Performing Property, Making the World

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“Property surely does something in our social order. What it does is the issue.”

Scholars under the ‘Progressive Property’ banner distinguish between dominant conceptions of property, and its underlying realities. The former, exemplified by Singer’s ‘ownership model’, is said to misdescribe extant forms of ownership and misrepresent our actual moral commitments in worrisome ways. Put simply, it is argued that our representations of property’s reality are incorrect, and that these incorrect representations lead us to make bad choices. Better understandings of the reality of property should lead to better representations, and thus improved outcomes.

However, the relationship between ‘reality’ and ‘representation’ is not made fully explicit. This essay seeks to supplement progressive property through a more careful exploration of the relationship between the two, by drawing from performativity theory. From this perspective, accounts of property are in an important sense not descriptions of an external reality, but help bring reality into being. The ownership model is not so much constative (descriptive) as performative. Such an account, I suggest, directs us to several important insights. Rather than asking what property is or is not, the task becomes that of trying to describe how property is performed (or not) into being. But concepts do not stand alone; rather, other ideas, people, things and other resources have to be enrolled in complicated (and often fragile) combinations. Rather than criticizing the ownership model for its mismatch with reality, we might consider that models do not have to be ‘true’, just successful. As such, it may be more useful for progressive scholars of property to redirect their energy into enquiring how it is that certain

1 The author is Professor of Geography at Simon Fraser University. The comments of Akinbola Akinwumi, Gregory Alexander, Trevor Barnes, Jane Baron, Clare Huntington, Trenton Oldfield, Reuben Rose Redwood, Sean Robertson, Eduardo M Peñalver, Joseph Singer and participants at the 2011 Association of Law, Property and Society conference at Georgetown Law School, the 2012 Progressive Property Conference at Harvard, and the 2012 International Conference on Law and Society in Honolulu are greatly appreciated. Research funding was made possible by support from the Canadian Social Science and Humanities Research Council.

conceptions of property are successful, and others not. To do so also requires that we think about the role of scholars in performing property, for good or bad, into being.
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INTRODUCTION: BUILDING A FENCE, MAKING PROPERTY

My first full entry into the world of fee simple ownership was a humble one, with the purchase of a house in downtown Vancouver with my partner in the mid 1990s. It was a tiny house, on a 25 foot wide lot, in an inner city neighbourhood. In such a situation, getting along with your neighbours becomes particularly important. Our neighbours to the west were an older Italian couple, Corrado and Bruna, who’d lived in their house for some forty years. It became clear, very early on, that Corrado was keen that I repair the fence that divided our properties. He taught me the neighbourhood “rule” whereby an owner’s western fence was his or her responsibility. Whether he made this up, or not, I never learnt. However, he quickly made it clear that he was very happy to participate in the fence building project. I borrowed a truck and we drove to a sawmill where a cousin of his worked. He was happy to provide cedar fencing supplies, and we commenced, in our amateurish way, to build the dividing fence.

What is the point of this story? We can read it as an example of the instantiation of a particular view of real property, I suppose, whereby both of us proved keen to carve a sharp divide between our respective parcels of land, and sustain our “separative selves.” Perhaps Corrado was like Robert Frost’s neighbour, who insisted on a meeting in the spring time “to walk the line/And set the wall between us once again.” For Frost, this is rather absurd: his neighbour “moves in darkness”: he “will not go behind his father’s saying,/And he likes having thought of it so well/He says again, ‘Good fences make good neighbours.’” Frost pokes fun at his neighbour for holding fast to an abstraction that denies reality. Frost’s apple trees will never jump the wall, he points out, and eat his neighbour’s pines. But his neighbour insists

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on his simple minded proverbial truism. But the act of fence building, for Carrado and I, could also be thought of as producing good neighbours differently, for it was in the act of division, ironically, that we came to know each other. The business of nailing and sawing produced a sort of masculine relational autonomy. My willingness to build a fence also signalled to my neighbour, I suppose, that I was not a narrow-minded, self-interested monad, but that I embraced the social propriety that underpins property.

The ambivalent nature of our fence-building is echoed by a rich and lively body of property theory that has recently been distilled in a “statement of progressive property.” Four leading U.S. property law scholars argue that property operates as an extremely influential conception, the essence of which is the “protection of individual control over valued resources.” This conception, however intuitively appealing, is said to be inadequate as a basis for resolving property conflicts and designing property institutions. Conversely, what is needed is to look to the “underlying human values that property serves and the social relationships is shapes and reflects.” But these values are said to be incommensurable: like our fence building, they cannot be reduced to a singular calculation. Reasoned, contextual and principled deliberation as to how best to allocate property entitlements is therefore called for, with the end goal that of assuring that property law

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5 The Progressive Property literature is largely US centred (although it does occasionally draw on some interesting comparative work, as well as the contributions of some Israeli scholars). The degree to which the ownership model is particularly American is worth reflecting upon, as may further comparisons to other jurisdictions. It should also be noted that this literature is broad and diverse, including a diverse array of scholars, some of whom may not identify with the statement. For one possible listing of its members, see Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208 (2002)).
6 Alexander et al., *supra* note 4, at 743.
7 *Id.*
establishees a framework for social life that is “appropriate to a free and
democratic society.”

While there is much to applaud in this call, I argue that it rests on an
unresolved and under-examined question. As we shall see, progressive
property scholars criticize the dominant conception of property not only
because of their different ethical commitments, but also because they see it
as a misrepresentation of property’s realities. In its place, they seek to
install better representations. While I appreciate the call for such
alternatives, I fear they have not given appropriate attention to the nature of
the relationship between representation and reality (which, one might argue,
is rather curious, given that this is at the core of their critique). In place of a
rather weakly articulated form of social constructionism, I offer – hopefully –
a more sustained analysis that draws from performativity theory. Such a
conceptualization – which refuses a divide between reality and
representation – offers several supplements as well as some distinct
departures for progressive property scholarship.

The first Part of this Essay lays out what I term the ‘mismatch
critique’ at the center of progressive property scholarship. This relies on an
assumed dissonance between dominant models and the real world of
property. These models are said to misrepresent the actual workings of
property in the world, and to lead us to make poor ethical choices. What is
needed, therefore, are more accurate models of property. In the second Part, I
suggest that the mismatch critique, while in many ways compelling, does not
give a satisfactory account of the relation between ‘model’ and ‘reality’. I thus
turn to performativity theory, particularly that developed in economic
sociology, to suggest that our representations do not simply describe a world;
they may participate in enacting a world into being. The world is no less real
as a consequence. But it needs to be thought of differently. Part 3 addresses

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8 Id., at 744.
some important differences between performativity and social constructivism, a form of which is implicit to some progressive property scholarship. Performativity, I suggest, offers a way of bypassing the twin temptations of structure and agency, refusing a view of the idea of property either as ‘false consciousness’ or as entirely open to autonomous choice. We emerge as subjects through forms of reiterated performance in ways that can be both disciplining yet potentially creative. As such, performances of property – like fence building – are both citational, referencing numerous other performances, and reiterative, entailing sustained forms of re-performance. Property claims are continuously remade and re-enacted, and, as such, open to surprise and complexity, yet also capable of fixity and sedimentation. Part 4 extends this point by exploring the ways in which performances of property are successful to the extent that they align with other things, ideas, and acts in what we can term ‘enrolment’. The resultant composite can be termed an ‘assemblage’, a complex combination of things and people. The garden fence, therefore, needs to be thought of as part of such an assemblage, enrolling not just pieces of wood and nails, but also culture, maps, ideas about boundaries, land registry offices, case-law, and so on. If we’re interested in property, performativity invites us to consider how such enrolments are stabilized and thus made real, as well as following how they fail or work in unexpected ways. I draw from my own research on seventeenth century enclosure hedges as a way of exploring the success and failure of property’s enrolments. In Part 5, I use performativity to take on a vexing question for progressive property theory. Put simply: if dominant models of property are as flawed as suggested by their critics, how and why do they endure? Performativity suggests that to succeed, representations of the world do not have to be accurate so much as ‘felicitious’. Certain conceptions of property are dominant, on this view, because of their ability to enrol resources and arrange other representations. In so doing, they can help constitute a world in which they become true. I close, in Part 6, with a brief discussion of the
normative dimensions to performativity, suggesting some important implications for the ethical commitments of progressive property, and its desire to critique dominant models so as to make room for better alternatives. Rather than assailing such models as inaccurate, we might be better advised to inquire into the reasons for their success. Further, assuming, as we must, that progressive property scholars are also implicated in a performatice project, what are the dangers of unwittingly performing forms of property we find less congenial into being? How might we perform more agreeable forms of property, and through what assemblages?

I. THE MISMATCH CRITIQUE

Let me step back from the statement, therefore, and examine the larger corpus of writing upon which it draws. For my purpose, much of this can be said to entail three moves: the identification of a supposedly dominant model or conception concerning property; the critique of the model; and the attempt to fashion alternatives. Collectively, I will refer to this as the “mismatch critique.” On the first count, progressive property theorists have sought to make explicit the often ill-defined understandings that animate and inform judicial and lay understandings of what property actually is, and the ends that it should serve, it being argued that we live, breathe and enact a particular model of property. This is not a formalized model, as such (except, perhaps, when made manifest in law and economics) but a series of deeply engrained norms that help define what property is, and what it should be:

What is property? One might think this was a simple question.

Property is about rights over things and the people who have

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9 I should note that some progressive property scholars—notably Greg Alexander—do not see their work as adopting this approach. However, I take my characterization as more generally paradigmatic of the field.
those rights are called owners. What powers do owners have over the things they own? Owners are free to use the property as they wish. They have the right to exclude others from it or grant them access over it. They have the power to transfer title – to pass the powers of ownership to someone else. They are also immune from having the property taken away from them without their consent, or they must be adequately compensated if the property is taken by the state for public purposes.\(^\text{10}\)

Joseph Singer characterizes this conception of property as the ownership model,\(^\text{11}\) premised on consolidated, permanent rights vested in a single identifiable owner, identified by formal title, exercising absolute control, distinguished from others by boundaries that protect the owner from non-owners by granting the owner the power to exclude.\(^\text{12}\) Property, in that sense, is almost exclusively private property. A bright line is drawn between the owner and the state: Although the state may intervene to limit these rights if they threaten harm to others, such interventions are seen as secondary to the core rights of the owner. Property rights are negative rights, in that sense. The ownership model also assumes a unitary, solitary owner, appropriately engaged in self-regarding actions that concern him or herself alone and the things owned. Put in more popular terms, this conception is made explicit when a homeowner claims “this is my land, and I can do what I like with


\(^{11}\)Underkuffler similarly notes the dominance of what she terms the ‘absolute approach’ to property in US jurisprudence (which assumes that property is objectively definable, is set apart from social context, and that it represents and protects the sphere of legitimate, absolute individual autonomy), which has tended to downplay an alternative understanding of property (the ‘comprehensive’ approach). Laura S. Underkuffler, *On Property: An Essay*, 100 Yale L.J. 127 (1990). Gregory Alexander, in *Property as Propriety*, 77 Nebraska L. Rev. 667 (1998), refers to the Blackstonian conception of property.

The ownership model is said to be deeply engrained: it “remains powerful and exerts substantial determinative force.”

The problem with the model, for progressive property theorists, is in part simply a reflection of the fact that they don’t like it (or, at least, don’t like it as the only model available for property), and wish for models of property that better reflect their own ethical commitments. So, for Singer, the ownership model “distorts moral judgment by hiding from consciousness relevant moral choices about alternative possible property regimes.” But it is also said to misrepresent the reality of property. It is “descriptively inaccurate and ... misdescribes the normal functioning of property systems...” Singer identifies a number of such inaccuracies. The insistence on the solitary owner fails to reflect the fact that in many cases multiple actors have a property interest: “If we observe the operation of private property systems,” Singer argues, “we see that full consideration of property rights in the same person is the exception rather than the rule.” Even if we can identify the owner, this does not necessarily help us to adjudicate property disputes, given that governments routinely constrain the powers of the owner through various forms of regulation. The singularity of the ownership model is also belied by property’s rich diversity. The image of the single family home that the ownership model invites offers only one form. Yet multiple models of family property (child support, marital ownership etc.), housing forms (land trusts, co-operatives, tribal property etc.), and business (partnerships, quasi-public corporations, public corporations etc.) can be discerned. “These models are not merely variants on

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14 Joseph Singer, Property and Social Relations: From Title to Entitlement, in PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 3, 27 (Geisler, Charles et al. eds., 2000).
15 Singer, supra note 14, at 5.
16 Id., at 5.
17 Id.
the basic title or full ownership theory. Many of them are such departures from the basic model ... that use of that basic model is essentially misleading as a conceptual baseline.”

The ethical dimensions of the ownership model are also said to miss the empirical boat. Its insistence on the rights of the solitary owner ignore the realities of the property rights of others. The ownership model is overly abstracted (Underkuffler criticizes its “artificial manipulation.”), and overlooks the social reality of coexistence. Property rights, in fact, are not absolute and unyielding, but contingent and contextual, being shaped by social conditions. The scope and extent of property rights are relationally dependent. The right to exclude, for example, is limited by public accommodation law. But such relationality is more systemic: property law and property practice, Singer argues, contain within them principles that foster distributive justice. Property serves not just the interest of titleholders, he insists, but those of others.

This is not, in other words, an argument for how property should be. Rather, it is predicated on an empirical claim that property already has a distributive logic: “Once we recognize this, it makes no sense to argue that distributive justice can be achieved only by limiting property rights; rather, private property systems always contain within them a partial system of distributive justice. The prevailing norms of private property, as it has operated in the United States, have always contained a tension between the norms of protecting the rights of titleholders .. and the norm of shaping property rules to ensure widespread access to the system by which such titles are acquired (emphasis added).” In this sense, he argues, property is not just an individual entitlement, but a social system that serves, in fact, not

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18 Id., at 9.
19 Underkuffler, supra, note 11, at 133.
21 Singer, supra note 14, at 11-12.
only to protect individual property interests but also is “designed to sustain the system of personal and market relationships that allow these interests to flourish.”

Singer is not alone in identifying a mismatch between model and reality. For Meir Dan·Cohen the prevailing view of property is “incorrect.” Underkuffler characterizes the view of property as individualistic as an incredible “mythology.” For John Christman, traditional, liberal conceptions of property are a myth (meant both as a legend and a falsehood). The prevailing view of property “is a faulty theory from a descriptive perspective and ... a limited theory from a normative perspective.” A Blackstonian view of property as an absolute right to exclude is a “trope” that conceals the interactive character of property and gives an inappropriately individualistic “patina” to “this most profoundly sociable of human institutions.”

What is the “reality” upon which the ownership model runs aground? It seems to have several locations. One is doctrinal. Singer invokes Unger’s “deviationist doctrine” in order to engage in a form of internal critique whereby “we use the counterprinciples already existing in the legal system as a basis for criticism of the principles in the legal system.” Put simply, the ownership model is said to misdescribe the actual workings of property law

22 Id., at 16.
25 Id., 1252.
29 Singer, supra note 20, at 630. See also, Roberto Mangabeira Unger, The Self Awakened: Pragmatism Unbound (2007).
and jurisprudence. The model tells us, for example, that factory owners have rights to dispose of their property as they see fit, including closing a plant that may have sustained a community for generations. However, a closer examination of the legal system reveals “a variety of doctrines - in torts, property, contracts, family law and in legislative modifications of those common law doctrines - that recognize the sharing or shifting of various property interests in situations that should be viewed as analogous to plant closings.”30 We may suppose that property forms are unyielding and absolute, but an examination of property’s history reveals strikingly different possibilities.

Another overlapping argument is from ethics. However, rather than simply criticizing the ownership model for its failure to take on board the norms of progressive theorists, this proceeds by arguing that the ownership model does a poor job of representing our actual, lived ethical commitments31. Underkuffler critiques the dominant model to the extent that it brackets social ends and goals, insisting that this ignores the ethical realities of property deliberation: “Property rights are, by nature, social rights; they embody how we, as a society, have chosen to reward the claims of some... and to deny the same claims of others.”32

While the ownership model may capture some of our ethical commitments (including, maybe, some good ones), it fails to adequately evoke others. This we can see if we delve into property’s history. For example, Alexander notes that much political and legal discussion in the early years of

30 Singer, supra note 20, at 621.
31 Singer, supra note 20, at 626, discusses how to make value choices, premised not on abstractions but on intuitions and ‘social facts’ and appeal to ‘shared experience.’
the American Republic turned on the public functions of private property.\textsuperscript{33} He argues that dominant conceptions of property as an alienable private commodity existed in a dialectic with a proprietarian conception which held that property is meant not simply to satisfy individual preferences, “but to fulfill some prior normative vision of how society and the polity that governs it should be structured.”\textsuperscript{34} This model of property clearly departs from the ownership model, in which the “the core meaning of independence, signified by property rights, is personal security against unwanted interference by others, most especially the state.” Conversely, from a proprietarian perspective, property’s purpose is to protect “against political-ethical loss, that is, loss of the self-respect that is the basis for proper citizenship and, ultimately, the proper social order.”\textsuperscript{35}

Such ethical alternatives continue to be present in contemporary legal practice, it is argued. For example, landlord-and-tenant law presumes that residential housing is not to be treated purely as a market asset, given its importance as a space for human flourishing and thus full citizenship.\textsuperscript{36} Joseph Sax’s account of cultural property notes the ways in which cultural artefacts can be conceived of as part of the commonwealth of a nation, rather than a purely private asset.\textsuperscript{37} Kevin Gray characterizes contemporary property law as evidence of a “new equitable property,” driven by “the articulation of a civic or social morality relating to the goods of life.”\textsuperscript{38}

\textsuperscript{34} Id., at 2.
\textsuperscript{35} Id., at 2.
\textsuperscript{36} Gregory Alexander, Property as Propriety, 77 Nebraska L. Rev. 667, 697 (1998);
\textsuperscript{37} Margaret Radin, Residential Rent Control, 15 Philosophy and Public Affairs 350 (1986).
\textsuperscript{39} Kevin Gray, Equitable Property, 47 Current Legal Problems 157, 207 (1994).
Such claims rest on uncovering departures from the ownership model within law. Yet they may also appeal to realities beyond the formal legal realm. So, for example, accounts of propriety note its presence not only in debates within law, but also more generally.  

Implied here is an appeal to everyday beliefs, or what Singer terms “our values.” But such values are not abstract, but expressed in nitty-gritty, lived contexts. Singer assails the abstractions of the ownership model, and its failure to acknowledge these lived contexts: “…we have created a framework for thinking about property that privileges a certain form of life – the owner. In the conceptual space framed by the life of the owner, we are invited to live as if we were the only ones that mattered. We are invited to live as if we were alone. Yet we know that we do not live alone…” The objects of property are also said to complicate the ownership model. Peñalver challenges a Demsetzian conception of property maximization as it relates to land, insisting on land’s inherent complexity as both a physical resource and as a site for human interaction. Land is not simply an economic asset, but implicated in “the full spectrum of human aspiration and activity.” Layered and intertwined histories of land use thus confound reductionist treatments.

If the ownership model fails to adequately reflect property’s realities, whether those found within legal practice or more generally, what is needed, therefore, is a better model. This is the third stage of the mismatch critique. Alternative models have included Singer’s “social relations” model, which recognizes that property, is in fact, contingent and contextual; a “social-republican” model, which seeks to leaven private ownership with the claims of citizenship, and “civic property,” which tasks property not simply with allocative efficiency, but also meeting non-economic functions such as

40 SINGER, supra note 10, at 9.
41 Id., at 6.
42 Peñalver, supra note 9, at 829.
democratic engagement. All of these alternative theories are said to better reflect actually existing ethical commitments, and the empirical realities of property. For Singer a social relations model offers “a way to understand and describe social life better.”

Better models, presumably, are those that better reflect property’s diversity. The ownership model, because of its flaws, leads us to make confused and erroneous decisions about property. How, then, can we make sense of the relationship between property and its models? We do not get much explicit guidance on this question. A divide is clearly drawn between a model and that which the model represents. The latter is deemed considerably more complex than the former, which is deemed reductionist. The former operates in the realm of ideas, being characterized as “concept,” “model,” “theory,” and “myth.” The latter, however, is protean, diverse, varied, changing, and dynamic, and thus inadequately captured by the ownership model.

One way to make sense of the relation between property and its models is to assume that progressive property is working with a sort of foundational realism, which posits a mind-independent external reality and a set of representations that, more or less accurately, “mirror” this reality. Yet progressive property seems to take a different tack. The ownership model, it argues, is problematic not only because it does a poor job of representing property, but also because it actually helps shape that reality. Were it simply an empty representation, critique would be so much easier. But, as Singer warns, “[d]emonstrating that ownership can be deconstructed does not

44 Singer, supra note 20, at 659.
deprive it of force as an organizing category,”45 for it is said to have considerable “tenacity, power and significance.”46 “The power of property as an ... idea is undeniable.”47 It “exerts substantial determinative force,” and “is deeply implicated in how we construct ourselves and our world.”48 Indeed, it is this that makes it particularly problematic, shaping ethical deliberation and practical activity related to property in misguided ways. We need to “confront the demands that property, as an idea, inevitably makes – and the costs that it imposes upon others.”49

Such a view can be likened to “virtualism” in economic theory which explores the ways in which the “virtual realities” of the economy are taken by people “to be not just a parsimonious description of what is really happening, but prescriptive of what the world ought to be; when, that is, they seek to make the world conform to their virtual vision.”50 Central to virtualism, then, is the idea of a divide between a pure abstraction and the reality of markets: for one commentator, “...even as the market model is enacted in practice and people are forced to follow the economists’ prescriptions, the model remains detached from reality, forced upon it, as an ideological foil and false consciousness.”51 Market models are, therefore, an artificial imposition, creating an ersatz reality, sustained only through brute power and ideological obfuscation. The ownership model could be similarly interpreted through a virtualist lens. Indeed, as noted, many scholars point to the “delusional” nature of much property talk. Steinberg, for example, in his account of

45 Singer, supra note 10, at 83.
46 Nedelsky, supra note 3, at 54.
48 Singer, supra note 12, at 1453.
49 Underkuffler, supra note 47, at 163.
property and environment, sees property law as “another tool for imposing order on the chaos of nature.” He sees this as a naïve form of reduction, reliant upon a presumptive claim to the mastery of nature.

2. FROM REPRESENTATION TO PERFORMANCE

The mismatch critique, in many ways, is compelling and important, and I have drawn from it myself. However, it is an incomplete one to the extent that it relies upon a divide between an abstraction (the ownership model) and the reality of property. Put baldly, it argues that our representations of property's reality are incorrect, and that these incorrect representations lead us to make bad choices. Better understandings of the reality of property should lead to better representations, and thus improved outcomes.

My project embraces the ethical thrust of progressive property while hopefully offering a richer and more robust account of the relation between representation and reality by drawing from performativity theory. From this perspective, statements about the world, such as the ownership model, are not outside that world: they also make that world. Social reality is a relational effect, not a prior ground, that is brought into being by the very act

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53 In my explorations of property in multiple empirical settings (gentrification, gardening, municipal property, indigenous lands, enclosure and so on) I have often drawn from progressive property scholarship and related writings, noting the mismatch between dominant conceptions of property, and empirical reality. Yet I have done so, increasingly, with a sense of dissatisfaction. While it is productive to reveal property’s diversity and complexity, for example, this does not appear to have dethroned the ownership model. How is it possible for dominant conceptions of property to endure, despite their manifest internal failures? Such questions have lead me to probe for alternative understandings of the relationship between property and ‘reality’. In so doing, I will revisit some of my earlier writings – written before my engagement with performativity – as nascent, if unarticulated, attempts at such a reworking. See, Nicholas Blomley, Unsettling the City: Urban Land and the Politics of Property (2004).
of performance itself. The distinction between representation and reality, therefore, has to be rethought. Austin characterized certain performances, such as “I name this ship Queen Elizabeth,” as performative, arguing that language does not merely represent the world, but enacts it. In saying something, he noted, we do something. But not every utterance has the same performative force, Austin notes, but reflects the degree to which it meshes with prevailing conventions. If, for example, the ship-naming ceremony is conducted by an inappropriate person or under inappropriate circumstances, the performance is “infelicitous.”

Such claims have been extended beyond language to include other modes of performance, such as bodily deportment or, as we shall see, combinations of objects and persons, and have been extended to the study of science and economics. So, in the latter case, markets are not prior to and separate from our representations of them, but are described as “performative effects of complex embodied and concrete socio-material arrangements.” Thus, “[m]arkets and the economy do not have an

54 J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1965).
independent existence, but only become reality through a performance. The economy and markets are no less real as a result. But they need to be thought about differently....”

Discourse, consequently, “is not something that subjects use in order to describe objects; it is that which constitutes both subjects and objects.”

As the state is a performance, made possible by a wide array of discursive practices such as immigration policies, military interventions, and cultural debates, so property does not pre-exist its performances. The sites for such performances are diverse: real property, for example, is produced through humble acts of fence building, mortgage foreclosures, judicial pronouncements, debates around the use of force in the protection of one’s home, burglary, instructions to children not to cross someone else’s lawn, the installation of security systems, law review articles, the creation of a cadastre, the cutting of hedges, World Bank funding initiatives, struggles over gentrification, property registration, indigenous mobilizations and on and on. Similarly, we can think of particular expressions of real property, such as acts claiming possession of colonial land or the construction of residential property markets as coming into being through multiple performative acts and representations.

What is meant by performance, in this context? Most immediately, the emphasis is on active forms of engagement, communication and interaction that help constitute the world in particular ways. Meaning, put another way,

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57 Id., 1437.


does not inhere in the world, but is brought into being. Such performances are remarkably diverse and varied, implicating both people and things, ideas and actions, and operating at many scales and sites, both formal and everyday. Performances can be thought of as consciously persuasive, as noted by Carol Rose, as well as routinized and quotidian. The registration of a deed at a land titles office is as much a performance, on this account, as is an argument for the sanctity of private property. Performance may be dramaturgical, entailing often elaborate human presentations to others (consider the almost ritualized Sunday lawn mowing of the North American suburb as a communication of propriety and pride of ownership). Yet performance extends beyond the communicative acts of individuals, as we shall see, and is also evidenced by the workings of objects.

What are to we to make of the ownership model when we think about it through a performative lens? Perhaps we should begin by resisting the notion of the ownership model as a “model,” that is, a more-or-less accurate representation of the reality of property. To do so, of course, is to draw precisely the distinction between model and reality that performativity resists. Rather, we should think of it as a performance of property itself. Thinking of the ownership model performatively also invites us to consider the degree to which it has, indeed, become part of the reality of property. There is a tendency in the progressive property literature to assume that the ownership model is clearly dominant, shaping legal practice and everyday thought. As I shall argue, performativity would encourage us to think of the model as more-or-less successful. The reality of property may be considerably more diverse than a fixation upon the ownership model may suggest. Yet it is undeniable that certain enactments of property are easier than others. An American economist can characterize the property of the Innu of Labrador as an example of the successful internalization of externalities, and achieve

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61 ROSE, supra note 35, at 296: “Persuasion is what makes property available to action”.

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considerable scholarly status\textsuperscript{62}. Yet the Innu themselves struggle to have their claim to their traditional territory recognized as ‘property’ at all. Not all performances are successful, it would seem. Tracing how this is so becomes an urgent analytical task.

We might also avoid treating the ownership model as a unitary, coherent representation of property (a singular “model”). It is not like the Black-Scholes-Merton model of derivatives\textsuperscript{63} or Crick and Watson’s double-helix, but a distillation of multiple enactments of property. The term “ownership cluster” might be more apposite. Whenever a judge identifies a discrete owner, or fixes a property boundary, whenever I plant vegetables in my back garden, not my front garden, it is performed.\textsuperscript{64} Performativity encourages us to trace how property gets variously performed, and to explain which of these performances have performative effect; that is, successfully constitute the reality of property in particular ways. To do so requires an attention to the geographic diversity of the model (for it would seem to be more successful in the United States than, say, Canada), as well as its temporal trajectory (tracing its complicated emergence and subsequent reworking at particular historical moments).

3. **CONSTRUCTION VS. PERFORMANCE**

Now, as we have seen, progressive property scholars also recognize that the ownership model does not represent the world, but goes some way to producing it. How this occurs is not fully explored, but what seems to be a

\begin{itemize}
\item \textsuperscript{62} Harold Demsetz, ‘Towards a theory of property rights’ 57 AM. ECON. REV. 347 (1967)
\item \textsuperscript{63} Donald MacKenzie, *Is Economics Performative*, in DO ECONOMISTS MAKE MARKETS? ON THE PERFORMATIVITY OF ECONOMICS 54 (Donald MacKenzie et al. eds., 2007).
\item \textsuperscript{64} We might usefully think of the performative effect of other ‘models’ of property, such as the commons, or the metaphors of the bundle of sticks, or the castle.
\end{itemize}
work here is a form of implicit social constructionism. For Underkuffler, “[p]roperty rights are, after all – like all legal rights – merely socially constructed phenomena.”65 However, performativity departs from a constructionist view, given its refusal of a conception of property’s reality as something separate from the ownership model, and other performances of property. The reality of property is not prior to the “ownership model,” but is itself partly produced through it. That which we call reality is brought into being through such performances and does not have an independent existence outside of it.66 Indeed, the idea of the real as distinct from the model is itself a performative effect.67 This is not to argue that reality is entirely representational, but that it can only be apprehended through language68.

65 UNDERKUFFLER, supra note 32, at 162.
66 A useful comparison of the differences between a constructionist and performative account through a property based example can be found in the contending treatments of the extension of individual transferable quotas (a sort of environmental ownership model) to the Norwegian fishery. For Helgason and Páalsson, the ITQ is a brutal misinterpretation that nevertheless seeks to remake reality according to its own narrow vision. Helgason Agnar and Gísli Páalsson, Cash for Quotas: Disputes Over an Economic Model in Iceland, in VIRTUALISM: A NEW POLITICAL ECONOMY 117 (James G. Carrier & Daniel Miller eds., 1998). Holm criticizes this view as reliant on a view of the ITQ as separate from reality. The problem with the ITQ, for Holm, is not that it is an abstraction that ‘constructs’ reality from on high, but that reality is itself partly (re)performed through the ITQ: ‘[This is a story] about actors that become what they are as their relationships with other actors stabilize.’ Holm, supra note 51, at 239.
68 As Laclau and Mouffe argue: “the fact that every object is constituted as an object of discourse has nothing to do with whether there is a world external to thought, or with the realism/idealism opposition. What is denied is not that objects exist externally to thought, but the rather different assertion that they could constitute themselves as objects outside of any discursive condition of emergence.” ERNESTO LACLAU AND CHANTAL MOUFFE, HEGEMONY AND SOCIALIST STRATEGY 108 (1985); cf. Searle’s (2008) distinction between brute facts, that can exist without human institutions, and institutional
Performativity also offers a way of circumventing a constructivist dilemma between structure and agency, and idealism and materialism.\textsuperscript{69} As Butler notes, constructivist arguments proceed through two paths.\textsuperscript{70} One is to consider discourse as omnipotent, acting as a “godlike agency,”\textsuperscript{71} thereby expunging human agency. A second is to foreground a voluntarist subject who acts independently as a constructive agent. Does the ownership model act upon the world, as the \textit{primum mobile}, constructing property through the force of ideas? Or is it produced through the agency of particular actors – judges, maybe – who engage in a more or less conscious construction of property’s reality? Performativity refuses either the view of property as a form of “false consciousness,” a mask imposed upon us ideological dupes, or a conception of property as a fully manipulable artifice, wilfully appropriated by agents. Corrado and myself, as subjects that perform property as we build our fence, do not stand before that performance. We neither precede nor follow the act of fence building, but emerge as subjects of property through these very performances. “Construction is neither a subject nor its act, but a process of reiteration by which both ‘subjects’ and ‘acts’ come to appear at all. There is no power that acts, but only a reiterated acting that is power in its persistence and instability.”\textsuperscript{72} Agency, then, is not to be found outside power, but is immanent to it. But power, for Butler, is not to be treated in reductive ways. To recognize a matrix of power relations that “institutes and sustains the subject is not to claim that there is a singular matrix that acts in a singular and deterministic way to produce a subject as its effect.”\textsuperscript{73} Further, such a subjectification is never quite complete, but always open to alternative facts, that cannot. John Searle, \textit{Social Ontology and Political Power, in The Mystery of Capital and the Construction of Social Reality} 19 (Barry Smith et al. eds., 2008).

\textsuperscript{69} Bialasiewicz, \textit{supra} note 58.
\textsuperscript{70} \textsc{Judith Butler, \textit{Bodies that Matter: On the Discursive Limits of ‘Sex’}} (1993).
\textsuperscript{71} \textit{Id.}, at 7.
\textsuperscript{72} \textit{Id.}, at 9.
\textsuperscript{73} \textit{Id.}, at 8.
possibilities.

This takes us to a related distinction between construction and performance. A naïve view would assume that if every thing is a construction, all constructions are equally possible. If the ownership model constructs property one way, surely alternative constructions can be proposed? Performativity, however, asks: what is it that gives certain performances - like a neighbourly fence - the power to constitute reality (what makes them performative, in other words)? It is tempting to presume that it is as a function of the power of agents, such as Corrado and myself, that property comes into being. Performativity, however, “must be understood not as a singular or deliberate ‘act,’ but, rather, as the reiterative and citational practice by which discourse produces the effects that it names.”

The performative power of a fence (or a judicial pronouncement, real estate advertisement, map or other of property’s enactments, including Robert Frost’s poetry, or children’s stories) cannot be explained by some originating act of will, but is always derivative, taking hold and becoming real in the world to the extent that it successfully cites other such performances and, in so doing, compels future similar performances. The ownership model, in this sense, has performative force not as a “model,” in abstraction, but because it is more or less plugged into a world in which it is deemed “true.” Citational failures, conversely, are less likely to have performative effect, and thus to become reality. Our fence, therefore, cites innumerable fences, hedges, and other territorializations, as well as other markers and signs of ownership and entitlement. We could, of course, tear down our fence, and plant vegetables in each other’s gardens. Yet such alternative enactments of property are unlikely to reconstitute prevailing judicial dispositions and cultural practices more generally. There appears to be a magic to property, as with law more
generally such that certain solitary speech acts or other performative moments (such as the judge declaring the defendant guilty, or the registration of a property interest in the Land Titles Office) appear to, by themselves, bring a legal interest into being. But this is to overlook the dense networks of meaning, violence, record-keeping, and sedimented history that make such performances possible.

But the performance of property is not just citational. It is, of necessity, reiterative. For property to be made real requires sustained, repetitive and often complicated work. Such iterative enactments are not just an outcome of property, but its precondition and a means for its continuance. Remarkably, every morning, when we wake up, property is – more or less – as it was when we went to bed. A social and, occasionally, legal set of expectations exist that I will perform the title to my home through a series of often visual and persuasive enactments (mowing the grass, evicting trespassers, paying property taxes, maintaining borders etc.) An instance of the ownership model, therefore, has performative power not only due to its citational ability to reference innumerable other such manifestations, but also through its sedimented, repetitive, duplicated form. The very human labour exerted in the building of a fence (and its subsequent maintenance, policing, surveillance etc.) constitutes subjectivity in particular ways. That we tend to know what a fence is, does, and says, reflects both these dimensions. Yes, it is capable of other meanings. Yet it tends to constitute the reality of property according to prevailing norms. As we built our fence, Corrado and I re-enacted property through multiple, complex acts, words and

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76 ROSE, *supra* note 35.
relationships. In so doing, our citations reinscribed the ownership model. Yet this is not a closed loop. The very necessity that property has to be performed – often through bodily practices – opens the possibility, perhaps even the inevitability, of rearticulations of property and subjectivity.

To make and remake property, then, takes work. To turn things into property – according to the terms of the ownership model, or according to alternative “models” – requires sustained and citational labour. Take, for example, the process of turning “nature” into “property.” Steinberg, as noted above, argues that property law serves to reduce the complexity and mobility of nature into a “giant legal abstraction.” Property law, he argues, is “the voice of reason that we use to tidy up the messy and dynamic world of nature.” Through a series of case studies, he identifies the ways in which nature resists such impositions, making a mockery of property’s “abstractions.” Nature, on this account, seems to be pre-exist property. One of the examples he offers is that of the Blackbird Bend case, concerning the movements of the Missouri River, and its reworking of property boundaries. For Steinberg, this powerfully illustrates the agency of the river. While the courts sought to impose a categorical grid over its movements (did it move through “avulsion” or “accretion”?), at Blackbird Bend, “the river fought back.”

While the judicial process did entail a form of simplification in its attempt to fix property’s boundaries in the uncertain, muddy and fluid space of the river, I would want to point to the fact that simplification was, itself, complicated, by which I mean, firstly, that it was not easily achieved, but entailed a considerable amount of effort and work, within which simplifications frequently bumped into each other; and secondly, that this

78 STEINBERG, supra note 52, at 10.
79 Id., at 50.
80 Id., at 49.
work, while reductive, was far from coherent. Attempts to render the river legible frequently foundered, or ran into different ways of seeing that produced different, and sometimes opposing rivers. Through an immensely protracted process of judicial deliberation, legal agents proffered the simplified river, rendered legible, and determinate. This nomothetic sensibility, however, bumped up against an idiographic river - the Missouri itself - whose specificity rendered common-law abstractions laughably ill suited. For others, however, the river was muddy: vague and even potentially illegible. Due to the central role of expert witnesses, a scientific river was also in evidence. Portrayed in maps and historical data, the scientific river was legible, but in ways that differed from judicial “ways of seeing.”

Simplification, in other words, took multiple forms which overlapped, but also conflicted. Fixing property in the world requires, it seems, hard, concerted effort. Citation was at work, but in a far from unitary manner.

But where does such an account take us? For Steinberg, the central conclusion to be drawn is, as he puts it, that “real estate isn’t.” “Real” property, in other words, is unreal and illusionary, a head-trick that we play upon ourselves. Property law, he argues, has “helped us to reimagine and reinvent what we understand to be the real world.” But a performative account would resist the implied divide between the “unreality” of property and the “real world.” For despite such frequent slippages and “failures” of property, it manages to attain settlement and resolution. Perhaps the very lack of coherence of law allows it to produce space: as John Law argues, any organization that is gripped with a single vision of reality is not long for this world. Either way, despite the odds, a grid was successfully superimposed upon Blackbird Bend. Avulsion and accretion proved to be instruments of

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81 Id., at 17.
successful action, to borrow from pragmatism. Certainty was extracted - albeit by hard work - from a situation of legal uncertainty (even, perhaps, indeterminacy). Rather than viewing Blackbird Bend as an example of the incoherence and unreality of real estate, I would also want to see the decisions as testament to the organizing power of law. One can, as I have done, read the decisions against the grain, and note the patching and “work-arounds” that are required. Yet, determinacy was produced. This applies not only to the Blackbird Bend case itself, but more generally. For one of the crucial performative effects of property is to produce the appearance of resolution, simplicity, order, certainty, and security. This should not be overlooked: despite its manifest exclusions, expulsions, and violences, it appears equitable and benign. Even though contradictory, messy, and unsettled, property presents itself as certain and secure. Property law, like any simplification, may be absurd. Yet to stop here is to risk ignoring the ways in which such absurdities organize the world for us in often brutally efficient and powerful ways.

4. **ENROLMENT AND ASSEMBLAGES**

This example alerts us to another useful dimension of performativity that supplements progressive property’s emphasis on the power of ideas. Performance occurs not only by words and ideas but also through particular relations between bodies and things. These can be grandiose forms of discourse, and seemingly mundane and apparently inert things. Performativity does not suppose a divide between human agents that arrange and assemble, and things that have been arranged. Property, then, is not

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83 **BLOMLEY**, *supra* note 53.

84 **BLOMLEY**, *supra* note 53.

just made through words, such as Lockean pronouncements, but also through the enrolment and arrangement of locks, \textsuperscript{86} “space,”\textsuperscript{87} river mud, paper and so on. Such entities, whether human or nonhuman, take their form and acquire their attributes through relations with other things. A fence performs property when it is hooked up to other entities. Put more generally, property is performed when such entities stabilize and work together (the term of art here is “enrolment”). The resultant composite (of things, ideas, acts, people etc.) can be termed an assemblage\textsuperscript{88} or an “agencement” - a “combination of heterogeneous elements that have been carefully adjusted to one another.”\textsuperscript{89} Mitchell describes the installation of a property regime in colonial Egypt as entailing not just human subjects and abstractions (such as the idea of “economy”), but also survey chains, cardboard, map paper and so on.\textsuperscript{90} Property is not property unless it is actualized in particular relational arrangements. The form that such arrangements take, moreover, is important\textsuperscript{91}.

Rather than trading in abstractions, then, performativity follows how these assemblages are put together, stabilized and made real. Performativity scholars in economics have devoted considerable attention to how neoclassical economics is performed into being (and successfully sustained in the face in failure) through such enrolments, such as ideal neo-classical strawberry

\textsuperscript{86} Bruno Latour, \textit{The Berlin Key or How to Do Things Without Words}, in \textsc{Matter, Materiality and Modern Culture} 10 (P.M. Graves-Brown ed. 2000).
\textsuperscript{87} Nicholas Blomley \textit{Cuts, flows, and the geographies of property} 7 \textsc{Law, Culture and the Humanities} 203 (2011).
\textsuperscript{88} Kevin D. Haggerty & Richard V. Ericson, \textit{The Surveillant Assemblage}, 51 \textsc{British Journal of Sociology} 605 (2000).
\textsuperscript{89} Michel Callon, \textit{What Does it Mean to Say that Economics is Performative?}, in \textsc{Do Economists Make Markets? On the Performativity of Economics} 311, 319 (Donald MacKenzie et al. eds., 2007).
\textsuperscript{90} MITCHELL, \textit{supra} note 65.
\textsuperscript{91} Poovey’s discussion of early double entry book-keeping reveals that ideas are not to be set apart from their articulation. The arrangement of text on the page, she argues, served a powerful rhetorical role in performing honesty and virtue. MARY POOVEY, \textsc{A History of the Modern Fact} (1998).
markets,\textsuperscript{92} or derivatives models.\textsuperscript{93} To understand how the ownership model is made real, therefore, we can explore how its proponents arrange the world so as to make the model felicitous.\textsuperscript{94}

But while such enrolments can be immensely powerful, to the extent they bring together complex combinations of things and people, they do not always succeed. Their instantiation is both a strength and a weakness: objects and people can resist, or fail, or act unpredictably. Rivers, as we have seen, can move, and land can become mud. Economic assemblages, for example, are vulnerable, as “[m]arkets do not exist in the abstract, as a pair of supply and demand curves drawn in Euclidean space, but are produced on the ground by an enormous effort bringing together, and aligning multiple agents in order that market calculation occurs. If things go wrong – paper maps shrink, Bre-X geologists fall out of helicopters, New York Stock Exchange computers go off-line – markets wobble, if not topple, … indicating the fragility of the construction. As with science and technology, market stability depends on each of the heterogeneous elements playing their part, in concert with others.”\textsuperscript{95} Similarly, property assemblages may fail, or work in unintended ways. The attempts of British colonial authorities in Cyprus to delineate land holdings, for example, required the stabilization of complex assemblages of maps, masonry cairns, survey instruments and the bodies of goats and their herders. But the very production of lines on the ground


\textsuperscript{93} Mackenzie, \textit{supra} note 61.


\textsuperscript{95} Barnes, \textit{supra} note 56, at 1435-6.
created new realities: traditional patterns of pasture now become “trespass,” radicalizing Cypriots who thus engaged in attacks on the assemblage itself.  

Take, for example, English rural enclosure in the late 16th and early 17th Centuries. The reworking of property relations, whereby land traditionally subject to common right was increasingly individualized, marked a significant remaking of rural economies and of long standing and deeply entrenched conceptions of property rights, and was often vigorously opposed by commoners. While enclosure in later periods was usually state-sanctioned, the authorities often frowned upon it during this early period, even going so far as to formally forbid it. How, then, was it practically achieved, against such odds? How did one social group lay claim to land and then persuade or coerce others into accepting their exclusive claim? How was property performed differently, in other words? Some scholars have characterized enclosure as an essentially imaginative undertaking, produced through representations and ideas. Several commentators have focused on the role of estate surveying, the effect of which was to produce a view of property as a severable space or territory, rather than, as traditionally understood, a bundle of localized relations. Harley, arguing for the Tudor surveyor’s role in “spreading capitalist forms of agriculture,” claims that maps introduced “space discipline.” Yet, whatever the performative effect of maps in bringing new forms of property into being, enclosure did not work through maps alone but required many other enrolments. Nor was private property performed exclusively through ideas and representations. Rather,

98 It should be noted, however, that such enactments in some senses preceded ‘private property’, in the sense that earliest use of the term and its definition in legal dictionaries or legal writings was the eighteenth century.
it also turned on the installation of forms of corporeal discipline as landowners sought to regulate the movement of commoners and their livestock. As such, they enrolled the hedge – a form of organic barbed wire – as a device through which new forms of spatial discipline were materialized and enforced. The hedge helped concretize a new set of discourses around property and space, and aimed to regulate forms of movement traditionally associated with the commoning economy. This was partly citational, given that the hedge had long signalled a “close” – a space of exclusive use and entitlement. But the hedge was now put to work to sustain a more expansive and aggressive program of exclusivity. And it did more than “communicate” property – it sought to enforce it. In this, of course, it did not work alone, but depended on other enrolments, such as local courts, or emergent writings in estate management, that extolled its practical and symbolic virtues. The hedge, then, worked iteratively, as enclosure was unrolled.

But the hedge’s performative success was not guaranteed, at least for some generations. Its citational quality was both a strength and weakness. For the commoner, in particular, it was often interpreted not so much as a justifiable defensive line, but as an illegitimate individual encroachment upon collective interests and, as such, something that was (based on past practice) to be torn down. Thus those tearing down hedges often did so in the name of property, rather than as an affront to it. Moreover, gathering wood or fruit from a hedge was often itself a form of common right. Thus, the hedge could be a defensive barrier or an encroachment. It materialised private property’s right to exclude, and thus conflicted with common property’s right not to be excluded. The hedge was an edge to property, or itself become property. Both the encloser and the commoner, however, had property interests in the hedge. If broken, the hedge could signal violence and riot, or
the legitimate assertion of common right. The hedge served as an often formidable material barrier, yet this very materiality made it vulnerable.99

5. **TRUTH VS. SUCCESS**

Performativity offers a third valuable supplement to progressive property in relation to an important, but hitherto unanswered question. If the ownership model is as flawed as the critics suggest, how and why does it endure? To date, responses to this question have been rare, and those that have been proffered are, to me, unsatisfactory.100 Performativity, however, points out that representations of the world, such as the ownership model, do not have to accurately represent the world to have a purchase in the world. What is important about a representation, such as the ownership model, is not its verisimilitude, but its “felicity,” the degree to which it is successfully actualized in the world. Its performative power does not rest on the accuracy of its representations, but its ability to enrol resources and arrange other representations. In so doing, in fact, the world may come increasingly to conform to the representation. Different forms of property (whether the ownership model or other models of property, such as Singer’s social relations model) are not more or less true, in other words, just more or less successful. If so, the question we should ask, then, is not: “is the ownership model true”, but: “is it successful, and if so, how?”

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100 Explanations for how we negotiate the gap between property’s reality and dominant models include Gray’s ‘mutual conspiracy’ of property talk; legal realism’s strategy of consigning the ownership model to the past, as outdated; and Alexander’s and Rose’s view of the diversity of property as a reflection of our different moral commitments. Singer suggests that departures from the ownership model are marginalized in our consciousness as they do not fit the prevailing model. Singer, *supra* note 20 at 701.
Timothy Mitchell offers a striking example of the “felicity” of an “inaccurate” representation of property in his analysis of the uptake of Peruvian economist Hernando de Soto’s influential prescriptions for property reform. De Soto has mobilized the ownership model, persuading numerous governments in the developing world to formalize the property holdings of squatters in the name of converting “dead capital” into collateral and thus achieving economic security and prosperity. Yet while de Soto’s ideas are immensely powerful, numerous scholars have shown that the actual effects for the poor are neutral, at best, and positively regressive, at worse. De Soto’s model is a massive simplification, they point out, that misses the evident realities of squatter settlements (for example, squatters are often able to raise capital and transfer property even without state sanctioned title; also people choose to hold assets informally to avoid dispossession).

It is tempting, therefore, to expose the neoliberal fallacies of de Soto’s ideas by pointing out the divide between “representation” and “reality.” But, as Mitchell points out, the effectiveness of de Soto’s arguments do not reflect their success in representing the real world: “If the fallacies of de Soto’s arguments seem surprisingly easy to expose, that is because their effectiveness does not rest on the precision with which they capture the workings of particular property arrangements. The performative power of economics does not rest on the accuracy or inaccuracy of its representations.” We should not treat de Soto’s ideas as representation, he argues, but as performance. They work not by representing that which was previously unrepresented, but rather through a reconfiguration of property, in particular through the construction of a boundary between a market and

that which is outside (the informal sector), and thus should be brought within it.

But why are his ideas taken up? It is not, it seems, because of their veracity, but their ability to mesh with and constitute a receptive world. Latour refers to organizing work of this sort as “metrology,” meaning “the gigantic enterprise to make of the outside a world inside which facts … can survive.” A context exists within which de Soto’s ideas are truthful, while the very enactment of his ideas help to further constitute a receptive context: “Economic facts were established in a world that was organized, through specific projects such as de Soto’s property titling program, to enable economic knowledge to be made. These projects occupy quite closely defined spaces—specific neighborhoods in particular cities of Peru, the local offices of a development organization and a think tank, the text of a survey questionnaire and its administrators, the offices of a parent organization in Washington that provides the funds.”

Another telling example of a felicitous, yet “inaccurate” property representation comes from my current research into the Indigenous-state treaty process in British Columbia, Canada. This was initiated in the early 1990s in an attempt to resolve the legal uncertainty surrounding the status of an un-extinguished aboriginal interest in land (with a few exceptions, treaties had not been signed earlier). One crucial, and controversial, question concerns the nature of the property interest that a First Nation (as they are termed in Canada) would have in its “treaty settlement lands” (that is, the lands returned by the state). State negotiators have insisted that these be held by the First Nation as a fee simple estate. This would, it is argued, create certainty and would allow for investment, given the prevalence of the fee simple in Canadian legal and economic practice.

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104 Mitchell, Rethinking Economy, supra note 99, at 1120.
However, closer inspection reveals that the interest carved out under treaty is quite distinctive, departing significantly from the conventional fee simple estate. This is implicitly recognized by the state, who refer to it as “fee simple plus.” The “plus” component technically refers to the fact that the fee is held communally, by the First Nation, and that the lands are not subject to the normal exceptions and reservations set out in the provincial Land Act.\(^\text{105}\) The lands are also not subject to expropriation except under particular terms, and do not fall within the state’s reversionary interest. There is also an undeniable cultural dimension to fee simple plus, it being allocated to a First Nation, as a collectivity. The operation of the fee simple is also distinctive, it usually being made available only to identified members of the Nation. If a member leaves the Nation they must relinquish their holdings. In that sense, the fee simple is also territorialized, rather than generic, applied to a particular parcel of land.

For some observers, not surprisingly, fee simple plus is no longer fee simple: it has burst its categorical bounds, and established a new form of property holding. Yet for one senior Crown representative, unwittingly channelling performativity, debates about what fee simple plus actually is are irrelevant. Fee simple plus acts like fee simple in the world, to the extent that it can be “fit into” a fee simple assemblage, as the following snippet from a research interview makes clear:

Q: If it’s not a cat anymore, it’s become a dog, why do we have to keep calling it a cat?

A: Well, I guess because it is.

Q: It’s a cat?

\(^{105}\) Land Act, RSBC 1996, c. 245.
A: Well, it’s fee simple title with some additional attributes.

Q: Okay. So, from your perspective, it’s still a recognizable legal entity, a fee simple?

A: That’s correct. And it can be fit into the land registry systems to provide certainty for people who are dealing with the property, whether they’re individuals or lending institutions.106

Don’t ask me what fee simple is, he seems to say, ask me what it does. Fee simple does not have be true, it seems, just felicitious.

Many First Nations appear to have a similar perspective. For them, however, the worry is that fee simple plus performs property in ways they find objectionable. Far from being simply a disinterested instrument that will bring about economic certainty it is, for them, part of a much larger assemblage of sovereignty, history and geography the effect of which is to negate any indigenous relationship to land and territory. Yet some First Nations have accepted fee simple. However, in so doing, they have sought to have it perform property differently. Rather than a common law grant from the Crown, it is, for them, a form of allodial property. This performance of property rests on their ability to enact multiple, wide-ranging indigenous laws, the effect of which is to reconstitute the relationship between people and land. As such, property gets re-performed, they argue. More generally, Indigenous communities have been adept at re-performing property at multiple scales and sites in ways that begin to make alternatives to the

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106 Interview with author, January 22 2011.
ownership model more possible. The test, of course, is whether such a counter-performance of property can prove successful in the face of alternative assemblages, each with their own powerful citational purchase.

6. **PERFORMATIVE CRITIQUE**

One of the strengths of the progressive property critique is its recognition of the existence of alternatives to the ownership model. Property is much more diverse than the ownership model allows. Breaking the “confines” of the ownership model would appear to be a powerful move, opening property up to diverse possibilities. While property can, indeed, be individualized, paranoid and antisocial, it can also be collective, inclusive and indelibly human. This is a point recognized by other property critics, such as Macpherson, who challenges the view that the category “property” is coterminous with private property, that being an “exclusive individual right, my right to exclude you from some use or benefit of something.” Macpherson thus insists that we treat prevailing categorizations as logically and ethically incomplete: “We have treated as the very paradigm of property what is really only a special case... [P]roperty ... need not be confined, as liberal theory has confined it, to a right to exclude others ... but may equally be an individual right not to be excluded.”

But how are we to articulate such alternatives? Is it sufficient to simply uncover them, and trust that behaviour and beliefs will change? Jane Baron characterizes progressive property as here reliant on a form of

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109 Id., 201.
expressivism, predicated on the view that law carries meanings and signals norms and attitudes. The problem with the ownership model, for the progressives, is that it is a poor form of expression, inadequately communicating our values, and suppressing our inherent understandings of property as relational. What is needed, therefore, is better expression: “a new vocabulary for describing property concepts.” Yet precisely how this will effect such a change is unclear. Baron wonders if the progressives are engaged in a form of idealism, whereby if bad ideas have sent us in the wrong direction, they can be beaten back with better ideas. But “can an idea (the ownership model) be changed by showing that it is descriptively inaccurate?” She is unconvinced at the merits of idealism: “just telling is that something is wrong with our understanding of property seems a somewhat feeble strategy to effect a meaning change.”

Performativity invites us to restage this critique and its associated implications. As we have seen, one immediate implication concerns the target of the critique. Rather than assailing the ownership model as inaccurate, we might be better advised to inquire as to the reasons for its success. How is it able to produce a world in which it becomes, for all intents and purposes, real? The ownership model, I have suggested, is not simply a “social construction,” but a performance that helps make the world through the (more-or-less) successful enrolment of particular relational assemblages of ideas, practices, and things. These enrolments are at work in the abstractions of doctrine, and the practical experiences of fence building (indeed, they work to the extent that the successfully hook up both sites).

110 Baron, supra note 5.
111 Singer, supra note 10, at 91.
112 Baron, supra note 5.
113 Id., at 232.
114 Id., at 233.
If the ownership model is a form of “frozen politics,”\textsuperscript{115} an emphasis upon the \textit{performance} of property perhaps begins to offer us some tools for an unfreezing to the extent that it alerts us that property is iteratively produced in concrete social contexts, not found. As such, particular forms, such as the ownership model, must be recognized as human projects, rather than a static distillation of timeless, pre-political realities.

But what then are to make of the extant alternatives to the ownership model? The very fact that the ownership model continues to require a progressive critique suggests that revealing the empirical existence of such alternatives is inadequate. Rather than just insisting, in Canutian fashion, on property forms that buck the trend, a performative analysis would seek to explore why it is that such alternatives remain marginal outliers, at best. More productively, we might wish to unpack what is needed to make such alternatives less marginal.

Further, rather than a claim about the realities of property, the mismatch critique can itself be productively thought of as a performance. As the ownership model is performative, so must be the work of those who critique it. Property theorists of whatever bent are thus not engaged in a description of property, but in its very production. There is thus, as Law and Urry no innocence when it comes to scholarship.\textsuperscript{116} And to the extent that scholarship conceals performativity from itself, “it is pretending to an innocence that it cannot have.”\textsuperscript{117} If we scholars help to make reality, “the question is: which realities? Which do we want to help to make more real, and which less real? How do we want to interfere (because interfere we will, one way or another)?”\textsuperscript{118}

\textsuperscript{115} Unger, \textit{supra} note 29.
\textsuperscript{117} \textit{Id.}, at 404.
\textsuperscript{118} \textit{Id.}
Two consequences follow. One caution comes from the work of Gibson-Graham, who alert us to the dangers of unwittingly performing the ownership model. They characterize capitalism as a representational effect that is sustained in part by characterizations (including those of critics) of it as a coherent and obdurate system or structure. The performative effect is to render alternative forms of economy marginal and secondary. Capitalism is thus strengthened, “its dominance performed, as an effect of its representations.” Critical accounts of the ownership model that re-emphasize its centrality and its reach are in danger of a similar enactment. The “ownership model” is a product of its critics, rather than its advocates. If naming is doing, there is a danger in thus constituting it with a powerful unity, coherence and presence. While identifying the ownership model has merit as a means of identifying a set of implicit conceptions of property, the danger, of course, is that such a naming performs it into being.

Secondly, if scholarship participates in the world through its accounts of it, it needs to take seriously the question of what world it wishes to perform. It is not so much engaged in a realist epistemological project of describing the world, as it is participating in an ontological project of producing a world. Thus, the notion of performativity directs us to the most important question: what sort of property do we wish to see performed? Rather than a grandiose scholarly stance of critique exposing falsehood in the name of truth, or one that unwittingly performs dominance through its insistence on unfolding logics that limit freedom, performativity invites a more tentative yet still fully ethical exploration of political possibility:

“When ontology becomes the effect rather than the ground of knowledge, we

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120 Law and Urry, *supra* note 112.
lose the comfort and safety of a subordinate relation to ‘reality’ and can no longer seek to capture accurately what already exists: interdependence and creativity are thrust upon us as we become implicated in the very existence of the worlds that we research.”\(^\text{122}\) If the felicity of the ownership model is a function of the tests to which it is put,\(^\text{123}\) its performative effect is surely diminished by the events of the past few years, as the “ownership society” appears increasingly chimerical. As truth fails, there are possibilities for political learning and experimentation.\(^\text{124}\) As such, one productive line of progressive exploration is through the identification of new spaces of “property-politics,” such as those that seek to recover and rework the commons.\(^\text{125}\) What is needed, Santos argues, is a sociology of emergences that can “disclose, and give credit to, the diversity and multiplicity of social practices in opposition to the exclusive credibility of hegemonic practices.”\(^\text{126}\) Recognizing the commons in our midst thus becomes a crucial political task through which alternative possibilities can be discerned and revalorized.\(^\text{127}\)

This, finally, is a task for all those interested in property, whether scholars, activists or concerned citizens. But it is one for lawyers and non-lawyers alike. Property – whether the ownership model or its many alternatives – is performed not only in Law, but in a socio-legal world. With its attention to the complex webs of enrolment and the diverse human and

\(^\text{122}\) Gibson-Graham, supra note 115, at 620.
\(^\text{123}\) Callon, supra note 87, at 332.
\(^\text{125}\) Nicholas Blomley, Enclosure, Common Right, and the Property of the Poor, 17 SOCIAL AND LEGAL STUDIES 311 (2008).
nonhuman entities bound up in its assemblages, performativity invites us to seek out property not only at the Supreme Court but also at the humble garden fence.