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Professor Paul Babie

The Idea of Property: A Comparative Review of Recent Empirical Research  
Methods

# The Idea of Property: A Comparative Review of Recent Empirical Research Methods

PAUL T. BABIE,\* PETER D. BURDON,† FRANCESCA DA RIMINI,+ CHERIE METCALF,± AND GEIR STENSETH#1

## ABSTRACT

*While theory offers important insights into property's normative content, it sometimes fails to tell us about what people understand property to mean and how they interact with those things said to be owned by them. This has significant implications for some of the challenges facing humanity, including climate change, unequal distributions of wealth and resources, biodiversity loss, and innovation. In response, a growing body of literature is emerging that looks at property through a different lens; rather than theorizing property in an abstract way or attempting to craft a normative account of and justification for the institution, this new scholarship focuses on everyday people's views and experiences—what some call the psychology of property and what we call the idea of property. This article presents a comparative review of empirical research methods that the authors have*

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\* Adelaide Law School Professor of the Theory and Law of Property, Adelaide Law School, The University of Adelaide (Australia).

† Associate Professor of Law, Adelaide Law School, The University of Adelaide (Australia).

+ Research Associate, Adelaide Law School, The University of Adelaide (Australia).

± Associate Professor, Faculty of Law, Queen's University (Canada).

# Professor dr. juris, Department of Private Law, The Faculty of Law, University of Oslo (Norway).

1. Parts of this article have previously appeared in other publications. See Paul Babie, Peter D. Burdon & Francesca Da Rimini, *The Idea of Property: An Introductory Empirical Assessment*, 40 HOUSTON J. INT'L L. 797 (2018); Cherie Metcalf, *Property Law Culture: Public Law, Private Preferences & the Psychology of Expropriation*, 39 QUEEN'S L.J. 685 (2010); Geir Stenseth, *Current Empirical Premises of the Disclosure of the Secrets of Property Law: A Foundation and a Guideline for Future Research*, 2008 ANCILLA JURIS 96 [Hereinafter; Stenseth, *Current Empirical Premises of the Disclosure of the Secrets of Property Law*]; Geir Stenseth, "A Man's House is His Castle": *An Economic and Comparative Approach to Compensation and Gain Sharing in Public and Private Takings*, 2017 ANCILLA JURIS 11 [Hereinafter Stenseth, "A Man's House is His Castle"]. Sincere thanks to Nigel Williams for the preparation of the Table.

recently used to study the idea (or psychology) of property and provides evidence drawn from the United States, Canada, and Australia: (i) Stenseth's work on behavioral economics and property law; (ii) Metcalf's empirical research drawing on social psychology and behavioral economics; and (iii) the small-scale, qualitative study conducted by Babie, Burdon, and da Rimini. All three studies suggest that individuals hold an idea of property that exists independently from the formal law found in the jurisdiction studied. Moreover, while individuals do appear willing to self-regulate with reference to the environment or for the public good, for the most part people's idea of property is one that allows for promoting individual desires. Whether this is innate, culturally determined, or both is beyond this article's scope, but we conclude that this is an important area for future research and investigation.

#### INTRODUCTION

Theorists have long debated property's meaning and content.<sup>2</sup> The institution has been described in religious and secular terms, and justifications have been sought in politics, law, and philosophy. The dominant literature on property can be cerebral, sometimes abstract and seemingly disconnected from the psychology and experience of real people. As a result, while there exist highly complex and nuanced theories of property, they sometimes fail to explain how people both understand property and interact with the things they are said to own. In response, a growing body of literature is emerging that looks at property through a different lens.<sup>3</sup> Rather than theorizing property in an abstract way or attempting to craft a normative account of and

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2. For a rich overview, see RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* (1951); Timothy Earle, *Property in Prehistory*, in *COMPARATIVE PROPERTY LAW: GLOBAL PERSPECTIVES* (Michele Graziadei & Lionel Smith eds., 2017); JOHN BREWER & SUSAN STAVES, *EARLY MODERN CONCEPTIONS OF PROPERTY* (1996); Bertram Turner, *The Anthropology of Property*, in *COMPARATIVE PROPERTY LAW: GLOBAL PERSPECTIVES* (Michele Graziadei & Lionel Smith eds., 2017).

3. Further to the methods articulated in this article, see Jon L. Pierce, *The State of Psychological Ownership: Integrating and Extending a Century of Research*, 7 *REV. GEN. PSYCHOL.* 84 (2003); Janice Nadler & Shari Seideman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 *J. EMPIRICAL L. STUD.* 713 (2008); Janice Nadler, *The Social Psychology of Property: Looking Beyond Market Exchange* 5.1 *ANN. REV. L. & SOC. SCI.* 14 (2018); Kristine S. Knaplund, *Women and Wills: An Empirical Analysis of the Married Women's Property Act and its Remarkable Resonance Today*, 45 *RUTGERS L. RECORD* 216 (2018); Yun-Chien Chang & Henry E. Smith, *Convergence and Divergence in Systems of Property Law: An Empirical Analysis*, 91 *SOUTHERN CAL. L. REV.* (forthcoming 2019); Gregory N. Mandel, Kristina Olson & Anne Fast, *Debunking Intellectual Property Myths: Cross-Cultural Experiments on Perceptions of Property*, *BYU L. REV.* (forthcoming 2020).

justification for the institution, this new scholarship focuses on people's views and experiences.

Understanding what people think ownership means and why they engage with it in the ways they do motivates this new approach to property—which we call the *idea of property* and others refer to as the *psychology of property*.<sup>4</sup> For example, if people view property in terms of preference satisfaction, self-seeking, or agenda-setting choice, then why a person chooses one course of action and not another with a given thing is a matter for the idea (or psychology) of property. Abstract theories of property offer limited guidance on this matter. Instead, it appears necessary to investigate what real, flesh-and-blood people understand property to mean when they are deciding what to do with their things pursuant to the dominant concept of property conferred by the state.

Investigations into the idea of property also have the potential to offer practical insights that cannot be found in orthodox property theory. Serious challenges facing humanity emerge from competing understandings of what property means—these include, but are not limited to, climate change,<sup>5</sup> unequal distributions of wealth and resources,<sup>6</sup> biodiversity loss,<sup>7</sup> and innovation.<sup>8</sup> It is impossible to address these challenges through government or market interventions without also focusing attention on real people's responses to any such interventions. As such, the idea or psychology of property must inform and drive effective responses. Further, we argue that the ideas people hold about property constitute a form of law. Indeed, some scholars suggest that this *living law* is more powerful than anything enacted by the state or enforced by courts,<sup>9</sup> that it has not been superseded by the state, and that it therefore remains “the most important and continuous

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4. Babie, Burdon & Da Rimini, *supra* note 1; Paul Babie, *Idea, Sovereignty, Eco-colonialism, and the Future: Four Reflections on Climate Change and Private Property*, 19 GRIFFITH L. REV. 527 (2010) [Hereinafter Babie, *Idea, Sovereignty, Eco-colonialism, and the Future*]; Paul Babie, *Choices that Matter: Three Propositions on the Individual, Private Property, and Anthropogenic Climate Change*, 22 COLO. J. INT'L ENVTL. L. & POL'Y. 323 (2011) [Hereinafter Babie, *Choices that Matter*].

5. Babie, *Idea, Sovereignty, Eco-colonialism, and the Future*, *supra* note 4.

6. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 443-44 (1988).

7. PETER D. BURDON, *What is Good Land Use? From Rights to Responsibilities*, 34 MELBOURNE. U.L. REV. 708, 715 (2010).

8. See CHRISTINE GREENHALGH & MARK ROGERS, *INNOVATION, INTELLECTUAL PROPERTY, AND ECONOMIC GROWTH* (2010).

9. See IVAN ILLICH, *SHADOW WORK* (1981); DUNCAN KENNEDY, *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 1-5 (1995); CHARLES TAYLOR, *A SECULAR AGE* 159-211 (2007); WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* (2009); ROBERT H. WESTON & DAVID BOLLIER, *GREEN GOVERNANCE: ECOLOGICAL SURVIVAL, HUMAN RIGHTS AND THE LAW OF THE COMMONS* (2013).

normative experience” for individuals.<sup>10</sup> Put another way, the idea of property matters because it becomes itself a form of law.

This article presents a comparative review of empirical research methods which we have recently used to study the idea of property. It proceeds in four parts. Part I unpacks what we call the idea of property and describes how legal scholars recognize it as a kind of law. With this background in place, Part II draws together and summarizes the approaches we have used in recent studies. In order, we first examine the work of Stenseth,<sup>11</sup> whose work on behavioral economics and property law serves as background for later investigations into the idea of property. Next, we summarize Metcalf’s empirical research that draws on social psychology and behavioral economics.<sup>12</sup> Finally, we examine the small-scale, qualitative study conducted by Babie, Burdon, and da Rimini.<sup>13</sup> In addition to illustrating the diverse methods that can be used to study the idea of property, our research provides evidence from the United States, Canada, and Australia for doing so.

Part III summarizes our findings and identifies points of commonality and difference both in relation to the empirical idea of property and in the approaches used to study it. In particular, all three studies suggest that individuals hold an idea of property that exists independently from the formal law found in the jurisdiction studied. Moreover, while individuals appear willing to self-regulate their use of property with reference to the environment or for the public good, people’s idea of property is one that, for the most part, allows them to promote their own individual desires. Whether this is innate, culturally determined, or both is beyond the scope of this article, but we conclude that it is an important area for future research and investigation. Part IV concludes with some brief reflections on the future of empirical research into the idea of property.

## I. THE “IDEA OF PROPERTY”

What Babie, Burdon, & da Rimini refer to as the *idea of property* can be traced in nascent form to the work of Rousseau, if not earlier to Locke and Hobbes.<sup>14</sup> More recently, Laura Underkuffler writes: “From

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10. W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* 3 (1999).

11. Stenseth, *Current Empirical Premises of the Disclosure of the Secrets of Property Law*, *supra* note 1; Stenseth, “A Man’s House is His Castle”, *supra* note 1.

12. Metcalf, *supra* note 1.

13. Babie, Burdon & Da Rimini, *supra* note 1.

14. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* (Victor Gourevitch ed., 1997) (1762); JOHN LOCKE, *TWO TREATISES OF*

our earliest moments of childhood, we feel the urge to assert ourselves through the language of possession against the real or imagined predations of others.”<sup>15</sup> And the scholarly literature reveals glimpses of the idea in, for example, what David Pearce calls *psychological ownership*;<sup>16</sup> Stenseth’s *psychology of property*;<sup>17</sup> Robert H. Weston and David Bollier’s *vernacular law*;<sup>18</sup> and Aboriginal scholar Irene Watson’s *living law*.<sup>19</sup> While discrete differences exist in each approach, they are nonetheless united by a common concern for the informal, everyday beliefs that people hold, use to negotiate, and to devise their own rules, norms, and practices. These informal beliefs about property constitute a form of law<sup>20</sup> and often represent “the most important and continuous normative experience” for individuals.<sup>21</sup>

More broadly, one finds a growing body of theoretical research in other disciplines into what is called the *psychology of property*.<sup>22</sup> The early progenitors of the psychology of property were economic psychologist Leon Litwinski<sup>23</sup> and social psychologist Lita Furby,<sup>24</sup> both of whom suggested that people attach a “psychology of mine” to specific objects. Others have been interested in property’s possessive and individualizing tendencies,<sup>25</sup> with some offering genetic explanations for

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GOVERNMENT (Peter Laslett ed., 1988) (1690); THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., 1996) (1651).

15. LAURA UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 1 (2003).

16. Pierce, *supra* note 3, at 84.

17. Stenseth, *Current Empirical Premises of the Disclosure of the Secrets of Property Law*, *supra* note 1, at 106.

18. WESTON & BOLLIER, *supra* note 9, at 189.

19. See IRENE WATSON, *ABORIGINAL PEOPLES, COLONIALISM AND INTERNATIONAL LAW: RAW LAW* 29-32 (2015).

20. See generally KENNEDY, *supra* note 9 (discussing groups and cultural identities throughout history).

21. REISMAN, *supra* note 10, at 4.

22. *Id.*; Nadler, *supra* note 3; Metcalf, *supra* note 1.

23. Leon Litwinski, *Is There an Instinct of Possession?*, 33 *BRIT. J. PSYCHOL.* 28 (1942) [hereinafter Litwinski, *Is There an Instinct of Possession?*]; Leon Litwinski, *The Psychology of Mine*, 22 *PHIL.* 240 (1947) [hereinafter Litwinski, *The Psychology of Mine*].

24. Lita Furby, *The Socialization of Possession and Ownership Among Children in Three Cultural Groups: Israeli Kibbutz, Israeli City, and American*, in *PIAGETIAN RESEARCH: COMPILATION AND COMMENTARY* 95 (Sohan Modgil & Celia Modgil eds., 1976) [hereinafter Furby, *The Socialization of Possession and Ownership Among Children in Three Cultural Groups*]; Lita Furby, *Understanding the Psychology of Possession and Ownership: A Personal Memoir and an Appraisal of Our Progress*, 6 *J. SOC. BEHAVIOR AND PERSONALITY* 457 (1991) [Hereinafter Furby, *Understanding the Psychology of Possession and Ownership*].

25. See Litwinski, *Is There an Instinct of Possession?*, *supra* note 23; Litwinski, *The Psychology of Mine*, *supra* note 23; Amitai Etzioni, *The Socio-Economics of Property*, 6 *J. SOC. BEHAVIOR AND PERSONALITY* 465 (1991); Furby, *The Socialization of Possession and*

such psychological states,<sup>26</sup> while others argue that they are the product of social practices.<sup>27</sup> Still other theorists working from the conceptual framework of socio-biology combine both biological and social explanations to account for the tendencies toward possessiveness in property relations.<sup>28</sup> Alongside this theoretical research, one finds limited empirical evidence on the idea of property,<sup>29</sup> particularly in relation to the law,<sup>30</sup> on the popular expectations about the circumstances under which government should be permitted to take property from a private owner,<sup>31</sup> or which explores the regulation of property rights for environmental protection.<sup>32</sup>

The idea of property can itself become a form of law. To explain how, it is necessary to turn back for a moment to the theory of property. The state-conferral of choice is, theoretically, nothing less than a grant of sovereignty, in Morris Cohen's sense that the person with property has in fact received a grant of power or control that renders them a "little sovereign" over whatever the thing in question is.<sup>33</sup> But what is their practical understanding of that sovereignty? This is something that is difficult to derive from theorizing about liberal or neo-liberal rights and choice alone. It is, instead, at least equally important what a person thinks they have when they are exercising choice; that is the idea of property. And the holding of such sovereignty has serious implications if the person who holds it *thinks* of property in individualist or absolutist terms. We are dealing here with two types of law: what the state *seems* to confer, and what the individual *thinks* one or it (in the case of corporations) receives. How do we reconcile the two?

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*Ownership Among Children in Three Cultural Groups*, *supra* note 24; Furby *Understanding the Psychology of Possession and Ownership*, *supra* note 24.

26. Caroline Frear Burk, *The Collecting Instinct*, 7 THE PEDAGOGICAL SEMINARY 179 (1900).

27. Furby, *The Socialization of Possession and Ownership Among Children in Three Cultural Groups*, *supra* note 24; Furby, *Understanding the Psychology of Possession and Ownership*, *supra* note 24.

28. EDWARD O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* (1975); David M. Buss, *Evolutionary Social Psychology: Prospects and Pitfalls*, 14 MOTIVATION AND EMOTION 265 (1990).

29. Jon L. Pierce, Tatiana Kostova & Kurt T. Dirks, *The State of Psychological Ownership: Integrating and Extending a Century of Research*, 7 REV. GEN. PSYCHOL. 84 (2003); Stenseth, *Current Empirical Premises of the Disclosure of the Secrets of Property Law*, *supra* note 1.

30. Nadler, *supra* note 3; Jonathan Nash, *Packaging Property: The Effect of Paradigmatic Framing of Property Rights*, 83 TUL. L. REV. 691 (2008); Jonathan Nash & Stephanie Stern, *Property Frames*, 87 WASH. U. L. REV. 449 (2010).

31. Nadler & Diamond, *supra* note 3; Metcalf, *supra* note 1.

32. Metcalf, *supra* note 1.

33. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927-1928); Paul Babie, *Choices that Matter*, *supra* note 4.

Eugen Ehrlich's work assists in separating what the state seems to confer from what the individual thinks is received. In the early twentieth century, Ehrlich developed the socio-legal concept of the *living law*, which sees law in two ways. On the one hand, there are formal, positive laws that govern a particular set of circumstances; it is normally only necessary that officials within legal structures be familiar with such formal, positive laws. Alternatively, many members of society will not only have little familiarity with such formal positive laws, but they also will govern their day to day lives through a set of social norms and rules which are often at odds with that formal positive law. Ehrlich referred to this as the *living law*,<sup>34</sup> an umbrella term capturing the realm of unofficial law that emanates from people's everyday perspectives and social interactions.<sup>35</sup>

Ehrlich further argued that to ignore living law is to ignore the reality of law in most people's lives. And, as such, emphasizing the state as the only source of law misdirects our attention from the full meaning and realm of law: "The law of the state may be important, but law, real law, is found in all human relations, from the simplest, briefest encounter between two people to the most inclusive and permanent type of interaction."<sup>36</sup> Indeed, William Twining identifies this living law as but one form of law that currently operates the world over and gives rise to a plurality of legal structures.<sup>37</sup>

In the case of property, theory posits that what the individual might do with things said to be held pursuant to property is inherently limited by obligation as imposed through regulation. That may be so, but only to the extent that law—in the form of positive statements of law by courts or legislatures—actually imposes that limitation. But as Duncan Kennedy has demonstrated, the law regulates only a small portion of the totality of human conduct, leaving a large swathe unregulated.<sup>38</sup> With property, the choices that people make pursuant to their sovereign power are often contingent upon the idea of property—the living law of property—rather than sole reliance upon what theorists say about property being *socially relational* or *communitarian*, or, more importantly, what the law might impose so as to restrict or regulate the freedom to choose. In other words, the idea of property, the living law of property, and theorizing about it should be seen as complementary, each

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34. EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Walter L. Moll trans., 1936); A. Javier Treviño, *Sociological Jurisprudence*, in *L. AND SOC. THEORY* 35, 35-51 (Reza Banakar & Max Travers eds., 2013).

35. WESTON & BOLLIER, *supra* note 9.

36. REISMAN, *supra* note 10, at 3.

37. TWINING, *supra* note 9.

38. KENNEDY, *supra* note 9.



informing the other.

The law can thus act in two ways. It may do so in its positive pronouncements or, as we argue, where the law is silent on a given action or course of conduct that may affect and harm others, it may nonetheless act through that silence. That is the living law. Kennedy argues that “inaction [on the part of a legal system] is a policy,” and the law is responsible for the outcome—at least in the abstract sense that the law “could have made it otherwise.”<sup>39</sup> In short, law does not act in, control, or move into all *spaces/places* of human conduct, it does not move into the *living law*. Rather, many of those spaces/places are left entirely untouched.<sup>40</sup> Indeed, Kennedy argues, it might be that as much as 95 percent of all human conduct is left unregulated in this way.<sup>41</sup>

To the extent that the law issues no positive prohibition on a given course of conduct, the idea of property held by an individual, and backed by state-conferred sovereignty over the thing or resource so held, *becomes*, for lack of any limitation, the law as concerns the thing or resource in question with all of the attendant consequences for others that may flow from choices made pursuant to that law. Cohen’s little sovereign becomes a true sovereign—a situation which persists until the state acts otherwise through positive law. Until the law so acts, the state conferral of sovereignty leaves myriad small, living “legal systems” in its wake.

The vast area of human conduct that law chooses to leave unrestrained through positive pronouncement, as opposed to the small fraction that it does choose to restrain, has seldom been studied. Yet, as Ehrlich warned, if we fail to understand the living law, we fail to understand the reality of law. In the case of property, then, what is living law; or, put another way, what is the idea of property? The empirical studies that we have previously conducted are each, in one way or another, an attempt to understand the living law, the idea of property.

With this background in place, we consider in the next section the distinct methods we have used to study the idea of property. Our summary begins with Geir Stenseth’s work, whose research has bridged the gap between behavioral economics and property law, providing a backdrop to Metcalf’s and to Babie, Burdon, & da Rimini’s empirical research on the psychology of property.

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39. *Id.*

40. *Id.*; ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK* (2<sup>nd</sup> ed., 2015) (1983).

41. KENNEDY, *supra* note 9; UNGER, *supra* note 40.

II. EMPIRICAL METHODOLOGIES FOR USE IN STUDYING THE IDEA OF PROPERTY

A. *Geir Stenseth: Behavioral Economics and the “Endowment Effect”*

In 2008, Stenseth examined the pioneering work of behavioral economist Richard H. Thaler, who first identified what has come to be known as the *endowment effect*.<sup>42</sup> This effect reveals that:

[P]eople have a tendency to stick with what they have, at least in part because of loss aversion. Once I have that mug, I think of it as mine. Giving it up would be a loss.<sup>43</sup> [ . . . ] I called this phenomenon the “endowment effect” because, in economists’ lingo, the stuff you own is part of your endowment, and I had stumbled upon a finding that suggested people valued things that were already part of their endowment more highly than things that could be part of their endowment, that were available but not yet owned.<sup>44</sup>

In this way, occupying property creates psychological changes in the possessor, and endowment effect experiments show that there is a difference between a buyer’s willingness to pay for a good and a seller’s willingness to accept such amount for the same good. In 1990, Thaler, along with Daniel Kahneman and Jack L. Knetsch, reported a series of such experiments that always resulted in similar outcomes: median-selling prices showed to be about twice median-buying prices.<sup>45</sup> In one such study, conducted in a law and economics class, Thaler put a coffee mug with the Cornell insignia in front of *every other student*, who then became the owner of the mug. *All the students* in the class were told to inspect the coffee mugs (either their own or the neighbor’s). After a while, they were asked to make trade offers. Mug owners were asked to make offers to sell; the other students were asked to make offers to buy.

The outcome? Buyers were willing to pay only about half of what the

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42. Stenseth, *Current Empirical Premises of the Disclosure of the Secrets of Property Law*, *supra* note 1.

43. RICHARD H. THALER, *MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS* 154 (2015).

44. *Id.* at 18.

45. Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990).

sellers would demand.<sup>46</sup> The endowment effect has been replicated in numerous experiments<sup>47</sup> and seems to be broadly recognized by scholars today.<sup>48</sup> The experiments systematically show that the possessor values one's objects significantly more than does a third party.<sup>49</sup> While the endowment effect is closely linked to the idea of property, for Thaler, possession (or ownership) does not independently create the effect. Rather, what really matters is the prospect of losing possession or ownership loss aversion. To an owner, one's things represent a potential loss; to other people, the same things represent a potential gain. Since losses tend to loom larger than corresponding gains, loss aversion, not the possession or ownership *per se*, is thought to trigger the endowment effect.

Thaler's original take on the endowment effect—based on loss aversion—remains the leading explanation for the phenomenon, but several alternative, supplemental explanations can also be found.<sup>50</sup> One of them—a 2009 study conducted by Carey K. Morewedge and other

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46. THALER, *supra* note 43.

47. See Nathan Novemsky & Daniel Kahneman, *The Boundaries of Loss Aversion*, 42 J. MARKETING RES. 119 (2005); Jochen Reb & Terry Conolly, *Possession, Feelings of Ownership and the Endowment Effect*, 2 JUDGMENT DECISION MAKING, 107 (2007); see also Owen D. Jones & Sarah F. Bronsan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 WM. & MARY L. REV. 1935 (2008).

48. The robustness of the endowment effect experiments is questioned in Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay–Willingness to Accept Gap, the “Endowment Effect,” Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530 (2005); see also Charles R. Plott & Kathryn Zeiler, *Exchange Asymmetries Incorrectly Interpreted as Evidence of Endowment Effect Theory and Prospect Theory?*, 97 AM. ECON. REV. 1449 (2007). But see, e.g., Eric J. Johnson et al., *Exploring the Nature of Loss Aversion* (IZA, Discussion Papers No. 2015, 2006), <http://ssrn.com/abstract=892336>.

49. See Daniel Kahneman et al., *The Endowment Effect: Evidence of Losses Valued More than Gains*, in HANDBOOK OF EXPERIMENTAL ECONOMICS RESULTS (Charles R. Plott & Vernon L. Smith eds., 2008); Praveen K. J. & Vernon L. Smith, *The Endowment Effect*, in HANDBOOK OF EXPERIMENTAL ECON. RESULTS (Charles R. Plott & Vernon L. Smith eds., 2008). In a recent meta-analysis on the willingness to pay/willingness to accept disparity, the geometric mean of the ratio is calculated to be 1.63 for ordinary private goods (compared to 3.28 when it comes to goods overall). See Tuba Tuncel & James K. Hammitt, *A New Meta-Analysis on the WTP/WTA Disparity*, 68 J. ENVTL. ECON. MGMT. 175, 180-81 (2014).

50. Both Richard H. Thaler and Daniel Kahneman have been awarded The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel (Kahneman 2002, Thaler 2017). In its scientific background on the prize to Thaler, The Royal Swedish Academy of Sciences claims that Thaler's original explanation based on loss aversion is still the leading explanation for the endowment effect, even though alternative explanations have been offered. See Comm. for the Prize in Econ. Scis. in Memory of Alfred Nobel, *Richard H. Thaler: Integrating Economics with Psychology* 6 (2017), <https://www.nobelprize.org/uploads/2018/06/advanced-economicsciences2017-1.pdf>.

scholars—places greater emphasis on the idea of property. That study claimed that ownership—not loss aversion—causes the endowment effect. Based on what research in psychology was suggesting, the authors hypothesized that a loss frame is not necessary: “People may demand a lot for their lava lamps because they actually *like* them, and they may like them simply because they are theirs.”<sup>51</sup> The researchers tested the hypothesis by conducting a study comparable to Thaler’s Cornell-coffee-mug experiment, but with a twist: a group of buyers (called *owner-buyers*) received a mug in advance and were asked to indicate willingness to pay for a *second mug*.

The results suggest that ownership *per se* creates the endowment effect. Owner-buyers were willing to pay as much for the second mug as sellers were willing to accept, and both valued the mugs more than did standard buyers. Or, as the Morewedge research put it: “In other words, the main effect of endowment in our studies was to enhance the appeal of the goods participants owned, and the pain of giving them up was irrelevant.”<sup>52</sup>

While Morewedge’s and Thaler, Kahneman, & Knetsch’s research used *owner-buyers* or *ownership*, respectively, in the discussion sections of their articles,<sup>53</sup> the latter authors expressed themselves somewhat differently. They concluded that people tend to increase an object’s value as soon as they are “given that object,”<sup>54</sup> and the authors reflected on which feature of the receiving process actually creates the effect:

The impression gained from informal pilot experiments is that the act of giving the participant physical possession of the good results in a more consistent endowment effect. Assigning subjects a chance to receive a good, or a property right to a good to be received at a later time, seemed to produce weaker effects.<sup>55</sup>

This impression has later been tested: what role does the *legal* aspect actually play? Does the endowment effect merely mirror the formal legal system or does it operate independently? In a study by Jochen Reb and Terry Connolly, participants were divided into four

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51. C.K. Morewedge et al., *Bad Riddance or Good Rubbish? Ownership and Not Loss Aversion Causes the Endowment Effect*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 947, 948 (2009); see also C.K. Morewedge & C.E. Giblin, *Explanations of the Endowment Effect: An Integrative Review*, 19 TRENDS COGNITIVE SCI. 339, 344 (2015).

52. Morewedge et al., *supra* note 51, at 950.

53. Kahneman et al., *supra* note 45, at 1328-29, 1343.

54. *Id.* at 1332.

55. *Id.* at 1342, n. 7.

groups:

- Members of group one received an item (chocolate bars or coffee mugs) and were told they legally owned the item before they were asked to attach value to it;
- Members of group two also got the item in possession but were not told that they owned it;
- Members of group three were merely shown the item but were told that they legally owned it;
- Members of group four also were merely shown the item but were not told that they owned it.

The study reported a significant main effect *only for possession*: participants put a higher monetary value to an item when they physically possessed it. On the other hand, the effect of *ownership* was not significant. The study concludes that the endowment effect may be primarily driven by *subjective feelings* of possession rather than by legal ownership.<sup>56</sup>

Obviously, the endowment effect studies must be treated with caution as to their generalizability. There are two reasons for this. First, the psychological effects that were demonstrated confirm what Thaler, Kahneman, and Knetsch called *an instant endowment effect*, which is not dependent on, nor does it capture, long-term, sentimental attachment.<sup>57</sup> Second, the endowment effect depends on the possessor's intentions. Thaler, Kahneman, & Knetsch found that an

owner will not be reluctant to sell an item at a given price if a perfect substitute is readily available at a lower price. This reasoning suggests that endowment effects will almost certainly occur when owners are faced with an opportunity to sell an item purchased for use that is not easily replaceable.<sup>58</sup>

In 2005, Kahneman, with Nathan Novemsky, conducted a separate

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56. Reb & Connolly, *supra* note 47, at 112.

57. Kahneman et al., *supra* note 45, at 1342. It seems realistic, however, to presume that sentimental attachment would increase the long-term endowment effect. In 1998, Michal A. Strahilevitz and George Loewenstein showed that the effect of endowment goes beyond the immediate effect of current ownership to include the duration of current ownership. Michal A. Strahilevitz & George Loewenstein, *The Effect of Ownership History on the Valuation of Objects*, 25 J. CONSUMER RES. 276 (1998).

58. Kahneman et al., *supra* note 45, at 1344; *see also* Kajal & Smith, *supra* note 49.

investigation of the impact of intentions.<sup>59</sup> The results show that the intention behind ownership is crucial for the endowment effect's emergence. When goods are held for exchange, possession does not create such an effect. So, the same good can be intended for different purposes (by the same person or by different persons). The intention can produce or inhibit the endowment effect, depending on the circumstances: "Intentions define a good as an object of exchange or as an object of consumption, and therefore they determine whether giving up that good is evaluated as a loss or a foregone gain."<sup>60</sup>

Kahneman's article drew attention to the psychology that underlies the endowment effect.<sup>61</sup> Kahneman and Novemsky suggested several mechanisms by which intentions may moderate loss aversion: intentions may change people's cognitive focus; the anticipated emotional reaction to a loss; the effective reference point; and other, undiscovered mechanisms of loss aversion.<sup>62</sup> But it is unclear exactly how intentions operate, calling for further research: "After several decades of research, there is still a long way to go toward understanding loss aversion and the endowment effect, but considerable progress has been made."<sup>63</sup>

It is possible, then, to draw some conclusions about the idea of property from the research reviewed by Stenseth. Most importantly, these studies show that occupying property is associated with psychological changes in the possessor. Law seems to have recognized the phenomenon throughout human history. The Romans distinguished between *actiones in rem* and *actiones in personam*. And since constitutions with individual rights became fashionable in the eighteenth century, property has received constitutional protection.

Since the idea of property remains so interconnected with the legal protection of ownership, it is hard to separate what part of a person's ownership notion derives from physical possession and what derives from their legal position.<sup>64</sup> The endowment effect, however, seems to be an immediate result of factual possession when the possession is paired with an intent to hold the good for personal uses. The possessor then values the good more than does the market. Such a privileged position is usually protected by the law, by ordinary property rules: the possessor

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59. See generally Novemsky & Kahneman, *supra* note 47.

60. *Id.* at 127.

61. See Colin Camerer, *Three Cheers—Psychological, Theoretical, Empirical—For Loss Aversion*, 42 J. MKTG. RES. 129 (2005); Dan Ariely et al., *When do Losses Loom Larger than Gains*, 42 J. MKTG. RES. 134 (2005).

62. Nathan Novemsky & Daniel Kahneman, *How Do Intentions Affect Loss Aversion?*, 42 J. MKTG. RES. 139 (2005).

63. *Id.* at 140.

64. Stenseth, *Current Empirical Premises of the Disclosure of the Secrets of Property Law*, *supra* note 1, at 110.

has the right to exclude others from the good. Only when the intention in relation to a thing shifts—for example, the mountain cabin owner no longer enjoys winter sports and wants to spend time at the beach instead—may the possessor choose to place it on the market and transfer it to another.

Stenseth's consideration of the endowment effect reveals that the fundamental freedom to choose constitutes a normal feature of how individuals understand owning—having property in—a good or resource. This becomes important when the property-holder stands to lose what it confers—choice and control—as a result of a forced sale pursuant to a compulsory purchase or eminent domain. The endowment effect experiments (and other experiments, like the ultimatum and dictator games<sup>65</sup>) shed light on why people often strongly oppose such expropriation: the loss of possession and the associated freedom of choice.<sup>66</sup> As such, the endowment effect enables us to quantify the value possessors put on their freedom of choice when it comes to property. What the endowment effect experiments in behavioral economics have only scarcely provided, though, is an explicit focus on the role of law and the way people understand law in their reactions to the loss of freedom of choice conferred by property.<sup>67</sup> Metcalf's study began to fill that gap and provided an innovative, empirical methodology to assess law's place in the idea of property. The subsequent work of Babie, Burdon, & da Rimini used another qualitative, empirical methodology to shed light on the idea of property.

## B. *Cherie Metcalf: Law and the Idea of Property*

### 1. *Conceptual Framework*

The research behind Metcalf's *Property Law Culture: Public Law, Private Preferences and the Psychology of Expropriation*<sup>68</sup> draws on insights from social psychology and behavioral economics to probe the

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65. See Stenseth, "A Man's House is His Castle", *supra* note 1, at 17-22.

66. MARGARET JANE RADIN, REINTERPRETING PROPERTY 45 (1993) (referring to the Hegelian personality theory: "property is the first embodiment of freedom and so is in itself a substantive end.").

67. See Stenseth, *Current Empirical Premises of the Disclosure of the Secrets of Property Law*, *supra* note 1, at 110 (discussing the relationship between the descriptive mechanism of psychological ownership and the endowment effect and normative legal concepts of property).

68. Metcalf, *supra* note 1, at 686; see also Cherie Metcalf, Property Rights and Attitudes Toward Environmental Regulation: An Empirical Investigation (July 16, 2012) (draft of 7th Annual Conference on Empirical Legal Studies Paper), <https://ssrn.com/abstract=1987028>.

relationship between formal law and individuals' conceptions of property. While "social and moral influences" and "social relationships" impact beliefs about property,<sup>69</sup> the research questions whether the law is an influential piece of the broader social and cultural context that shapes views of property: does law operate as an influential reference point for individuals?<sup>70</sup>

The particular focus is on how law relates to individuals' attitudes and beliefs about government power to restrict property rights, either through direct expropriation or by regulation. This is an important interface between the private understanding of property and more social and relational aspects that link property to the community's broader needs.<sup>71</sup> In most jurisdictions, a constitutional right is used to police this boundary between the individual owners' interests and the state's demands.<sup>72</sup> Scholars have suggested that the use of this form of law, often associated with the expression of fundamental values for a society, sends a strong message about how property should be viewed—one confirming its private-ness and sanctity.<sup>73</sup> This setting thus offers fertile ground to examine the connection between formal law and the living law of property.

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69. Nadler & Diamond, *supra* note 3; *see also* Pierce, *supra* note 3, at 8.

70. *See generally* Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q. J. ECON. 1039 (1991); Botond Köszegi & Matthew Rabin, *A Model of Reference-Dependent Preferences*, 121 Q. J. ECON. 1133 (2006); Robert Sugden, *Reference-Dependent Subjective Expected Utility*, 111 J. ECON. THEORY 172 (2003) (listing examples of theoretical accounts that suggest that individual preferences are dependent upon reference points or expectations); Armin Falk, Ernst Fehr, & Christian Zehnder, *Fairness Perceptions and Reservation Wages—The Behavioral Effects of Minimum Wage Laws*, 121 Q. J. ECON. 1347 (2006); Rafael Di Tella, Sebastian Galiani, & Ernesto Schargrodsky, *The Formation of Beliefs: Evidence from the Allocation of Land Titles to Squatters*, 122 Q. J. ECON. 209 (2007); Jonathan Remy Nash, *Framing Effects of Regulatory Choice*, 82 NOTRE DAME L. REV. 313 (2006) (listing examples of works that support role for law as a reference point).

71. *See, e.g.*, JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990); GREGORY ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* (2006); Hanoach Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 745 (1999).

72. *See* David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 773 (2012).

73. *See, e.g.*, Laura S. Underkuffler, *Property as Constitutional Myth: Utilities and Dangers*, 92 CORNELL L. REV. 1239, 1244-45 (2007); Jennifer Nedelsky, *Should Property be Constitutionalized? A Relational and Comparative Approach*, in *PROPERTY ON THE THRESHOLD OF THE 21ST CENTURY* 422 (G.E. Van Maanan & A.J. Van der Walt eds., 1996) (“[C]onstitutionalizing property is an extremely powerful symbol of the public/private divide which designates governmental measures affecting property as public ‘interferences’ with a sacred private realm—which then bear the burden of justification.”).



## 2. Methodology

To empirically test for a relationship between formal constitutional protection of property and individuals' beliefs and attitudes toward government restrictions, Metcalf used a series of survey vignettes. Experimental and non-experimental surveys are a common method for generating evidence in both social psychology and behavioral economics.<sup>74</sup> In this research, survey instruments were administered in both the United States, which provides constitutional protection for property, and Canada, which does not.<sup>75</sup> The difference in property's constitutional status provided underlying variation to help tease out whether there was a connection between formal law and individuals' survey responses.

## 3. Research Questions

The research investigated whether constitutional property rights serve as a reference point by comparing the evidence generated by Canadian and U.S. participants. Both individuals' financial and attitudinal responses to hypothetical government *takings* of their property were examined. The results were relevant to research questions, including:

- Are U.S. respondents more resistant to government takings of property than Canadians – do they demand more compensation and/or have more negative attitudes?
- Does the nature of the property and individuals' subjective attachment, or the proposed government use, affect individuals' responses to government *takings*? Are there any differences between Canadian and U.S. respondents that reflect the U.S. constitutional right?
- How do individuals' beliefs about the law influence their responses? Are individuals' beliefs consistent with the formal law of their jurisdiction?

If formal, constitutional status of property plays an important role in shaping individual preferences and beliefs, one would expect to see

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74. See, e.g., Nadler & Diamond, *supra* note 3; Krin Irvine, David A. Hoffman, & Tess Wilkinson-Ryan, *Law and Psychology Grows Up, Goes Online, and Replicates*, 15 J. EMPIRICAL LEGAL STUD. 320, 322 (2018).

75. Cherie Metcalf, *The (Ir)Relevance of Constitutional Protection of Property Rights? Compensation for Takings in Canada and the United States*, 65 U. TORONTO L. J. 143, 144 (2015).

different responses to government limits on property from Americans compared to Canadians.<sup>76</sup>

#### 4. *Research Design*

The research design involved two stages. The primary stage involved administering surveys in Canada to replicate the prior published research for the United States by Janice Nadler and Shari Diamond.<sup>77</sup> These authors used experimental surveys to probe the nature of intense popular backlash to the U.S. Supreme Court's decision in *Kelo v. City of New London*.<sup>78</sup> This decision upheld the government's constitutional power to force the sale of a residential home for the purpose of facilitating economic development. While the legal outcome was unsurprising to experts, the circumstances of the case seem to have outraged many in the United States and led to state-level reforms that limit government's legal power of eminent domain.<sup>79</sup> The authors used experimental variation in survey vignettes similar to the *Kelo* facts to assess how an owner's subjective attachment and the nature of the government's proposed use for the property may have influenced the popular response.<sup>80</sup>

Metcalf constructed a survey matching that used by Nadler and Diamond but modified a few details to make it appropriate for the Canadian context.<sup>81</sup> The survey included financial and attitudinal responses to proposed takings, with experimental variation in the hypothetical length of time the individual had held the property (Term on Land: 2 years, 100 years) and in the government's proposed use of the property (Use: Children's Hospital, Shopping Mall, Unspecified). Participants were asked to read a version of the following short vignette and to imagine themselves in the position of the property owners facing

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76. The research does not use a truly causal design to investigate the impact of constitutional protection. Individuals are not randomly assigned to the respective countries, and constitutional rights are not exogenous to the residents of a country. The design, however, provides evidence to test for effects consistent with a constitutional right shaping individual attitudes toward property.

77. Nadler & Diamond, *supra* note 3, at 728.

78. *Kelo v. City of New London*, 545 U.S. 469 (2005).

79. See, e.g., Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2102 (2009); Daniel H. Cole, *Kelo's Legacy*, 37 ENV'TL. L. REP. NEWS & ANALYSIS 10540, 10540 (2007).

80. Nadler & Diamond, *supra* note 3, at 725-30.

81. Compare Nadler & Diamond, *supra* note 3, at 728-30 (showing the format for the original survey), with Metcalf, *supra* note 1, at 700 (discussing how Metcalf's replication made very minimal changes to the survey, for example use of "provincial" to describe government in order to preserve comparability of the results).

expropriation:<sup>82</sup>

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 [2/100] years.

The Development

The provincial government is planning to build [a new children's hospital/a new shopping mall/unspecified] 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 Nadler and Diamond, to indicate the financial incentive they would require to move voluntarily:

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

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82. See Metcalf, *supra* note 1, at 700-01; Nadler & Diamond, *supra* note 3, at 728-29.

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.

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.<sup>83</sup> Participants were asked: how they felt about moving; how morally right or wrong they thought it was for the government to ask them to move; how morally right it would be for them to move; how beneficial or harmful the development would be for the community; and how good or bad they thought the government's motives were. These attitudinal measures match those used in Nadler and Diamond's survey.

In a separate study, Metcalf focused on a regulatory taking, rather than direct expropriation of property. Participants in both Canada and the United States were asked to imagine themselves in the landowners' position facing development restrictions that reduced their property's value. The scenario closely tracked the (very similar) facts in key U.S. and Canadian cases on environmental regulatory takings, *Lucas v. South Carolina Coastal Council*<sup>84</sup> and *Mariner Real Estate Ltd. v. Nova Scotia*.<sup>85</sup> Participants were told they owned plots of undeveloped land that had recently been designated as environmentally sensitive so that the land was now subject to strict regulations that could prevent any future building or development. Respondents were also told that an independent appraisal indicated the regulations had caused a drop in the land's market value.<sup>86</sup>

The participants were first asked to indicate whether they thought

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83. See Metcalf, *supra* note 1, at 702; Nadler & Diamond, *supra* note 3, at 730 (noting that the attitudinal responses were solicited on a 7-point scale, with 1 as the least favorable response. Qualitative descriptors were used with the scale (e.g. "very bad" to "very good").

84. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

85. See *Mariner Real Est. Ltd. v. Nova Scotia*, (1999) 178 N.S.R.2d 294 (Can.).

86. See Metcalf, *supra* note 1 (noting the survey indicated the drop in the value of the property was \$50,000, or 20% of the unregulated market value).

the government should have to compensate them for the drop in the value of their property because of the restrictions required for the environmental reserve.<sup>87</sup> Respondents were then asked about the level of compensation they thought was appropriate. Metcalf adopted a scaled format similar to that used in the previous study.<sup>88</sup>

In addition to the financial incentive that participants were required to accept for government restrictions on their property, the survey again asked about participants' attitudes. In this portion, respondents were first asked to indicate if they thought that the law where they resided would require the government to compensate them. Respondents who said "yes" were asked to follow up by indicating what type of law.<sup>89</sup> Once respondents had answered these questions, they advanced to a new part of the survey that gave them information about the applicable law. They were told that while the law sometimes required government compensation for a decrease in the value of property, it would require denial of all reasonable, economically valuable use of the property. The survey informed respondents the drop in their property value would not likely be enough for a legal right to compensation, which was an accurate description of the law relevant to the scenario in both Canada and the United States. The survey's description of the law was constructed to leave some room for ambiguity and invited participants to draw on their intuitions about what should be expected. In many examples of potential regulatory takings, the level of protection offered to property owners is the same in both Canada and the United States.<sup>90</sup> In some more extreme cases, however, the U.S. constitutional guarantee appears to provide stronger limits on the government's power to interfere with property.<sup>91</sup>

Respondents were then asked a series of questions about their

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87. Responses were given with a 7-point attitudinal scale, ranging from "definitely yes" to "definitely not." Metcalf, *supra* note 1, at 702.

88. The categories in this case included: \$0—no compensation required; \$10,000, \$25,000; \$40,000; \$50,000; \$60,000; \$75,000, \$100,000; \$200,000; \$500,000 or more; no amount is enough. The categories were chosen to provide a range of values some of which were "close to" but not exactly equal to natural anchors (\$0, market drop in value of property, value of property itself, no amount). Metcalf, *supra* note 1, at 706.

89. Participants could choose all that applied from the following categories: constitutional rights, legislation, judge-made law, or not sure. Metcalf, *supra* note 1, at 706.

90. See Metcalf, *supra* note 75, at 173.

91. Compare *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (explaining that an "economic wipeout" in the United States alone was sufficient to trigger a regulatory taking), with *Mariner Real Est. Ltd. v. Nova Scotia*, (1999) 178 N.S.R.2d 294 (Can.) (holding that economic wipeouts in Canada were not sufficient to trigger a taking, but the further requirement to show deprivation of all reasonable use/incidents of ownership was imposed).

attitudes toward the environmental regulation in light of the information about the applicable law.<sup>92</sup> Respondents were asked: how they felt about the environmental restrictions in the circumstances; how morally right or wrong the government would be to impose the regulations without compensation; how morally right or wrong it would be for them to ask the government for compensation; how beneficial or harmful they thought the environmental reserve would be for the community; and how good or bad they thought the government's motives were.

### 5. Data & Results

Two methods were used to administer the surveys and collect data for analysis. The primary survey was administered to a convenience sample of students at Queen's University who were enrolled in classes in the economics department and the law school.<sup>93</sup> The second survey was administered with the assistance of a panel data service provider.<sup>94</sup> In addition to responses to the vignette questions, data on a number of participant characteristics was collected.<sup>95</sup> This allowed for including a variety of controls in the statistical analysis and also indicated how reflective the sample was of the general population. The sample for the primary survey was younger and more educated than that in Nadler and Diamond's study but otherwise generally similar.<sup>96</sup> The sample in the regulatory takings survey was generally comparable across Canadian and U.S. participants and fairly representative of the underlying populations.

The data was analyzed in several ways to generate the results. In the primary study, the financial responses were used to generate means

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92. Attitudinal responses were solicited on a 7-point scale, with 1 as the most negative response and 7 the most positive, and qualitative indicators were attached to the scales (e.g. "very bad" to "very good"). Metcalf, *supra* note 1, at 702.

93. As the research involved use of human subjects, ethics approval was required and obtained before any data was collected using either survey/sample approach. A total of 155 individuals participated in the primary survey. The U.S. data used to generate the comparative results was obtained as detailed in Nadler & Diamond, *supra* note 3, at 728 (describing the study used to obtain data in the United States).

94. Qualtrics Panel Data Services provided the sample participants according to requested characteristics (even split, Canada/United States, even gender split) and administered the survey, constructed using Qualtrics survey software. A total of 608 individuals participated.

95. Controls in the primary survey mirrored those used in Nadler & Diamond, *supra* note 3, including gender, ethnic origin, education, age, whether they were owners or renters of property, lived in an urban or rural environment. In the regulatory takings survey, Metcalf added a control for family income.

96. See Metcalf, *supra* note 1, at 702-05 (discussing the survey in greater detail).

across the experimental conditions (Term and Use conditions). Regression analysis was also used to analyze the contribution of the experimental conditions to the financial responses. Metcalf first contrasted those highly unwilling to sell with those who were more amenable<sup>97</sup> and then considered all categories of financial incentive as dependent variable observations in an ordered logistic regression. Metcalf generated marginal effects for the independent variables of interest (Term and Use conditions) to see how they influenced the likelihood that any particular category of compensation was selected. While controls for respondents' ownership status, location, age, gender, education, and ethnicity were included, they were generally insignificant. The attitudinal measures were coded on the numerical scales to generate average responses across the experimental conditions. In the analysis, the attitudinal measures were grouped as relating to individuals' own attitudes about moving or their attitude toward government. The results from analysis of the Canadian survey were then compared to Nadler and Diamond's similar results.

Although one might have expected differences based on the varying constitutional status of property, there were strong similarities between the Canadian and American responses.<sup>98</sup> A majority of both Canadian and U.S. respondents were willing 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 smaller in the Canadian sample (4.5 percent) than in the American sample (9.4 percent). But both cases were much more likely to include those in the long-term condition in which the family had occupied the property for one hundred years. In both the Canadian and U.S. results, those in the long-term condition also demanded significantly more compensation. 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 confirmed the broad outlines above. Despite the very different institutional environments in terms of underlying constitutional protection of property rights, Canadians and Americans appeared to behave in a similar manner. For both Canadians and Americans, the most influential variable explaining demands for compensation appeared to be subjective attachment, as proxied by how long the respondent had hypothetically owned the property.

The attitudinal results showed more variation across the Canadian

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97. See Metcalf, *supra* note 1, at 708 (defining those demanding \$500,000 or more to sell as "unwilling").

98. See Metcalf, *supra* note 1, at 705-24 (discussing the complete survey results).

and U.S. responses but still displayed significant similarity. Both respondents were lukewarm at best when faced with government demands for their property. These more-or-less negative attitudes, however, were moderated when the proposed use was a hospital. The Canadian and American respondents were indistinguishably more positive about government's moral justification for expropriation to build a hospital than for other purposes. Their responses were also indistinguishable when evaluating government motives for expropriation demands. Both Canadian and American respondents found government takings for unspecified uses or for commercial development (such as a mall) to be somewhat immoral—a substantially more negative assessment than for the more evident public purpose of a hospital. Importantly for the hypothesis that constitutional property law matters, the data did not provide strong evidence of differences in attitudes toward government taking the property and instead showed that for the most part, attitudes of Canadian and U.S. respondents were very similar.

Some marginal differences did emerge. Attitudes of the Canadian respondents did not appear to vary with the degree of subjective attachment, as reflected in the Term variable. Surprisingly, the Canadian respondents actually felt worse than their U.S. counterparts about being asked to move and were less convinced that it was morally right for them to move. Respondents in the American study were somewhat more negative about government's moral justification for taking the property if it was to be used for a mall. These differences may offer some support for a reference effect by the U.S. constitutional right. The long-term occupation condition may have helped move U.S. respondents' view of property closer to an intuitive core of private property and triggered intuitions that the constitutional constraint should protect it. The constitutional right suggests that everyone is equally protected from (or equally exposed to) government takings. Canada's lack of any constitutional check may have heightened the sense that an individual was being singled out or imposed upon in the hypothetical government taking of the home. This could help explain why Canadian respondents felt worse about it. Similarly, a mall is less clearly a public use consistent with the U.S. constitutional guarantee than the alternatives. In Canada, the absence of any similar public use constitutional reference might help explain why this use was relatively less troubling for Canadian respondents.

These differences offer some support for the idea that formal law may influence individuals' views of property and government powers over property, but the results as a whole suggest this effect is not a dominant force. Despite the difference in the constitutional status of



property rights, the responses by individuals in the Canadian and U.S. experiments did not display any striking variation.

In the regulatory takings study, a similar approach was used to analyze the survey results. In this study, however, instead of comparing financial and attitudinal measures across experimental conditions, the focus was on assessing the significance of formal law and individuals' beliefs about the law across the two countries.<sup>99</sup>

A similar theme emerged; the responses of Canadian and American respondents were qualitatively very similar. In both Canada and the United States, respondents felt quite strongly that compensation should be offered. In Canada, 81 percent of respondents indicated one of the positive response categories, compared with 82 percent of U.S. respondents. The overwhelming majority of respondents felt that government should compensate property owners in a case like the scenario despite the fact that there is likely no legal basis to claim it in either country.

There is also strong similarity in the data across Canada and the United States in the distribution of respondents' financial demands for compensation. Most of the survey respondents anchored on the change in fair market value as the amount they would require to willingly accept the environmental restrictions (37 percent Canada, 40 percent United States). The next largest category was the group that requires no compensation (13 percent Canada, 9 percent United States). Another substantial cluster of respondents demanded substantial compensation—at least the value of the property—to accept the restrictions (15 percent Canada, 19 percent United States). Finally, in both Canada and the United States a small group felt that no compensation would be enough for them to willingly accept the environmental restrictions (6 percent Canada, 8 percent United States).

The distribution of financial demands indicates that there was considerable variation across individual reactions to the government regulation of the property for the environmental reserve. Although the law would not likely support a requirement for compensation in either country, on average, respondents in both Canada and the United States wanted at least market value compensation to willingly accept the regulation.

There are again some statistically significant differences that suggest a potential role for formal legal property rights in strengthening resistance to regulatory restrictions on property. A larger percentage of

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99. The approach was structurally similar to that of the primary study, using comparison of means stratified by country and legal beliefs for the attitudinal measures, and ordered logit regressions and marginal effects to assess financial demands responsiveness to formal law and legal beliefs.

Canadian respondents chose the below-market compensation levels, and the mean compensation demand in the United States statistically was significantly higher than for Canadian respondents.<sup>100</sup> The ordered logit regressions confirm this effect. The marginal effect of being a U.S. respondent is statistically significant. It shifts individuals away from choosing the low compensation categories (particularly \$0) into higher compensation demands (particularly \$100,000 and above) relative to Canadian respondents. While the effect is not large, U.S. respondents were somewhat more resistant to the suggested government regulatory restrictions. These differences, however, were not as stark as the difference in the constitutional status of property might suggest.

The attitudinal results tell a similar story. While there are some statistically significant differences in the mean scaled responses, in most cases the results are qualitatively similar. On average, the respondents were unhappy about the law not providing compensation; on average both Canadian and US respondents indicated they feel between “bad” and “somewhat bad”. Both Canadian and US respondents felt it was morally right to ask for compensation. Both Canadian and US respondents assessed the environmental reserve as falling between “neutral” and “somewhat beneficial” for the community. It is only with regard to government’s motives that American and Canadian respondents generated qualitatively different responses. On average US respondents assessed government motives as falling between “somewhat bad” and “neutral” while average Canadian respondents would fall between “neutral” and “somewhat good”.<sup>101</sup> The constitutional status of property may be associated with stronger skepticism about uncompensated government limits on private property. US respondents also disagreed more strongly than Canadians that it was morally acceptable to restrict the use of the property without compensation.

While there was some evidence consistent with the view that formal law in the form of a constitutional property right may be linked to individuals’ attitudes and beliefs about property, the effects were not large. Strong similarities between Canadian and US respondents indicated that other factors were largely driving respondents’ choices.

The results that incorporated individuals’ legal beliefs are supportive. Respondents who believed there was a legal obligation for government to provide compensation were also more convinced that government *should* provide compensation. The average compensation

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100. The mean compensation demand in the United States (slightly above market) was statistically different from the Canadian mean (market value). Compare Metcalf, *supra* note 1 (describing the survey used in Canada), with Nadler & Diamond, *supra* note 3 (describing the study used to obtain data in the United States).

101. This result was highly statistically significant (1%).

demanded was also substantially and significantly higher for individuals who believed the law required it.<sup>102</sup> When legal beliefs were incorporated into the regressions, the effects were similar to the country difference, but roughly twice as large and more strongly statistically significant. Belief that the law required compensation shifted individuals out of the lower and into higher compensation demands, with the largest results in the “tails” of very low and very high demand categories. Even after individuals were provided correct information about the law applicable to the scenario, their prior legal beliefs remained statistically relevant to their attitudinal responses. As with the financial demands, individuals who believed that the law should require government to provide compensation expressed more negative attitudes about the government restrictions on their property and government’s motives.

Of particular importance for the idea of property was the divergence between many individuals’ beliefs about the law and the formal legal environment. A substantial proportion of respondents held legal beliefs that did not correspond to the “actual” law of their jurisdiction. Roughly 40% of both Canadian and US respondents thought that the law would require government to compensate them in the regulatory vignette scenario. The most common category of legal entitlement cited by US respondents was the constitution.<sup>103</sup> A surprising share of Canadian respondents also thought they had a constitutional claim to compensation.<sup>104</sup>

Individuals’ legal beliefs were an important influence on their responses to government limits on their property rights, but it is unclear where these beliefs originated. While it is possible that the “actual” law played a significant role for many individuals, the results suggested that for another substantial group their beliefs about the law had some other origin—or that their beliefs about the law were very general and heuristic and not aligned with the strict application of the law. Whatever the origin, these beliefs appeared to be at least as important a predictor of variation in individuals’ responses as differences in formal law.

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102. Those who believed there was a legal obligation on average demanded above market value compensation while those without this belief on average chose a value just below it.

103. In the US sample 38% of those who thought the law would require compensation cited the constitution as the legal basis.

104. In the Canadian sample 42% of respondents who believed the law required compensation cited the constitution.

C. *Babie, Burdon, & da Rimini: Law and the Idea of Property*

1. *Conceptual Framework*

Babie, Burdon, & da Rimini conducted a small-scale, qualitative study entitled *The Psychology of Property Law Pilot Project in 2013-2016*.<sup>105</sup> Drawing upon Ehrlich's work, this study aimed to demonstrate that the concept of living law explains how Australians imagine their ownership of property. Furthermore, Babie, Burdon, & da Rimini sought to identify both actual and potential behaviors associated with such beliefs and apparent gaps between social and legal property norms.

2. *Methodology*

Because the goal of qualitative research is to "describe and clarify experience as it is lived and constituted in awareness,"<sup>106</sup> Babie, Burdon, & da Rimini employed an ethnographic mode of research and conducted semi-structured interviews with people living in Adelaide, Australia. The interview transcripts formed the sole data set for the study's empirical component. *Grounded Theory* was used to guide data collection, discourse analysis, and interpretation.<sup>107</sup> In general, Grounded Theory generates concepts and hypotheses from insights gained through systematic iterative processes whereby researchers "build their patterns, categories, and themes from the bottom up, by organizing the data into increasingly more abstract units of information."<sup>108</sup> The focus is on the meaning that participants themselves have about the subject of investigation. As such, Babie, Burdon, & da Rimini invited people to discuss how they imagined and experienced different things that may be the subject of property.

3. *Research Questions*

The classic approach in Grounded Theory recommends that researchers conduct only a light initial literature review so that they avoid being overly influenced by existing theory. Babie, Burdon, & da Rimini's literature review surveyed empirical legal studies examining the psychology of property and identified key contributions to property

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105. See Babie, Burdon & da Rimini, *supra* note 1.

106. Donald E. Polkinghorne, *Language and Meaning: Data Collection in Qualitative Research*, 52 J. COUNSELING PSYCHOL. 137, 138 (2005).

107. See KATHY CHARMAZ, *CONSTRUCTING GROUNDED THEORY 1* (2014).

108. JOHN W. CRESWELL, *RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES* 175 (2009).

theory produced within a socio-legal framework. Subsequently, two high-level research questions framed the investigation:

- Are the informal, everyday beliefs of Australians about property such that people consider themselves not bound by any limitation on the scope of the freedom afforded to them by property, or do Australians consider themselves bound by an obligation to others in exercising that freedom?
- Do the informal, everyday beliefs of Australians about property include a sense of limits about what they can do with their things?

These core concerns were used to generate six related questions, which would underpin the interview instrument:

- What does it mean to say “something is my property”?
- What are the rights associated with property?
- What can you do legally with (valuable) things associated with your land?
- What can you do legally with cultural property?
- What is the relationship between corporate property rights and ethical decision-making?
- What is the relationship between property rights and the right to compensation?

#### 4. *Research Design*

Interview-based qualitative studies, even those seeking to “develop or test a general theory”, do not require a large sample size or many demographic variables.<sup>109</sup> This is in contrast to survey-based quantitative studies, which must have minimum participant numbers to reduce margins of error and increase confidence levels so that any generalizations arising from statistical analysis can apply to specific populations. Babie, Burdon, & da Rimini’s sample universe was Adelaide residents. A *purposive* sampling strategy ensured that particular categories of cases within the study population were represented, which sought to ensure that the participant pool reflected gender balance and a range of ages. This also made it possible to discover whether formal legal training appeared to make a difference to how people experienced and created the living law. Finally, participants

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109. Oliver C. Robinson, *Sampling in Interview-Based Qualitative Research: A Theoretical and Practical Guide*, 11 QUALITATIVE RES. IN PSYCHOL. 25, 29 (2014).

who possessed good communicative skills were sought because “one well-placed articulate informant will often advance the research far better than any randomly chosen sample of fifty.”<sup>110</sup> Accordingly, Babie, Burdon, & da Rimini recruited three cohorts. Cohort 1 comprised people with no legal training; Cohort 2 comprised lawyers and law students; and Cohort 3 comprised referrals from both Cohorts 1 and 2. Professional and community networks in Adelaide were used to recruit Cohorts 1 and 2. No material incentives for involvement were offered.

One limitation of the project was the lack of diversity within Cohorts 1 and 2, particularly with regard to educational background, socio-economic status, and political leanings. Nevertheless, the sample (n=27) was balanced for gender (fifteen females, twelve males) and age variables (most between twenty-five and fifty-four years of age) and therefore reflected some measures of diversity. Still, no claim was made that the responses are necessarily representative of the wider Australian population’s views.

Primarily, Babie, Burdon, & da Rimini endeavored to elicit people’s conceptions, concerns, and attitudes about property. The semi-structured, conversational style of the interviews might reveal underlying psychological, cultural, and social influences shaping participants’ imaginings. As with some existing empirical studies on the psychology of property,<sup>111</sup> many questions elicited responses to hypothetical vignettes about different forms of property (for example, land; natural resources; fungible commodities; intellectual property) and property choices to ascertain people’s willingness to agree to intrusions upon their property rights so as to benefit the public good. The study included some questions canvassing personal experiences of property (for example, items holding sentimental significance; what the concept of home means with regard to ownership) to draw out psychological and affective dimensions of ownership that might influence acceptance of property limitations. Other questions sought to discover feelings of obligation as part of the psychology of property. Questions used included:

- Thinking of your own home, what does it mean to you to say that “this home is mine”? What do you think the law allows you to do, and not do, with your home?
- What is your most treasured or valued possession? What does it mean to you to say “it is yours”? What do you imagine that the law allows you to do, and not do, with that possession?

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110. Ted Palys, *Purposive Sampling*, in 2 THE SAGE ENCYCLOPEDIA OF QUALITATIVE RESEARCH METHODS 697, 697 (Lisa M. Given ed., 2008).

111. See Metcalf, *supra* note 1; Nadler & Diamond, *supra* note 3.

- Imagine that you have discovered a valuable mineral deposit under your land. What do you think that the law will allow you to do with those minerals?
- The law says that Company X can dump up to Z units of a by-product or effluent into the air. Should Company X do it?
- Imagine there is a 40-meter-high healthy tree on your property. You want to cut it down to build an extension. Should you be required to consult with your neighbors/government before felling the tree? Why or why not? If you are not allowed to cut down the tree, should the government compensate you for the loss of choice in this matter?

### 5. *Data Collection*

After obtaining ethics approval from the University of Adelaide, Babie, Burdon, & da Rimini conducted twenty-seven, semi-structured interviews over a period of six months from December 2013 to May 2014. Cohort 1 (non-lawyers) had seventeen participants, Cohort 2 (lawyers or law students) had forty-four participants, and Cohort 3 (*snowballed* or *nominated* referrals) had six participants. Interviews typically lasted between forty-five to sixty minutes and were conducted either at the Adelaide Law School or at participants' workplaces. The only demographic data requested was participants' gender identification and age range. The recorded audio files were professionally transcribed and transcripts then de-identified.

Using the principles of *intensive interviewing*, the study employed a "gently-guided, one-sided conversation that explores participants' perspective on their personal experience with the research topic."<sup>112</sup> During the conversation, a researcher remains attuned to what is said, stays alert to what is left unsaid or implied, and is sensitive to the emotional content of the discourse, pausing or redirecting a dialogue in response to participants' reactions. Interview transcripts do not necessarily capture dialogues' emotional content, and so we discussed these impressions when analyzing the transcripts because they illustrated that people's ideas of property at times contain emotional and cognitive content.

### 6. *Data Analysis*

The data analysis stage of the Grounded Research method involves continual reflection on increasingly abstracted ideas. This study

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112. CHARMAZ, *supra* note 107, at 56.

employed three stages of data analysis, beginning with open coding. This entails “naming segments of data with a label that simultaneously categorizes, summarizes, and accounts for each piece of data.”<sup>113</sup> Working together or in pairs and using the qualitative data analysis software program NVivo, the study created a hierarchy of thematic categories and sub-categories, including the interview questions and a group of themes that we anticipated participants’ answers might cover. As new analytical categories emerged, more codes were added. To ensure consistency of coding among the three researchers, the study defined each code’s properties.

Coding hierarchies shifted and categories were moved or merged as part of the process of constant comparison that is a hallmark of Grounded Theory. Because most categories emerged throughout the first pass of data analysis, the study used a second pass of coding so that each transcript was reviewed considering all possible categories. Memos within transcripts captured Babie, Burdon, & da Rimini’s insights about how people’s ideas of property ownership seemed to reflect, or embody, various property theory concepts. Each researcher brought their own subjective interests and expertise to the task, which resulted in a multi-perspective interpretation of the material.

By the conclusion of open coding, Babie, Burdon, & da Rimini had generated nine core categories: Individual-Absolutist, Justifications of Property, Social Relationships, Choice and Freedom, Ethical and Ecological, Property and Equality, Conceptual Understandings, Entitlement and Compensation, and Emotional Connection. Many quotes were coded against more than one category or sub-category, and produced a total of 3,539 references.<sup>114</sup>

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113. *Id.* at 111.

114. Babie, Burdon & da Rimini, *supra* note 1, at 821 (excluding the codes matching the interview questions in this tally).



The third stage of content analysis involved *selective coding*, a process of “selecting the central or core category, systematically relating it to other categories, validating those relationships, and filling in categories that need further refinement and development.”<sup>115</sup> Babie, Burdon, & da Rimini chose three categories that had a strong interrelationship with one another: Choice and Freedom, Individual-Absolutist, and Social Relationships. Within these higher-level categories, sub-categories that were most useful in suggesting answers to the research questions were also selected. The study sifted through a possible 1,452 coded references, choosing quotes that suggested patterns, trends, and anomalies that would help to “explicitat[e] a story” about people’s ideas of property, and by examining the interconnection of these categories.<sup>116</sup> This process yielded 381 quotes, providing approximately 26 percent of this data subset to interpret in light of the original research questions (see Table 1, Comparative Results of Open Coding and Selective Coding for data subset).

<b>Category/Sub-category</b>	<b>Open Coding:</b> total quotes coded 2 stages, 2014-2015	<b>Selective Coding:</b> total quotes selected 1 stage, 2016
<b>Choice &amp; Freedom</b>	<b>4</b>	<b>4</b>
Choice	117	46
Desire for less legal limitation or regulation	24	11
Personal perception of burdens of ownership	7	4
Personal self-limiting choices	99	39
<b>Individual-Absolutist</b>	<b>0</b>	<b>0</b>
Individualism	203	44
It’s Mine	207	49
Property is Absolutist	138	22
Property is Not Absolutist	274	27
<b>Social Relationships</b>	<b>2</b>	<b>1</b>
Communitarian view of Property	134	50
Community power in defining or protecting property	204	62
Property includes responsibility or obligation	39	22

**Table 1**

Comparative results of Open Coding and Selective Coding for data subset.

115. JULIET CORBIN & ANSELM STRAUSS, *BASICS OF QUALITATIVE RESEARCH: TECHNIQUES AND PROCEDURES FOR DEVELOPING GROUNDED THEORY* 116 (2008).

116. CRESWELL, *supra* note 108, at 184.

## III. FINDINGS

A. *Metcalf*

Individuals appear to have strong intuitions about what property rights entail. One dimension involves the boundary between the private rights of owners and the power of government to limit those rights. The difference in the formal constitutional status of property in Canada and the United States failed to translate into substantial differences in the results of the empirical studies conducted by Metcalf. American and Canadian participants responded similarly to hypothetical government takings. This similarity in responses was not confined to the case where government was taking a home—a type of property that is particularly resonant in the psychological literature.<sup>117</sup> It also appeared in relation to a government regulatory restriction on undeveloped land. In both contexts, respondents had similar beliefs about when it was appropriate for government to take property and whether and how much compensation should be provided. Their beliefs about the law also appeared to be similar and at least as important as the formal law in explaining their responses.

B. *Babie, Burdon, & da Rimini*

The central question of Babie, Burdon, & da Rimini's study could be stated this way: what do people mean when they defend an action taken in respect of something said to be their property with "it is mine, so I'll do with it as I please"? At the outset, it was hypothesized that it is *individualist/absolutist*, not in the liberal/neo-liberal theoretical sense, but in the sense of the psychology of what the person in the street thinks it means to say "I have property,"<sup>118</sup> or as expressed by one participant: "Those things are mine; I paid for them, they belong to me, they're for my use."

Quite apart from theory, though, from the perspective of a person making a choice about their *stuff*, it is possible that such decisions may operate independently of any legally imposed regulation. Instead, it may be the case that such choices are a product of what a person *thinks* property means and what choices that person *thinks* it offers to them in a given circumstance (this finds support in Stenseth's work on the

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117. See generally Nadler, *supra* note 3, at 5.7-5.8; Pierce et al., *supra* note 29, at 90-91.

118. See generally Metcalf, *supra* note 1; Babie, *Idea, Sovereignty, Eco-colonialism, and the Future*, *supra* note 4, and Babie, *Choices that Matter*, *supra* note 4 (discussing the psychological effects of property ownership).

endowment effect). The idea of property, then, more closely approximates than does any real-world system of property Blackstone's familiar aphorism that property is "that sole and despotic dominion over . . . [a] thing."<sup>119</sup> Or, Babie, Burdon, & da Rimini argued that the idea of property is more colloquially typified by the phrase "a man's home is his castle," and that idea is what leads a person to think, as a matter of psychology, that they may do with their stuff whatever they might choose with no regard for others or for the environment.

Broad agreement was found among respondents that property entails a degree of freedom. This found expression in a number of ways, including the most direct, in response to what it means to say that one's house is mine, and that "it gives me that autonomy and freedom from a lot of stress that I might encounter otherwise"<sup>120</sup> and to the more general sense that saying that one has property in a thing means that a person has the ability to set an agenda about that thing, be it a rubbish bin, a car, a house, or even a pet: "what would the law let me do with [that item]?—probably quite a lot really...."<sup>121</sup>

A very strong strand of thinking emerged that choice can be exercised by its holder so as to suit one's preferences, individualistically, absolutely: "They're mine [a good or resource]; I paid for them, they belong to me, they're for my use."<sup>122</sup> Some even used the most commonly associated metaphor for this stance: "It's mine because I think the saying 'your home is your castle,'"<sup>123</sup> or "the law allows a sort of . . . sovereignty somehow if you're in your own home; . . . it's like your own little castle, you're in charge of, you can make rules there . . ."<sup>124</sup> One important insight gleaned from these responses was that participants frequently held an idea of property that was divergent from their jurisdiction's formal law and also demonstrated a limited understanding of what that formal law was. Thus, what guided individual responses and behavior was not law or theory, but an idea of property.

Some respondents felt strongly that while property is a conferral of freedom in the form of choice over things, those choices nonetheless occur within a web of social relationships. This was clearly stated by this respondent: "Well to live . . . happily within [my house], however I'm also . . . in a community and the way I live as a neighbor to others, shapes relationships with others and their relationships in turn with

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119. William Blackstone, *Of the Rights of Things, in 2 THE COMMENTARIES ON THE LAWS OF ENGLAND* 1, 2 (1966) (1765–1770).

120. Paul Babie, Peter Burdon, & Francesca da Rimini, *The Psychology of Property Law Pilot Project in 2013-2016*, Respondent Co1\_P18.

121. *Id.*

122. *Id.*, Respondent Co1\_P07.

123. *Id.*, Respondent Co1\_P06.

124. *Id.*, Respondent Co1\_P12.

others, so there's a kind of a network of inter-relationships that occurs around the area that I live in."<sup>125</sup>

The theme that emerges most strongly, no matter how one might view the way in which choice can be exercised, is the simple fact of choice as central to the idea of property. Every respondent saw property as encompassing some form of freedom of choice, whether it was absolute in the hands of its holder or limited either by law or by the actor who holds it.

#### IV. CONCLUSION

We bring together three unique inquiries into what some have called the psychology of property and what we call here the idea of property, drawing on Babie, Burdon, & da Rimini's studies. Despite jurisdictional differences, we found substantial convergence on at least four points relating to the idea of property. First, and for us most importantly, all three studies concluded that people hold an idea of property and that their idea is potentially of as much importance to their actions as formal law. Metcalf, for example, found that individual intuitions about property did not appear to significantly differ between Canadians and Americans despite variation in the constitutional status of property in these two countries. Second, in the studies conducted by Metcalf, and Babie, Burdon, & da Rimini, respondents expressed views about property that did not correspond with the formal law in their jurisdiction.

Third, people tended to view property in an individualistic way: formal law conferring upon them the authority—consistent with Cohen's *little sovereign*—to make their own choices about things the law treats as theirs. And here we find a complementarity between the idea and theory; some theorists argue that the formal law confers a "decisionmaking authority"<sup>126</sup> or the power to "set an agenda"<sup>127</sup> about a thing. Clearly, the formal law and the idea of property find some common ground here. This result was strongest in the qualitative study conducted by Babie, Burdon, & da Rimini, where the majority of respondents expressed a conception of property that promoted the importance of individual choice. For Stenseth, subjective attachment was also critical to a person's sense of ownership and control. Along

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125. *Id.*, Respondent Co1\_P05.

126. C. Edwin Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 742-43 (1986).

127. Larissa Katz, *The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law*, 55 MCGILL L.J. 47, 58 (2010); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 278 (2008).

these lines, Stenseth argued that physical control of an object gives rise to a psychological change in the possessor, in particular if possession is paired with an intention to engage the object for personal use (the endowment effect). Similarly, Metcalf found that most respondents felt that governments should compensate people for takings (whether or not they had a formal legal right to compensation) and were largely resistant to government restrictions on their ability to make choices about their property. Once again, this was particularly true when participants had a subjective attachment to their property, as with a long-term family home.

Looking to the future, we hope that scholars interested in this area can use and adapt our research methods for deeper investigation into the idea of property. Possible areas of inquiry include the extent to which respondents identify both an individualist-absolutist conception of property and acknowledge that their property choices take place within a web of social relations that may give rise to a sense of obligation. Further, studies might investigate whether other types of law influence people's ideas about property. To this end, surveys and interview questions might be formulated that vary the type of law considered by respondents—from the constitution to local laws and ordinances where people might have experiential knowledge. Connected to this, one might also find ways to ask more direct questions about the reasons underlying an individual's view about property or the objections to certain government actions. This would help distinguish between economic and psychological influences that shape the idea of property.

Each of these inquiries will offer insight into an important—but frequently overlooked—aspect of property law: the idea of property held by individuals. Put simply, we need to know more about the idea of property to have any hope of understanding why people react in certain ways to government responses to a range of contemporary challenges that influence a property holder's choices and decisions. If we focus solely on what the law is, and not on how it might impact behavior, we will never change behavior, whatever we might think about those attempts. And if governments fail to understand this, there will be a continued disjunction between the ends sought from law reform and the results achieved.