command and the straightforward connection suggested in the above passage between thought and action (which I am suggesting might not be as straightforward). Finally, of course, is the question of resistance and the failures of the performative; the question of how reiterations might go awry.

reimagining of normativity. (The first and the last of these are, in a sense, reflections of each other.)

First, as is clear from the above quotation, Davies' account of legal theory as performative complicates the cardinal distinction between description and normativity. Her account does not, to my mind, evacuate such a distinction but rather makes it more difficult for us to grasp[9] and, consequently, more ethically important for us to do so. Many of the denizens of the discipline of legal theory (with whom Davies is, throughout the book, engaged in a gently provocative discussion) style themselves as mere describers of law. This is of course one rich methodological (if contested) seam within analytical jurisprudence.[10] Yet, on Davies's performative account, any straightforward distinction between description and normativity is untenable, for the reasons already given. Description is not only *always already* normatively inflected but, to reiterate Davies' point, the very act of describing the world is a way of reproducing that very world (and not other possible worlds). This does not rule out the work of description, but it does, at a minimum, prompt us, as putative legal describers, to locate our descriptions and to account for them. However, the theoretical claim about the performativity of legal theorisation is not simply a claim about perspectivism and the irreducible locatedness of legal knowledge-making[11] but rather goes beyond this to suggest that discursive formations such as legal theory have investments (maybe not always witting or intentional ones on the part of individual subjects) in the reproduction of the supposed legal object of knowledge. Butler writes about this phenomenon herself in terms of a 'ruse of power', an '*already productive* power, [that] form[s] the very object that will be suitable for control and then, in an act that effectively disavows that production, claim[s] to discover that [object] outside of power'.[12] According to

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9 See Davies, above n 1, 150–1.

10 See Frederick Schauer, 'The Path-Dependence of Legal Positivism' (2015) 101 *Virginia Law Review* 957, 959–69 (on the question of normativity and description, focusing on Bentham's approach); Stephen R Perry, 'Hart's Methodological Positivism' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (2001) 311–54 (critiquing HLA Hart's pretensions to separate evaluative and normative analyses in his work).

11 This claim (ie, that law's truths are fashioned by particular constituencies to the exclusion of other truths and other experiences) is a staple of feminist legal theory, critical race theory and critical legal studies accounts of law. For a discussion of feminist empiricism and standpoint epistemology, for example, see Margaret Davies, 'Law's Truths and the Truth About Law: Interdisciplinary Refractions' in Vanessa Munro and Margaret Davies (eds), *The Ashgate Research Companion to Feminist Legal Theory* (2013) 68–9. I find compelling the argument made in Law and Urry, above n 4, 396–7, distinguishing the claims of perspectivism from performativity, the former being invested (ultimately) in a realist epistemological project whereas the latter is concerned to show how the real is produced (rather than mis-, or selectively, or tendentiously, described). This is also Blomey's critique, in 'Performing Property', above n 4, of progressive property scholarship.

12 Judith Butler, 'Sexual Inversions' in John Caputo and Mark Yount (eds), *Foucault and the Critique of Institutions* (1993) 87 (emphasis in original).

Davies's account of legal theory as a performative enterprise, then, we are encouraged to ask precisely these sorts of questions about legal theory's descriptive claims and to expose its disavowals. What is legal theory actually making when it is supposedly only describing? What are the theoretical and political effects of this disavowal of legal theory's generativity and conceptual productivity? What does the critical exposure of this performative investment reveal to us (that is to say, what changes for us once we appreciate legal theory's productivity in this sense)? One thing that changes, on Law and Urry's related account of the performativity of social science's knowledge claims, is a loss of theoretical innocence: 'If methods also produce reality, then whatever we do, and whatever we tell, social science is in some measure involved in the creation of the real. There is no innocence'.[13] As they go on to explain, and as follows from Davies's kindred analysis, '[i]f methods are not innocent then they are also political. They help to *make* realities. But the question is: which realities?'[14] (More on this normative question, shortly.)

We might also ask these kinds of questions, of course, about the very subject of legal theory. The accent in many contemporary understandings of performativity (Butler's included) falls upon the subject, the supposedly autonomous knower and doer of things. It is in and through the ritualised repetition of gender norms, for example, that the gendered identity of the subject is produced. If we attend to the discipline of legal theory's formative effects upon the subject (and here it is important to recall that Davies's account of performativity is a *materialist* one that is interested in the embodied practices of theorising, in the material and concrete contexts in which legal theory is done — in print or in person, in the university classroom, in the streets, or on bushwalks) then what different picture emerges of the legal theorist? In performing legal theory, how are we performing our subjectivity as legal theorists? What are the discursive protocols that establish, and then re-establish, what counts as legal theoretical knowledge and hence who or what can be heard as a legal theorist? What possibilities exist for us to perform our legal theoretical identities differently or otherwise? In a different jurisprudential idiom, perhaps, this is to ask after the conduct of the office of the jurist, about what it means to profess and perform the role of the legal theorist today.[15] But in posing this question, too, it must be remembered that the answer (for Davies) cannot be singular, as if there could only ever be one authorised way of being a legal theorist — this would be to forget not only the salutary political insistence upon *plurality* in the present book, upon the many different and often opposed ways of thinking and doing law, but also Davies's own previous genealogy of the field, a description that

13 Law and Urry, above n 4, 404.

14 Ibid (emphasis in original).

15 See, eg, Shaun McVeigh, 'Office and Conduct of the Minor Jurisprudent' (2015) 5 *UC Irvine Law Review* 499, 500.

is also a normative and performative intervention in its own right, recording and progressing the productive 'dissolution' of its object.[16]

Finally, then, we might ask; what is the normative stance proper to legal theory thought of as a performative exercise? If, on this account, legal theorists cannot use the datum of legal reality straightforwardly to make distinctions between rival descriptive claims about the nature of law, then what can and should we use? According to what norms might we judge the rival performances of legal theory? And the rival normativities embedded in their supposedly descriptive performances? If in her conceptualisation of law the legal theorist unavoidably reperforms certain (social, cultural, political) norms, and, in iterating them further, entrenches them, then what separate normative basis emerges from which to question or challenge law? These are by no means either new questions (recall that this is the charge of *performative contradiction* that Habermas levelled at poststructuralist thinkers like Foucault and Derrida over thirty years ago now in *The Philosophical Discourse of Modernity*)[17] nor are they specific to performative accounts (indeed they have been and are routinely directed at *any* critical legal theory that seeks to put into question the supposed objectivity or neutrality of the subject of legal knowledge: *but what makes your account epistemologically or politically preferable?*). But if thinking about legal theory as a performative enterprise makes standard normative claim-making more epistemically difficult (or less easy to justify), even as it threatens to undo or undermine its own normative standpoint (thought in the orthodox way), it might nevertheless open up other registers of normative inquiry and bring into play a different normative ethos. After all, it is only if one understands normativity as necessarily operating on an *a priori* and universal register (rather than as contingent, historicised, local, shifting, non-exclusive and non-exhaustive) is it the case that the normative claims of the performative legal theorist appear problematic or questionable. Writing in the context of the contemporary critique of secularism (specifically, the reactions to the 2005 publication of the Danish cartoons of the Prophet Muhammad), Butler argues for a more expansive conception of normativity, precisely according to a performative perspective, that self-reflexively understands that 'when we judge, we locate the phenomenon we judge within a given framework, and our judgment requires [and performs] a stabilization of the phenomenon'.[18] 'We may think', she writes, 'that we first describe a phenomenon and then later subject it to judgment, but if the very phenomenon at issue only "exists" within certain evaluative frameworks, then norms precede description'[19] and the question becomes not whether the contested phenomenon is, say, blasphemy or free speech or indeed something else, but manifests as a rather different set of

16 Margaret Davies, *Asking the Law Question* (4th ed, 2017). A previous edition of this text bore the subtitle: 'The Dissolution of Legal Theory'.

17 Jürgen Habermas, 'Some Questions Concerning the Theory of Power: Foucault Again' in his *The Philosophical Discourse of Modernity: Twelve Lectures* (F Lawrence trans, 1997) 282–6.

18 Judith Butler, 'The Sensibility of Critique: Response to Asad and Mahmood' in Talal Asad (ed), *Is Critique Secular? Blasphemy, Injury, and Free Speech* (2009) 104.

19 Ibid 105.

questions that attend to the politics of framing. How and under what conditions does such a phenomenon become discursively entrenched and naturalised as a particular and singular phenomenon (as this thing and not that thing)? And with what political effects? Whose interests are served by such a naturalisation and whose evaluative frameworks become displaced by such a performance?

Butler's normative stance of 'evaluat[ing] the very modes of evaluation'[20] that structure public discussion of a topic like the Danish cartoon affair is not simply a bracketing or an evasion of the normative question (as it would appear to be from the perspective of either secular liberals or devout Muslims pre-committed to a certain ontology of legal subjectivity, harm, faith, injury, reason, and so forth) but constitutes a critical reimagining of the normative question itself, one committed to a fraught 'practice of cultural translation'[21] attentive to the irreconcilability and mutual rupturing of the different normative frameworks that condition our globalised and multicultural world. This is also, I would suggest, the normativity embodied in *Law Unlimited*. Davies is not centrally, or explicitly, concerned with 'the normative question' in *Law Unlimited* (and definitely neither with justifying nor with policing the normative credentials of the legal theorist). But there is still an implicit normative preference suffusing the book for accounts of law that productively complicate received wisdom and pluralise (or democratise) our understanding of law — she is at pains to point out, for example, that her own more expansive account (more expansive, that is, than the 'state-based, insider-generated jurisprudence' with which hers is in some tension) is neither intended to 'discredit' nor to 'reject' present orthodoxies but rather to supplement them.[22] With Butler, then, Davies is committed to a vision (and practice!) of normativity in legal theory that does not try to lay claim to a definitive and stabilising account of the phenomenon of law but rather tries to show that law always 'exists precisely at the crossroads of competing, overlapping, interruptive, and divergent [evaluative] frameworks [that is to say, legal theories]'.[23] For her this means neither that the canonical jurisprudential question of 'What is law?' is unanswerable or should not be broached,[24] nor that any answer to the question disappears — but rather it means a constant interrogation of received legal theoretical wisdom where new materialism jostles with analytical jurisprudence, and feminist legal theory with lawscapes and legal geography. In other words, law unlimited. This is doubtless a function of authorial style, of playfulness, of capaciousness, of a certain generous Adelaidean sensibility, but it also flows from a normative politics of critical pluralism that says, in answer to 'the' normative question, that the performative legal theorist can neither rely on something out there in the world (which she, after all, helps to make) in order to vouchsafe her performance nor on a set of universal

20 Ibid.

21 Ibid 104.

22 Davies, above n 1, 21, 38.

23 Butler, above n 19, 104.

24 See Davies, above n 1, 22. Cf Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (2005) 10.

norms removed from that world, but rather must be called to account by other performances that arrive to challenge and contest her view of the world.[25] There is an emphasis on agency here and on the corresponding responsibility of the legal theorist.

Let me turn in closing to address the question of creativity and political transformation that is also, along with the ethos of pluralism and a commitment to translating between different laws (or 'legalities', as she sometimes says)[26] an important element of Davies's normativity. As Davies makes clear, she intends to unearth and 'describe other latencies within law that may also have a transformative potential'[27] and argues that her form of legal 'theory … can be understood as a practical and experimental intervention that elicits and tests potential future conceptual forms'.[28] There is a utopian dimension to her writing and thinking here that is most evident in those moments where Davies writes of the *prefigurative* power of conceptualisation to bring new ways of being and acting into play:[29] 'Rather than waiting for conditions to be right for general social change to occur or to be instituted from above, prefigurative politics is an acknowledgement that change accumulates through repeated practices and that one part of making the

25 For a view of legal pluralism that emphasizes its performative and world-making dimensions, see Martha-Marie Kleinhans and Roderick A Macdonald, 'What is a *Critical* Legal Pluralism?' (1997) 12(2) *Canadian Journal of Law and Society* 25. See also, on the question of challenging performances, Davies, above n 12.

26 See, eg, Davies, above n 1, 33.

27 Ibid 18.

28 Ibid 19.

29 Prefiguration as a concept and as a practice has been much discussed in left wing thought, especially in anarchist and social movement literature. Davies draws in particular upon the work of Davina Cooper: see Davina Cooper, 'Prefiguring the State' (2017) 49(2) *Antipode* 335 ('Prefiguring the State'); Davina Cooper, 'Transformative State Publics' (2016) 38(3) *New Political Science* 315; Davina Cooper, 'Enacting Counter-States Through Play' (2016) 15(4) *Contemporary Political Theory* 453. It is difficult to separate the concepts of performativity and prefiguration, and while Davies, above n 1, suggests that they are in some sense distinct ('[i]n addition to being performative, legal theory can also be seen as prefigurative': at 16) there is also a sense in which the concepts perform similar work in her argument. Both emphasize the productivity and generativity of theory and practice, even as the latter concept emerges out of a more practice-oriented tradition of thought. Perhaps one might say there is a temporal difference, or a different orientation towards or emphasis of temporality, in that performativity attends to the prior and the received in its precedential repetition (even as it anticipates its future undoing) whereas prefiguration dwells in the now, determinedly bringing the future into the present. And, of course, we might also read a more wilful (individual or collective) dimension in prefiguration as against performativity, in which agency is perhaps less foregrounded, or more difficult and fraught. But, then again, it is also possible to read both concepts differently, which goes to support Davies's own understanding of concepts in the book as malleable, emergent, contingent, dynamic, and so forth: at 12–6.

imagined future is to perform it now,' counsels Davies.[30] (This provides one answer to the hypothetical question I posed above about whether there are *separate* normative standards available to challenge law's present iterations — to the contrary, as Davies and thinkers like Butler will insist, law always already immanently contains the possibilities of its own subversion or transformation and those transformative resources are there to be drawn out and performed differently. This is not a story about law's inherent progressive potential, though, but rather about law's ineluctable unravelling, and about the possibility of reading, and performing, law against the grain.)

I have been discussing Davies's claim that legal theorizing is a performative (and possibly prefigurative) activity but it follows from this discussion, and Davies's own theoretical commitments, that the distinction between law as an object and legal theory as a body of knowledge professedly about that object breaks down at this point and that 'law' is itself (however, we can delimit that object by this stage of proceedings!) directly performative (and legal counter-practices can be prefigurative in the sense she suggests). As Blomley writes about property theory, namely that 'we should think of it as a performance of property itself',[31] so too should we think about legal theory being a performance of law itself. Davies radically expands not only our conception of law (beyond, primarily, the statist horizon) but also our conception of who legal actors are, insisting that a range of different legal subjects beyond the judge, the legislator and the official are themselves *jurisgenerative*, as Robert Cover might have said.[32] We see this, for example, in Davies's renewal of customary legality.[33] On Davies's account, law is constantly being reperformed and remade by these legal actors across a number of domains. Here a slightly different set of questions emerge, though, and they are perhaps not so much about the limits of this conception of legal transformation as about the contexts under which those contrary performances can take hold and have an enduring effect. Under a performative conception of law the possibility of legal change is an ever-present possibility (in the sense that 'ordinary', and of course also extraordinary, 'official', legal actors are jurisgeneratively involved in re-performing law and that in re-performing law the possibility of iterating it otherwise, 'the aberrant temporality of the norm',[34] in Butler's apt phrase, is a structural feature of law's continued application). Yet, if this is true, it is also true that the weight of social and historical context constrains the manner and form of those performances. In order for a performance of legality to be recognised as legality and to have some performative effect, it must cite (however disobediently) prior conventions of law. When we are talking about formal, state-based, legality (and indeed international legality as well), the available scripts of what counts as law (and what can be

30 Davies, above n 1, 16.

31 Blomley, above n 4, 34.

32 Robert Cover, 'The Supreme Court, 1982 Term – Foreword: *Nomos* and Narrative' (1983) 97(1) *Harvard Law Review* 4.

33 Davies, above n 1, 37.

34 Judith Butler, *Antigone's Claim: Kinship Between Life and Death* (2000) 29.

received and interpreted as law by legal audiences) continue to exercise a profound and very constraining force. The political and legal theorist Davina Cooper, one of Davies's central references for the related concept of prefiguration, writes that:

> Conceptual prefiguration has its limitations. Like other forms of prefigurative practice, it may over-read the political agency available to think and act effectively against the status quo, under-estimating the preconditions and temporal specificity political changes require (including the conditions that enable thinking to take a different shape.[35]

Discussions of performativity (Butler's being a key example, yet again) tend to oscillate between the critical exposure of the norms that go to make us who we are and the utopian reminder that those norms, being both contingent and pregnant with the possibility that iteration brings, need not fully define our futures. Any story (and performance) of performativity inevitably hews towards either the more critical or the utopian end of the spectrum, and Cooper (again, from the same passage) remarks helpfully that 'because the scope of political agency is both uncertain and emergent, prefiguration tacitly treats the risk of over-reading as less problematic than the reverse, which is to assume such agency's absence'.[36] Perhaps there is something about the emergent and imperilled sense of our agency, as political and legal actors remaking the worlds that we inhabit, that might incline towards a more utopian account. Yet again, and to historicize the account that Davies provides in *Law Unlimited*, perhaps there is also something more specific about the time and place in which we find ourselves today, reading this excellent book, that calls for this reminder of our performative and prefigurative agency as legal actors. Perhaps this is the state we're in?

35 Cooper, 'Prefiguring the State', above n 30, 351.

36 Ibid.