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Tort Claims and Canadian Prisoners

*Adelina Iftene, Lynne Hanson & Allan Manson**

Prisoners can be tragically wronged by the prison system, as highlighted by the recent Ashley Smith case, and tort actions have proven to be a problematic form of recourse for prisoners. Negligence claims made by prisoners face obstacles at every stage of the analysis: duty of care, standard of care, breach and causation. The authors first offer an overview of the tort litigation that has come out of Canadian prisons, with a focus on health care-based negligence claims, on risks arising from other prisoners and on the risk of self-harm. They find that these claims have been unevenly resolved when the plaintiff is a prisoner. Secondly, the paper considers whether negligence actions for prisoners can be expanded by using “conditions of confinement” standards to furnish a novel duty of care. The authors outline several impediments to the imposition of such a duty. They note that Canadian courts are reluctant to impose duties on public actors, particularly when the conduct in question walks the line between operational and policy-oriented action. Because imposing a duty of care with regard to conditions of confinement would require the courts to make orders with heavy funding implications, courts would in the authors’ view be unlikely to adopt such a duty. Nonetheless, if tort litigation can be made more accessible to prisoners, the end result may be the improved enforcement of their entitlements and the betterment of internal prison conditions.

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Introduction

Prisoners live in an environment totally controlled by perimeter architecture, internal security and surveillance, disciplinary rules and official discretion. Inevitably, there will be conflicts, disagreements, grievances, assaults and injuries. The past fifty years of Canadian prison law can be characterized more by the pursuit of appropriate remedies than by the development of substantive law and legal norms. This story of remedies has had its ups and downs. Positive steps have included the broadening of the availability of *certiorari* and the acceptance of a general duty of fairness in *Martineau v Matsqui Institution (No 2)* in 1979,¹ the entrenchment of the *Canadian Charter of Rights and Freedoms*,² the modernization of *habeas corpus* in the *Miller* trilogy,³ the new *Corrections and Conditional Release Act (CCRA)*,⁴ the provision of legal aid for prisoners in most Canadian jurisdictions, and the evolution of the role of the Correctional Investigator. On the downside, we have seen continuing challenges to the scope of *habeas corpus*, a persistently dysfunctional internal grievance system and a general reduction in the availability of legal aid.

1. (1979), [1980] 1 SCR 602, 15 CR (3d) 1.

2. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3. *R v Miller*, [1985] 2 SCR 613, 52 OR (2d) 585; *Cardinal v Kent Institution*, [1985] 2 SCR 643, 24 DLR (4th) 44; *Morin v Canada (National Special Handling Unit Review Committee)*, [1985] 2 SCR 662, 24 DLR (4th) 71. The trilogy formed the basis for more recent clarification of the role of *habeas corpus*. See *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809.

4. SC 1992, c 20 [CCRA].

Significantly, this remedy story has occurred within a national context in which only a small prison law bar has experience with prison issues. Although both prison monitoring mechanisms and remedial avenues have improved in recent decades, legitimate grievances and cases of mistreatment still go unresolved and unaddressed. One reason might simply be that only a tiny portion of the bar has had any experience with prison matters. Another reason might be the high threshold of review that courts regularly apply to legal challenges brought by prisoners. The limited role of “cruel and unusual punishment claims” under section 12 of the *Charter* is an example of this,⁵ as is the degree of deference that Canadian administrative law affords to official decision makers.⁶ Even constitutional challenges have been exempted from a correctness standard, forcing courts to defer even more to administrative decisions.⁷

Prisoners rarely use private law to bring civil claims. Such claims, when made, often settle without judicial scrutiny. When cases go to trial, they are typically fact-driven, usually with little analytical attention paid to the elements of the substantive claims. Prisoners have brought some successful claims for intentional torts such as battery,⁸ assault⁹ and false imprisonment.¹⁰ Actions in negligence are expanding in number but are still largely unsuccessful.

The purpose of this paper is to ascertain the utility of tort law as a remedy for prisoners. We focus on negligence, which provides a remedy for unintended harm or harm caused by careless conduct. The plaintiff must show that there was a duty of care owed to him or her, and that the

5. *Supra* note 2, s 12. See Allan Manson “Arbitrary Disproportionality: A New Charter Standard for Measuring the Constitutionality of Mandatory Minimum Sentences” (2012) 57 Sup Ct L Rev 173 at 174–86.

6. See *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

7. See *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395.

8. See *Abbott v Canada* (1993), 64 FTR 81, 41 ACWS (3d) 753; *Proctor v Canada (Attorney General)* (2002), 111 ACWS (3d) 713, [2002] OTR 79 (Sup Ct) (motion for summary judgment dismissed, case settled outside court).

9. See *Abbott v Canada*, *supra* note 8 (assault); *British Columbia v Zastowny*, 2008 SCC 4, [2008] 1 SCR 27 (sexual assault).

10. See *Hermiz v Canada*, 2013 FC 288, 228 ACWS (3d) 585 (Prothonotary), rev'd 2013 FC 764, 230 ACWS (3d) 292 (detaining prisoners past their release date or unjustly holding a person in segregation); *Abbott v Canada*, *supra* note 8; *R v Hill* (1997), 148 DLR (4th) 337, 36 BCLR (3d) 211 (CA); *Brandon v Canada (Correctional Service)* (1996), 131 DLR (4th) 761, 105 FTR 243; *Canada (Attorney General) v McArthur*, 2010 SCC 63, [2010] 3 SCR 626.

defendant breached the standard of care by failing to do what a reasonable person of “ordinary intelligence and prudence”¹¹ would have done in those particular circumstances. The plaintiff must then prove causation by showing that “but for” the defendant’s negligence, his or her injury would not have occurred¹² and that this injury was not too remote. If there is no loss, then there is no tort—negligence is not actionable per se.¹³

We approach the task of surveying private law tort actions for prisoners via a cross-jurisdictional review of the Canadian case law. We begin by reviewing the nature of the duty owed by corrections authorities and their staff to prisoners. We consider whether the requisite standard of care is being met in prisons regarding medical treatment, the prevention of self-harm and the risk posed to prisoners by other prisoners. Finally, we consider whether negligence liability could be expanded to improve conditions of confinement more generally and we observe that there are substantial obstacles to the creation of a novel duty of care toward prisoners in the Canadian correctional system.

I. The Duty of Care Owed to Prisoners

To impose tort liability, a court must first find that the defendant owed a general duty of care to a class of persons of which the plaintiff is a member, and that the defendant therefore owed a duty toward the individual plaintiff. In the prison context, negligence actions typically focus on the duty owed by a public authority and its employees to an individual plaintiff, the prisoner. The authoritative test for the duty of care was established by the Supreme Court of Canada in *Cooper v Hobart*,¹⁴ following the House of Lords decision in *Anns v Merton London Borough*

11. *Arland v Taylor*, [1955] OR 131 at para 29, 3 DLR 358 (CA).

12. *Clements v Clements*, 2012 SCC 32, [2012] 2 SCR 181, rev’g (2010), 327 DLR (4th) 1, 298 BCAC 56.

13. The final step of negligence analysis requires the plaintiff to prove that the loss was not too remote. This element is not fully addressed in this paper, but it is worth noting that remoteness may bar recovery when prisoners engage in self-injurious behaviour—courts have found that suicide is by definition “too remote” a consequence. See *Wright v Davidson* (1992), 64 BCLR (2d) 113, 88 DLR (4th) 698 (CA).

14. 2001 SCC 79, [2001] 3 SCR 537. See also *Childs v Desormeaux*, 2006 SCC 18, [2006] 1 SCR 643.

Council.¹⁵ A duty is owed where the harm was the reasonably foreseeable consequence of the defendant's act, where there was a sufficient relationship of proximity between the parties and where there are no residual policy considerations that negate the imposition of a duty. Courts are reluctant to impose a duty of care on public authorities, and tort actions will often founder where there is insufficient proximity between the government and an individual, or on policy grounds where the imposition of a private law duty will interfere with the public authority's obligation to provide good governance to the general public. A further limit is that governments will only be held liable for operational decisions and are immune from suit for policy decisions at a higher level of governmental authority.¹⁶ Public authorities will, however, owe a duty to private parties where there is a special relationship of proximity between the government and a particular individual.¹⁷

These potential limits present no problem where there is an established duty of care, but might prevent the recognition of a novel duty. As such, they will be explored in more detail at the end of this paper, where we propose that conditions of confinement might form the basis for a new claim in negligence.

A prison's duty to provide a safe environment is well established in the case law. Both legislation and internal directives confirm that Correctional Service Canada (CSC) must provide federal prisoners with safe premises. For instance, section 70 from the *CCRA* establishes that: "The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of prisoners and the working conditions of staff members are safe, healthful and free of

15. (1977), [1978] AC 728 HL (Eng).

16. The policy/operational distinction was authoritatively set out by the Supreme Court of Canada. See *Just v British Columbia*, [1989] 2 SCR 1228, 64 DLR (4th) 689 [cited to SCR]. This test was later incorporated into the *Anns/Cooper* test as part of the broader residual policy concerns that might negate the duty of care. See *Cooper v Hobart*, *supra* note 14.

17. Courts will more likely find a special relationship when certain conditions are met. See *Fallowka v Pinkerton's of Canada*, 2010 SCC 5, [2010] 1 SCR 132 [*Fallowka*] (known risk to a group of people); *Heaslip Estate v Mansfield Ski Club*, 2009 ONCA 594, 96 OR (3d) 401 (direct communication between plaintiff and defendant).

practices that undermine a person's sense of personal dignity."¹⁸ Prisoners are under the physical control and legal responsibility of correctional systems and they are dependent on them for the necessities of life. There have only been a few reported decisions based on a failure to provide safe premises, probably because such claims are often settled out of court. In *Chilton v Canada*, CSC admitted its liability for the physical harm suffered by a prisoner working in an industrial woodworking shop in the penitentiary, and the plaintiff was awarded \$2,500 in damages.¹⁹ Such cases are rarely matters of establishing liability, but rather focus on the damages award.²⁰

Undoubtedly, prisons can be dangerous places. Prison officials exercise control, and it is within their power to make decisions and take steps to protect prisoners from each other and from themselves.²¹ Federally, the *CCRA* clearly enforces the common law and statutory duty to control the behaviour of prisoners and to protect them against harm.²² In New Brunswick, a duty to control behaviour was found when twenty-one

18. *Supra* note 4, s 70. See *Corrections and Conditional Release Regulations*, SOR/92-602 (“[t]he Service shall, to ensure a safe and healthful penitentiary environment, ensure that all applicable federal health, safety, sanitation and fire laws are complied with in each penitentiary and that every penitentiary is inspected regularly by the persons responsible for enforcing those laws”, s 83(1)).

19. 2008 FC 1047, [2008] 336 FTR 308, leave to appeal to SCC refused, 33705 (September 16, 2010).

20. See also *Sarvanis v Canada* (1998), 156 FTR 265, 82 ACWS (3d) 897 (CSC denied liability for an injury suffered by the plaintiff while working in the penitentiary's hay barn, but the Court dismissed the government's motion for summary judgment). This decision was appealed to the SCC on a related question of whether the plaintiff's suit in tort should be barred by the concurrent recovery of disability benefits under the Canada Pension Plan. For the Court, Iacobucci J once again denied the motion for summary judgment, finding that this was not double recovery and that the tort law claim could proceed. See *Sarvanis v Canada*, 2002 SCC 28, [2002] 1 SCR 921. There is only one case where a claim in negligence for an accident sustained by a prisoner while working in a penitentiary's garage was dismissed as “manifestly without foundation”. *Beauchemin v Canada*, [1979] FCJ No 901 (QL) at para 6 (TD).

21. See *CCRA*, *supra* note 4, ss 5, 69, 70, 76, 86.

22. See *Home Office v Dorset Yacht Co*, [1970] AC 1004 HL (Eng) (first case to institute a duty to control the behaviour of prisoners in order to not harm third parties). The effect of a statutory duty on a finding of a common law duty of care is an interesting question and currently beyond the scope of this paper. In Canada, there is no tort of statutory breach, but courts are increasingly willing to ground a common law duty of public authorities on the presence of a co-existent statutory duty.

prisoners were killed in a fire set by another prisoner.²³ *Funk Estate v Clapp* similarly held that there was a duty to control a prisoner in order to protect him from himself.²⁴ More recently, *Wiebe v Canada (Attorney General)* held that there was a duty to supervise a prisoner who assaulted Wiebe, the plaintiff.²⁵ Wiebe was incarcerated in a minimum-security federal facility and was living in a house with the prisoner who eventually assaulted him. He told several correctional officers that tensions were building between himself and the other prisoner but they did not report his concerns. Ultimately, the other prisoner beat Wiebe severely. The trial judge found CSC liable in negligence for failing to supervise, but this decision was reversed in the somewhat cryptic Manitoba Court of Appeal decision. For a unanimous court, Monnin JA held that, notwithstanding the trial judge's finding that there was a well-established duty of care owed, CSC was not liable because the occurrence was not foreseeable.²⁶ Monnin JA did not indicate whether this lack of foreseeability precluded a duty or whether this was a matter of causation.²⁷

In other cases, the duty to protect prisoners from harm has been framed as an "obligation to take reasonable steps to intervene and protect the at-risk inmate",²⁸ a "duty to keep [the prisoner] safe and . . . to promptly come to his rescue",²⁹ a duty to "attend to the safety of the inmates",³⁰ a "duty to take reasonable care of inmates",³¹ an "obligation

23. See *Williams et al v Saint John, New Brunswick and Chubb Industries Ltd* (1985), 34 CCLT 299, 66 NBR (2d) 10 (CA).

24. 54 DLR (4th) 512 at 519, [1989] BCWLD 102 (CA).

25. 2006 MBCA 159, [2007] 2 WWR 598 [*Wiebe*], rev'g 2006 MBQB 5 (available on QL), leave to appeal to SCC refused, 31860 (10 May 2007).

26. *Ibid.*

27. *Ibid.* Justice Monnin also found that the prisoner's suit failed on causation, on the grounds that no action by the prison officials or guards could have prevented the attack. He further held that the trial judge erred in applying the material contribution test rather than the "but for" test. *Ibid.*

28. *Carr v Canada*, 2008 FC 1416 at para 23, 339 FTR 50.

29. *Guitare v Canada* (2002), 224 FTR 272 at para 1, 118 ACWS (3d) 310.

30. *Chilton v Canada*, *supra* note 19 at para 55. See *Miclash v Canada*, 2003 FCT 113, 227 FTR 116.

31. *Scott v Canada*, [1985] FCJ No 35 (QL) (TD).

to take reasonable steps to protect an inmate from fellow inmates”,³² a “duty to ensure the safety of the inmates”,³³ an obligation “not to act in a fashion that put the [prisoner] at risk of harm that was reasonably foreseeable”,³⁴ and a duty to “protect . . . from foreseeable risks”.³⁵ A statutory duty exists to ensure that the penitentiary is “safe, healthful and free of practices that undermine a person’s sense of personal dignity”.³⁶ In *Maljkovich v Canada*, the Federal Court held that there are statutory and common law duties of care to “incarcerate [the prisoner] in conditions that are healthful and do not cause [the prisoner] to suffer physical discomfort and upset”.³⁷ Other duties recognized by the case law relate to the conduct of investigations and mandated reviews, to record keeping and to the providing of information. For example, courts have held that there is a duty of care owed when investigating a disciplinary offence³⁸ and that there is a duty to review a segregation order on a timely basis.³⁹ Conversely, it has been held that there is no duty “to advise [the prisoner] that he should not tell other inmates about his transfer”.⁴⁰ Similarly, in *Farrows-Shelley v Canada*, the Court held that there was no duty to warn a prisoner that his double-bunked cellmate was prone to violence and infected with HIV and hepatitis C, as there was “no foreseeable danger to him”.⁴¹

To summarize, the duty of care owed by prisons to prisoners is a recognized category in private law, particularly in relation to the safety of

32. *Coumont v Canada (Correctional Services)* (1994), 77 FTR 253 at para 38, 47 ACWS (3d) 1196 [Coumont]. See *Hodgin v Canada (Solicitor General)* (1998), 201 NBR (2d) 279, 514 APR 279 (TD) [Hodgin].

33. *Légère v Canada* (1999), 159 FTR 87 at para 5, 87 ACWS (3d) 603.

34. *Carlson v Canada* (1998), 80 ACWS (3d) 316 at para 23 (available on QL) (FCTD). See *Wild v Canada (Correctional Services)*, 2004 FC 942, 256 FTR 240; *Bastarache v Canada*, 2003 FC 1463, 243 FTR 274; *Timm v Canada* (1964), [1965] 1 Ex CR 174 (available on QL); *Iwanicki v Ontario (Minister of Correctional Services)*, 45 WCB (2d) 600, [2000] OTR 181 (Sup Ct) [Iwanicki].

35. *Pete v Axworthy*, 2004 BCSC 1337 at para 62, 34 BCLR (4th) 146. See *Russell v Canada*, 2000 BCSC 650 at para 6 (available on QL).

36. *CCRA*, *supra* note 4, s 70. See *Curry v Canada*, 2006 FC 63, 145 ACWS (3d) 620.

37. 2005 FC 1398 at para 19, 281 FTR 227. See *CCRA*, *supra* note 4, s 70.

38. See *Hermiz v Canada*, *supra* note 10.

39. See *R v Hill*, *supra* note 10 at para 17.

40. *Batty v Logan*, [2000] OTC 53 at para 17, 94 ACWS (3d) 657 (Sup Ct).

41. 2003 FCT 415 at para 31, 232 FTR 77.

physical premises and the provision of the necessities of life. A common law duty has also frequently been imposed to protect prisoners from self-harm and from harm by other prisoners. As we will see below, tort claims for such harm frequently fail at the standard of care and causation stages.

II. Medical Care in Prisons

Health care in federal penitentiaries is provided by CSC and the health of prisoners is its responsibility. Federally, the *CCRA* states that CSC “shall provide every inmate with essential health care” and “shall conform to professionally accepted standards”.⁴² Three sets of defendants could potentially be held responsible for negligence in prison medical care: the correctional system, prison staff and contract health professionals not employed by CSC. We will discuss each in turn.

A. The Correctional System

Courts have found a “duty to provide medical care,”⁴³ a duty to provide “adequate medical care and attention for . . . health and well-being during . . . detention,”⁴⁴ and a duty to inquire about the inmate’s health.⁴⁵ In *Lavoie v Canada*, the Court stated that “the duty to provide medical care is a requirement placed on correctional services as part of their general duty of care”, but that this did not include a “duty to consult in such matters as hiring medical services”.⁴⁶ In the federal penitentiary system, health care is also thoroughly regulated by directives that set out the obligations CSC owes prisoners and that establish the standard of care

42. *Supra* note 4, s 86.

43. *Sutherland v Canada*, 2003 FC 1516 at para 67, [2003] 243 FTR 297; *Levasseur v Canada*, 2004 FC 976 (available on WL Can).

44. *Steele v Ontario*, 1993 CarswellOnt 2686 (WL Can) at para 3 (Ct J (Gen Div)). See also *Swayze v Dajoe*, [2002] OTC 699, 116 ACWS (3d) 781 (Sup Ct).

45. *Lipcsei v Central Saanich (District)*, [1995] 7 WWR 582, 8 BCLR (3d) 325 (SC) [*Lipcsei*].

46. [2008] OJ No 4564 (QL) at para 13 (Sup Ct).

for physical and mental illness.⁴⁷ These duties were also recognized in case law prior to the enactment of the *CCRA*.⁴⁸

While most negligence claims will assert carelessness on the part of prison staff (addressed in Part II-B), a prison system may be held liable for failing to ensure that effective medical services are in place. Effective medical services include timely access to health care, adequate record keeping, reporting requirements and supervision of medical staff. A useful comparator is a hospital's responsibility to provide proper instruction and supervision, and to ensure that all contract physicians are qualified and have access to proper facilities, equipment and resources.⁴⁹ In other words, these cases involve systems negligence, i.e., systems that are negligently designed or operated, or are unreasonably unsafe.

An obstacle to prison liability is posed by the potential finding that the physicians are independent contractors and the prison is therefore not liable for any negligence on their part.⁵⁰ However, we would argue that the existence of a contractual relationship with physicians should not alter the primary duty owed by the correctional system to prisoners. In *Braun Estate v Vaughan*, the Manitoba Court of Appeal held that a hospital's duty is not displaced or altered by the fact that its doctors are independent contractors:

[W]hether the physician is a private physician holding hospital privileges or a salaried employee is of little consequence. In terms of the negligence of the institution, the question is whether there was a duty of care on the hospital, and if so, whether it was breached. The status of the doctor in such circumstances should not matter.⁵¹

47. See Correctional Service Canada, Commissioner's Directives, *CD 259: Exposure to Second Hand Smoke*; *CD 800: Health Services*; *CD 803: Consent to Assessment, Treatment and Release of Information*; *CD 821: Management of Infectious Diseases*; *CD 840: Psychological Services*; *CD 843: Management of Prisoner Self-Injurious and Suicidal Behavior*; *CD 850: Mental Health Services* (Ottawa: Corrections Service Canada, 2009–2013) available online: <<http://www.csc-scc.gc.ca>>.

48. See *British Columbia (Attorney General) v Astaforoff* (1983), 6 CCC (3d) 498, 54 BCLR 309 (CA); *R v Hall* (1996), 45 Alta LR (3d) 166, [1997] 4 WWR 390.

49. Ellen I Picard & Gerald B Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3d ed (Toronto: Carswell, 1997) at 367.

50. See *Oswald v Canada* (1997), 126 FTR 281, 69 ACWS (3d) 854 [cited to FTR]; *Hickey v Canada*, 2007 FC 246, 309 FTR 202.

51. (2000), 145 Man R (2d) 35 at para 44, 94 ACWS (3d) 579 (CA).

Similar reasoning should apply to prisons: even in the absence of primary negligence on the part of the correctional system, in our view, prisons ought to be vicariously liable for the torts of health professionals, whether they are employees or contractors. In 1997, in *Oswald v Canada*, the Federal Court rejected this view, holding that even though a surgeon was liable for failing to exercise appropriate professional judgment, CSC had nonetheless fulfilled its duty “by arranging for services of qualified members of the medical and dental professions”.⁵² This holding seems inconsistent with the fact that the actual relationship between CSC and physicians more closely resembles an employer-employee relationship in light of the degree of control and supervision that prisons have over many aspects of medical care, including nursing, medication, appointments, follow-up and prison visits. Recent case law in other contexts indicates that vicarious liability will ordinarily be imposed where a worker is subject to employer direction and control, and where the employer is in a better position than the worker to guard against risk, allocate costs and insure against loss.⁵³ There is no reason why this approach should not apply to prisons as well.

52. *Supra* note 50 at para 60.

53. See *Douglas v Kinger*, 2008 ONCA 452, [2008] 57 CCLT (3d) 15, leave to appeal to SCC refused, 32787 (11 December 2008). One could also argue that the prison’s obligation to provide health care to prisoners is a non-delegable duty, so that it is not open to them to avoid liability by pointing to the negligence of its subcontractors. See *Lewis (Guardian ad litem of) v British Columbia*, [1997] 3 SCR 1145, [1998] 5 WWR 732, McLachlin J, concurring (the Ministry of Transportation could not escape liability by hiring an independent contractor because they owed a non-delegable duty). This is

a duty not only to take care, but to ensure that care is taken. It is not strict liability, since it requires someone (the independent contractor) to have been negligent. But if it applies, it is no answer for the employer to say, “I was not negligent in hiring or supervising the independent contractor”. The employer is liable for the contractor’s negligence. The employer already has a personal duty at common law or by statute to take reasonable care. The non-delegable duty doctrine adds another obligation—the duty to ensure that the independent contractor also takes reasonable care.

Ibid at para 50.

B. Prison Staff

A prison service will be vicariously liable for the torts of its employees so long as those acts are sufficiently connected to their employment, in the sense that the job creates or enhances the potential risk of tortious conduct.⁵⁴ This is particularly likely to be true in prisons where friction and confrontation, coupled with the opportunity for abuse of power, are inherent in the enterprise.⁵⁵ There are numerous cases in which prison staff members have been found negligent and the correctional institution found to be vicariously liable.⁵⁶ In at least two cases, a breach of the standard of care was found when prison guards failed to send a prisoner whose condition had visibly deteriorated to a doctor.⁵⁷ A breach was also found when a prisoner who had been shot by a guard failed to receive medical treatment.⁵⁸ In other cases, however, no breach of the duty to provide medical care was found where medical assistance was delayed to the point that the prisoner suffered serious consequences, which have included death or a serious injury.⁵⁹

Failure to respond to medical emergencies is a well-documented problem in prisons. In 2007, the Office of the Correctional Investigator (OCI) stated that two-thirds of medical emergencies in the federal system were not responded to properly⁶⁰ and there has been little or no

54. See *Bazley v Curry*, [1999] 2 SCR 534, 174 DLR (4th) 145.

55. See *ibid.*

56. See *Benard v Canada*, 2003 FCT 41, 2003 CFPI 41; *Lavoie v Canada*, *supra* note 46; *Lipcsei*, *supra* note 45; *Geary v Alberta (Edmonton Remand Centre)*, 2004 ABQB 19, 25 Alta LR (4th) 231.

57. *Steele v Ontario*, *supra* note 44; *Lipcsei*, *supra* note 45.

58. See *Abbott v Canada*, *supra* note 8.

59. See *Swayze v Dajoe*, *supra* note 44 (Swayze ingested drugs and choked on his vomit. The officers met delays in transporting him from his cell to the hospital because they required additional guards, as he was a very large individual, and he died en route); *Corner v Canada* (2002), 119 ACWS (3d) 502 (available on QL) (Ont Sup Ct J) (the prisoner was attacked in the yard of a maximum security facility and stabbed from behind, and he alleged that he did not receive medical care immediately); *Bastarache v Canada*, *supra* note 34 (the prisoner was hit over the head by another prisoner with a metal bar and he did not receive medical attention until the following day, when the correctional officer sent him for medical treatment after noticing blood on his bedding).

60. Office of the Correctional Investigator, *Deaths in Custody: Final Report* by Thomas Gabor (Ottawa: Office of the Correctional Investigator, 2007), online: <<http://www.oci-bec.gc.ca>>.

improvement since then.⁶¹ The 2011–2012 OCI report⁶² focused on deaths in custody, and the Correctional Investigator remarked once again on the deficiencies, both systemic and case-specific, that prevented an effective response to emergencies.⁶³ The recent events involving Kinew James reinforces these conclusions.⁶⁴ James pressed the emergency button in her cell at the Regional Psychiatric Centre in Saskatoon repeatedly for over

61. Office of the Correctional Investigator, *Final Assessment of the Correction Service of Canada's Response to Deaths In Custody* by Howard Sapers (Ottawa: Office of the Correctional Investigator, 2009–11), online: <<http://www.oci-bec.gc.ca>> .

62. Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2011–2012* by Howard Sapers (Ottawa: Office of the Correctional Investigator, 2012) online: <<http://www.oci-bec.gc.ca>> .

63. *Ibid* at n 19. The OCI noted:

These reviews continue to point to recurring compliance problems, repeated mistakes and structural weaknesses previously identified by this Office:

1. Responses to medical emergencies that are either inappropriate or inadequate.
2. Critical information-sharing failures between clinical and front-line staff.
3. Recurring pattern of deficiencies in monitoring suicide pre-indicators.
4. Compliance issues related to the quality and frequency of security patrols, rounds and counts.
5. Management of mentally ill offenders too often driven by security responses rather than appropriate health care and treatment.
6. CSC investigative reports and processes require consistency and improvement.

In the reporting period, the following individual failures were identified via the Office's section 19 review procedures:

- Failure to verify a living, breathing body consistent with life-preservation principles during security rounds and patrols.
- Failure to initiate life-saving procedures (CPR) without delay.
- Failure to apply automatic external defibrillator (AED) as part of a mandatory resuscitation process.
- Problems in recording and communicating a history of significant self-harm and suicide attempts in a transfer of an inmate from one institution to another.
- Failure to "reset" the segregation clock for cases involving prisoner transfer.
- Failure to comply with emergency response protocols and preservation of evidence following an inmate murder.

Ibid at n 20.

64. See Kim Mackrael, "Corrections Canada changes rules for medical emergencies after inmate's death", *The Globe and Mail* (11 April 2013) online: *The Globe and Mail* <<http://www.theglobeandmail.com>> .

an hour and other prisoners pushed the buttons in their cells in an effort to trigger a response, but to no avail. James died of a heart attack before help arrived. This sort of situation has arisen in provincial custody as well. In one instance, a prisoner named Julie Bilotta gave birth in her segregation cell. The infant was born prematurely and in breech position because guards refused to believe that Bilotta was going into labour and threatened her with isolation if she did not stop screaming. As a result, the baby had to be put on a respirator in a hospital and Bilotta needed a blood transfusion.⁶⁵ Taken together, these instances demonstrate the unacceptably low de facto standard of care in prisons in response to medical emergencies.

C. Contract Health Professionals

The duty owed by CSC does not change the doctor-patient relationship; physicians still owe prisoners the same duty of care that they owe to other patients.⁶⁶ The relationship is an asymmetrical one, characterized by the patient's reliance and dependence on the physician's knowledge, skill and control.⁶⁷ Physicians must adhere to a standard of reasonable care in all the circumstances,⁶⁸ so the assessment of what is negligent should be no different in prisons than it is in the broader community. However, a number of cases involving prisoners have concluded, without explaining

65. See "Guards inside Ottawa-Carleton Detention Centre should have listened to pregnant prisoner", Editorial, *The Globe and Mail* (15 October 2012) online: The Globe and Mail <<http://www.theglobeandmail.com>>.

66. See *Ewert v Marshall*, 2009 BCSC 762, 187 ACWS (3d) 1052 [*Ewert*].

67. The doctor-patient relationship has been characterized as a fiduciary relationship. See *Norberg v Wymrib*, [1992] 2 SCR 226, 92 DLR (4th) 449, McLachlin J ("it is readily apparent that the doctor-patient relationship shares the peculiar hallmark of the fiduciary relationship—trust, the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and in his or her best interests" at 272). This power imbalance would clearly be present in the prison context, given the vulnerability of the prisoner population to the unilateral exercise of authority.

68. See *ter Neuzen v Korn*, [1995] 3 SCR 674, 127 DLR (4th) 577; *White v Turner* (1981), 31 OR (2d) 773, 120 DLR (3d) 269 (H Ct J), aff'd (1982), 47 OR (2d) 764, 12 DLR (4th) 319 (CA).

the established standard of care, that there was no evidence the medical worker had failed to act in accordance with the standard of practice.⁶⁹

Causation may also pose a hurdle in the prison medical context. In one controversial case, *Hickey v Canada*,⁷⁰ an HIV-positive prisoner claimed damages for the negligence of a prison doctor when he was given an overdose of medication and developed a peripheral neuropathy, a condition not inherent in HIV-positive people. The Court held that the plaintiff could not prove a causal relationship, as HIV itself might also cause the condition in question. There was conflicting medical evidence on this point and to make the causal connection the prisoner would have had to bring additional expert evidence that was not readily available. Arguably, this burden was too heavy—calling for scientific proof that went well beyond the “robust and pragmatic” approach to the “but for” test, as set out in *Snell v Farrell*⁷¹ and endorsed in *Clements*.⁷² The Court in *Sutherland v Canada* imposed a similarly high threshold, finding that causation was not established because the prisoner was unable to prove that the delay in providing medical care was linked to the deterioration of his ulcer condition.⁷³

Judging by the few cases that have made it to court, there is an obvious difference between the standards of care imposed on health professionals within the prison context and the standard applied within the community. It is unclear why courts have been inconsistent in finding negligence in situations of delayed response to medical emergencies, or in cases where skill, resources or proper supervision were lacking. The tendency to impose a higher standard of proof of causation is worrisome, as it can require medical evidence that the plaintiff cannot reasonably be expected to produce. Finally, it seems contrary to public policy and to the law of vicarious liability to hold that the correctional system cannot be held

69. See *Pete v Axworthy*, *supra* note 35; *Vittis v Younger* (1990), 22 ACWS (3d) 1083 (available on WL Can) (BCSC); *Ewert*, *supra* note 66; *Gawich v Klar*, 2010 ONSC 4972, 192 ACWS (3d) 409.

70. *Supra* note 50.

71. [1990] 2 SCR 311, 107 NBR (2d) 94.

72. For different concerns raised by this case, see Sandra Ka Hon Chu, “Federal Court Says Crown Not Liable for HIV-Positive Prisoner’s Illness” (2007) 12:2–3 HIV/AIDS Policy & Law Review 43.

73. *Supra* note 43.

liable for the malpractice of its subcontractors.⁷⁴ As long as medical staff is working for the correctional system, even as contractor or subcontractor, there is no legal reason not to apply principles of vicarious liability. This point is reinforced by the fact that prisoners cannot freely contract with the health professionals of their choice, and are completely dependent on the decisions made by CSC in that regard. Future court decisions in this area should enforce the principles of the *CCRA* and the obligation to apply the same standard of care equally to all patients, whoever and wherever they may be.

III. Risks from Other Prisoners and the Risk of Self-Harm

A. Risks from Other Prisoners

The duty to protect prisoners from other prisoners has been clearly recognized by Canadian courts and is probably the most frequent basis for negligence claims in prison litigation. However, such actions frequently fail to establish a breach of the standard of care. It seems that Canadian courts, like their British counterparts, believe that prison violence is inherent. The courts purport to apply the ordinary test for determining the standard of care, but often conclude that a reasonable person would not have done a better job at monitoring the prisoners and find no breach without offering a sustained analysis.⁷⁵ In *Pete v Axworthy*, for example, the trial judge found that transferring dangerous offenders to a minimum-security facility constituted a breach of the standard of care and held officials liable for the harm suffered by another prisoner at the hands of a violent offender.⁷⁶ The BC Court of Appeal overturned this decision, finding that the standard imposed by the trial judge was too high. To

74. This is arguably a situation where a non-delegable duty should be found. See *Ewert*, *supra* note 66. Prisons should ensure that care is taken by doctors, regardless of their contractual status.

75. *Scott v Canada*, *supra* note 31; *Légère v Canada*, *supra* note 33; *Coumont*, *supra* note 32; *Russell v Canada*, *supra* note 35; *Neeson v Canada*, 2012 FC 77, 403 FTR 296.

76. *Supra* note 35.

discharge their duty, the Court of Appeal held, officers only had to watch the violent offender closely, which they did to the best of their ability.⁷⁷

In some cases, the courts have found a breach of duty where officials had failed to act on repeated signs that a prisoner was likely to be assaulted by another prisoner.⁷⁸ Courts have also been more likely to find negligence when the harm was caused by the breach of an established rule. For example, prematurely opening the door to a cell (resulting in an assault by another prisoner) was considered to be a breach of existing policy rules, and thus to constitute a breach of the standard of care.⁷⁹ Nonetheless, there are plenty of rules that leave room for interpretation. There is clearly an obligation to supervise prisoners while in the prison yard, but courts have often been excessively lenient in enforcing that obligation. For example, *Hamilton v Canada* held that the standard of care was met even though the part of the yard where a violent act occurred was not monitored by cameras.⁸⁰ There were guards around who could have seen the area in question but did not because they did not mingle with prisoners. Similarly, where there have been sudden attacks with no prior indications courts have found no breach on the part of guards.⁸¹

The causation requirement poses another potential obstacle to a finding of negligence in these cases. Where the immediate cause of harm was the wrongful actions of a third party (i.e., another prisoner), a breach of the duty of care by guards is often found not to have been a sufficient cause to warrant liability. *Coumont v Canada* held that even if there was a history of stabbings in a certain part of an institution, the officials' failure to supervise that place did not amount to a breach and was not ultimately the cause of the plaintiff's stabbing.⁸² Similarly, *Iwanicki v Canada* held that even if the prison had fallen below the standard of care by giving razors to prisoners, the breach was not found to be causally linked to the stabbing of the plaintiff with a razor.⁸³ By requiring the plaintiff to

77. *Pete v British Columbia (Attorney General)*, 2005 BCCA 449, 258 DLR (4th) 657, leave to appeal to SCC refused, 31208 (9 February 2006).

78. See *Carr v Canada*, *supra* note 28; *Miclash v Canada*, *supra* note 30; *Squires v Canada (Attorney General)*, 2002 NBQB 309, 253 NBR (2d) 326.

79. See *Guitare v Canada*, *supra* note 29.

80. [2001] OTC 617 (available on QL) (Sup Ct J).

81. *Supra* note 25; *Hodgin*, *supra* note 32.

82. *Coumont*, *supra* note 32.

83. *Iwanicki*, *supra* note 34.

show a clear connection between the breach of the standard of care and the attack, the Court arguably went beyond the robust and pragmatic approach endorsed in *Clements*—an approach which would obviously have led to a finding of liability on these facts, as the injury would not have occurred “but for” the prison’s negligence in providing razors.⁸⁴ In the same vein, the Manitoba Court of Appeal in *Wiebe* held that the “but for” test had not been met because nothing that the guards could have done would have prevented the “violent and unforeseen outburst” in question.⁸⁵ Thus, currently, the main obstacle to satisfying the causation requirement in cases where prison officers have failed to control a third party is the view on the part of the courts that these are random acts of violence which cannot be predicted or prevented.

B. Duty to Prevent Self-Harm

The duty to protect prisoners from harm includes harm done to oneself.⁸⁶ Liability has been imposed in cases of self-harm where supervision has been found to be inadequate. In particular, a breach of the standard of care has generally been found where a guard has not followed an established protocol. In *Funk v Clapp*, a breach was found when the prisoner committed suicide with his belt, which was not confiscated because the guard did not properly check him for such objects as the protocol required.⁸⁷ Similarly, in *Dix v Canada*, the plaintiff was subjected to a mentally abusive interrogation, and the prison was found liable when he subsequently attempted suicide in custody.⁸⁸

84. *Supra* note 12.

85. *Supra* note 25 at para 45. In reaching this finding, the Court of Appeal in *Wiebe* relied on the Bonnie Mooney case, where the BC Court of Appeal found that the RCMP were not liable for failing to prevent a violent attack by Ms. Mooney’s ex-partner because police and governments cannot prevent domestic violence. See *BM v British Columbia (Attorney General)*, 2004 BCCA 402, [2004] 10 WWR 286.

86. See *Funk Estate v Clapp*, *supra* note 24; *Dix v Canada (Attorney General)*, 2002 ABQB 580, 7 Alta LR (4th) 205 [*Dix*].

87. *Funk Estate v Clapp*, *supra* note 24.

88. *Dix*, *supra* note 86. After being arrested, Dix was subjected to eleven hours of interrogation without any food or drinks, after which police had him drive to the crime scene. At bail hearings, police used a letter that they knew was false to try to show that Dix was a dangerous offender. He was kept in custody as a result, and during that time he attempted suicide. *Ibid*.

Claims where protocols are less clear often fail to establish that the standard of care was breached. In *Rhora v Ontario*, the plaintiff was known to be mentally disturbed.⁸⁹ He had killed one of his cellmates during his first night in custody. Although the police later claimed there was no indication that Rhora was violent or suicidal,⁹⁰ the following day he injured his head by banging it on a cell wall. Rhora's suit in negligence was dismissed, and this finding was upheld by the Ontario Court of Appeal two years later.⁹¹ The Court found that, while the police should have provided more information to prison authorities on Rhora's psychiatric history, the rest of the police officer's decisions were appropriate because there was no evidence that the detention centre would have acted differently with more information. Failure to establish a breach of the standard of care and causation prevented a finding of negligence. Similarly, in *Gerstel v Penticton (City)*, no negligence was found in the supervision of a schizophrenic prisoner who, on the basis of delusions, dove headfirst onto the floor of his cell, rendering him a quadriplegic.⁹² He had been under no special supervision, even though his medical history showed that his illness was intractable and that he had not responded to treatment.

The Ashley Smith case provides tragic evidence of the problems with the federal correctional system's management of self-injurious prisoners. The OCI investigator has published a number of reports on this issue and has requested immediate changes.⁹³ Smith was a mentally ill teenager who spent most of her sentence in segregation. She went through a number of transfers, undergoing a new assessment process in each institution. As a consequence, there was no continuity in her medical treatment, and she repeatedly engaged in self-injurious behaviour. At Grand Valley Institution for Women, guards were told not to remove ligatures from around her neck or to intervene in any way. Senior staff did not take her suicidal attempts seriously, dismissing them as mere cries for attention. The order not to intervene was supported by a CSC psychiatrist who concluded that Smith was not an imminent danger to herself or to others,

89. [2004] OTC 651, 132 ACWS (3d) 1180 (Sup Ct J).

90. *Ibid.*

91. *Rhora v Ontario* (2006), 43 CCLT (3d) 78, 217 OAC 307 (CA).

92. (1995), 9 BCLR (3d) 49, 57 ACWS (3d) 118 (SC).

93. See Office of Correctional Investigator, *A Preventable Death* by Howard Sapers (Ottawa: Office of Correctional Investigator, 2008) online: <<http://www.oci-bec.gc.ca>>.

despite frequent self-injurious acts. Eventually she succeeded in strangling herself while guards watched from her cell door.⁹⁴ Subsequent investigation showed that Smith's medical files did not accompany her transfers in a timely way and that certain psychologists had recommended Ms. Smith be transferred to a hospital because segregation was not a proper response to her illness. Smith herself had filed several grievances, which were never answered.⁹⁵ They came to light only at the coroner's inquest that started five years after her death.⁹⁶ The coroner's jury rejected the argument that the death was a suicide and returned a verdict of homicide.⁹⁷

In light of the obligations arising from the common law, legislation and directives,⁹⁸ the courts would appear to be more lenient to the correctional system than they should be. This system is failing to meet established medical standards in dealing with suicidal prisoners, who are instead placed in segregation apparently for their safety, with little or no treatment. This approach provides no therapeutic benefit, and there is good evidence to suggest that the rigours of segregation actually exacerbate symptoms of mental illness.⁹⁹

94. See e.g. Colin Perkel, "Corrections actions 'unacceptable' in Ashley Smith case, Harper says", *The Globe and Mail* (1 November 2012), online: The Globe and Mail <<http://www.theglobeandmail.com>>.

95. See *ibid.*

96. See e.g. Donovan Vincent, "Ashley Smith not psychotic, psychologist testifies at inquest", *Toronto Star* (4 March 2013) online: The Star <<http://www.thestar.com>>; Donovan Vincent, "Ashley Smith's ex-psychologist tells inquest he felt 'undermined' by decision to transfer her to Saskatoon", *Toronto Star* (5 March 2013) online: The Star <<http://www.thestar.com>>; Donovan Vincent, "Ashley Smith turned down right to apply for full parole, inquest told", *Toronto Star* (26 March 2013) online: The Star <<http://www.thestar.com>>.

97. Colin Perkel, "Ashley Smith's death should be ruled homicide, lawyer argues", *The Globe and Mail* (26 November 2013), A8.

98. See e.g. CSC, *CD 843 Management of Prisoner Self-Injurious and Suicidal Behaviour*, *supra* note 47.

99. See Ivan Zinger, Cherymy Wichman & DA Andrews, "The Psychological Effects of 60 Days in Administrative Segregation" (2001) 43:1 Can J Crim 50; Ronald Aday, *Aging Prisoners: Crisis in American Corrections* (Westport, Conn: Greenwood Publishing Group, 2003) at 101-05; House of Commons, Standing Committee on Public Safety and National Security, *Mental Health and Drug and Alcohol Addiction in the Federal Correctional System* (December 2010) at 13 (Chair: Kevin Sorensen); Correctional Service Canada, *Federally Sentenced Offenders with Mental Disorders: Correctional Outcomes and Correctional Response*

IV. Conditions of Confinement

We observed at the outset that the correctional system has a well-established duty to provide prisoners with a safe environment. In Part IV, when we speak of conditions of confinement, we are referring to broader systemic concerns about the general quality of the prison environment and prisoners' entitlement to a certain standard of living. There is no clear boundary between safe premises and safe conditions of confinement. Generally, "premises" refers strictly to the physical environment and to operations that must accord with certain standards—for example, the requirement that tools work properly and that hazards such as fire and floods be minimized. In contrast, "conditions of confinement" can include the perils caused by double-bunking, the exposure to certain physical hazards such as infectious illness, or the amenities necessary for a decent standard of life in prison. From a tort perspective, cases about conditions of confinement rarely make it to court, likely because the plaintiff would have a hard time establishing that a duty of care is owed on the part of the authorities.

The current test for a duty of care, as articulated in *Cooper v Hobart*, raises a number of obstacles to the imposition of liability on government authorities.¹⁰⁰ The first line of inquiry is whether the duty falls within a judicially recognized category.¹⁰¹ If it does, then it is not necessary to proceed with the *Anns/Cooper* test. In the prison context, the argument could be made that the duty to provide safe conditions of confinement falls within the already existing category of the duty to provide a safe environment, as the two are co-extensive and, at times, indistinguishable. There is some uncertainty, however, about how strictly to construe these pre-established categories, and courts will frequently interpret earlier cases so narrowly that any new fact situation is characterized as requiring

by Lynn Stewart, Geoff Wilton & Colette Cousineau, Research Report R-268 (Ottawa: Correctional Service of Canada, 2012).

100. *Supra* note 14.

101. *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27, [2008] 2 SCR 114 [*Mustapha*].

the imposition of a novel duty.¹⁰² Indeed, the Supreme Court has shown a growing reluctance to impose a duty of care on government, as is evidenced by the use of the *Anns/Cooper* test to negate such a duty in a number of cases.¹⁰³

If a novel duty is alleged, one then proceeds to the first stage of the *Anns/Cooper* test, which requires the plaintiff to establish sufficient relational proximity to justify the imposition of a duty. This might require the government body to have had actual knowledge of a plaintiff's concerns or to have been aware of a grave risk.¹⁰⁴ This would not ordinarily be a problem in the prison context, given that the individual plaintiff is clearly known to the defendant but proximity could be negated on policy grounds, where a duty to an individual plaintiff would conflict with a duty of the government to the public as a whole. In *Cooper v Hobart*, for example, the Supreme Court refused to find that the Ontario Registrar of Mortgage Brokers had been under a duty of care to investors who lost money when the Registrar failed to revoke a broker's licence in a timely manner on the basis that there was not sufficient proximity between the Registrar and investors.¹⁰⁵ The Court held that policy concerns negated the recognition of a duty of care in that context because the Registrar owed a duty to the public at large that would conflict with any duty to individual investors. The prospect of conflicting duties could just as easily negate a finding of proximity in the prison context where the plaintiff's claim focuses on inadequate conditions of confinement. The issue of public safety comes into play here, as correctional systems have to protect

102. The Court concluded that a doctor's duty to an unborn child (once born alive) was novel, in spite of a substantial body of prior case law that had imposed a duty in similar circumstances. See *Paxton v Ramji*, 2008 ONCA 697, 299 DLR (4th) 614, Feldman J, leave to appeal to SCC refused, 32929 (23 April 2009). A BC trial court declined to follow Feldman J's decision in *Paxton*, stating that "[w]ith what appears to be a long history of judicial recognition of a physician's duty of care to a fetus, a duty which crystallizes upon the live birth, an *Anns* analysis appears unnecessary." See *Ediger v Johnston*, 2009 BCSC 386 at para 206 (available on QL) (this finding of a duty was accepted by both the BC Court of Appeal and the Supreme Court of Canada).

103. Robert M Solomon et al, *Cases and Materials on the Law of Torts*, 8th ed (Toronto: Carswell, 2011) at 774. See also *Childs v Desormeaux*, *supra* note 14 (social host liability); *Design Services Ltd v Canada*, 2008 SCC 22, [2008] 1 SCR 737 (contract); *Mustapha*, *supra* note 101 (products liability).

104. See *Fullowka*, *supra* note 17.

105. *Supra* note 14.

the public and serve other social goals. In such circumstances, courts tend to defer to governmental discretion and are generally loath to interfere with the government's balancing of competing concerns. Foremost among such concerns would likely be the extremely high financial cost of across-the-board improvements that would be needed to improve the conditions of confinement.

Deference of courts to government discretion is especially likely when the allocation of resources is involved. In *Just v British Columbia*, the Supreme Court held that budgetary allocations are true policy decisions and are immune from tort liability.¹⁰⁶ This approach was followed in the medical context, when parents of a baby who died in an emergency ward sued the Ontario government for providing inadequate funding for medical care.¹⁰⁷ The Ontario Court of Appeal found that this was a novel duty of care and refused to recognize it, holding that the Ministry of Health's duty to society as a whole negated a finding of proximity to the individual plaintiffs.¹⁰⁸ The Court also confirmed that such decisions were immune from suit as bona fide policy decisions about funding and hospital restructuring.¹⁰⁹ Similarly, in *Imperial Tobacco*, the Supreme Court indicated that decisions made at the highest level of government about social and economic considerations were "true or core" policy decisions that will be immune from suit.¹¹⁰ In light of these decisions, it might be difficult to persuade a court to impose liability where the claim goes beyond a concern for safety and asserts a prisoner's entitlement to a better standard of living. Such a claim would require the allocation of more funds to living conditions generally.

We would argue, however, that many matters related to conditions of confinement could be characterized as operational insofar as they involve the practical application of the basic policy decision to establish and operate prisons. Decisions about conditions of confinement could be seen as "manifestations of the implementation of the policy decision", and would therefore be subject to review as operational choices about how to implement the policy choices in favour of prisoners.¹¹¹ This is the

106. *Supra* note 16.

107. *Mitchell v Ontario* (2004), 71 OR (3d) 571, 188 OAC 385.

108. *Ibid.*

109. *Ibid.*

110. *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 95, [2011] 3 SCR 45.

111. See *Just v British Columbia*, *supra* note 16 at 1246.

route that the British courts have taken, stating that prisoners subjected to improper conditions of confinement could have both a public remedy and a private action in negligence.¹¹² This position is to some extent borne out in the Canadian case law on environmental factors within prisons. In *Curry v Canada*, the plaintiff was strip searched and placed in a dry cell for over twenty four hours despite having already undergone x-ray and cavity searches.¹¹³ The Court stated that they were operational decisions and procedures that amounted to negligence and were incompatible with the duty of care imposed on the correctional system by the *CCRA* to ensure that the penitentiary was safe, healthful and free of practices that undermine a person's sense of personal dignity.¹¹⁴ Similarly, in *Maljkovich*, the Court stated that by exposing the plaintiff to second-hand cigarette smoke while incarcerated, the government "fails in its statutory and common-law duties of care".¹¹⁵

An interesting question is raised by the issue of double-bunking, that is, whether negligence liability could be used to require better living conditions in prison generally. *Savard v Canada* held that the double-bunking in question was legal and justified based on its "temporary character",¹¹⁶ perhaps suggesting that if it were implemented on a more permanent basis it might be open to challenge. This position is supported both by *CCRA* regulations and by international prison guidelines, which state:

[W]here sleeping accommodation is in individual cells or rooms, each inmate shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception from this rule, it is not desirable to have two inmates in a cell or a room.¹¹⁷

112. See *R v Deputy Governor of Parkhurst Prison*, [1992] 1 AC 58, [1991] All ER 733 HL (Eng); *Weldon v Home Office*, [1991] 3 WLR 340 HL (Eng).

113. *Curry v Canada*, *supra* note 36.

114. *Ibid* at para 29.

115. *Maljkovich v Canada*, *supra* note 37 at para 2.

116. 2003 FCT 683 at para 21, 235 FTR 168.

117. First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/CONF/611, ESC Res 663 C (XXIV), UNESCOR, 1957, Supp No 1 UN Doc E/3048, amended ESC Res 2076 (LXII), UNESCOR, 1977, Supp No 1, UN Doc E/5988, ss 9–10 [*Standard Minimum Rules*].

Commissioner's Directive 550 Inmate Accommodation states that "population management strategies must include single occupancy when feasible and ensure that double-bunking remains a temporary accommodation measure".¹¹⁸ The international prison guidelines also indicate that prisoners should not be hosted in the same dormitory if they are unsuitable roommates and state that "all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating, and ventilation".¹¹⁹

Notwithstanding the clear imposition of an internal duty by the Commissioner's Directive, in *Piche v Canada (Solicitor General)* it was nonetheless held that double-bunking was a policy decision and thus "not open to question".¹²⁰ In *Williams v Canada (Commissioner of Corrections)*, another case from the same era, the Court found that "there was no evidence that there would be irreparable harm to the plaintiffs as a result of an increase in double bunking in the institution" and held that the administrative decision of the warden was reasonable.¹²¹ Although *Williams* did not treat the issue of double-bunking as being beyond judicial scrutiny as a policy decision, it offered nothing more on the duty of care issue.

Even where a duty of care is found with respect to conditions of confinement, deference on the standard of care poses an obstacle to a finding of negligence. Courts are mindful of the difficulties that governments may face in providing for the basic needs of all prisoners. As noted earlier, the Federal Court in *Savard* held that because double-bunking may be permissible where it is temporary, the standard of care had been met.¹²² This minimal standard of care is also evident in *Allan v Canada (Commissioner of Corrections)*, which held that the failure to provide special orthopedic footwear was not a breach of the duty to provide recreational clothing and footwear.¹²³ Because the duty was "imprecisely defined by regulations", the Court said, "a reasonable

118. Corrections Service Canada, *CD 550 Inmate Accommodation* (Ottawa: Corrections Service Canada, 2009–2013) available online: <<http://www.csc-ccc.gc.ca>>.

119. *Standard Minimum Rules*, *supra* note 117, ss 10–11a.

120. (1984), 13 WCB 149, 17 CCC (3d) 1 at 102 (FCTD).

121. [1993] FCJ No 646 (QL) at para 18 (TD).

122. *Supra* note 116.

123. (1990), 38 FTR 176, 23 ACWS (3d) 286 [cited to FTR].

discretion on the part of administrators in meeting their duty must be recognized and the court ought not intervene”.¹²⁴ This approach is consistent with Cory J’s statement in *Just v British Columbia* that “the standard of care imposed upon the Crown may not be the same as that owed by an individual” and must be balanced against a number of other factors such as the extent of the risk, budgetary limits and availability of personnel and equipment.¹²⁵

In sum, there are substantial obstacles to a finding that conditions of confinement will give rise to the recognition of a novel duty of care. We have found some jurisprudential support for the claim that the setting of conditions of confinement by CSC should be characterized as operational decisions, given the existence of a statutory duty to provide proper conditions of confinement. While statutory provisions are not determinative of the standard of care and do not provide an independent basis for a finding of liability, they may nonetheless provide useful evidence and guidance as to the standard of care that is expected.¹²⁶ This may support the imposition of a stringent standard of care, as it clearly establishes the duty of correctional services to ensure a safe and healthy environment, and to provide appropriate living conditions for prisoners.¹²⁷ As a general rule, however, the cases where there is no clear duty owed rarely make it to court. Thus, aside from the above examples, it is difficult to say whether general conditions of confinement could form the basis for a claim in negligence. Moreover, conditions of confinement would likely be viewed as giving rise to a novel duty and could be negated for policy reasons. The concern here is that standards of conditions of confinement are essentially funding decisions, and are therefore matters of policy that are immune from suit.

124. *Ibid* at 181.

125. *Supra* note 16 at 1244.

126. *Canada v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at 228, 143 DLR (3d) 9.

127. These rules in turn form the basis for directives that are being daily put into practice by correctional staff. See e.g. Corrections Service Canada, Commissioner’s Directives, CD 259: *Exposure to Second Hand Smoke* (Ottawa: Corrections Service Canada, 2014) available online: <<http://www.csc-scc.gc.ca>> (forbids smoking inside the perimeters of a prison).

Conclusion

In this paper we have reviewed those tort claims that made it to trial. We did not have access to what is probably a large number of cases that were settled outside of court. Further, the cases that have been litigated are generally the controversial ones.

Tort claims by prisoners meet many obstacles. First, correctional staff and institutions are held to a lower standard of care than defendants in the general community. Under similar circumstances, a prisoner seems to have a worse chance of succeeding than a plaintiff from the outside. In addition, the causation analysis has been applied more rigorously in prison tort cases and requires more than the robust and pragmatic inference called for in *Snell* and *Clements*. Judges seem to be asking prisoners to produce evidence that is not readily available to them and that lies mostly in the hands of the correctional services.

Second, courts appear to be less receptive to health care-based claims when the plaintiff is a prisoner. Arguably, prison medical staff are held to a lower standard of medical care than medical staff that serve the wider community. This is clearly inconsistent with legislative requirements that the standard of health care in prison is to be equivalent to that in the community as a whole. In addition, by applying the controversial distinction between contractor and sub-contractor, courts are permitting correctional institutions to escape vicarious liability for injuries suffered by prisoners at the hands of some health care workers.

Finally, claims of novel duties are not well received by the courts when the defendant is a government actor engaged in a public role, particularly where there are conflicting duties at stake or where there are resource implications. For this reason, general conditions of confinement are unlikely to ground successful private claims even though we often see infringements of the legal provisions.

Tort-based litigation may nonetheless benefit prisoners. The other remedial avenues currently available to prisoners are only partially effective. The internal grievance system is still highly bureaucratic and

lacks clear remedies.¹²⁸ The standard for judicial review of administrative decisions is now higher than ever, with reasonableness replacing correctness even for *Charter*-based claims. Tort claims and compensation may be an effective way of drawing attention to some issues of safety and delivery of care,¹²⁹ notwithstanding all of the difficulties we have discussed.

This paper has pointed out some troubling obstacles to tort law claims against prisons; this is amplified by the lack of lawyers specialized in this area, the costs of litigation and the obstacles raised by courts themselves. Tort litigation has the potential to be a tool for the protection of prisoners' rights. This would require a firmer attitude on the part of the courts to discourage authorities from taking a relaxed approach to rules that govern prisoners' entitlements. Governments cannot afford the cost of defending themselves repeatedly against civil actions, or the cost of damages when claims for prisoner injuries, illnesses and death succeed. At some point,

128. See e.g. Correctional Service Canada, *Report of External Review of Correctional Services of Canada Offender Complaints and Grievances Process* by David Mullan (Ottawa: Correctional Service Canada; 2010). To update the Mullan Review, see Howard Sapers, Correctional Investigator, in Senate, Standing Committee on Justice and Constitutional Affairs, *Evidence of Proceedings of the Standing Committee on Justice and Constitutional Affairs*, 41st Parl, 1st Sess, No 29 (12 December 2012).

Arising from the Mullan review, an alternative dispute resolution pilot project has been implemented at 10 medium and maximum security institutions. The pilot is showing some promising early results, including a high resolution rate, reduction in the number of complaints, and more timely resolution of priority grievances. The pilot affirms that offender complaints are best resolved at their source at the lowest possible level and as informally as possible.

Ibid.

129. For the difficulties of prison litigation, see e.g. *Brazeau v Canada*, 2012 FC 1300 (available on QL). In *Brazeau*, the prisoner plaintiffs were self-represented and filed a Statement of Claim challenging the general circumstances of their confinement. The defendant brought a motion to dismiss the Statement of Claim on the basis that it did not meet the formal and substantive requirements of pleadings. The motions judge permitted the filing of an amended Statement of Claim and took the time to indicate what kind of changes would be required to comply with the rules. Given the deprivation, frustration and hopelessness disclosed by the prisoners' document, there might be good reason to expect that the underlying facts could support a justiciable cause of action, at least an arguable one. However, given the pleading deficiencies, one cannot be optimistic that the unrepresented plaintiffs will proceed beyond the interlocutory stage.

it may be prudent to improve internal prison conditions rather than to meet these costs. Our goal in this paper has been to provide guidance and encouragement to lawyers and researchers who might contemplate this use of tort law as a means of enforcing legal norms and protecting prisoners' rights.

Property Law Culture: Public Law, Private Preferences and the Psychology of Expropriation

*Cherie Metcalf**

Scholars divide into two main camps in the debate on the role of law in shaping the decisions of individuals. Rational choice scholars argue that individual preferences are exogenous to law, so law can be used instrumentally; realist and socio-legal scholars argue that law is culturally contingent and must be understood in its broader context. Recent work in the theory of reference-dependent preferences may help unite the two schools by suggesting that while social context helps us understand law's operation, law can also determine that context and culture. This would complicate the relationship of law to individual decisions.

This paper provides empirical evidence to help determine whether law acts as a reference point, by looking to a major difference in the level of property protection provided by the constitutions of Canada and the United States. Unlike Americans, Canadians do not enjoy constitutional protection against the expropriation of private property. Except where there are statutory restrictions, Canadian governments can expropriate land without compensating the property owner. Therefore, according to reference point theory, attitudes towards expropriation should differ between Americans and Canadians.

The author administered a survey to a group of Canadian students, asking them to describe their financial and attitudinal responses to hypothetical scenarios involving government expropriation of their property. The results were then compared to those of a similar, earlier study in the US. If constitutions have expressive power and can act as reference points for shaping individual preferences and culture, we would expect to see a difference in the responses to the two studies. Surprisingly, no such difference was found. Attitudes among Canadian respondents were largely similar to those in the American study. These results challenge the widespread assumption that Americans are more attached to private property than Canadians.

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Introduction

Scholars are divided on the role that law plays in shaping the decisions of individuals. For more formalist legal scholars and scholars in the rational choice school of law and economics, the preferences of individuals are assumed to be exogenous to the law. Law can be turned to instrumental purposes and the incentive effects of the law can be quite readily determined. By contrast, scholars working in legal realist and socio-legal traditions generally see the law as more culturally contingent and hence less exogenous or deterministic in its form and effects. For these scholars, the influence of the law can only be understood by examining law in its broader context, attending closely to extra-legal influences on the actors involved.

Recent work by economists potentially spans these divides by arguing that individual preferences depend on reference points. This research suggests that while culture and context may be important to understanding how law operates and hence to determining its welfare effects, law may also operate to determine social culture and context through its influence on the construction of individual preferences and social norms, and hence on individual and collective choices. If this reciprocity exists, it would substantially complicate the analysis of the potential impact of legal rules. Law may be more powerful than supposed by legal realists and some socio-legal scholars, and less direct in its effects than generally assumed by formalists and traditional rational choice theorists. To try to assess

how accurately these competing views of the law reflect reality, empirical work is needed.

It is something of a commonplace among legal scholars that constitutional rules are declarative of the fundamental values of a society. The rules, then, may be a strong candidate for inclusion among the type of law that we would expect to operate as reference points for shaping individual preferences. The design for this study exploits a major difference between the Canadian and American constitutions. It uses a prior, published study by Janice Nadler and Shari Seidman Diamond (N & SD), set in the United States, as an opportunity to provide empirical evidence on the impact of such constitutional differences on individual preferences.¹ In the US, the Constitution protects private property and prevents government from expropriating it except for “public use” and only when “just compensation” has been paid.² Canada lacks a constitutional constraint on government expropriation of property and there is no constitutional requirement to pay compensation. The study generates evidence on Canadian responses to a proposed government expropriation of property and compares them with American responses. While this does not allow us to determine whether there is a causal relationship between law and individual preferences and attitudes, we can assess whether the evidence generated is consistent with a significant link between formal constitutional rights and the psychology of individual and social responses. If formal constitutional rights were an important reference point for individuals, we would expect to see a difference in the attitudes and responses of Canadians and Americans regarding government expropriation of their property. The evidence will be helpful in understanding the nature of constitutional rules and their relationship to individual preferences and culture.³

The specific method I adopt in this paper is to administer a questionnaire mirroring the questions asked by N & SD in their study of attitudes toward expropriation in the US. This approach generates empirical evidence that allows us to begin to probe the attitude of Canadian respondents to

1. Janice Nadler & Shari Seidman Diamond, “Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity” (2008) 5:4 *J Empirical Legal Stud* 713 [N & SD].

2. US Const amend V.

3. The meaning of culture is highly contested. Here I am assuming that it reflects prevailing attitudes.

expropriation, and also allows for comparison between the results of the Canadian and American surveys. Both the N & SD study and mine focus on eliciting financial and attitudinal responses to government demands to take real property. Participants' opinions were solicited after exposure to a short hypothetical vignette. The survey vignettes differ with respect to how long the owner had been on the land in question (the Term variable), and with respect to the use the government was proposing for the land (the Use variable).⁴ The survey solicited information from each respondent on the compensation she would require, as an owner of the property, to agree to move voluntarily (Compensation Incentive), as well as her attitude toward the requirement to move and toward the appropriateness of the government action.

The results were generated by ordered logit regression of the Compensation Incentive on the Term and Use variables, along with a series of controls. In addition, the distribution of the attitudinal measures was analyzed to investigate variation in response to the Term and Use variables. Results were generated for the Canadian survey response data, and were then compared to the results generated from N & SD's American data.

The results are somewhat surprising. Despite the stark difference in the constitutional treatment of property rights in the two countries, the data indicates that the attitudes of Canadians and Americans are very similar. While some of the results may be consistent with the law playing a role in shaping individual attitudes and preferences, the role appears to be only secondary. If law operates as a reference point for individual preferences, the results suggest we must look beyond the mere existence of "first order" differences in constitutional structure to discover the nature of this effect.

I. Law, Culture and Private Preferences

Understanding how law operates to produce its effects in the "real world" is a difficult and highly contested enterprise. For many scholars, particularly those who work in the rational choice framework of law

4. The Term on Land variable can take one of two values: a short term of two years, or a long term of 100 years. The Use variable can take one of three possibilities: a hospital, a shopping mall or an unspecified future use.

and economics, the preferences of individuals are treated as “given”, or invariant to the law. These scholars focus on assessing the impact of law through its incentive effects, primarily operative through impacts on an individual’s income or wealth.⁵ This approach has been criticized as being too parsimonious toward individual preferences and choices, abstracting away from important contextual and cultural drivers of behaviour and painting too simplistic a picture of the law’s effects and instrumental potential.⁶ At the extreme, this critique of the rational choice framework suggests that the influence of law can only be understood by fully situating it within the relevant social and cultural context. When taking this broader context into account, law is arguably often a less instrumentally powerful influence on individual behaviour.⁷

As stated above, recent work in economics provides a possible bridge between these divergent approaches. In a move that brings them closer to socio-legal scholars, economists are recognizing that “culture” and non-market institutions are vital to understanding how individuals make

5. See e.g. Gary S Becker, “Crime & Punishment: An Economic Approach” (1968) 76:2 J Pol Econ 169 (a classic example of this type of approach); Richard A Posner, *Economic Analysis of Law*, 5th ed (New York: Aspen Law & Business, 1998) (a standard reference text).

6. This point has been made by various scholars, including those working in socio-legal traditions, critiquing law and economics scholarship. See e.g. Ravi Kanbur & Annelise Riles, “Commentary 6: And Never the Twain Shall Meet? An Exchange on the Strengths and Weaknesses of Anthropology and Economics in Analyzing the Commons” in Pranab Bardhan & Isha Ray, eds, *The Contested Commons: Conversations between Economists and Anthropologists* (Malden, Mass: Blackwell, 2008) 266. Scholars operating more within the law and economics tradition have made the point as well. See e.g. Robert C Ellickson, *Order Without Law: How Neighbours Settle Disputes* (Cambridge, Mass: Harvard University Press, 1991) [Ellickson, *Order Without Law*]; Elinor Ostrom, *Governing the Commons* (Cambridge, UK: Cambridge University Press, 1990) (concerning the role of social norms on individual behaviour and the relevance of institutions to individual choice). For the works of “new norms” scholars, see e.g. Robert Cooter et al, discussed in Robert C Ellickson, “Law and Economics Discovers Social Norms” (1998) 27:2 J Legal Stud 537.

7. This is only a subset of the potential modifiers for relevant context. Factors such as historical and economic context would also be relevant to understanding how law functions. The importance of context in fully understanding law is a prominent issue in debates about the appropriate approach to comparative law. See e.g. William P Alford, “On the Limits of ‘Grand Theory’ in Comparative Law” (1986) 61:3 Wash L Rev 945; John C Reitz, “How to Do Comparative Law” (1998) 46:4 Am J Comp L 617.

choices both individually and collectively.⁸ In response, scholars have begun to model individual preferences in ways that are contextually dependent.

One strand of literature links the preferences and choices of individuals to their perception of how others will interpret their behaviour.⁹ According to this literature, law can play an important role by signalling or declaring norms of appropriate behaviour. As a social institution, law can operate to declare a society's fundamental shared values, which feed into individual preferences. In this way, law can help shape individual preferences and influence the choices individuals make.¹⁰ Law's power and effects are felt not only directly through financial incentives, but also through law's reflection of social norms and values.

Another recent line of literature draws on Kahneman and Tversky's prospect theory to propose that individual preferences are contingent on

8. See e.g. Karla Hoff & Joseph E Stiglitz, "Equilibrium Fictions: A Cognitive Approach to Societal Rigidity" (2010) 100:2 *Am Econ Rev* 141. In this paper, the authors treat culture, modeled as ideologies/belief systems, as a state variable, and emphasize the importance of socially constructed context to perceptions, beliefs and behaviour of individuals. A question the authors do not really interrogate in this paper is the role of law in constructing and influencing these cultural state variables.

9. See e.g. George A Akerlof & Rachel E Kranton, "Economics and Identity" (2000) 115:3 *The Quarterly Journal of Economics* 715 (individual preferences constructed in terms of identity, actions consistent with identity can enhance utility, social norms/law play role in definition of identities, coding of actions); Eric Posner, *Law and Social Norms* (Cambridge, Mass: Harvard University Press, 2000) (not via preferences directly, but social norms operative in signaling role, determining actions in cooperative games); John A List, "Social Preferences: Some Thoughts from the Field" (2009) 1:1 *Annual Review of Economics* 563 at 565 (individual preferences as a function of monetary calculations and other factors, including moral/ethical considerations that are shaped by the strength of social norms or legal rules that govern behaviour in a particular society); Ernst Fehr & Armin Falk, "Psychological Foundations of Incentives" (2002) 46:4 *EER* 687 at 705-08 (discussing the role of social norms and approval on individual preferences and choices, the role of law in influencing individual beliefs about social values, and how the expressive function of law feeds into individual choice); Oren Bar-Gill & Chaim Fershtman, "Law and Preferences" (2004) 20:2 *JL Econ & Org* 331 (law influences incentives and also through evolutionary channels influences profile of preferences in society).

10. In this literature, individuals still generally exhibit preferences consistent with standard rational choice theory, albeit a slightly more complex version.

the reference point from which individuals begin to assess their choices.¹¹ According to this theory, individuals lose more utility from a particular action when it is framed as a loss relative to their reference point than they gain from the same action when it is framed as a gain relative to their reference. This “framing” effect, initiated through setting the reference point, becomes critical to understanding individual preferences and choices. Individuals’ assessments of outcomes, and their notions of fairness and tolerance for behaviour, are fundamentally driven by comparisons with a relevant benchmark.¹² A growing body of empirical work provides support for reference-dependent preferences and the role of framing effects.¹³ In this model of preferences, the initial reference point or frame plays an important role in determining the structure of individual choice.

Despite the importance of reference points in this theory of individual choice, it is unclear exactly how they are established. Possible choices can

11. The earliest exposition of this model of preferences is developed in Amos Tversky & Daniel Kahneman, “Loss Aversion in Riskless Choice: A Reference-Dependent Model” (1991) 106:4 *The Quarterly Journal of Economics* 1039. For more recent versions of reference-dependent preference theory, see e.g. Botond Köszegi & Matthew Rabin, “A Model of Reference-Dependent Preferences” (2006) 121:4 *The Quarterly Journal of Economics* 1133; Robert Sugden, “Reference-Dependent Subjective Expected Utility” (2003) 111:2 *Journal of Economic Theory* 172.

12. See e.g. Daniel Kahneman, Jack L Knetsch & Richard Thaler, “Fairness as a Constraint on Profit Seeking: Entitlements in the Market” (1986) 76:4 *Am Econ Rev* 728. In this paper, the authors demonstrated that individuals held certain expectations about what it was “fair” for firms to do (e.g., regarding changing prices, wages and employment). Firms were expected to (and did) adhere to these norms, deviating from standard predictions.

13. See Amos Tversky & Daniel Kahneman, “The Framing of Decisions and the Psychology of Choice” (1981) 211:4481 *Science* 453; Ian Bateman et al, “A Test of the Theory of Reference-Dependent Preferences” (1997) 112:2 *The Quarterly Journal of Economics* 479; Ernst Fehr & Lorenz Goette, “Do Workers Work More if Wages Are High? Evidence from a Randomized Field Experiment” (2007) 97:1 *Am Econ Rev* 298; Christian Grund & Dirk Sliwka, “Reference-Dependent Preferences and the Impact of Wage Increases on Job Satisfaction: Theory and Evidence” (2007) 163:2 *Journal of Institutional and Theoretical Economics* 313; Peter R Locke & Steven C Mann, “Daily Income Target Effects: Evidence from a Large Sample of Professional Commodities Traders” (2009) 12:4 *Journal of Financial Markets* 814. In these papers labour markets often provide support for theories of reference-dependent preferences. But see Henry S Farber, “Reference-Dependent Preferences and Labor Supply: The Case of New York City Taxi Drivers” (2008) 98:3 *Am Econ Rev* 1069 (empirical research questioning the role of reference-dependent preferences).

include the status quo, “what is normal”, “any stable state of affairs”¹⁴ or the individual’s expectations (rational or not) about what is likely to happen.¹⁵

Recent work suggests that law itself can serve as an important reference point. Falk, Fehr & Zehnder, for example, used laboratory experiments to determine that a minimum wage law served as an important benchmark of “fair” wages.¹⁶ They observed that “public policies are likely to affect behavior not only through changing incentives but also by shaping perceptions of entitlements”.¹⁷ The impact of laws may be felt both in their direct application and more diffusely through their influence on individuals’ perceptions and beliefs. Other scholars have suggested that legal entitlements under contract may serve as a benchmark for individuals’ expectations and assessments of fairness.¹⁸

If law serves as a reference point for framing individual preferences and choices, then law could play an important role in creating culture, as reflected in the prevailing attitudes of individuals. The claim that situating law within culture is critical to understanding law’s effects is weakened, or substantially complicated, if law itself can serve as an important determinant of culture. While debates over the role of law in shaping culture are not new, the recent developments in the theory of individual preferences offer a more precise and potentially testable hypothesis about that role.

Both strands of scholarship on contextualizing individual preferences suggest that law can have powerful effects, influencing individuals directly through standard incentive effects and indirectly through the construction and transmission of information on social values. However, the extent to

14. Kahnemann, Knetsch & Thaler, *supra* note 12 at 730.

15. See Köszegi & Rabin, *supra* note 11 at 1141 (their model relies on an individual’s probabilistic beliefs held in the recent past about outcomes, as distinct from simple use of the status quo).

16. Armin Falk, Ernst Fehr & Christian Zehnder, “Fairness Perceptions and Reservation Wages: The Behavioral Effects of Minimum Wage Laws” (2006) 121:4 *The Quarterly Journal of Economics* 1347 at 1348–49. The minimum wage law, through this channel, appeared to generate spillover effects—helping to explain “puzzles” as to why employers would pay higher wages than required even when the law was not applicable or the minimum wage was reduced or removed.

17. *Ibid* at 1351.

18. See e.g. Oliver Hart & John Moore, “Contracts as Reference Points” (2008) 123:1 *The Quarterly Journal of Economics* 1.

which law truly reflects the relevant social influences is an open empirical question. Do individuals look to the law to define the reference norms that feed into their more contextual preferences and choices? Although some empirical work suggests that law can operate as an important reference point and have an important influence on individuals' attitudes,¹⁹ other research suggests that it has a more limited role.²⁰

The use of constitutional rules to protect property rights may operate as a reference point for individual preferences in the way that Falk, Fehr & Zehnder argue that minimum wage laws influence individual preferences. The model of reference-dependent preferences helps to provide a more precise way of thinking about the declarative or expressive role often ascribed to constitutional rules.²¹ It suggests that constitutional rules will operate as broader norms, with an influence on public perceptions and on government that goes beyond their strict impact as legal rules. While Falk, Fehr & Zehnder's work suggests that any legal rule might have such a "baseline" effect, the constitutional status of a rule should in itself make the rule a more potent normative touchstone. The fundamental, entrenched nature of constitutional rules should also contribute to reasonable expectations that they will be adhered to—at least in terms of recent articulations of the rules.

The model of reference-dependent preferences suggests that by serving as a common reference point, the existence of a constitutional right not

19. For work supporting the role of law as reference point, see Falk, Fehr & Zehnder, *supra* note 16. See also Rafael De Tella, Sebastian Galiani & Ernesto Schargrodsky, "The Formation of Beliefs: Evidence from the Allocation of Land Title to Squatters" (2007) 122:1 *The Quarterly Journal of Economics* 209 (finding that conferral of title to property occupied by squatters led to changes in attitudes, tilting toward more materialist and individualist beliefs). For evidence that the form in which property entitlement was presented linked to individual attitudes about limitations on property, see Jonathan Remy Nash, "Framing Effects and Regulatory Choice" (2006) 82:1 *Notre Dame L. Rev.* 313.

20. For empirical work pointing to a more limited role for law, see e.g. Ellickson, *Order Without Law*, *supra* note 6 (testing Coase's theory that individuals bargain around legal entitlements to allocate access to resources). He found in his study of Shasta County that the law played a limited role in settling disputes, and that individuals instead had recourse to more particular social norms.

21. For discussion of symbolic and expressive aspects of law, see Bar-Gill & Fershtman, *supra* note 9 at 332. See also Richard H. Pildes, "Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism" (1998) 27:52 *J. Legal Stud.* 725 (discussing the expressive role of rights in constitutional law).

only reflects, but also helps to shape the way individuals assess government limitations on property. In other words, a constitutional right may help to generate the individual attitudes that collectively shape the social and cultural context within which the law is situated. The new work on contextual preferences suggests a significant autonomous impact for constitutional law. Can we find evidence of variation in attitudes that is consistent with the hypothesis that constitutional law plays an important role in shaping individuals' perceptions and judgments?

II. The Comparative Law of Expropriation

Examining attitudes toward the expropriation of property in Canada and the US provides a natural setting to look for evidence of the impact of constitutional rules. There is a significant difference in the symbolic and declarative aspects of the legal treatment of property in the two countries. The constitutional protection of property has a long and storied history in the US, but a right to property was deliberately excluded from the *Canadian Charter of Rights and Freedoms*.²² If law operates as a reference point or signal for social values, then we would expect a divergence at this level to be reflected in an individual's basic attitudes.

In the United States, property rights receive constitutional protection under both the Fifth Amendment takings clause and the due process provisions of the Fifth and Fourteenth Amendments.²³ Most potentially relevant to individual attitudes toward expropriation and compensation is the Fifth Amendment, which limits the range of purposes for which property can be taken and imposes a requirement for compensation. It provides a legal touchstone for the key elements of takings liability that applies to government actors at both the federal and state level.²⁴

22. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

23. The Fifth Amendment takings clause provides: "nor shall private property be taken for public use, without just compensation". *Supra* note 2. The Fourteenth Amendment provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law". US Const amend XIV, § 1.

24. Takings liability is imposed on the states via incorporation through the Fourteenth Amendment. See *Chicago, Burlington and Quincy Railroad Company v Chicago*, 166 US 226 (1897).

Legal scholars have criticized the US Supreme Court's inconsistent treatment of the Constitution's limits on government's ability to "take" property.²⁵ Much of this uncertainty surrounds the extension of the clause to "regulatory takings" rather than direct expropriation of property. However, the Supreme Court has consistently interpreted the clause to potentially require compensation for even these indirect regulatory encroachments on real property.²⁶ The clause has also been invoked to guard against even trivial or indirect physical encroachments on real property.²⁷ In contrast, the US Supreme Court has been relatively forgiving in its scrutiny of the substantive limitation on government's power to take property only for "public use".²⁸ Despite this legal ambiguity, the American constitutional right still seems to play a role in influencing individual expectations about government powers. Specifically, the right potentially helps to support an expectation that private property will be interfered with by government only in limited circumstances and will be

25. See e.g. Bruce A Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977) ("a chaos of confused argument" at 8); Jed Rubenfeld, "Usings" (1993) 102:5 Yale LJ 1077 (the takings clause is a candidate for the "doctrine-in-most-desperate-need-of-a-principle prize" at 1081).

26. Scholars have suggested that regulatory takings challenges are rarely successful; however, a number of prominent cases involve successful challenges to regulatory interference with real property. See e.g. *Nollan et ux v California Coastal Commission*, 483 US 825 (1987); *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992); *Dolan v City of Tigard*, 512 US 374 (1994). For discussion of the general preference for land in regulatory takings cases, see generally Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass: Harvard University Press, 1985). See also Eduardo Moisés Peñalver, "Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law" (2004) 31:1 Ecology LQ 227. However, zoning restrictions are somewhat of an exception to the prioritized protection of land under the US takings clause. See *Penn Central Transport Co et al v New York City et al*, 438 US 104 (1978).

27. See *Loretto v Teleprompter Manhattan CATV Corp et al*, 458 US 419 (1982) (installation of cable equipment on an apartment roof is compensable as a per se encroachment on property); *United States v Causby et ux*, 328 US 256 (1946).

28. Thomas W Merrill, "The Economics of Public Use" (1986) 72:1 Cornell L Rev 61. See also *Hawaii Housing Authority et al v Midkiff et al*, 467 US 229 (1984); *Kelo et al v City of New London et al*, 545 US 469 (2005) [*Kelo*].

accompanied by corollary compensation.²⁹ Indeed, there has been intense public controversy over the Supreme Court's interpretation of "public use" to include public benefits by direct redistribution of property between private parties.³⁰

As a reference point, the Fifth Amendment provides a number of potential anchors for expectations. Elements of the clause could be read in its negative formulation to guarantee the sanctity of property rights, potentially helping to solidify an understanding of private property as a "keystone" right.³¹ Alternatively, the clause in its entirety could serve as a reference point that legitimizes government interference with private property for appropriate uses, but only so long as compensation is paid.³² On either view, individuals assessing government actions will more strongly engage the expectations generated by the constitutional command when the state action in question touches closer to a core understanding of property.³³

29. See e.g. Jennifer Nedelsky, "Should Property be Constitutionalized? A Relational and Comparative Approach" in GE van Maanen & AJ van der Walt, eds, *Property Law on the Threshold of the 21st Century* (Antwerp: Maklu, 1996) 417 at 422; Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago: University of Chicago Press, 1990), at ch 6 (the role of the takings clause in shaping perception of property, legitimacy of state regulation).

30. See e.g. *Poletown Neighbourhood Council v City of Detroit*, 304 NW (2d) 455 (Mich 1981) (involving appropriation of property for transfer to automaker for building a factory with economic benefits for the city), rev'd *County of Wayne v Hathcock*, 684 NW (2d) 765 (Mich 2004); *Kelo*, *supra* note 28 (involving appropriation of property to support redevelopment by a pharmaceutical firm, providing economic benefits).

31. See e.g. Carol M Rose, "Property as the Keystone Right?" (1996) 71:3 Notre Dame L Rev 329 (discussing and critiquing strands of theory that prioritize property rights); Laura S Underkuffler, "Property as Constitutional Myth: Utilities and Dangers" (2007) 92:6 Cornell L Rev 1239 (American constitutional right contributes to the popular understanding of property in ways not directly congruent with nuanced legal interpretation of the clause).

32. The US Supreme Court has occasionally taken this view. See e.g. *Lingle, Governor of Hawaii, et al v Chevron USA Inc*, 544 US 528 at 541 (2005).

33. The "framing" of property itself is complex legally, theoretically and in "layman's" terms. See e.g. Ackerman, *supra* note 25. For recent empirical evidence on the influence that the choice of frame for property as either a "discrete asset" or "bundle of rights" had on an individual's reactions to restrictions on property, see Nash, *supra* note 19.

In Canada, although property rights are in fact relatively secure and there is a long tradition of compensation for expropriation,³⁴ there is no constitutional limit on government's ability to take property and no requirement to provide compensation. In fact, when Canada adopted a suite of individual constitutional rights in 1982, the drafters vigorously debated and eventually rejected the inclusion of a right to property, leaving Canada as a relative "outlier" in eschewing a constitutional right to property.³⁵ This deliberate exclusion was based on a number of factors, including concern that constitutional protection of property rights would be too restrictive of government's ability to engage in socially desirable regulation or redistributive policy.³⁶ Scholars have suggested that the absence of property rights from the *Charter* was supported in order to reserve room for governments to engage in (desirable) social and economic regulation and redistribution of wealth.³⁷

Canadian courts have frequently referred to the lack of constitutional status for property rights in decisions rejecting the claims of owners that

34. See e.g. *Attorney General v De Keyser's Royal Hotel Ltd*, [1920] AC 508 (statutes not to be construed to take property without compensation, unless words of statute clearly demand otherwise). The basic presumption that the Crown will respect private property can be traced much further back in English law, at least to the *Magna Carta*.

35. See David S Law & Mila Versteeg, "The Declining Influence of the United States Constitution" (2012) 87:3 NYUL Rev 762 at 773 (97% of all countries with written constitutional documents contain a property clause).

36. Provincial governments also feared that there would be limitations imposed on their own powers over property and civil rights through interpretation of the clause. For discussion of this Canadian constitutional debate, see e.g. Jean McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988) 26:3 Alta L Rev 548; Sujit Choudhry, "The Lochner Era and Comparative Constitutionalism" (2004) 2:1 International Journal of Constitutional Law 1; Richard W Bauman, "Property Rights in the Canadian Constitutional Context" (1992) 8:3 SAJHR 344; Alexander Alvaro, "Why Property Rights were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24:2 Can J Pol Sci 309.

37. See e.g. David Schneiderman, "Property Rights, Investor Rights and Regulatory Innovation: Comparing Constitutional Cultures in Transition" (2006) 4:2 International Journal of Constitutional Law 371 (absence of property rights linked to space for economic policy, expected role for the state to "facilitate markets and redistribute wealth" at 382-83). See also Choudhry, *supra* note 36 at 21-27 (absence of property rights, substantive due process in the *Charter* to protect governments' ability to engage in desirable socioeconomic regulation); Bauman, *supra* note 36 at 355 (listing the types of schemes feared to be vulnerable if property were included in the *Charter*).

government has unjustifiably burdened them and “taken” their property.³⁸ In *Mariner Real Estate Ltd et al v Nova Scotia (Attorney General)*, in a detailed consideration of Canadian expropriation law in comparison with US takings law, Cromwell JA (as he then was) underlined the contingent nature of property rights in Canada and their inherent potential for legislative redefinition without compensation.³⁹ In the context of these legal references, we might expect Canadians to regard their property rights in less absolute terms, be more tolerant of government “interference” with their property, and more receptive to redistributive schemes than Americans. The absence of a constitutional right permitting judicial scrutiny of government incursions on property suggests a more positive or trusting relationship between Canadians and government and that Canadians are less likely to view the sanctity of property rights as a fundamental value that should constrain government’s powers.⁴⁰

Canada and the US provide a good opportunity to test how the presence of a constitutional right relates to individual attitudes to government expropriation of property. In practice, governments in both countries would face similar legal obligations when expropriating land for purposes similar to those in the survey vignette. For example, under the Ontario *Expropriations Act* a government expropriating residential property is required to pay compensation based on the property’s market value.⁴¹ The federal government and virtually all provinces have statutory schemes governing expropriation and imposing a substantive requirement

38. See e.g. *Canada Pacific Railway Co v Vancouver (City)*, 2006 SCC 5, [2006] 1 SCR 227 (no expropriation of property or compensation where the city restricted development of land held by the Canadian Pacific Railway for uses other than its continued use as a no longer economically viable rail line); *Authorson v Canada (Attorney General)*, 2003 SCC 39, [2003] 2 SCR 40; *Mariner Real Estate Ltd et al v Nova Scotia (Attorney General)*, 178 NSR (2d) 294, 549 APR 294 (CA).

39. *Ibid* at para 39 (“rights of ownership” defined by reference to lawful uses of land, which may be severely restricted, including potential for stringent land use regulation); at para 42 (extensive uncompensated land use regulation is the “norm” in Canada); at paras 40–41 (Canadian courts lack the constitutional mandate to inquire into the distributive aspects of legislative restrictions on property rights).

40. See e.g. Bauman, *supra* note 36 at 361 (discussing widespread skepticism about incorporating property rights into the *Charter*, indication that protection of property is not part of the “bedrock of polity”).

41. RSO 1990, c E.26, ss 13(1)–(2). Similar legislation applies to government expropriation of real property in other Canadian provinces and at the federal level.

to pay compensation. Similarly, virtually all US states have constitutions prohibiting direct expropriation of property without compensation.⁴² However, at a declarative or expressive level, the variance in constitutional status of property rights ostensibly sends different messages in the two countries. This makes the Canada-US comparison particularly apt for examination of the potential preference-shaping effect of constitutional law, and, in particular, of individual constitutional rights.

Can we find evidence that this difference in the legal structure resonates at the level of individual attitudes toward property and the choices individuals would make in hypothetical confrontations with government over their property rights?

III. Empirical Approach: The Survey

In order to solicit Canadian attitudes to expropriation of property in a way that would also allow for comparison with US attitudes and for analysis of the link to the constitutional status of property rights, I administered a survey that mirrors one used in the N & SD study referred to above. That study set out to explore the psychological foundations of popular response to the US Supreme Court's decision in *Kelo v City of New London*,⁴³ which elaborated on the extent of government's ability to take property for public use under the Fifth Amendment of the US Constitution. In *Kelo*, the Supreme Court confirmed New London's authority to take residential property in a depressed area that it zoned for redevelopment and to transfer the property to a private developer.⁴⁴ The decision, while unsurprising to legal observers, seemed to shock the

42. See Stewart E Sterk, "The Federalist Dimension of Regulatory Takings Jurisprudence" (2004) 114:2 Yale LJ 203 at 261. The consensus approach in US takings law is to require compensation based on the fair market value of property. See e.g. Christopher Serkin, "The Meaning of Value: Assessing Just Compensation for Regulatory Takings" (2005) 99:2 Nw UL Rev 677 at 678.

43. *Supra* note 28.

44. For discussion of the *Kelo* context, see N & SD, *supra* note 1 at 718–20. See also Daniel H Cole, "Kelo's Legacy" (2007) 37:7 ELR 10540 (decision and its aftermath).

public.⁴⁵ Popular backlash to the decision triggered a host of legislative efforts to amend state constitutions to limit the reach of eminent domain.⁴⁶ In their empirical work, N & SD used a survey based on a vignette similar to *Kelo* to probe attitudes toward the government's power to take private property.

For this study, I constructed a survey that matched that used by N & SD, modifying a few details to make it appropriate for a Canadian context.⁴⁷ The survey explores financial and attitudinal responses to proposed takings, with experimental variation in the hypothetical length of time the individual has held the property (Term on Land: 2 years or 100 years) and in the government's proposed use of the property (Use: children's hospital, shopping mall, or unspecified).⁴⁸ Participants were asked to read a version of the following short vignette and to imagine themselves in the position of the property owners facing expropriation:

Your House

You live in a house on a plot of land. The property (house plus land) has a market value of \$200,000. The property has been in your family for [2 or 100] years.

45. This might seem to undermine any claim that constitutional law operates as a reference point; however, it may be that these rules create expectations in a simple or heuristic way for most individuals that do not necessarily match the more nuanced interpretations of the constitution by legal experts. See e.g. Ackerman, *supra* note 25 (ordinary observers versus experts). The results of N & SD's study confirm that individuals felt most strongly about takings of property that were more "private" in the sense of being held by a family for an extended period, and for uses that were further away from "public purposes", e.g., use for commercial development as opposed to a hospital. The results are consistent with an important heuristic, expectation-setting role for the constitutional right.

46. See Ilya Somin, "The Limits of Political Backlash: Assessing the Political Response to *Kelo*" (2009) 93:6 Minn L Rev 2100; Cole, *supra* note 44.

47. The format for the original survey is found in N & SD, *supra* note 1 at 728-730. I made very minimal changes to the survey (for example, the use of "provincial" to describe government).

48. N & SD also varied their surveys by using two response formats for the financial incentives required to move. The response format varied between a scaled response, with specific dollar amounts offered as choices, and an open format that simply allowed participants to fill in their own value. However, in part of their analysis, N & SD converted the open responses to a scaled format, as the data generated non-normal residuals. In their analysis, N & SD grouped the responses, controlling for format. I chose to administer my survey in only a scale format for this initial study, using the same scale as N & SD. With a larger sample, it would be possible to test the impact of also allowing an open format in the Canadian survey.

The Development

The provincial government is planning to build [either a new children's hospital, a new shopping mall, or an unspecified use] on a large parcel of land that includes your property.

The Government's Offer

The provincial government approaches you and tells you about a property (house plus land) not too far away that is extremely similar to your current property. An independent appraiser tells you that the new property is valued at \$200,000. The provincial government asks you to move to this new property and agrees to cover all expenses associated with the move.

If necessary, the provincial government can use its power to expropriate your property. In that case the law will require you to sell your property for its fair market value (\$200,000) and pay your moving costs.

The participants were then asked, on the same scaled format used by N & SD, to indicate the financial incentive they would require to move voluntarily, as set out below:⁴⁹

Your Response

You can try to negotiate with the government.

The government has offered to trade you the other property (worth \$200,000) plus pay all of your moving expenses. How much incentive would you need to agree to part with your property and to move, IN ADDITION TO the new property and moving expenses?

- \$0 (I would accept the government's offer.)
- \$5,000
- \$10,000
- \$50,000
- \$100,000
- \$500,000
- \$1 million
- I am not willing to trade regardless of the incentive.

49. I did not adjust the dollar figures to reflect any exchange rate effects, but the impact of this effect was likely very small. At the time the surveys were administered, the Canadian and US dollars were trading almost at par value. See Bank of Canada, *Can\$/US\$ Exchange Rate Look-Up*, online: Bank of Canada <<http://www.bankofcanada.ca>>. During the period these surveys were administered, the Canadian dollar was trading at between \$0.9283 and \$0.9780 USD. Adjustment for exchange rate equivalence would also not take into account differences in property-related purchasing power.

In addition to being asked about the financial incentive they would demand, participants were asked a series of questions about their attitudes toward the proposed expropriation. Participants were asked how they felt about moving (very bad to very good), how morally right or wrong they thought it was for the government to ask them to move (very wrong to very right), how morally right it would be for them to move (very wrong to very right), how beneficial or harmful the development would be for the community (very harmful to very beneficial), and how good or bad they thought the government's motives were (very bad to very good). These responses were solicited on a 7-point scale, ranging from 1 (for the most negative response) to 7 (for the most positive). Participants were also asked an open format question on what they thought government would do with the property once acquired. These attitudinal measures and scaled responses match those used in N & SD's survey.

I administered the survey to undergraduate and law students at Queen's University.⁵⁰ The survey took approximately ten to fifteen minutes to complete at the beginning of a regularly scheduled class and was not announced in advance. After hearing a brief description of the study, students were allowed to choose whether or not to participate. They were offered no incentive (other than satisfaction of their curiosity) to participate and were assured that their responses would be confidential.

The pool of respondents in my survey was drawn from the undergraduate economics program and the first and second year of the law program at Queen's University. This differs from the method of participant recruitment used by N & SD. Their subjects were drawn from a pool of individuals who had agreed previously to participate in web-based research and who were offered a small financial incentive to complete the survey, in the form of being entered into a draw for a prize.⁵¹

Drawing on the information solicited about the personal characteristics of the participants, the resulting samples varied somewhat between my study and that of N & SD. My sample was smaller—it had a total of 155 participants, as compared to 568 in the N & SD study. The gender balance was roughly the same—my sample was 54% female, as compared with 58% in the N & SD study. My sample population was somewhat more ethnically diverse than that of N & SD. In my sample, 79% of participants

50. Most of these participants were Canadians (97.5%) residing in Ontario (86.5%).

51. N & SD, *supra* note 1 at 728.

reported White/European ethnic origin, 2% Black, 18% Asian/South Asian and 1% Aboriginal.⁵² The mean age of my sample population was younger than that of N & SD—23 years compared with 40 years. This is unsurprising, given the different recruitment strategy. In terms of educational attainment, 16% reported high school as their highest attained education, 40% reported college or university undergraduate and 44% reported graduate or professional education. This compares with figures of 20%, 60% and 19% respectively in N & SD's sample. It is also unsurprising that the educational level of my sample is higher than that of N & SD, as all respondents were enrolled in at least a university undergraduate program.

Respondents were also asked to state whether they rented or owned their principal residence. Not surprisingly, the majority in my sample were renters (59%), but a fairly substantial portion indicated that they owned their principal residence (37%).⁵³ This seems surprisingly high for a student group. A small number (3%) added comments to the effect that they lived with their parents, suggesting that the ownership status of the respondents related to the parents. Most of the respondents currently lived in an urban environment (48%), while 2% lived in a rural setting, 23% in a small town and 27% in a suburb. This distribution is more urban than that of N & SD and particularly differs in the very small number of rural residents.⁵⁴ It not entirely clear whether the respondents were answering in terms of their own situation or that of their parents, both in terms of their status as renters or owners and in terms of where they lived.⁵⁵ However, their responses do indicate how they saw themselves in these respects prior to completion of the survey.

52. I used the same categories for ethnic origin in my survey as N & SD used in their survey to preserve comparability in the measured controls. In their sample, 87% were White/European, 5% Black, 3% Hispanic, 3% Asian and 2% Native American. *Ibid* at 728. I did not have any observations in the "Hispanic" ethnic origin category. A number of respondents wrote in answers indicating that they considered themselves to be part of a category not reflected in the choice set offered in N & SD. I have treated these as missing observations on the ethnic origin control.

53. This compares with a larger majority of owners in the N & SD sample. In their data, 71% of respondents indicated they owned their principal residence.

54. Comparable figures in N & SD are as follows: 24% urban; 42% suburban; 16% small town; and 19% rural.

55. The question about whether the respondent rents or owns immediately preceded the question about whether the location was rural, small town, suburban or urban. Both

As part of my survey, I asked about respondents' own current family income and their parents' current family income, variables not mentioned among the controls used by N & SD. The responses were scaled into eight categories.⁵⁶ Not surprisingly given the student population surveyed, most respondents (74%) indicated that they had annual family incomes between \$0 and \$20,000. However, there was considerably more dispersion in the reported family income of parents. The median parental income for survey respondents was in the \$100,000 to \$150,000 category, exceeding the median Canadian family income.⁵⁷ A substantial portion of respondents indicated family incomes in the upper categories; likely reflecting the escalating incomes of educated individuals and those at the top of the income distribution in recent years.⁵⁸ The relatively high income measures produce a sample of survey respondents more likely to own property or to have families who do, who may also place a higher priority on the protection of property from public encroachment.

Although the use of student samples in experimental surveys is a well-established strategy,⁵⁹ a sample consisting of university students is not representative of the Canadian population, and caution must be exercised in extrapolating from it. N & SD used a different recruitment strategy, but they also failed to generate a sample representative of their underlying population.⁶⁰ The use of experimental methods nevertheless

questions asked the respondent about the status of their "primary residence" to encourage consistency across the responses within subjects.

56. The income categories were as follows: \$0–\$20,000; \$20,000–\$40,000; \$40,000–\$60,000; \$60,000–\$80,000; \$80,000–\$100,000; \$100,000–\$150,000; \$150,000–\$200,000; more than \$200,000.

57. Median family income in Ontario, the province of residence for the majority of students surveyed (86%), was \$72,734 in 2005. See 2006 Census Analysis Series, "Earnings and Incomes of Canadians Over the Past Quarter Century, 2006 Census: Highlights" (13 October 2009), online: Statistics Canada <www.statcan.gc.ca>. A number of respondents (around 30) chose not to answer one or both of the questions on family income, so the summary statistics above are not entirely reflective of the sample used in the main analysis.

58. See *ibid.*

59. For an example of the common use of student samples in experimental, behavioural studies in psychology, sociology and economics, see W Jonathan Cardi, Randall D Penfield & Albert H Yoon, "Does Tort Law Deter Individuals? A Behavioral Science Study" (2012) 9:3 *J Empirical Legal Stud* 567 at 577 (using a student sample to draw inferences about the deterrent effect of tort law).

60. For example, 87% of their sample is White and 19% had graduate degrees. N & SD, *supra* note 1 at 728. This is not reflective of the US population as a whole: recent US

allowed them to draw inferences about the influence of their variables of interest, and we can similarly use the results of my survey to gain insights into the likely influence of those variables in a Canadian setting. In terms of uncovering the influence of constitutional status for property, differences in the sample population I surveyed and that in N & SD also require caution in direct comparison of the results across the two studies. However, the comparative exercise provides a first step in investigating the potential impact of constitutional property rights on the responses of Canadians and Americans to expropriation. Ideally, future work will complement this study with data more reflective of the Canadian and American populations.

IV. Results

Implementation of the surveys provides an opportunity to investigate how Canadian respondents react to government expropriation of property. In particular, we can examine how financial and attitudinal responses vary depending on the owner's relative attachment to the property and the use that government wants to make of the property. Little is known empirically about the potential systematic influence of these variables. The Canadian results can subsequently be compared with the American data from N & SD's study, as a way to begin unpacking the potential influence of constitutional status for property on individual preferences and attitudes toward expropriation.

A. Canadian Responses

(i) Financial Incentives

After they had read the vignette, respondents were first asked what financial incentive, in addition to an equivalent replacement property, would induce them to accept the government's offer and move

Census Bureau data indicate that 64% of the US population is White, and about 10% of the census population had graduate degrees. See US Census Bureau, *Voting Age Population by Citizenship and Race (CVAP)* (2012) online: US Census Bureau <<http://www.census.gov>>; US Census Bureau, *Educational Attainment in the United States: 2013* (2013) online: US Census Bureau <<http://www.census.gov>>.

voluntarily. The full distribution of responses broken down by Term on Land is shown in Table 1.

Table 1: Financial Incentive Required to Move Voluntarily by Term on Land

Incentive	Distribution of Responses		
	Short Term	Long Term	All
\$0	3	5	8 (5.16%)
\$5,000	3	2	5 (3.23%)
\$10,000	22	8	30 (19.35%)
\$50,000	32	18	50 (32.26%)
\$100,000	13	18	31 (20.00%)
\$500,000	6	12	18 (11.61%)
\$1,000,000	0	6	6 (3.87%)
No Incentive Enough	0	7	7 (4.52%)
Total	79	76	155

* Percentage in each category among all responses given in brackets.

Most respondents said that some level of financial incentive would persuade them to move voluntarily. However, a few respondents (4.5%)—all of them in the group that received the long-term version of the survey—indicated that they would not be willing to move at any price.⁶¹ A substantially larger number (20%) were highly resistant to the idea of moving voluntarily, demanding at least 2.5 times the fair market value of the property in addition to the substitute property.⁶² Overall, respondents in the short term condition demanded less on average in order to be willing to move.⁶³ The general resistance of respondents to being asked to

61. Roughly the same number of respondents were in the short (79) term and long (76) term experimental conditions.

62. This group included those selecting one of the following choices from the response scale: \$500,000, \$1,000,000 or “I am not willing to trade regardless of the incentive.” There were 31 respondents in this group out of 155 responses to the financial incentive questions.

63. Hypothesis of equal mean responses rejected: $F(1,154) = 15.60, p < 0.0001$.

move because of expropriation is apparent from the fact that a majority demanded a substantial premium in addition to a replacement property.⁶⁴

Respondents generally demanded less when their property was to be used for construction of a hospital, compared with other uses, as is shown in Table 2.

Table 2: Financial Incentive Required to Move Voluntarily by Proposed Use

Incentive	Distribution of Responses			
	Hospital	Mall	Unspecified	All
\$0	3	4	1	8 (5.16%)
\$5,000	5	0	0	5 (3.23%)
\$10,000	11	11	8	30 (19.35%)
\$50,000	23	12	15	50 (32.26%)
\$100,000	10	12	9	31 (20.00%)
\$500,000	5	7	6	18 (11.61%)
\$1,000,000	3	2	1	6 (3.87%)
No Incentive Enough	1	2	4	7 (4.52%)
Total	61	50	44	155

* Percentage in each category among all responses given in brackets.

This is not a strongly significant result, however. When the mean response for those in the hospital condition is compared with the mean response for those in both alternative uses combined, there is only a marginally significant difference ($F(1,154)=3.08$, $p<0.0813$). Contrasting the hospital with the unspecified use, respondents demanded significantly less financial incentive ($F(1,154)=4.10$, $p<0.0445$). However, when asked to move for a hospital as compared to a mall, there is no significant difference in the mean financial incentive required by respondents

64. More than 50% of respondents in the short term condition demanded a premium of \$50,000 or more, while 50% of respondents in the long term condition demanded a premium of \$100,000 or more to move voluntarily.

($F(1,154)=0.95$, $p<0.3320$). The statistical results confirm the apparent similarity of the responses across use. The surveys were slightly less equally distributed across experimental conditions for the Use variable, and there are a smaller number of respondents in each experimental condition. Both of these factors lead to a somewhat less robust inference about how Proposed Use influences demands for financial compensation in order to agree to move when government asks.⁶⁵ The results suggest that the variation in compensation demands is primarily driven by the need to move and to give up one's own property, rather than by what sort of use the government will make of the property.

In order to more systematically investigate the relationship between the amount of financial compensation demanded, the proposed use and the term on the land, I performed two sets of regressions. The first contrasts the characteristics of those respondents who were highly resistant to moving with those who were more open to it. I divided the responses into two categories: those who were "unwilling to sell" (which included the 20% of respondents who demanded \$500,000 or more in compensation) and those who were more willing to sell. I then ran a logistic regression, with willingness to sell or not as the dependent variable regressed on the Use and Term conditions and their interaction, as well as a set of controls.⁶⁶ Results for this model are given in Table 3.

65. The uneven distribution of surveys across sample conditions arises because of the voluntary nature of the survey and the recruitment strategy. The survey is distributed to all students with equal representation of the experimental conditions; however, students must have the option to choose not to participate at any time during the survey, resulting in less than equal representation in returned surveys. The randomized distribution of surveys and relatively small difference in the return rate make it unlikely that there is any consequent systematic link to respondent characteristics that could have significantly influenced the results. Although the hospital condition has more responses, there are a significant proportion of respondents in all Use categories.

66. The controls were based on information collected in the survey; however, in part because of the nature of the responses and because of the small sample, I did not uniformly implement categorical controls with dummies for each possible index category. I indicate where index categories were combined in the controls that follow. Controls included are: location (grouping rural and small town versus suburban & urban (latter both grouped and separately)); ownership (owning versus renting); age (continuous or numerical); ethnicity (grouped to contrast White/European versus minority); education (grouped to contrast undergraduate or lower versus graduate/professional). I also used the financial controls (own family income, parent family income) in a few test regressions; however, these cannot be contrasted with results from N & SD, so they are of less interest here.

Table 3: Logistic Regression for Unwillingness to Sell

Variable	Coefficient	Odds Ratio	Z-stat ⁶⁶ (p value)
Term	1.76 (0.54)	5.79 (3.15)	3.23 (p < 0.001)
Use	-0.79 (0.51)	0.453 (0.23)	-1.55 (p < 0.122)
Constant	-2.29 (0.49)		-4.70 (p < 0.000)
Log Likelihood	-55.31		
$\chi^2_{(2)}$	14.95 (p < 0.0006)		
N ⁶⁷	133		

* Standard errors in parentheses.

The results of this first logistic regression show that those in the long term experimental condition were more than five times as likely to be unwilling to sell as those in the short term experimental condition. This result is highly statistically significant ($p < 0.001$). Those in the hospital experimental condition were less likely to be unwilling to sell, but this result was not significant at conventional levels of confidence ($p < 0.122$).⁶⁹ Despite the existence of a fair amount of variation in the control variables employed, they did not generate any significant explanatory power.⁷⁰ The results below are for simple regressions of the bivariate

67. Tests for single coefficient restrictions in logistic models are calculated as t-statistics, compared to the standard normal distribution, while more complex coefficient restrictions may be tested with Wald, LR or LM tests. For discussion of hypothesis testing in bivariate choice models, see William H Greene & David A Hensher, "Modeling Ordered Choices" (2009) at 42, online: New York University <<http://people.stern.nyu.edu/wgreene>> .

68. The sample size in the logistic regressions is reduced, as some observations were dropped due to missing information on control variables, such as ethnicity, ownership status or location. Only observations for which there was a complete set of controls were used in the regression analysis.

69. The reported results are for the regression treating hospital use versus other uses grouped. There is no significant effect of Use when the alternative format of dummies for each use is employed (omitting "unspecified").

70. The results presented are from simple regressions of the bivariate dependent variable on the Use and Term dummies. Alternative specifications including the controls produced

dependent variable on the Term and Use experimental conditions.⁷¹ This is interesting in itself, as it suggests that the responses were consistent across controls for residence location, ownership category and ethnicity.⁷² The most consistent result was the link between long-term occupation of the vignette property and unwillingness to sell. This effect was large, statistically significant and robust across all specifications. These results appear to confirm that attachment to the property (reflected in length of occupation) was a much more important driver of variation in compensation demanded than the proposed use of the property.

The second set of regressions focused on the full set of ordered responses for the financial incentive required for individuals to agree to move. The level of financial compensation was coded in eight ordered categories, with 1=\$0 and 8="not willing to trade regardless of incentive". I then ran ordered logit regressions of this dependent variable on the controls, the Term and Use variables, and their interaction. Results are presented below in Table 4.

The results from the ordered logit regressions on the full menu of financial incentives are similar to those for the previous model. As before, the most consistent result is the significant effect of the Term condition on the choice of financial incentive by respondents when asked to move. The Term variable was highly statistically significant in all specifications.

The Use variable was marginally significant ($p < 0.081$) in the restricted model that excludes the control variables: Model 2 in Table 4. The hypothesis that the controls are jointly insignificant cannot be rejected.⁷³ However, there is some evidence of explanatory power in the controls, as the ethnicity variable in particular was marginally significant ($p < 0.090$).⁷⁴ In alternative specifications that include control variables,

similar results; however, I was not able to reject the hypothesis that the controls were jointly insignificant (LR Test: $\chi^2_{(6)} = 6.61$, $p < 0.3586$).

71. The interaction variable was insignificant in alternative specifications in which it was included.

72. There was more variation in these controls; other insignificant controls including Age and Education may have lacked sufficient variation to produce measurable effects.

73. LR test: $\chi^2_{(6)} = 7.63$, $p < 0.2666$.

74. This result was robust across several alternative specifications, including those with multiple dummies for the Use variable and a version of the model adding controls for parental income. In the alternative specifications the significance on the ethnicity variable was at least as high as the reported significance above.

the Use variable was no longer significant. The Use variables also became insignificant when the alternatives (hospital and mall) are considered separately (omitting the unspecified Use). The interaction between Use and Term was also insignificant.

Table 4: Ordered Logit Regression for Financial Incentive to Move

Variable	Model 1: With Controls		Model 2: No Controls	
	Coefficient	Z-stat ⁷⁵ (p value)	Coefficient	Z-stat (p value)
Term	1.25 (0.34)	3.70 (0.000)	1.17 (0.33)	3.56 (0.000)
Use	-0.50 (0.32)	-1.56 (0.119)	-0.55 (0.31)	-1.74 (0.081)
Location	-0.40 (0.39)	-1.03 (0.304)		
Ownership	-0.30 (0.31)	-0.96 (0.338)		
Age	0.05 (0.06)	0.87 (0.384)		
Gender	-0.07 (0.33)	-0.21 (0.831)		
Ethnicity	0.68 (0.40)	1.69 (0.090)		
Education	-0.56 (0.39)	-1.44 (0.151)		
Log Likelihood	-223.43		-227.24	
χ^2	23.68 (p < 0.0026)		16.05 (p < 0.0003)	
N	133		133	

* Standard errors for coefficients in parentheses. P values for Z-stats in parentheses.

Further calculation is needed to uncover the marginal effects of changes in the independent variables of interest, as estimated coefficients in ordered logit regressions do not have direct, intuitive interpretations in terms of

75. Tests for single coefficient restrictions in ordered logistic models calculate a Wald statistic in the form of a z-statistic that is compared with critical values from the standard normal distribution, while more complex coefficient restrictions may be tested with Wald, LR or LM tests, distributed χ^2 . For discussion of hypothesis testing in ordered logit models, see Greene & Hensher, *supra* note 67 at 124–25.

the relationship between the independent and dependent variables.⁷⁶ The calculated marginal effects, by definition, would shift the distribution of probability between the available categories.⁷⁷ The marginal effects of moving between the short term and long term experimental conditions, as well as moving from the combined alternative uses to the hospital, are given in Table 5, below.

Table 5: Marginal Effects of Term & Use on Choice of Financial Incentive

Incentive	Model 1: With Controls			Model 2: No Controls		
	Pr(Incent)	dPr/dTerm	dPr/dUse	Pr(Incent)	dPr/dTerm	dPr/dUse
\$0	0.039	-0.048 (p < 0.018)	0.020 (p < 0.179)	0.044	-0.049 (0.019)	0.024 (p < 0.141)
\$5,000	0.029	-0.033 (p < 0.039)	0.014 (p < 0.201)	0.032	-0.033 (p < 0.042)	0.016 (p < 0.166)
\$10,000	0.189	-0.153 (p < 0.000)	0.064 (p < 0.128)	0.195	-0.143 (p < 0.001)	0.070 (p < 0.090)
\$50,000	0.351	-0.058 (p < 0.090)	0.021 (p < 0.228)	0.340	-0.048 (p < 0.118)	0.019 (p < 0.245)
\$100,000	0.227	0.115 (p < 0.002)	-0.051 (p < 0.136)	0.221	0.105 (p < 0.003)	-0.054 (p < 0.099)
\$500,000	0.109	0.107 (p < 0.004)	-0.042 (p < 0.129)	0.109	0.099 (p < 0.004)	-0.045 (p < 0.095)
\$1,000,000	0.026	0.031 (p < 0.068)	-0.012 (p < 0.202)	0.027	0.030 (p < 0.069)	-0.013 (p < 0.170)
No Incentive Enough	0.030	0.039 (p < 0.043)	-0.014 (p < 0.182)	0.032	0.039 (p < 0.045)	-0.017 (p < 0.148)

* Pr(Incent) = probability incentive choice falls in the corresponding category; dPr/dTerm & dPr/dUse are changes in probability of category from discrete change in the associated dummy. P values for estimated marginal effects in brackets, effects significant at 10% or better in **bold**.

76. See e.g. *ibid* at 119–21.

77. See *ibid* at 120.

The marginal effect of moving from short-term to long-term occupancy of the vignette property is similar for both models. The effect is to shift the distribution of financial incentive responses toward the higher values.

As seen in Table 5, the likelihood of a choice among all four categories from \$0 to \$50,000 declines, with the largest absolute predicted decline in the probability of an individual selecting the \$10,000 category. The likelihood of a choice among the upper set of incentives increases (ranging from \$100,000 to “no incentive enough”). There are large, significant predicted marginal increases in the probability of an individual selecting either \$100,000 or \$500,000 as the preferred compensation. While the shift between short and long term also increases the predicted probability that individuals will demand very high compensation or be completely unwilling to move, these effects are smaller in absolute terms and not as statistically significant.

The marginal effect of designating the hospital use relative to the alternative use was also similar across models. The presence of the hospital condition is associated with a predicted shift in the distribution of incentive responses toward the lower values; however, the predicted effects are often not statistically significant. The predicted marginal effects of introducing the hospital use are smaller in magnitude than the effect of the Term on Land condition on the incentive responses. The largest response is found in the predicted increase in the probability that the \$10,000 category is chosen (6.4% in Model 1; 7% in Model 2). This effect is marginally significant in Model 2. The other substantial effects are the declines in the probability that the \$100,000 and \$500,000 categories are selected when the hospital condition is present—declines in the order of 5% and 4% respectively. These effects are also marginally significant in Model 2.

The analysis of the marginal effects indicates a relatively consistent relationship between the variables of interest and the compensation demands. The long term experimental condition was associated with higher demands for compensation in the form of a shift from moderate demands for compensation to high, but not extreme, demands for compensation. The marginal impact of the Use condition is more muted. The introduction of a clearly “public use” condition (the hospital) shifted the demand for compensation downward, increasing the probability of choice in the moderate range and reducing the likelihood of demands in the

higher categories. However, the effect is not robust across models and the effects are often statistically insignificant. Overall, the marginal analysis appears to confirm that individuals' demands for financial compensation in the face of expropriation are most robustly influenced by the nature of their attachment to the property, as reflected in the term they have hypothetically been in occupation. While there is some evidence that the use government proposes for the property has an effect on compensation, it is much less systematically significant.

(ii) Attitudinal Responses

In addition to the questions about the level of financial incentive needed to induce a voluntary move, the survey solicited attitudinal responses from respondents about the proposed move on a 7-point scale. Below, I discuss the results for these attitudinal measures, breaking the analysis down by Term and Proposed Use. As in the N & SD study, I have grouped analysis of the individuals' attitudes toward the move and attitudes about government.

The mean responses for individuals by Term are given in Table 6.⁷⁸ Considering the responses together, on average, none of the respondents felt particularly good about moving, as the mean falls between the "bad" and "somewhat bad" categories. However, on average, respondents were neutral about whether it was morally right for them to move. On average, they saw moving as slightly beneficial to the community, with average responses falling between "neutral" and "somewhat beneficial". Tracking this result, respondents also felt government was marginally influenced by good motives, the mean response falling again between the "neutral" and "somewhat good" categories. However, on average, respondents considered it slightly morally wrong for the government to have asked them to move, with the mean response falling between "somewhat wrong" and "neutral".

Comparing these attitudinal measures across the Term variable disclosed no statistically significant differences. It did not seem to matter how long the respondents in the scenario had held the land; they responded similarly to the attitudinal questions. This is evident from the F-statistics

78. Note that these responses are conditional on sorting by Term only, and are not conditioned on the Proposed Use.

for the null that the attitudinal means for short term and long term responses were equal, as set out in Table 6. None of these test statistics imply rejection of the null at any conventional level of significance.

Table 6: Mean Responses for Attitude Measures by Term on Land

Question	Mean		F-stat $\mu_S = \mu_L$
	Short Term	Long Term	
Attitude Toward Moving	2.87 (1.05)	2.65 (1.24)	F(1,152)=1.44 P<0.2312
I Am Morally Right if I Move	4.08 (1.21)	3.87 (1.20)	F(1,153)=1.14 P<0.2863
Moving Will Benefit Community	4.73 (1.44)	4.51 (1.32)	F(1,154)=0.99 P<0.3221
Government Morally Right	3.47 (1.44)	3.32 (1.38)	F(1,154)=0.45 P<0.5013
Government Motives	4.42 (1.46)	4.47 (1.24)	F(1,154)=0.07 P<0.7980

*Standard errors in parentheses.

Comparing the attitudinal measures across the Proposed Use variable disclosed significantly more variation in the average responses, as seen in Table 7, below. Respondents still felt slightly negative about moving, and this response is different in a marginally significant way across proposed uses. A comparison of the mean response for the hospital use with the alternatives of a mall and an unspecified use grouped together produced a marginally significant difference ($p < 0.0672$). This significance is driven by the lower mean response for respondents confronting expropriation with no proposed use specified. Comparing the mean response of those who faced expropriation for a hospital with the mean response of those whose property was taken to build a mall, disclosed no statistically significant difference in the attitude toward moving. However, there is a much more marked difference when contrasting the mean responses to whether the individual is morally right to move, and to whether moving will benefit the community across the proposed uses. The use of the property for a hospital strongly increases the mean response for both. On average, respondents felt that they were morally somewhere between “neutral” and “somewhat right” to move, and that the use will

be between “somewhat beneficial” and “beneficial” to the community when the property is taken for a hospital. In contrast, the other uses generated responses that are neutral to marginally negative. Again, it is interesting that on these measures the sample means for the mall use are more positive than those where no use is specified. There are strongly statistically significant differences between the means for hospital use compared to the other uses combined, and when contrasting the specific uses of a hospital with a mall, as set out below in Table 7.

Table 7: Mean Responses for Attitude Measures by Proposed Use

Question	Proposed Use			F-stat $\mu H = \mu O$	F-stat $\mu H = \mu M$
	Hospital	Mall	Unspecified		
Attitude Toward Moving	2.98 (1.24)	2.68 (1.06)	2.56 (1.10)	F(1,152)=3.40 P<0.0672	F(1,152)=1.91 P<0.1687
I Am Morally Right if I Move	4.46 (0.91)	3.78 (1.18)	3.52 (1.39)	F(1,153)=20.76 P<0.0000	F(1,153)=11.20 P<0.0010
Moving Will Benefit Community	5.66 (1.08)	4.04 (1.28)	3.86 (0.95)	F(1,154)=88.01 P<0.0000	F(1,154)=50.51 P<0.0000
Government Morally Right	3.84 (1.34)	3.18 (1.26)	3.02 (1.52)	F(1,154)=10.68 P<0.0013	F(1,154)=7.03 P<0.0088
Government Motives	5.16 (1.00)	3.74 (1.37)	4.25 (1.31)	F(1,154)=38.85 P<0.0000	F(1,154)=37.63 P<0.0000

*Standard errors in parentheses. Statistically significant test statistics indicated in bold.

When we examine the respondents’ attitudes toward government, again we see that the proposed use makes a significant difference to the response. For all proposed uses, respondents feel marginally negative about the expropriation; however, the mean for the hospital use is closest to “neutral” while the other mean responses are closer to the view that it is “slightly wrong” for the government to ask for the property. The means are significantly different, whether comparing the hospital to the other uses grouped ($p < 0.0013$) or comparing the hospital to the mall directly ($p < 0.0088$). Respondents facing possible expropriation for the hospital project also ascribed more positive motives to the government on average, rating them at slightly better than “somewhat good”. In

contrast, the mean responses for those whose property was to be taken for the mall fell between “somewhat bad” and “neutral”, while those for unspecified uses were roughly neutral about the government’s motives. The difference between the positive mean response of hospital use and other uses grouped was significant ($p < 0.0000$), as was hospital versus mall ($p < 0.0000$).

Based on the sample data, the nature of the proposed use was more important than the length of time on the property in explaining the variation in respondents’ attitudes. The latter did not drive significant variation in participants’ attitudes toward the proposed expropriation. In general, the sample respondents held neutral to negative attitudes toward government expropriation of the property, except where the proposed use was a hospital—an evocative “public use” of the property. Even then, respondents were lukewarm toward moving. However, the hospital condition was associated with significantly more positive attitudes, indicating that moving was seen as morally right and as being beneficial to the community. The hospital use also produced significantly more positive assessments of the legitimacy of the government demand for the property, and particularly of government’s motives. While the respondents did not appear to translate the influence of these attitudes into variation in the compensation demanded, the nature of the proposed use of the property does appear to have affected their attitudes toward expropriation, particularly their assessment of the government behaviour.

B. Comparative Analysis: Canadian and American Responses

To probe the question of whether the existence of a constitutional right to property influences individual responses to government expropriation, I will compare the Canadian survey results with those of the N & SD study set in the US. As noted above, this comparative exercise must be approached with caution. The nature of the experimental design does not allow for a test of the potential causal effect of constitutional property law; at most we can examine the comparative data to see if it is consistent with the hypothesis that constitutional rights serve as a reference point for individuals. In addition, although my survey design for the Canadian data follows N & SD’s work as closely as possible, there are some

methodological differences.⁷⁹ Neither the Canadian nor American sample is fully representative of the underlying populations, and there were differences in the recruitment methods of the two samples and in their characteristics.⁸⁰ This limits the ability to draw generalizable conclusions from these studies about attitudes toward expropriation in the two countries.⁸¹ Nevertheless, keeping these caveats in mind, I will examine the comparative data to see whether any significant differences are apparent between the attitudes of the Canadian and American respondents when faced with similar expropriation scenarios.

(i) Financial Incentives

There are strong similarities between the Canadian and American responses on the financial incentives required to move.⁸² A majority of both sets of respondents expressed a willingness to move at some level of compensation. Only a small minority said that no amount of compensation could induce them to give up the property—a minority that was even smaller in the Canadian sample (4.5%) than in the American sample (9.4%). In both samples, respondents in the long term experimental condition were much more likely to be in this minority. In fact, in the Canadian sample, all of those who would have refused to sell were in the long term condition. This difference provides some indication that the rate of “private property extremism” may be higher in the US, although

79. In some ways the designs are not identical. For example, in this study I did not use separate questions to ask whether government was motivated by good motives and bad motives, but asked a single question asking for a global assessment of government’s motives. I thought this would be a more straightforward way to approach individuals’ assessments of government motives. It is similar to the approach in N & SD, but a “net” approach to their questions. The 7-point scale in N & SD for assessing whether government is motivated by good or bad motives ranges from 1=“not at all” to 7=“very much”. N & SD, *supra* note 1 at 730. In the analysis below, I assume that a value of 4 is equivalent to respondent neutrality on the question of government motives for both of N & SD’s questions.

80. Here again, the inclusion of control variables helps to mitigate this problem to a certain degree.

81. This concern is somewhat blunted by the insignificance of control variables/robustness of the general conclusions across controls that relate to the representativeness of the sample (e.g., age, ethnicity, education, income, owner/renter status, location, etc.)

82. The results for the financial component of the US study are set out in N & SD, *supra* note 1 at 731–34.

the small sample size for Canadian respondents in this category makes it difficult to draw any robust inference. In both samples, those in the long term condition demanded significantly more compensation than those in short-term occupancy. In contrast, the variation in the Use variables had no consistent significant effect on the financial incentives required by respondents in either sample.

The results from the logit regressions on the Canadian and American data confirm the broad outlines above. In analyzing the group of highly resistant sellers in both samples, the main result is the significant influence of the Term variable: those in the long-term occupancy condition were significantly more likely to refuse or be very unwilling to sell their property. In contrast, the Use variable had little or no effect. While the hospital use had some marginal significance in Canada, this was not robust across specifications and it showed no significant effect in the American data. Similarly, in regressions including the full range of financial incentives, the long term condition led to higher demands for compensation in both samples. This result is significant and robust across specifications in both the Canadian and American data. The Use variable worked in a similar direction in both studies, with respondents demanding lower compensation when the proposed use was a hospital. However, in neither case were the effects statistically reliable or robust across specifications.

Despite the very different constitutional protection of property rights, Canadians and Americans appear to behave in a similar manner when confronted with a hypothetical expropriation scenario. For both Canadians and Americans, the most influential variable explaining demands for compensation appears to be how long the respondent has owned the property. In neither sample did respondents appear to systematically and reliably calibrate their demands for compensation on the basis of the use that the government proposed for the property.

(ii) Attitudes Toward Moving

In contrast, there was more variability in how the Canadian and American respondents felt about the expropriation scenarios. A major qualitative difference is found in the respective influence of the Term variable. This is apparent in Table 8, below, giving mean responses by

Term in the Canadian and American samples. In the American data, the Term variable continues to exert a strong and statistically robust influence on attitudes. In the American experiments, those in long-term occupancy felt more negatively about moving, and felt that it was both less moral for them to move and less beneficial to the community. They also considered it less moral for government to ask them to move, and were more inclined to attribute bad motives to government.⁸³ For the Canadian sample, in contrast, the results on the attitude measures are not significantly influenced by the Term variable. The Canadian respondents appear to have felt the same about the proposed takings whether they were in short- or long-term occupancy of the property.

Table 8: Attitude Toward Moving by Term on Land in Canada & US

Question	Short Term		Long Term	
	Can	US	Can	US
Attitude Toward Moving	2.87 (1.05)	3.91 (1.65)	2.65 (1.24)	3.38 (1.66)
I Am Morally Right if I Move	4.08 (1.21)	4.66 (1.50)	3.87 (1.20)	4.38 (1.50)
Moving Will Benefit Community	4.73 (1.44)	4.52 (1.42)	4.51 (1.32)	4.30 (1.35)

*Sample mean responses. Standard errors of responses in parentheses. Statistically significant differences in bold.

In both the Canadian and American samples, respondents' attitudes, in contrast with their financial demands, do appear to be significantly influenced by the proposed use of the property, as seen in Table 9, below. In both countries, when the proposed use was the hospital respondents felt better about moving, felt that it was more morally right, and that it would be more beneficial to the community. Similarly, when the hospital was the proposed use respondents in both countries felt that government was more morally right and more influenced by good motives.

83. The US attitudinal results shown in Tables 8–11 are set out and discussed in N & SD, *supra* note 1 at 734–36.

Table 9: Attitude Toward Moving by Proposed Use in Canada & US

Question	Proposed Use					
	Hospital		Mall		Unspecified	
	Can	US	Can	US	Can	US
Attitude Toward Moving	2.98 (1.24)	3.81 (1.67)	2.68 (1.06)	3.60 (1.63)	2.56 (1.10)	3.54 (1.71)
I Am Morally Right if I Move	4.46 (0.91)	4.80 (1.41)	3.78 (1.18)	4.43 (1.42)	3.52 (1.39)	4.36 (1.64)
Moving Will Benefit Community	5.66 (1.08)	5.25 (1.34)	4.04 (1.28)	3.97 (1.28)	3.86 (0.95)	4.05 (1.19)

*Sample mean responses. Standard errors of responses in parentheses. Statistically significant difference in bold.

Overall, the Canadian respondents appear to have felt *worse* about the proposed expropriations than their American counterparts, as is apparent from Tables 8 and 9. Both the Canadian and American respondents had worse than neutral feelings about moving, but the Canadian responses were significantly less favourable than the US responses.⁸⁴ This result is robust whether we compare attitudes across short term and long term conditions in the Canadian and American samples⁸⁵ or attitudes across Proposed Use categories.⁸⁶ The Canadians were also less convinced than the Americans that it was morally right for them to move. Again, this result

84. I am assuming comparability of the seven point attitudinal scales used in N & SD with those used in my survey. In this section, in order to test whether there is a significant difference between the Canadian and US means, I have used simple t-tests for the mean of a single distribution (the Canadian distribution) and tested the null hypothesis that the mean of the Canadian distribution is equal to that of the US (as reported in N & SD), primarily against a two-tailed alternative of unequal means, but occasionally against a one-tailed alternative.

85. Test for means for attitude toward moving by Term condition, $H_0: \mu_{Can} = \mu_{US}$: short term: $t_{(78)} = -8.73$ ($p < 0.0000$); long term: $t_{(73)} = -5.0579$ ($p < 0.0000$).

86. Test for means for attitude toward moving by Use condition, $H_0: \mu_{Can} = \mu_{US}$: hospital: $t_{(59)} = -5.16$ ($p < 0.0000$); mall: $t_{(49)} = -5.75$ ($p < 0.0000$); unspecified: $t_{(42)} = -6.22$ ($p < 0.0000$).

is robust across comparison by Term⁸⁷ and by Proposed Use.⁸⁸ However, this result is not due to any feeling by Canadian respondents that their move would be less beneficial for the community; to the extent that there were any significant differences in this regard, Canadian respondents felt that their move would be *more* beneficial to the community.⁸⁹

(iii) Attitudes Toward Government

Somewhat surprisingly, the more negative feelings expressed by the Canadian respondents also cannot be linked to more negative attitudes toward the government's moral justification in asking for the property, or more negative perceptions of its motives. The means for attitudinal questions focused on government are summarized below in Table 10 by Term and in Table 11 by Use.

In general, both Canadian and American respondents appear to have felt that it was mildly immoral for government to ask them to give up their property. In the US sample, this attitude was stronger among respondents in long-term occupancy, but that was not true for the Canadian sample.⁹⁰ There was no significant difference between the samples in the attitude of those in short-term occupancy toward the government's moral justification in asking for the property, nor was there any significant difference between them with respect to the government's moral justification for demanding their property for a hospital or for an

87. Test for means for moral to move by Term condition, $H_0: \mu_{\text{Can}} = \mu_{\text{US}}$: short term: $t_{(77)} = -4.24$ ($p < 0.0001$); long term: $t_{(75)} = -3.70$ ($p < 0.0004$).

88. Test for means for moral to move by Use condition, $H_0: \mu_{\text{Can}} = \mu_{\text{US}}$: hospital: $t_{(60)} = -2.94$ ($p < 0.0046$); mall: $t_{(48)} = -3.89$ ($p < 0.0003$); unspecified: $t_{(43)} = -4.00$ ($p < 0.0002$).

89. There is a marginally significant difference when testing the mean attitudes to community harm or benefit across term of occupancy, against the one-tailed alternative of a higher Canadian mean (short term: $t_{(78)} = 1.32$ ($p < 0.0962$); long term: $t_{(75)} = 1.41$ ($p < 0.0819$)). There is a significant difference in the mean attitude to community harm or benefit when examining the hospital use, with Canadians finding it more beneficial (hospital: $t_{(60)} = 2.94$ ($p < 0.0023$ —one tailed)). In contrast, when examining the attitude toward community harm or benefit across the unspecified or mall categories, there is no significant difference in mean response between Canadians and Americans (either one- or two-tailed tests).

90. Test for equal means to question of whether government moral to ask across Canada and US, by Term condition, $H_0: \mu_{\text{Can}} = \mu_{\text{US}}$: short term: $t_{(78)} = 0.546$ ($p < 0.587$); long term: $t_{(75)} = 2.124$ ($p < 0.0369$ —two tail; $p < 0.0185$ —one tail, $\text{Can} > \text{US}$).

unspecified Use condition, but Canadians appear to have been somewhat less negative in that regard than Americans when the property was to be used for a mall.⁹¹

Table 10: Attitude Toward Government by Term on Land in Canada & US

Question	Short Term		Long Term	
	Can	US	Can	US
Government Morally Right	3.47 (1.44)	3.38 (1.61)	3.32 (1.38)	2.98 (1.62)
Government Motives (Can)	4.42 (1.46)		4.47 (1.24)	
Government Good Motives (US)		4.69 (1.45)		4.15 (1.68)
Government Bad Motives (US)		3.42 (1.59)		3.82 (1.63)

*Sample mean responses. Standard errors of responses in parentheses. Statistically significant differences in bold.

Turning to comparative attitudes about government motives, a similar picture emerges.⁹² In general, in both Canada and the US, survey respondents felt neutral to slightly positive about them. Again, in the US those in long-term occupancy of their property had slightly more negative feelings, so they were more inclined to attribute “bad” motives to the government. As between the two samples, the Canadians who were in long-term occupancy on average attributed “good” motives to government to a significantly greater extent than the Americans who

91. Test for equal means for to question of whether government moral to ask across Canada and US, by Use condition, $H_0: \mu_{\text{Can}} = \mu_{\text{US}}$: hospital: $t_{(60)} = 0.733$ ($p < 0.4666$); mall: $t_{(49)} = 2.307$ ($p < 0.0253$ —two tailed; $p < 0.0127$ —one tailed, $\text{Can} > \text{US}$); unspecified: $t_{(43)} = -0.250$ ($p < 0.8035$).

92. Comparison on this variable is complicated somewhat by the different way in which attitudes about government motives were solicited. Where the net attitude toward government is positive in Canada, I have assumed the primary comparison of interest is between the Canadian measure and the “good” motives measure for the US data. When the Canadian net mean is negative, I have focused on the similarity with “bad” motives in the US.

were in long-term occupancy, but that was not true of those in short-term occupancy.⁹³

Table 11: Attitude Toward Government by Proposed Use in Canada & US

Question	Proposed Use					
	Hospital		Mall		Unspecified	
	Can	US	Can	US	Can	US
Government Morally Right	3.84 (1.34)	3.71 (1.67)	3.18 (1.26)	2.77 (1.48)	3.02 (1.52)	3.08 (1.59)
Government Motives (Can)	5.16 (1.00)		3.74 (1.37)		4.25 (1.31)	
Government Good Motives (US)		5.26 (1.39)		4.12 (1.48)		3.95 (1.56)
Government Bad Motives (US)		3.01 (1.58)		3.93 (1.55)		3.90 (1.57)

*Sample mean responses. Standard errors of responses in parentheses. Statistically significant differences in bold.

Both the Canadian and American respondents were sensitive to the proposed use in their attitudes about government motives. In both samples, the hospital use was associated with a substantially higher mean attribution of good motives to government than the other two uses. However, there was no significant difference between the level of “good” motivations assessed by Canadians and Americans when the proposed use was a hospital.⁹⁴ The Canadians and Americans were roughly neutral in their responses to government motivations for the other two proposed uses (mall or unspecified use). The mean Canadian response for the mall use is slightly negative about government motivations. This Canadian mean response is statistically indistinguishable from the American mean

93. Test for equal means comparing motives question in Canada with “good” motives mean in US by Term, $H_0: \mu_{Can} = \mu_{US}$: short term: $t_{(78)} = -1.653$ ($p < 0.1024$); long term: $t_{(75)} = 2.260$ ($p < 0.0267$ —two tail; $p < 0.0134$ —one tail, Can > US).

94. Test for equal means comparing motives question in Canada with “good” motives mean in US, by Use condition, $H_0: \mu_{Can} = \mu_{US}$: hospital: $t_{(60)} = -0.748$ ($p < 0.4574$).

for “bad” motives in the mall condition.⁹⁵ The mean Canadian response in the unspecified condition is weakly positive about government motives. This mean response is statistically marginally higher than that for the US “good” motives response.⁹⁶ Direct comparison of the results is slightly complicated because of the different approach used to assess respondent attitudes toward government motives. Overall, the responses across the Canadian and US surveys indicate a remarkable degree of consistency in how respondents attribute the level of good or bad motivation to government in the vignettes.

C. Public Law and Private Preferences

The broad objective of this survey experiment was to provide evidence to help assess the theory that law plays an important role as a reference point for individual preferences. There is a stark difference between the Canadian and American approaches to property at the level of individual constitutional rights—perhaps the most salient form of public law protection. The US constitutionally limits the ability of government to encroach on individual property rights, but Canada has no such restriction, and an individual right to property was deliberately excluded from the *Charter*. Whether we see constitutional law as constituting the fundamental values held by individuals in a society or as reflecting those values, we would expect to find significant differences in how Canadians and Americans respond to proposed government expropriation of property. For the most part, the results generated in this survey, when compared to those reported in a sample of American respondents in the N & SD study, do not point to any such divergence, but instead to strong similarity.

Canadian and American respondents were similar in terms of their demands for financial compensation in the face of proposed expropriation.

95. Test for equal means comparing motives question in Canada with “bad” motives mean in US, by Use condition, $H_0: \mu_{\text{Can}} = \mu_{\text{US}}$: mall: $t_{(49)} = -0.983$ ($p < 0.3307$ —two tailed). The Canadian response is significantly distinguishable, if the Canadian mean is compared with the US mean response for “good” motives: $H_0: \mu_{\text{Can}} = \mu_{\text{US}}$: mall: $t_{(49)} = -1.965$ ($p < 0.0551$ —two tailed; $p < 0.0275$ —one tailed, Can < US).

96. Test for equal means comparing motives question in Canada for unspecified use with “good” motives mean in US, $H_0: \mu_{\text{Can}} = \mu_{\text{US}}$: unspecified: $t_{(43)} = 1.514$ ($p < 0.1372$ —two tailed; $p < 0.0686$ —two tailed, Can > US).

The vast majority of respondents demanded some amount of compensation over and above the provision of a substitute property, with the amount demanded being tied most significantly to the length of occupancy of the land. Neither the Americans nor the Canadians appeared to alter their financial demands in response to the use proposed by the government for their property. For both, the degree of subjective attachment to the property (as reflected in the length of occupancy) was the variable that best explained the demand for compensation. These results do not appear to vary with the public law structure that governs expropriation, but to suggest a more universal approach to property rights that is at odds with the stark difference in their constitutional status in Canada and the US.

Nor do the attitudinal measures which were surveyed provide strong support for the theory that public law in the form of an individual constitutional right to property significantly determines or reflects individual preferences. Both the Canadian and American respondents were lukewarm at best when faced with government demands for their property. However, for both surveys, these more or less negative attitudes were moderated when the proposed use was a hospital. Importantly for the hypothesis that constitutional differences matter, the data offered no strong evidence of differences in attitudes toward government as between Canada and the US, but instead showed that for the most part, those attitudes were very similar. Some marginal differences emerged which reflect qualitatively different responses—for example, attitudes of the Canadian respondents did not appear to vary with the degree of subjective attachment, as reflected in the Term variable, but there is no obvious link between this difference and a theory of constitutional rights as reference points. The Canadian and American respondents reacted similarly to variation in the purpose of the government taking. They were indistinguishably more positive about government's moral justification for that action when the purpose was building a hospital than for other purposes. Their responses were also indistinguishable in the extent to which they attributed good motives to a government making an expropriation demand. Both Canadian and American respondents found government takings for unspecified uses or for commercial development (a mall) to be somewhat immoral—a substantially more negative assessment than for the more evidently “public” purpose of a hospital. Considered in these broad terms, the data does not strongly support the hypothesis that

the difference in the public law approach to property rights in Canada and the US will be reflected in distinct differences in how individuals in the two countries respond to intrusions on their rights.

Some of the results, however, are more supportive of the hypothesis that individual constitutional property rights reflect or shape such individual responses. Surprisingly, the Canadian respondents felt substantially worse than their US counterparts about being asked to move, and were less convinced that it was morally right for them to move—despite being, if anything, significantly more convinced that the move would benefit the community. This more negative individual response may reflect the absence of constitutional entrenchment of a right to property.⁹⁷ The US constitutional right to property makes it clear that every individual is equally protected from (and equally exposed to) government taking of property.⁹⁸ The absence of any such universal reference point in Canadian law may heighten the sense that an individual is being singled out or imposed on when a government in Canada takes her property.⁹⁹ This also might help explain the more negative individual feelings about expropriation in the Canadian respondents.

The results for the mall takings scenario may also provide some support for the importance of a constitutional right as a reference point. Canadian respondents felt significantly worse about moving and less convinced that moving was moral than their American counterparts. This is consistent with a heightened sense of individual vulnerability among Canadians in the absence of a constitutional rule. However, the respondents in the American study were statistically significantly more negative than the Canadian respondents about government's moral justification for taking the property if it was to be used for a mall. This

97. Conceivably, the younger cohort in the Canadian sample may also feel more strongly about issues in general, although their relative lack of experience in owning real property might be expected to have a contrary effect compared with the US sample.

98. Although this is a highly debatable point in fact, the form of the constitutional constraint may generate an intuitive expectation or reflect the aspiration that such equality of treatment will result.

99. Some indirect evidence supportive of this hypothesis is the finding that the control for ethnic minorities is significantly associated with higher demands for compensation in the logit regressions. One might expect minorities to have fears of being singled out, and we do see a result consistent with the translation of such a feeling into higher demands for financial compensation.

is consistent with the form of the US constitutional right in its heuristic sense, as a mall is less clearly a “public use” of the form that permits government to take property than the alternatives. In Canada, once again, there is no similar legal reference point that would limit the type of uses for which government could expropriate property. While the Canadian respondents did react negatively to the mall use, their slightly warmer response to it in comparison with the American respondents is consistent with a role for constitutional property rights as a reference point for American respondents.

A similar argument might be made about the qualitatively different effect of the Term variable on attitudes in Canada and the US. The long-term occupation of the vignette property may not only stand in for subjective attachment to it, but also help to consolidate an understanding of the property as nearer to an intuitive core of “private property” for the respondents. As the US constitutional right protects “private property” from government encroachment, the longer term may be more likely to trigger reference by Americans to the constitutional right as a bar to government interference. This might help to explain their relatively greater sensitivity to Term, and their lower assessment of government’s moral justification and motives for the expropriation than Canadian respondents in the long term condition.

The findings set out above are consistent with the hypothesis that public law, in the form of a constitutional right to property, can play some role in explaining individual responses to proposed expropriation, but they by no means support the claim that this reference dependency is the dominant force in explaining those responses. Despite the clear difference in the constitutional status of property rights in Canada and the US, the responses by individuals in the Canadian and American surveys are too similar to conclude that this difference has led to any striking variation in attitudes towards expropriation in the two countries.

Conclusion

Behavioural economists have begun to show empirically that individuals may have preferences that are contingent on reference points. Economists now take seriously the idea that culture and context may operate as important variables in modeling the preferences and choices

of individuals. In operationalizing these new theories of individual and collective choice and welfare, the question of how to establish the relevant reference points or cultural state variables looms large. The results of the simple experiment reported in this paper suggest that caution is required in looking to “first order” differences in formal legal systems, at least at the level of constitutional law, as a way to answer that question. Similarly, if the normative goal is to “reset” individual reference points, or cultural state variables, then the results of this experiment raise doubts about the potential for achieving this through the implementation of constitutional rights.

The experimental design for this study—relying on comparison with the published results of an American survey—constrains the analysis in a number of ways. The study was focused on a particular type of property (real, residential) and a particular type of government intervention (direct expropriation). Despite the constitutional differences, similar levels of legal protection exist in Canada and the US at a more “operational” level, and this may help explain why the survey responses in the two countries were similar. The results of this study do not rule out the possibility that law might play a role in shaping individual preferences at an operational level, and that differences in the hierarchical status of legal rules (i.e., whether they are constitutional or statutory rights) matter less than the rule’s functional content and history in shaping individual expectations.

Another problem with the current experimental design in this study lies in the inherent difficulty of fully controlling for differences in sample composition, recruitment methodology and survey implementation. Even minor differences in these respects can generate effects in the data that may influence the results. The relatively small size of the Canadian sample and the lack of balanced sample sizes in both studies are also not ideal.

Further examination of the potential influence of the constitutional difference in property protection between Canada and the US might expand the scope of property rights to different types of property, to test, for example, whether a common affinity for “home” lies behind the similar responses in this study. The nature of government intervention might also be expanded to include regulatory encroachment on property rights. The US constitutional property right sometimes requires compensation for this type of “regulatory taking”, while the lack of constitutional

property rights in Canada have generally been a barrier to claims for compensation. The constitutional difference in the status of property may be more influential in this “regulatory takings” setting, when it is associated with more practical difference in outcomes across Canada and the US. Ideally, future studies would administer methodologically identical surveys to representative Canadian and American samples, potentially incorporating additional experimental variation to enhance the range of causal conclusions that could be drawn from the results. The current study’s results raise a number of questions and suggest potential for further work to fill in gaps in our understanding of the relationship between legal institutions and individual preferences and attitudes.

Despite the limitations in both the Canadian and American studies compared in this paper, the initial results remain interesting and somewhat surprising, as they do not seem to confirm the stereotypical view that Americans are more individualistic and more attached to private property than Canadians. The results provide an initial window into the factors that might influence the choices and attitudes of Canadians faced with government expropriation of their property. Canadian respondents appeared to resist expropriation and to require “bonus” compensation in addition to the replacement for their homes in order to be willing to move voluntarily. The size of that compensation premium was systematically influenced by how long the respondents had (hypothetically) owned the property in question; those in long-term occupation were less willing to move, and demanded very high levels of compensation as a premium. In terms of assessing “just compensation” for expropriation, the results suggest that market value compensation would not have satisfied most respondents, particularly those with a longstanding connection to the property.¹⁰⁰

The nature of government’s proposed use for property it expropriates did not appear to strongly influence the level of compensation that the Canadian respondents required to give up their property, but the government’s objectives for the use of the property did appear to influence attitudes toward the use of expropriation powers. Canadian respondents

100. While the survey does not directly incorporate this measure, the structure asks for compensation required above that of the provision of an equivalent replacement property nearby. By construction, this property would stand in for the “fair market value” of a respondent’s home in most assessments.

appeared to more positively regard the morality of government's demand for their property, the benefit to the community from the exercise of expropriation powers, and government motives when a clearly "public" use of the property was proposed. In contrast, attitudes are more negative when government takes private property without a specific objective or to transfer it to a private party. These results suggest that it is not simply the "fact" of expropriation and the loss of their property that shape the attitudes of individuals toward the government's power of expropriation, but also the process that it followed. Where individuals know the objectives and the objectives are of a public nature, Canadian respondents appear to regard expropriation as more legitimate.

In terms of these general influences, the responses of Canadian and American respondents to government expropriation of their property are very similar. The effect of the stark difference in constitutional treatment of property rights between Canada and the US largely disappears when we look at the evidence on individual choices and attitudes generated in the experiments reviewed in this paper.

