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# Latin-American Land Reform: The Uses of Confiscation

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# LATIN-AMERICAN LAND REFORM: THE USES OF CONFISCATION

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IN Latin America, every land reform is motivated principally by political demands for equality, for the redistribution of wealth and income. The statement is true even in those countries where the governments are hostile to the idea of redistribution. Palliatives that exploit the ambiguity of the word "reform" in such countries are aimed at appeasement of the demand for sharing the wealth. Landless peasants and landowners understand perfectly well; yet, many technicians and students of land reform continue to speak a different language, a language in which land reform means anything from agricultural rent control to the introduction of hybrid corn.[1]

In part, talk of this kind is the product of sophistication. No responsible government can simply carve big estates into little ones and then stop. Once a decision is made to divide the land, staggering responsibilities fall on the government: agricultural credit and marketing, rural education and technical assistance, housing—none can be neglected. Those who administer such programs may be forgiven for emphasizing that their reforms are "integral," involving more than land distribution.[2] Nevertheless, these other functions are secondary and dependent; all of the reforms have as their chief purpose consolidation of the redistribution.[3]

"Land reform" is written into the Charter of Punta del Este, the basic document of the Alliance for Progress.[4] But, even today, United States policy reflects some uncertainty about the content of

* Professor of Law, The Ohio State University.—Ed. I am grateful to my colleague, Professor William T. Burke, who criticized a draft of this article.—K.L.K.

1. Those who speak for the United States Government frequently reflect this rather comfortable view. See, *e.g.*, U.S. DEP'T STATE, LAND REFORM—A WORLD CHALLENGE 4-5 (1952); Henderson, *U.S. Views on Agrarian Reform*, 41 DEP'T STATE BULL. 887, 888 (1959).

2. *E.g.*, GIMENEZ LANDINEZ, EVALUCION DE LA REFORMA AGRARIA ANTE EL CONGRESO NACIONAL (Venezuela, Ministerio de Agricultura y Cría, 1962); Lleras Restrepo, *Estructura de la Reforma Agraria*, in TIERRA: 10 ENSAYOS SOBRE LA REFORMA AGRARIA EN COLOMBIA 11, 13 (1962).

3. The point has been made forcefully by a number of writers. See FLORES, LAND REFORM AND THE ALLIANCE FOR PROGRESS (1963); WARRINER, LAND REFORM AND ECONOMIC DEVELOPMENT (1955); Barraclough, *Lo Que Implica una Reforma Agraria*, 15 PANORAMA ECONOMICO 123 (1962); Carroll, *The Land Reform Issue in Latin America*, in LATIN AMERICAN ISSUES: ESSAYS AND COMMENTS 161, 162 n.1 (Hirschman ed. 1961); Galbraith, *Conditions for Economic Change in Underdeveloped Countries*, 33 J. FARM ECONOMICS 689, 694-96 (1951).

4. See text at note 8 *infra*.

that expression. President Johnson, on the third anniversary of the founding of the Alliance, employed this omnibus description:

> "Through land reform aimed at increased production, taking different forms in each country, we can provide those who till the soil with self-respect and increased income, and each country with increased production to feed the hungry and to strengthen their economy."[5]

Since those words were spoken on a diplomatic occasion, perhaps they can be tolerated; they are indeed diplomatic, for they permit everyone to fill in his own preferred meaning for the statement's most important term.[6] The reason for the ambiguity is that the goals of the Alliance contain a built-in conflict.

The Alliance, as Fidel Castro boasts and despite regular official denials, was a reaction to the Cuban revolution. Its main purpose was to improve living standards in order to avoid violent upheaval in other countries; grants were to be conditioned upon the making of "institutional improvements which promise lasting social progress."[7] It is not enough to protest that the Alliance seeks to improve health, nutrition, literacy, and housing because that is the right thing to do; it was the right thing to do a long time ago, but this country did it only after Castro's emergence as a revolutionary symbol. Social and economic development was thought to be a peaceful alternative to revolution, particularly revolution with cold-war overtones. It was recognized from the first, however, that an important cause of stagnation in the Latin-American economy was the land tenure structure. The Alliance proposed "to encourage . . . programs of integral agrarian reform, leading to the effective transformation, where required, of unjust structures and systems of land tenure and use; with a view to replacing latifundia [the large estates of the traditional landed oligarchy] and dwarf holdings by an equitable system of property . . . ."[8] The phrase "where required" leaves

5. Address by President Johnson, Pan American Union, March 16, 1964. JOHNSON, THIRD ANNIVERSARY OF THE ALLIANCE FOR PROGRESS 8 (U.S. Dep't of State 1964).

6. Dr. Thomas Carroll has noted a striking demonstration of ambiguity in our national policy in two speeches of Hon. Teodoreo Moscoso, one pitched to the "social justice" theme and the other playing down redistribution and emphasizing the modernization of agriculture, "supervised credit and extension service, and farm-to-market roads." Carroll, *Land Reform as an Explosive Force in Latin America*, in EXPLOSIVE FORCES IN LATIN AMERICA 81, 112-13 (TePaske and Fisher ed. 1964). The leverage that the Alliance can bring to bear on Latin-American governments is discussed in Note, *The Chilean Land Reform: A Laboratory for Alliance-for-Progress Techniques*, 73 YALE L.J. 310, 327-33 (1963).

7. President Kennedy's Message to Congress, 44 DEP'T STATE BULL. 474, 476 (1961).

8. Charter of Punta del Este, N.Y. Times, Aug. 17, 1961, p. 8, col. 3.

some political leeway, but the message nonetheless is clear: the United States is ready to support land reform. To most Latin Americans that means redistribution on the pattern of the Mexican, Bolivian, and even Cuban models.

A redistribution of wealth and income, however, cannot fail to produce a realignment of political power in the reformed countries; to prevent a Castro-style revolution, the United States is thus committed to encouraging a revolution that it trusts will be peaceful and made principally within the existing structure. Misery alone is not enough to make a revolution; revolutions are born of hope, not despair, and that is why Ambassador Stevenson's phrase, "the revolution of rising expectations," fits Latin America so well. The Cuban revolution and the Alliance for Progress have, in uncomfortable combination, raised hopes of varying kinds throughout the region. Thus, the question now is not whether Latin America will have a revolution, but rather what kind it will have.[9]

Not the least of the tensions involved in the formulation of United States policy toward Latin America is antagonism between the need to make radical changes in land tenure structures and the interest of some North-American investors in preserving their holdings in land. The issues here are not simple. We are not faced with the easy choice between the Nation's broad political goal of hemispheric security and the narrow goal of profit for a few investors. Private investment is an indispensable ingredient of the Alliance's success. The Alliance, after all, aims to supply capital as the basis for sustained growth, and private foreign investment is plainly a key source of capital, one not lightly to be discouraged.[10] It is sometimes said, not without cynicism, that the United States supported land reform in Bolivia because little or none of the land was held by its own investors.[11] Whatever the truth of that charge, this country has now placed its weight on the side of land reform, "where required," and, presumably, that does not exclude countries in which there are substantial North-American investments in land. There is no reason to assume that all or even most such North-American interests will be affected by a land reform,[12] but it would

9. See SZULC, THE WINDS OF REVOLUTION (1963).

10. Mr. David Rockefeller has ably defended the view that the Alliance has given excessive emphasis to government-to-government assistance, failing to take advantage of private investment's full developmental potential. See N.Y. Times, Feb. 20, 1964, p. 46, col. 4. On the role of foreign capital as an important transmitter of modern technology, see URQUIDI, VIABILIDAD ECONOMICA DE AMERICA LATINA 101-12 (1962).

11. See FLORES, *op. cit. supra* note 3, at 10.

12. See text at note 98 *infra*.

be foolish not to recognize that some such interests are bound to be affected.

Although the political setting for land reform in Latin America is revolutionary, the reforming governments normally have not admitted to charges of confiscation. Normally, they have claimed to compensate the expropriated landowners. If not, then they have asserted some traditional "legal" justification for taking without compensation, such as that the government is merely restoring the land to its true owners. This article examines the legislative techniques for taking land, showing their confiscatory operation. For many lawyers, the analysis would then be easily completed: confiscation is wrongful and must be condemned. Rejecting the implicit absolutism of that conclusion, this article inquires into the justifications that can be pleaded on behalf of selective confiscation as an aid in solving some of Latin America's economic and social ills.

We begin with Mexico, both for historical reasons and because the theory of restitution it has employed is a good analytical starting place. Following discussion of the Mexican experience are analyses of two techniques of "compensation" that have been used by reforming governments in order to avoid making prompt payment of the market value of expropriated land. The justifications for confiscating certain kinds of interests are then considered through an examination of the legislative content of "the social function of ownership." That examination raises one last question: If the reforming governments of Latin America regard confiscation as legitimate, why should they try to hide what they are doing? In that context, the concluding discussion explores the borderland between useful rationalization and simple dishonesty.

## I. Mexico: The Theory of Restitution

Latin America's first effective land reform occurred in Mexico; it began in this century and reached its peak of redistributive activity only a generation ago. The Mexican reform was premised originally upon a theory of restitution. Madero's Plan of San Luis Potosí, the first basic document of the 1910 Revolution, included this promise: "let [the lands taken from the Indians] be restored to their original owners, to whom shall also be paid an indemnity for prejudice suffered."[18] "Land and Liberty" was the slogan of the Revolution's

13. Para. 3, Plan de San Luis Potosí, in Fabila, Cinco Siglos de Legislacion Agraria en Mexico (1493-1940), at 209 (1941); also in 1 Silva Herzog, Breve Historia de la Revolucion Mexicana 133, 138 (2d ed. 1962).

agrarian side, but the idea was hardly original. From the times of the Viceroys, throughout the colonial era and the first century of Mexican independence, the restitution of land to the Indians was a popular theme.[14] The very recurrence of the idea suggests that the various restorative decrees were carried out less than scrupulously.

Encroachment on the lands of the Mexican villages was not just a matter of pushing the Indians out, North American style. Because the indigenous populations of Mexico had been settled in agricultural communities, it was more convenient to enslave them than to eliminate them. Encroachments on their land and on their personal liberty were thus inseparable parts of a single process, a process that began with a distribution of Indians among the conquistadors for use as slave labor[15] and culminated in a series of dazzling legal moves aimed at "confirming" titles in a few landholding families.[16] Thus

14. The first official attempt to restore lands wrongfully taken from the Indian villages was made in 1535; by royal decree, the Viceroy of New Spain was directed to inform himself concerning the land and tax abuses that had been reported in Spain and to take action to return the Indians' land to them. Cédula of May 31, 1535 in FABILA, *op. cit. supra* note 13, at 13. For later decrees of the colonial era, see *id.* at 26, 29, 30, 42, 49, & 58.

15. The *repartimiento* was, literally, a distribution of Indians. When complaints were made against the system's inhumanity, the *encomienda* was invented as a substitute. See MCBRIDE, THE LAND SYSTEMS OF MEXICO 43 (1923). Indians were then "entrusted" to certain Spaniards who undertook to make them Christian. The royal decrees established safeguards for the Indians' persons and property: "[But soon] the system lost its original character and became simply a method of land tenure, since the colonists soon came to look upon the districts assigned to them as being virtually their own and to regard the native agriculturists as their serfs." *Id.* at 45. The allotment to Cortés was enormous. "The areas claimed must have amounted to not less than 25,000 square miles and contained a total population of some 115,000 people . . . ." *Id.* at 47. Compare CRIST, THE CAUCA VALLEY, COLOMBIA: LAND TENURE AND LAND USE 15 (1952), describing the use of Indians as agricultural workers for the haciendas and as pack animals on mountain trails.

16. Titles to the *encomienda* lands were confirmed in periodic surveys, during which each rightful possessor was entitled to a *composición*, a settlement or confirmation of his title. The village leaders were often unaware of the necessity for securing *composiciones*. Unconfirmed village lands were then subject to occupation as Crown lands, and might later be confirmed in new surveys. In the early eighteenth century, a decree authorized the denunciation of illegal (unconfirmed) occupancies by persons having knowledge of them, who might themselves claim the lands upon the payment of a fee. See FABILA, *op. cit. supra* note 13, at 34; WHETTEN, RURAL MEXICO 82-85 (1948).

The war for independence from Spain began in 1810 partly as a social revolution. Father Hidalgo sought the Indians' support in these terms: "Will you make the effort to recover from the hated Spaniards the lands stolen from your forefathers three hundred years ago?" Quoted in GRUENING, MEXICO AND ITS HERITAGE 30 (1928). But the great landowners and their allies captured the revolution and the succession of governments that followed it. After the brief mid-century flirtation with reform (see note 18 *infra*), Mexico's government returned to normal. Under the Díaz regime (1876-1910), new devices were invented for despoiling the villages: A law for colonization of "idle" lands was interpreted to permit new denunciations and claims, after the fashion of the *composición*; the private control of water rights permitted land companies to stop the supply of water to the villages, forcing them to abandon their land, which might then

were born the haciendas, the great estates that have been the chief target of land reformers in Mexico and throughout Latin America.[17] Curiously, the centralizing of land ownership not only survived during the mid-nineteenth century Reform movement, but it even accelerated.[18] Thus, until the Revolution of 1910, virtually nothing of a serious nature was done to restore the village lands.

That Revolution also began as just another political revolt, but it soon took on an agrarian cast. Now the promise of land to the villages began to be carried out by revolutionary generals such as Zapata, who seized land and divided it among the *campesinos*.[19] Yet, even in the midst of civil war, Zapata recognized the need for establishing the legitimacy of his land distributions. His Plan of Ayala proposed the restitution of village lands that had been usurped and the expropriation (compensated) of one-third of the great estates for distribution among the landless who had no claim of restitution.[20]

Zapata and others may be excused for failing to specify in detail the kinds of usurpation that would justify restitution; they were concerned primarily with getting and holding support for the Revolution, and one does not issue a call to arms in the language of a statute. As the Revolution continued, many of the great estates were simply occupied, either by the *campesinos* or by revolutionary generals, without the formality of court decrees or legislation. "Restitution dates from the days the peasants seized land forcibly and then sought legal justification."[21]

be occupied; the army destroyed some villages in punishment for "rebellion," and political friends of the regime moved in. SIMPSON, THE EJIDO: MEXICO'S WAY OUT 29-31 (1937).

17. FORD, MAN AND LAND IN PERU 21-52 (1955); MCBRIDE, *op. cit. supra* note 15, at 25-81.

18. A mortmain law, enacted in 1856 to break the power of the Church, was directed at corporate landholdings, with an exception for village communal lands. Art. 8, Ley de Desamortización de Bienes de Manos Muertas, June 25, 1856, in FABILA, *op. cit. supra* note 13, at 103, 104. The constitution of 1857 omitted the exception in its article 27 [TENA RAMIREZ, LEYES FUNDAMENTALES DE MEXICO, 1808-1957, at 606, 610 (1957)] and was interpreted to apply to the villages as well as to other corporate owners. The resulting fragmentation of village lands led directly to their piecemeal purchase by speculators and their ultimate consolidation in the haciendas.

19. See DIAZ SOTO Y GAMA, LA GUESTION AGRARIA EN MEXICO 18-19 (1959). The word *campesino* is used instead of "peasant" because the latter word calls to mind images of the European peasantry, many of which are inappropriate in the Latin-American context.

20. Paras. 6 and 7, Plan de Ayala, in FABILA, *op. cit. supra* note 13, at 214, 215-16. Paragraph 8 of the Plan proposed the confiscation of all lands of those who might oppose the Revolution; these lands were to be considered as war indemnity and were to be used to provide pensions for the widows and orphans of revolutionary soldiers.

21. SENIOR, LAND REFORM AND DEMOCRACY 25 (1958).

The "seizure" or "occupation" frequently, even typically, amounted to nothing more than the expulsion of the supervisors who managed the estates for absentee landowners. In such cases, the Indians continued to work the lands they had always worked and continued to live in the villages that had been enveloped by the haciendas. The differences were that they no longer recognized the right of the former owners to the crops raised and the central buildings of the hacienda were taken over for community use as hospitals, schools, or other public purposes.

In three different respects, this continuity of the people on the land adds justification to the claim of restitution. First, under these circumstances, restitution was less disruptive economically and socially than would have been a restitution that tore one group away from the lands it worked and replaced it with another group. Second, the persons to whom restitution was made[22] were the very ones whose previous labor under conditions of near-slavery had contributed substantially to the value of the land. Finally, the presence of the beneficiaries on the land, along with the decision to make restitution to villages rather than to individuals, eliminated the problem of locating "lost heirs" of the victims of earlier despoilment.

However well-founded the restitution theory may have been, it basically functioned as a rationalization for the agrarian phase of the social revolution. If there had been no continuity of the kind described, if the descendants of villagers long ago despoiled had been scattered instead of bound to the land, then restitution would scarcely have been a popular theme. Social revolutionaries are concerned with making a social reform, not with the purification of titles, and the main thrust of the revolution was to give the land to those who were working it. What the restitution theory gave to the Revolution was a basis in traditional legality for the transfer of wealth and power to the revolutionary classes.

Land reform legislation embodying the principle of restitution was first decreed in 1915,[23] and then incorporated into the Constitution of 1917.[24] Although it was emergency legislation—the military

22. The land was distributed to villages, not individuals. However, most of the villages divided their lands into parcels that were occupied, although not owned, by the families that worked them.

23. Ley Agraria de 6 Enero 1915, in FLORES, TRATADO DE ECONOMIA AGRICOLA 400 (1961).

24. Constitución de 1917, art. 27, in TENA RAMIREZ, *op. cit. supra* note 18, at 817, 825 (text before 1934, 1945 and 1947 amendments appears in *id.* at 882-89). The constitution is available in English translation, published by the Pan American Union.

phase of the Revolution did not end until 1920—the law spelled out the villages' rights to restitution in enough detail to make later amendment unnecessary. The rather moderate restitution provisions of the Agrarian Code that is now in force are, in all essentials, the same as those of the 1915 decree.[25]

Arising as it did out of a violent social revolution, the law was remarkable for what it did not do. It did not restore to the villages the lands that were theirs at the time of the Conquest, or even at the time of Independence. It did not upset the *composiciones,* which confirmed title in outside usurpers, except those made during the Díaz era.[26] Three kinds of transfers were declared void: (1) transfers of village lands made in violation of the 1856 mortmain law and other related laws; (2) concessions made by the federal government after December 1, 1876,[27] that encroached on village lands; and (3) transfers or confirmations of title made in the course of boundary-marking proceedings after December 1, 1876, that encroached on village lands.[28]

The inadequacy of this restitution legislation was partly evident even to its framers. From 1915 on, it was recognized that the restitution of lands to the villages would have to be supplemented to some extent by grants of land obtained by expropriation, for which compensation was to be paid. Just how much reliance would have to be placed upon expropriation was not at first recognized, perhaps because both the legislators and the public were generally familiar with the history of abuse that had attended the marshalling of lands for the great estates. It was easy to underestimate the difficulty of undoing four hundred years of official and private connivance. In

25. Código Agrario de los Estados Unidos de los Mexicanos, art. 46-49.

26. The 1915 law imposes the 1876-to-date limitations period noted in the text. The 1917 constitution extended the period back to 1856 for all forms of illegal encroachment. In 1934, the constitution was amended to conform with the provisions of the 1915 law, which provisions remain in force today. In fairness to those who drafted the 1915 law, it ought to be said that the number of illegal encroachments after 1876 must have been far more significant than the number between 1856 and 1876.

27. The date marks the beginning of the Díaz era. See HERRING, A HISTORY OF LATIN AMERICA 338-53 (2d ed. 1961), for an interesting brief account of Díaz' thirty-five year rule.

28. An exception was made for village lands that had been allotted in individual parcels in compliance with the 1856 mortmain legislation provided that the owner had held title for ten years and that the area of the land did not exceed fifty hectares (about 125 acres). Simpson notes that, by 1892, the total public lands granted by way of concession to the land companies, largely in connection with their "survey" work, amounted to about one-fifth of the entire area of Mexico. SIMPSON, *op. cit. supra* note 16, at 27-28.

any case, although restitution was expected to be the main legal weapon of the land reform, it turned out to be secondary.[29]

Some of the failings of the restitution legislation are apparent on its face. Most obvious is the cut-off point of 1876, the beginning of the Díaz regime. Even assuming the nullity of "encroaching" concessions and confirmations of title made after that date, the legislation left intact similar transactions, equally wrongful, that had occurred earlier. Much of the villages' land had been swallowed by the large estates in the first two centuries of Spanish rule. The classical arguments in favor of limitations periods are unpersuasive in this context. First, the doctrinal underpinnings for prescription are weak. The communal lands of the villages have been, along with other public land, exempt from claims of prescriptive right at least since the *Siete Partidas* of Alfonso X.[30] If it be argued that there must be a time of repose when old wrongs are beyond redress, then it is hard to see why the restitution legislation did not replace the old rule of imprescriptibility with a new, general limitations period, applicable alike to the villages and to other claimants. The law did permit the recovery—through prolonged and uncertain litigation[31]—of village lands that had been wrongfully occupied *without* the assistance of the state, even though the wrong might have been buried in the past. It impliedly carved out for protection those wrongful occupations that were effected before 1876 with the legal trappings of a *composición*. If it be argued that a limitations period is necessary in order to avoid reliance upon ancient and hard-to-produce evidence, the answer is that the solution adopted fails in

29. "During the entire period from 1916 to 1944, only 6 per cent of the total land distributed was by the method of restitution." WHETTEN, *op. cit. supra* note 16, at 129.

30. Ley 7a, tít. 29, Partida 3a. The Partidas were written in the middle of the thirteenth century, but were not officially recognized as a source of law until 1348. Although much of their content comes directly from the legislation of Justinian, they have had great independent doctrinal significance in Spain and in Latin America. See Lobingier, *Las Siete Partidas and its Predecessors*, 1 CALIF. L. REV. 487 (1913); Nichols, *Las Siete Partidas*, 20 CALIF. L. REV. 260 (1932). The preamble to the 1915 law took note of the fact that the village lands had not been subject to the operation of prescription; it was argued that the legal interests of the landowners were not invaded by the decree of restitution because they had never acquired rights in the land restored to the villages.

31. Zapata's Plan of Ayala referred in its sixth paragraph to "venal justice" as an instrument of the great landowners in taking control of the village lands. See note 20 *supra*. His deep distrust of the judiciary has carried over into the agrarian legislation only to the extent that expropriated landowners are disabled from seeking judicial relief, and even that restriction no longer applies to "small property" owners. When it is the villages that seek judicial relief (restitution), the obstacles in their path make it easy to sympathize with Zapata.

two ways to avoid such reliance. Not only were the villages permitted to rely upon old evidence to prove wrongful encroachments, but they were also required in every case—including those that came within the post-1876 period of limitations—to prove their own titles. Thus a village's rights depended upon its ability to produce a ragged and dusty document, hundreds of years old, the authenticity of which could only be guessed. There was a political motivation for the 1876 limitation. By purporting to undo only the transactions of the outgoing dictatorship, the Revolution's leaders could hope to avoid the hostility of large landholders whose rights were more deeply rooted in past dealings. Even that political judgment is now questionable, but at this distance it is hard to fault the revolutionary leadership for failing to make more sense out of the chaos that surrounded them.

Another kind of wrong that the restitution legislation did not try to right was the sale of lands to speculators at manifestly unfair prices. The first provision of the 1915 law nullified transfers made in violation of the mid-nineteenth-century mortmain laws. The effect was to denounce a number of village lands and the claims that followed them as illegal mortmain holdings. The law did not, however, reach cases in which the villages "voluntarily" complied with the current (pre-1910) interpretation of the mortmain legislation by fragmenting their lands into individual parcels, which were then purchased by speculators for prices reflecting small fractions of their value. Because the original principles of the Mexican land reform thus protected existing ownership to a degree that is astonishing in comparison with the theories of the land reforms that have since taken place in other quarters of the globe, it should not be surprising that these principles came to be ignored.

The theory of restitution was a title theory, based upon rights of ownership. But the concept of ownership as the normal form of land tenure was a European import. Before the Conquest, only some of the nobility held private property in land; the right to use land was vital to the ordinary man, but he did not own it.[32] Within the villages' common lands, individuals and families might have relatively well-defined rights of usufruct, but it would be misleading to describe them as owners. Perhaps for this reason, as well as others

32. The nobles' land was transferable by sale or inheritance and worked by serfs or slaves who passed with the land upon its transfer. Commoners who were neither serfs nor slaves might hold inheritable rights of usufruct or might work the land under contracts of tenancy. See Caso, *Land Tenure Among the Ancient Mexicans*, 65 AMER. ANTHROPOLOGIST 863 (1963) (Wicke translation). *Cf.* CHEVALIER, LAND AND SOCIETY IN COLONIAL MEXICO 12-23 (Eustis translation, 1963).

already noted, when it came time to secure titles from the Spanish crown, many villages failed to recognize the significance of documents of title:

> "Some of them were too remote from contact with Spanish officials to make any attempt toward reforming their land system [*i.e.*, confirming their titles]; some were not yet sufficiently advanced in culture to appreciate the need of proper titles for their holdings. These unrecognized towns or loosely organized settlements continued to occupy their lands (when not absorbed into Spanish properties) during the colonial period and after the establishment of the republic. In fact, many such settlements exist today . . . , holding their lands collectively and alloting them to members of the village, without titles of any kind save the rights established by occupancy or the testimony of chiefs and neighbors."[33]

Thus, the trouble with the restitution theory was that it was not possible for most of the villages to prove their titles to the satisfaction of judges.[34] As a *legal* mechanism for effecting land reform, restitution was a failure.

It would, nonetheless, be a mistake to write off the restitution theory as unimportant. It is true that not many villages recovered their lands in actions for restitution; instead, the lands were taken from the great estates by expropriation and were granted to the villages. While the 1915 law had seemingly added the expropriation-and-grant device as an afterthought, the 1917 constitution was interpreted to place the grant program upon an equal footing with restitution. Still, compensation was to be made in cases of grant, and the villages were to pay for the granted lands in installments that would be applied to the retirement of agrarian bonds issued as compensation to the landowners.[35] That ultimately the villages did not pay and the landowners largely went uncompensated[36] was not simply attributable to the new political force the villages found. In the background was the theory of restitution, giving rise to claims

33. McBride, *op. cit. supra* note 15, at 125.

34. The history of one village's unsuccessful efforts to produce title documents is recounted in Simpson, *op. cit. supra* note 16, at 465-66. There are parallels in the experience of some of our own Indian tribes:

> "[Tribal lawyers] cautioned that rejection of [the federal government's offer of settlement] might lead to lengthy litigation that could deprive many living Indians of any share in the settlement, and might result in no award at all.
>
> "In a lawsuit, the lawyers said, the now widely dispersed Indians would have difficulty furnishing the requisite legal proof that their forebears a century ago occupied specific tracts under tribal organization." N.Y. Times, Sept. 9, 1963, p. 29, col. 8.

35. See Simpson, *op. cit. supra* note 16, at 218-19.

36. See Flores, *op. cit. supra* note 23, at 324-45.

of the most traditional kind—claims that might properly be recognized, even though they could not be substantiated by records and proceedings in the usual European manner. This is not to say that there was no legitimate or legal alternative to recognizing and enforcing the villages' claims; the particular confiscatory solutions into which the Mexican Revolution fell were not compelled by positive law[37] nor by some abstract "Justice." But one should not condemn those solutions out of hand as immoral or as lacking any basis in equity or legitimacy[38] unless he is also prepared to deny the legitimacy of the villages' claims to restitution.

## II. Confiscation in Disguise: Deferred Compensation

Some Latin-American land reform laws provide immediate payment in cash for expropriated land,[39] and, while no such law expressly requires payment of the land's market value, statements concerning value or price are sometimes interpreted as referring to the market price.[40] More typically, however, the expropriating agency

37. In an opinion that is both wistful and eloquent, Mr. Justice Jackson points up the futility of judicial remedies to right the wrongs done by white men to Indians a century ago. The opinion recognizes, however, that there are equities that are beyond enforcement in court which nonetheless deserve recognition: "Whatever survives is a moral obligation resting on the descendants of the whites to do for the descendants of the Indians what in the conditions of this twentieth century is the decent thing." Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 354, 355 (1945) (concurring opinion).

38. Two expressions of this kind, mined from the rich lode of the *Congressional Record*, are 84 Cong. Rec. 3805 (Remarks of Hon. Hamilton Fish, April 4, 1939) ("robbery"); 86 *id.* at 5624-26 (Remarks of Hon. Dewey Short, May 6, 1940) ("theft," "piracy"). The main theme of the discussions here cited was the expropriation of North American interests.

39. *E.g.*, Honduras, Ley de Reforma Agraria, art. 52, Decreto No. 2, Sept. 29, 1962, *La Gaceta* No. 17,843, Dec. 5, 1962, p. 1; Panama, Código Agrario, Sept. 21, 1962, art. 45. The Honduran law has been translated into English in the series on Food and Agricultural Legislation of the United Nations' Food and Agricultural Organization; hereinafter, these translations will be noted: (FAO translation), and each basic reform law will be noted after the first reference only by the country and the article, as, Honduras, art. 52.

40. The Colombian law was so interpreted before its adoption. See López Michelsen, *Hacia una Verdadera Reforma Agraria que Complete la "Revolución en Marcha,"* in Tierra: 10 Ensayos Sobre la Reforma Agraria en Colombia 85, 96-99 (1962); Lleras Restrepo, *Estructura de la Reforma Agraria*, in *id.* at 11, 71. The general reference to valuation, which does not specify market value, is in Colombia, Ley No. 135 Sobre Reforma Social Agraria, art. 61, Dec. 13, 1961, *Diario Oficial* No. 30691, Dec. 20, 1961, p. 801 (FAO translation). Seven months after the adoption of the law, an executive decree limited the appraisers to values not exceeding 130% of the assessed tax valuation for the preceding year. Decree 1904 of 1962, art. 1. The use of this source for valuation, discussed in section III, *infra*, had been proposed by some writers on the basis of a 1959 colonization law. See Morales Benitez, Reforma Agraria—Colombia Campesina 269-70, 275 (1962). An experienced North American observer calls this valuation provision "perhaps the strongest one of the whole body of new legislation . . . ."

is authorized to defer payment (often by giving compensation in the form of agrarian bonds) and to consider factors other than market value in evaluating the land. By traditional North American constitutional standards, either of these practices would violate requirements of just compensation.[41] But, in view of the state of underdevelopment in which even the most advanced Latin-American countries find themselves, strict application of a standard of full, prompt, and effective payment would require the abandonment of a land reform.[42] Laws that purport to require such compensation cannot be taken at face value: if the government intends to comply with such a requirement, it does not intend more than a piecemeal reform; if it intends to create a general nationwide reform, then the statutory requirement will have to be modified or violated.

The extent to which deferment of compensation is confiscatory depends upon factors that go beyond those to be found in the standard accountant's tables: the length of the period of deferment, the rate of interest paid on the deferred obligation, and the going interest rate in the money market. In a time of continuing rapid inflation, a deferment of compensation for only a few years may amount to near-complete confiscation, even if the bonds that are given are made tax-exempt.[43] It is possible to reduce the effect of inflation on compensation awards by providing for periodic readjustments of the amounts due, tying compensation payments to a cost-of-living index[44] or even to some constant value measured by a commodity such as coffee or sugar.[45] But only rarely will the de-

HIRSCHMAN, JOURNEYS TOWARD PROGRESS 152 (1963). The landowners evidently agreed, for the rule was changed in 1963 to permit an owner to estimate a new valuation for future land tax purposes, which new valuation is also to be used in determining his land's value in the event of expropriation. Owners of rural land that exceeds one hundred hectares in area or twenty thousand Colombian pesos in value on tax registry books are required to make such estimates every two years; if they fail to do so, they are presumed to accept the existing valuation for expropriation purposes. An excessive valuation (over market value) is not binding on the acquiring agency, but the new scheme avoids the confiscatory feature of the 1962 regulation. Decreto No. 2895, Nov. 26, 1963; Decreto No. 181, Feb. 1, 1964.

41. 3 NICHOLS, EMINENT DOMAIN §§ 8.2, 8.6 (3d ed., Sackman, 1950).

42. See text at note 122 *infra*.

43. *E.g.*, Colombia, art. 75: "Both the capital and the interest shall be free of all national, departmental and municipal tax other than income tax and other taxes assimilated thereto"; Honduras, art. 66: "The bonds . . . shall be exempt from payment of income tax . . ."; Peru, Ley de Reforma Agraria, art. 230 (1964), La Prensa, Lima, May 23, 1964, pp. 11-14 (both bonds and interest free from all taxes).

44. The Chilean constitution, recently amended to permit deferred compensation, now provides for "a system of annual readjustment of the balance of the compensation, with the object of maintaining its value." Ley No. 15295, *Diario Oficial*, Oct. 8, 1963. *Cf.* Annot., 92 A.L.R.2d 772 (1963).

45. The land reforms in Taiwan and the Republic of Korea tied their deferred pay-

ferred payments bear interest at a rate that approximates the high rates now standard in Latin America.[46] (If high interest rates are simply a function of expected inflation, there is less need to match the market rate when the principal sum is protected against a fall in the value of money.)

Not all deferments of compensation are equally confiscatory. Some agrarian bonds may be used at face value to pay taxes or other obligations to the government.[47] Some bear very low interest, while others bear interest at the market rate.[48] Some are issued for longer terms than others.[49] Finally, the proportion of cash payments to bonds may vary.[50] The standards by which these various factors are adjusted all illustrate a single principle: the closer the ownership of the expropriated land comes to fulfilling its social function,[51] by producing well and by treating the agricultural labor force fairly, the less confiscatory will be the taking.[52] In addition, the extent of deferment of compensation may be roughly proportional to the size and value of the expropriated land.[53]

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ments to the expropriated landowners to the price of rice or other commodities. A description of the Korean case appears in Bunce, *Financial Aspects of Land Reform in the Far East*, in LAND TENURE 481, 485-86 (Parsons, Penn & Raup ed. 1956). *Cf.* Mallory, *The Land Problem in the Americas*, 43 DEP'T STATE BULL. 815, 821 (1960) (references to Taiwan reforms). [For recent comment on certain Asian reforms, see Ladejinsky, *Agrarian Reform in Asia*, 42 FOREIGN AFFAIRS 445 (1964).] In Colombia, it has not been unusual for private borrowers to give "coffee mortgages," that is, to agree to adjust their future payments to the price of coffee. In such a case it should be noted that the risks of the commodity market are added to those of inflation.

46. When inflation runs unchecked, interest rates also reach very high levels. The current rate in Brazil, for example, is upwards of forty per cent. See N.Y. Times, Dec. 5, 1963, p. 13, col. 1.

47. *E.g.*, Colombia, art. 78 (payment for parcels bought in consolidation or colonization programs). *Cf.* SIMPSON, *op. cit. supra* note 16, at 227 (Mexico: tax and other payments); Peru, art. 235 (permitting the use of agrarian bonds to pay taxes in the year in which the bonds are redeemable).

48. Venezuela, Ley de Reforma Agraria, art. 174, March 5, 1960, *Gaceta Oficial* No. 611 Extraordinario, March 19, 1960, p. 1 (FAO translation); Colombia, art. 75 (both differentiating among various classes of bonds).

49. *Ibid.*

50. Venezuela, arts. 33, 178; Colombia, art. 75; Peru, art. 233.

51. See section IV *infra*.

52. Venezuela, arts. 27, 33, 174; Colombia, art. 62.

53. Venezuela, art. 178; Colombia, art. 62. As these notes suggest, the Venezuelan and Colombian laws have done more to differentiate among the types of payment made to various expropriated owners than have the laws of other countries. Of course the interest rates, periods of deferment, proportions of cash payments, etc., vary from country to country, as do degrees of faithfulness of the government to the law's provisions. In Mexico, for example, only a small fraction of the landowners received even the authorized agrarian bonds. FLORES, *op. cit. supra* note 23, at 324-36. In Bolivia, *mortgage* bonds (two per cent, twenty-five year terms) are authorized. Decreto Ley No. 03464 de Reforma Agraria, arts. 156-57, Aug. 2, 1953. (FAO translation.) However, the bonds have not even been printed, and there is no present intention to issue bonds to any of the expropriated owners; "this phase of the land reform has been virtually

Transferability of the right to receive deferred compensation payments has also been limited rather strictly. The most favored classes of obligations, whether or not they take the form of bonds, are freely transferable,[54] being limited in their marketability only by such standard market considerations as their rates of interest. In most cases of expropriation, however, the obligations of the government either are not transferable at all or are transferable only on condition that their proceeds be invested in certain specified sectors of the economy.[55] The main purpose of these limitations on transferability seems to be to avoid the inflationary tendency created by issuing a kind of second-class currency.[56] Allowing the transfer of agrarian bonds for specified investment purposes does not change the nature of the government's obligation. If, however, the government permits an acceleration of payment on condition that the payment be invested in a certain way, the government in a sense becomes an investor for the benefit of the bondholder.

Following Mexico's lead, a number of the Latin-American countries have made express provision in their constitutions for the deferment of their land-reform compensation payments.[57] In fact,

ignored to date." Heath, *Successes and Shortcomings of Agrarian Reform in Bolivia* in THE PROGRESS OF LAND REFORM IN BOLIVIA 16, 19 (Discussion Paper 2, Univ. of Wisconsin Land Tenure Center, 1963). *Cf.* Flores, *Land Reform in Bolivia*, 30 LAND ECONOMICS 112 (1954); Flores, *La Reforma Agraria en Bolivia*, 20 EL TRIMESTRE ECONOMICO 480 (1953).

54. The class "C" bonds in Venezuela (art. 174), and the class "A" bonds in Colombia (art. 62).

55. An example of the latter feature is in Venezuela, art. 174: the less favored classes of bonds ("A" and "B") may be used to secure loans from official financial institutions "for agricultural or industrial purposes . . . ." Otherwise these bonds are not transferable. In Peru, art. 236, agrarian bonds are acceptable as security for loans up to fifty, sixty-five or eighty per cent of their face value, depending upon the class of bonds; the loans are authorized for government banks, and no restriction is placed on their purposes, which are presumably to be evaluated in accordance with the banks' normal lending policies.

56. See Galbraith & Morton, *Problems of Financing Land Distribution*, in LAND TENURE 492, 496-97 (Parsons, Penn & Raup ed. 1956).

57. The draftsmen of the 1917 constitution of Mexico deliberately substituted the expression "by means of compensation" (*mediante indemnización*) for the existing language of art. 27, "with previous compensation" (*previa indemnización*); in addition, the new article expressly recognized the agrarian debt. The recent amendment to the Chilean constitution (see note 44 *supra*) specifies a maximum period of deferment of fifteen years. *Cf.* Venezuela, Constitution of 1961, art. 101 (deferment "for a determined time" or payment in bonds "with sufficient guarantee"). In Cuba, the land reform law was issued by decree as an amendment to the constitution. See Cuba, Ley de Reforma Agraria, "final additional provision," June 3, 1959; CUBA AND THE RULE OF LAW 98-99 (Int'l Comm'n of Jurists 1962). The most recent constitution to be amended for this purpose is that of Brazil; the Congress passed, by an overwhelming vote, an amendment expressly permitting payment in long-term bonds for land expropriated in the revolutionary government's land reform. See Kent, *Farm Reforms for Brazilians*, Los Angeles Times, Nov. 7, 1964, p. 8, col. 4.

the only country in which the constitutionality of a deferred compensation scheme is open to question is Colombia, where the constitution, in relevant part, provides:

> "For reasons of public utility or social interest, defined by the legislative power, there may be expropriation, by means of judicial decision and prior compensation.
>
> "Nevertheless, the legislative power, for reasons of equity, shall have the power to determine those cases in which there shall be no compensation, by means of the favorable vote of an absolute majority of the members of both Houses."[58]

Some opposition legislators on the political left argued that, if the Congress failed to make a declaration of "equity" under the latter paragraph and failed to adopt the land reform law by a two-thirds vote, the supreme court might hold the deferred compensation provisions of the law invalid.[59] That view was opposed by members of the Conservative Party, some of whom, in the face of the quoted constitutional language, took the position that the constitution did not authorize *any* deferment of compensation.[60] The view which prevailed was that, since the constitution authorized the withholding of some compensation under proper circumstances, "the greater include[d] the lesser power," and the Congress was free to provide for compensation in agrarian bonds.[61] But this reasoning ignores the plain no-compensation language of the constitution; while it is perfectly acceptable to argue that there is no necessity for a purely formal declaration of any reasons of equity, the two-thirds vote requirement is not a technicality and seems indispensable.

## III. Debatable Confiscation: The Dilution of Market Value

Most Latin-American constitutions do not specify market value as the required basis for just compensation for expropriated prop-

58. Colombia, Constitution of 1936, as confirmed by plebiscite of 1957, art. 30.

59. López Michelsen, *supra* note 40, at 93-94.

60. Tovar Concha, *La Tesis Conservadora Sobre Propiedad*, in Tierra: 10 Ensayos Sobre la Reforma Agraria en Colombia 235, 242-43 (1962). Other conservatives simply agreed with López Michelsen on the need for a two-thirds vote; *e.g.*, Gómez Hurtado, *El Auténtico Contenido de Una Reforma Agraria*, in *id.* at 169, 184-85, which argues that a previous vote to dispense with the two-thirds rule in cases of "social" legislation did not cover most of the law's provisions. This emergency legislation, the constitutionality of which is itself questionable, expired in December 1961; the land reform law was rushed to passage just before the deadline. See Hirschman, *op. cit. supra* note 40, at 144, suggesting also that the combination of right and left opposition could have defeated a two-thirds vote.

61. Lleras Restrepo, *supra* note 40, at 64.

erty.[62] Taking advantage of these constitutional ambiguities, the existing land reform legislation tends to list market value as only one of a series of factors that may be considered in fixing compensation, along with declared tax valuations and capitalized-income values.

As in the United States, Latin-American tax registries normally list land at a valuation well below its market value. Some supporters argue, upon frankly redistributive grounds, for tax valuation as the basis for compensation: this is one way to confiscate, and confiscation is needed if there is to be a reform.[63] Another obvious argument is that the landowners have been paying property taxes determined by using the low base, and, therefore, ought not to complain if other dealings with the government are also based upon their own low declarations.[64] The trouble with this second argument is that all property in the nation may equally be undervalued and property tax rates calculated with the universal understatement of values in mind; it is not fair to single out the expropriated landowners for punishment when their practice may not have been regarded as wrongful and when it may have been common to all property owners.

A better argument would be that abandonment of market value is not confiscatory in a context in which the market—such as it is—is influenced by factors that do not deserve legislative recognition. Principal among those factors is the use of land as a defense against inflation. In the face of continuing deterioration of the currency, many who want to protect their savings buy land, using it as a "money box."[65] If there is no real land market apart from this kind

62. Typically the constitutions require "previous" or "previous and just" compensation. *E.g.*, Colombia, Constitution of 1886, as amended through 1957, art. 30; Brazil, Constitution of 1946, art. 141(16); Bolivia, Constitution of 1945, art. 17. Similar language in our own state and federal constitutions has been held to require payment of "market value." But see HAAR, LAND-USE PLANNING 470-505 (1959), for an exploration of the complexities hidden in that simple phrase. See Dunham, *Griggs v. Allegheny County in Perspective: Thirty years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 90-105.

63. See letter of Fr. Gonzalo ARROYO, in MORALES BENITEZ, *op. cit. supra* note 40, at 275.

64. *Ibid*; *cf.* SIMPSON, *op. cit. supra* note 16, at 225-26. The Chilean reform law achieves a neat twist on this theory. If an owner resists the administrative valuation of his land and if for any reason the expropriation is later abandoned, then for *all* tax purposes in the future the land's value may be modified upward to the level of the owner's claim. Ley de Reforma Agraria, art. 32, No. 15,020, Nov. 15, 1962, *Diario Oficial* No. 25, 403, Nov. 27, 1962, p. 2501 (FAO translation).

65. See López Michelsen, *supra* note 40, at 97.

of speculation,[66] land prices will not reflect land's utility as a factor of production.

The abandonment of market value as the standard for fair compensation does not necessarily require its replacement with the tax registry value of the land. A more satisfactory standard might be a capitalization of the land's income. Since much of the expropriated land has been cultivated non-intensively,[67] the use of historical income figures would not produce a valuation that matched the value of the land for the productive process; this could only be obtained by the capitalization of the land's *potential* net income, assuming the application of labor and other variable production factors to an extent that might realistically be expected of a conscientious manager. Despite the fact that using hypothetical income figures of this kind might result in a "truer" valuation in economic terms, however, there is a certain justice in using the income or product that the owner has in fact produced, just as there is in using his own property tax declarations. If this be confiscation, it can be argued that the owner has asked for it.

No doubt all of these considerations have had their influence in the drafting of those land reform laws that dilute the market value standard.[68] "Value," like any other word, ought to be defined in the light of the purposes of the legislation; in this case, those purposes are the purposes that motivate the land reform. The history of the landowner's minimal contributions to the society, whether they have taken the form of low taxes, or an inadequate production, or even the abuse of the agricultural labor force, cannot properly be ignored when the issue is the landowner's just desert. To call this kind of valuation confiscatory is to assume the conclusion, even though the assumption be cloaked in the rhetoric of market value.

Who makes the valuation may be as important as the standards prescribed for determining the amount. In every case, the administrators of the land reform are charged with making at least a pre-

66. See text accompanying notes 88 & 89 *infra*. Where there are similar artificial influences on market value, our own courts also may use other measures of just compensation. See JAHR, LAW OF EMINENT DOMAIN: VALUATION AND PROCEDURE 102-15 (1953).

67. See text accompanying note 80 *infra*.

68. Venezuela, art. 25 (production history, assessed value, market); Costa Rica, Ley No. 2825 de Tierras y Colonización, art. 127, Oct. 14, 1961, *La Gaceta* No. 242, Oct. 25, 1961, p. 4085 (FAO translation) (upper limit: assessed value); Cuba 29, 30 (assessed value plus improvements); Peru, art. 75 (recent declared value for tax purposes, potential income, and expert assessment).

liminary valuation. Review of the administrative determination by an ordinary court or by a specially established agency such as an arbitration board is regularly provided.[69] The Venezuelan experience suggests that reviewing judges have somewhat less hesitancy to substitute their own judgment when the question is the value of expropriated land than they do when the issue is the land's "affectability" (eligibility) for expropriation.[70] Independence of the reviewing body is plainly desirable but has always been difficult to achieve in Latin America. Zapata's Plan of Ayala, the document which served as the manifesto for the agrarian movement in the Mexican Revolution, noted the part that "venal justice" (*i.e.*, corrupt judges) had played in the despoilment of the village lands.[71] Corruption tends not to be the most serious problem in the context of a land reform; the major threat is that judges will be under great political pressure to give their support to the reform and it will become hard to distinguish between that support and support for the position of the executive branch in a particular case. In Bolivia, many an "agrarian judge"[72] has been a law student; but, however conscientious the judge, it may be asking too much to expect him to make an independent evaluation of the lawfulness of a decree signed by the President of the Republic.

The theory of restitution offers an explanation for the uncompensated taking of land that avoids frank recognition of the fact that the land is being confiscated. The same kind of anticipatory denial of the charge of confiscation is implicit in the adoption of schemes of deferred and reduced-value compensation. Since all of these legislative devices do result in uncompensated taking of land, the legitimacy of the takings must rest upon something more substantial than the pretense that confiscation is not involved. The more candid arguments in justification of confiscatory takings go directly to the function that land ownership performs in Latin-American society.

69. *E.g.*, Chile, art. 26 (special court); Honduras, art. 52 (Comptroller General); Colombia, art. 61 (three experts: one appointed by the owner, one by the Land Reform Institute, and one by a government geographical institute; if an objection to the arbitrator's finding is upheld by a court, then three more experts are appointed in the same manner and their decision is final); Cuba, Act No. 588 (regulating expropriation), art. 15, Oct. 7, 1959, *Gaceta Oficial* No. 191, Oct. 9, 1959, p. 22, 740 (FAO translation) (arbitration); Venezuela, art. 36 (arbitration, subject to judicial review).

70. Interview with Dr. Ing. Bruno Salazar Figueroa, Instituto Agrario Nacional, Caracas, Venezuela, March 12, 1963.

71. See note 31 *supra*.

72. The post is established by art. 166 of the Bolivian reform law.

## IV. "The Social Function of Ownership"

With all of the passion of fresh discovery, Latin-American reformers have taken to the idea that private ownership implies a degree of social obligation. Duguit's old phrase, "the social function of ownership,"[73] has in fact been written into several land reform laws. The idea that property should have to be justified by reference to its social function comes naturally to North American lawyers, who have subjected legal relations to the same kind of scrutiny for at least the past two generations. What is surprising, given the conditions of Latin-American society during the same period, is that similar analysis has taken so long to be accepted in those countries.

The tenacity of the civilian traditions against restrictions upon ownership perhaps can be explained as a result of the way most Latin-American lawyers have been trained.[74] There the law, at least as it is expressed in the principal codes, is normally expounded and analyzed, even memorized by students, as a kind of holy abstraction. Basic legal institutions are conceived to be static rather than dynamic; a discussion of social needs and a discussion of the meaning of the Civil Code, for example, would be kept in separate analytical compartments. Of course this is a caricature, exaggerated for emphasis, but the exaggeration is not too great.[75] In such an atmosphere, it has been easy for nineteenth-century protections of individual economic freedom to become frozen into law and, equally important, frozen into both professional and popular ideas concerning the nature of private ownership.[76]

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73. See Duguit, Les Transformations Générales du Droit Privé (1912), translated by Register and excerpted in Rational Basis of Legal Institutions 315, 317-23 (Wigmore and Kocourek ed. 1923); *cf.* 2 Ely, Property and Contract in Their Relation to the Distribution of Wealth 627-42 (1914).

74. See generally Katz, Report of a Visit to Mexico and South America, July 8-September 5, 1961, to the Committee on Higher Education in the American Republics, 1961.

75. Partly as a result of the activity of CHEAR (see note 74 *supra*), important, but largely unsuccessful, efforts for improvement were recently made in two of Latin America's best universities, the University of São Paulo and the University of Chile. Of course many individual teachers are not guilty of the kind of barren instruction here described; but they are, unhappily, still a small minority.

76. The Latin-American civil codes, largely taken from the Code Napoleon, recognize the limitation of "abuse of right," which, in its applications to property, roughly parallels the common-law maxim *sic utere tuo*. But it is important to remember that this limitation, like others, is regarded as an exception to the more general civilian tendency opposing restrictions on private ownership. Thus, a leading Argentine writer feels compelled to explain something that English or North American lawyers would never have doubted: that property is not really absolute. 8 Salvat, Tratado de Derecho Civil Argentino 362-67 (3d ed. 1946) (citing Duguit, *op. cit. supra* note 73).

### A. *Legislative Standards for Expropriation*

While similar performance of social functions might, with equal reason, be demanded of other property interests, at the present time in Latin America, talk of this kind has been largely restricted to ownership of rural land. There are few serious proposals for the expropriation of factories, corporate shares, or bank accounts.[77] In identifying those functions that the ownership of rural land ought to perform, the usual practice has been for the draftsmen of reform legislation to cast their definition negatively: ownership fulfills its social function when it avoids creating certain anti-social conditions. The legislative catalogue of such conditions is thus an imperfect mirror image of a near-feudal society that is at once economically drowsy and politically restless. The statutory definitions of the social function concentrate on two fundamental features of the hacienda society: the failure to cultivate land adequately and the injustices attendant upon the indirect exploitation of land through tenant farmers, sharecroppers, and the like. Any genuine effort to remedy these ills necessarily implies an attempt to destroy the system, and the draftsmen of land reform legislation know it.

The classical hacienda is not run for a profit; rather, it is run as a country estate for an owner who is usually absent. "The hacienda is not a business";[78] it is a symbol of wealth and power.[79] More than that, it is, or aims to be, a self-contained community,

77. It is true that some Latin-American governments have recently begun to make noises about tax reforms; others have both threatened and carried out nationalization programs, principally directed at public utilities. The generalization in the text stands, however. One exception that may come to be regretted is the Cuban "urban reform," which confiscated landlords' property, particularly apartment housing, for the benefit of their tenants. Bearing in mind the experience of Mexico, which left urban holdings intact (see text at note 127 *infra*), it has been suggested that the Cuban government acted hastily in (a) failing to maintain an urban land base for capital formation, and (b) driving large numbers of trained middle-class and professional people into exile, instead of trying to win their loyalty as did the Mexican government. The point is tentatively made in FLORES, REFORMA AGRARIA EN MEXICO 458-59 (Univ. of Chile mimeo 1962).

78. MOLINA ENRIQUEZ, LOS GRANDES PROBLEMAS NACIONALES 90 (1909). The comments that follow in the text describe the classical hacienda, not the plantations that raise cash crops for export. As Tannenbaum remarks, the plantation is more properly conceived as a rural industry, rather than a traditional agricultural undertaking, at least when reform questions are being considered. TANNENBAUM, TEN KEYS TO LATIN AMERICA 77-94 (1962). For a discussion of one land reform in the context of a plantation economy, see Note, *Puerto Rican Land Reform: The History of an Instructive Experiment*, 73 YALE L.J. 334 (1963).

79. The hacienda has been described very well by the writers often cited in these notes: McBride, Simpson and Whetten. An excellent short description is contained in TANNENBAUM, *op. cit. supra* note 78, at 5. Concerning the inefficiency of absentee ownership, see SCHULTZ, TRANSFORMING TRADITIONAL AGRICULTURE 118-22 (1964).

able to provide its own needs without recourse to the money economy. It neither produces primarily for the market nor demands things that can be obtained only for cash from the outside. In order to avoid paying cash wages, the hacienda permits some laborers to occupy dwellings and small parcels of land. In return, these workers and their families must furnish a specified number of days of work each week or month. Some cash wages are mythically paid, but they usually assume the form of credits on the books of the hacienda's store; in fact, the labor force lives at a subsistence level and is kept in a form of perpetual debt slavery.[80] The sharecropping system serves the same purpose of avoiding a cash outlay for labor. The forms of such arrangements are various, but they generally amount to this: the landowner furnishes the land, and perhaps some of the seed, and the sharecropper furnishes his own labor, along with the labor of his family; the crop is divided between the owner and the cropper, and part—often all—of the cropper's share may go to the owner to repay advances of subsistence items. The hacienda is large enough in extent that there is no economic motive either for working all of its land or for cultivating intensively those lands that are worked.

The conversion of such a regime to intensive farming, directly managed by the owner and subject to minimum legislative standards for wages and living conditions of the labor force, would amount to the destruction of the hacienda. Money would be needed in large amounts, both to satisfy the new wage regulations and to pay for the fertilizers and other ingredients of input required for intensive cultivation. In short, the owner would be required to operate his lands as a commercial farm. Farm land would be valuable principally as capital for the production of income and, therefore, would become the object of purchases and sales in a land market. (The market for hacienda lands has long been highly restricted; haciendas are normally inherited, occasionally acquired by marriage, but only infrequently purchased.)

Although there are undoubtedly some undesirable features of absentee ownership that are beyond the reach of meliorative reforms, it is likely that Latin-American reformers would not object to a continuation of indirect exploitation if it were possible to eliminate

80. The plight of the hacienda's workers was described in painful detail in a famous speech by Luis Cabrera to the Chamber of Deputies on December 3, 1912. The speech is widely reprinted: FABILA, *op. cit. supra* note 13, at 224; 1 SILVA HERZOG, *op. cit. supra* note 13, at 267; 2 LA CUESTION DE LA TIERRA 277 (1961).

certain abuses that are tied to the existing forms of tenure. The worst of those evils are: insecurity, both as to the duration of the tenancy and as to the recovery of investments in improvements during the period of tenancy; oppressive contractual ties binding the tenant to the landlord, who profits on the provision of input items, such as seed and fertilizer, and on the marketing of the crop; and lack of access to ownership. It is occasionally argued that, with enough money and trained manpower, a determined government (which itself has security of tenure) might solve all of these problems by regulation rather than expropriation. The hope for such a regulatory program stems from the possibility that it might obviate the need to give up the system of "private technical assistance and credit" that is provided by the present tenancy structure, along with some important marketing channels associated with landlord middlemen, all of which would have to be replaced following a more drastic reform.[81]

In Uruguay, just such a regulatory program seems to have been effective, and wholesale expropriations have been avoided.[82] But, certain facts make Uruguay's situation unique: its population is highly literate, even sophisticated, by Latin-American standards; there is relatively little population pressure on its rural land;[83] and, probably most important, the government is stable, and it is therefore possible to assume that programs that are instituted will be carried out, or at least given a fair try. This combination of conditions is not duplicated in any other Latin-American country, with the possible exception of Costa Rica. Whether the reason be the absence of trained administrators or the reformers' suspicion of measures that they consider to be "half way," most Latin-American land reform laws authorize the expropriation of indirectly exploited lands as well as the regulation of agricultural tenancy arrangements. The legislative language that makes such lands "affectable" (subject to expropriation) ranges from the naming of particular types of tenancy or farm labor arrangements[84] to the broad inclusion of all lands not personally worked, directed, and financed by their

81. O'BYRNE, THE HONDURAN AGRARIAN REFORM LAW 3, 13-14 (AID Rural Development Team Supplemental Report, 1963).

82. Uruguay, Ley de 27 Abril 1954, *Diario Oficial* No. 14224, May 15, 1954, p. 155-A, modified by Ley de 22 Junio 1954, *Diario Oficial* No. 14227, July 19, 1954, p. 95-A (FAO translation).

83. See ABENSOUR, MORAL LOPEZ & JACOBY, LOS ARRENDAMIENTOS RUSTICOS: PRINCIPIOS DE LEGISLACION 58 (FAO Legislative Series No. 58, 1957).

84. *E.g.*, Colombia, art. 55; *cf.* Bolivia, art. 12.

owners.[85] None of the definitions can be called precise, and all of them leave considerable room for discretion in their administration.

A similar breadth of language attends nearly all legislative definitions of the other main aspect of the social function of ownership: the rational cultivation of land. Expropriation is authorized when the land is "idle," or "uncultivated," or "notoriously badly exploited."[86] Almost never does a land reform law specify in greater detail the quality or level of cultivation that will take land out of the expropriable class.[87] The complaint is made that standards that are so vague are not standards at all, resulting in two principal unfortunate consequences: the selection of land for expropriation is left to administrative discretion, with no effective control over the administrator's conformance to legislative purposes, and the absence of standards frightens away new private investment in land.[88]

Given the political history of Latin America, fears of administrative abuse of discretionary power cannot be called groundless. Still, it is not immediately apparent how workable legislative definitions of adequate cultivation could be made more precise. A number of suggestions might be made for lending a greater degree of certainty to the selection of land for expropriation, but not one of them is much of an improvement:

(1) The law might list the principal factors to be considered by the agency charged with the initial determination of affectability. For example:

> "In classifying an area of land as being inadequately farmed, the Institute shall take the following factors into consideration: situation in relation to large urban centers; relief; quality of

85. *E.g.*, Venezuela, arts. 19, 20; Honduras, art. 7(a); *cf.* Peru, arts. 16-19.

86. Colombia, art. 55 ("uncultivated," "inadequately farmed"); Venezuela, art. 19 (failure to maintain "efficient exploitation and profitable use," "to bring usefully into play the productive factors thereof, according to the zone in which it is located and its special characteristics"); Honduras, art. 7 (failure "to operate efficiently"); Costa Rica, art. 120 ("uncultivated"); Peru, art. 14 ("idle or uncultivated"); Chile, art. 15 ("abandoned," or "notoriously badly exploited"). *Cf.* Bolivia, art. 25 ("undeveloped or substantially under-developed").

87. Article 29 of the Honduran law makes a slight concession in this direction, exempting stock-raising land when it is bounded and grazing one head of cattle (or five of sheep, etc.) for each two hectares.

88. O'BYRNE, *op. cit. supra* note 81, at 3-5, 10-11. "The United Fruit Co., a company which has made and is making great contributions to the economy of Louisiana and my home city of New Orleans, has made it clear to the Government of Honduras that it will make no new investment in Honduras should this law pass." 108 CONG. REC. A7959 (1962) (extension of remarks of Hon. Hale Boggs, largely devoted to a reprint of a speech of Mr. Victor C. Folsom of the United Fruit Co.). The fate of the Honduran law in the wake of the October 1963 "anti-Communist" military revolution is not yet apparent.

> the soil; possibility of irrigation and reclamation; possibility of continuous and regular use; type and intensity of farming; capital and labor employed on the farm; commercial value and yield of the property and population density in the rural area where the property is situated."[89]

Such a check-list is useful, but it adds little precision to the expression "inadequately farmed," either for the purpose of limiting the Institute's discretion or to reassure a potential agricultural investor.

(2) Lands might be classified administratively and minimum production levels established for various types of crops according to the classification. Although such a scheme, if coupled with a system of administrative or judicial review of challenged classifications, might provide the necessary minimum of assurance for investors, it would be impossible to administer, at least at the outset of any fundamental reform.[90] Reforming governments have all they can do to make the sort of piecemeal classifications that are required in each case of expropriation resulting from "inadequate" cultivation.[91] Also, a classification scheme that sought to cover any substantial part of a country's private land would not simply be expensive; it might be impossible to make the classification because of a personnel shortage, which is likely to continue well beyond the initial phases of expropriation and distribution of land.

(3) Standards that are phrased in terms of "average" levels of productivity[92] are equally unspecific, unless account is also taken

89. Colombia, art. 56. Honduras, art. 56 is copied from the Columbian provision.

90. The expression "fundamental" is used to distinguish redistributive reforms from reforms such as colonization, tenancy regulation, and the like, which do not involve significant changes in the pattern of distribution of agricultural income. Such a reform, if it is to be carried out at all, had better be done fairly rapidly; if reform talk goes on for a long time, agricultural investment is apt to fall just because of the uncertainty of the owners' position. The latter point is made frequently by Dr. Edmundo Flores, who served with FAO as an adviser to the Bolivian government; his advice was followed. See Flores, *Land Reform in Bolivia: An Informal Discussion*, in THE PROGRESS OF LAND REFORM IN BOLIVIA 4 (Univ. of Wisconsin Land Tenure Center Discussion Paper 2, 1963). A fundamental reform that is rapidly accomplished will make its distributions before an "adequate" administrative staff can be assembled, let alone trained.

91. Nonetheless, many of the reform laws make provision for national cadastres, surveys, and registers. *E.g.*, Honduras, arts. 207-16; Venezuela, arts. 166-71, 198, 203-04. The Venezuelan classification is still far from complete; lands are classified whenever they are the subject of expropriation proceedings, and the classifications are used in determining whether the ownership is fulfilling its social function. For the record in one such case, see INSTITUTO AGRARIO NACIONAL, ALEGACION Y PREUBA DE LA FUNCION SOCIAL (1962) (references to classification in the judge's opinion at 88-89).

92. See Cuba, art. 2 (exemption for sugar plantations producing at least fifty per cent over the national average yield); Chile, art. 15 ("levels below those of normal productivity"); *cf.* the 1960 progressive tax law of the State of São Paulo, Brazil, which exempted "rationally cultivated" land on which the workers were supplied with

of the character of the soil and other factors such as those noted in paragraph (1) of this list. Such standards will also fail to achieve the objective of radically increasing production unless they require production in multiples of the average levels of preceding years; if the hacienda economy has not produced well, it will not do to accept past production levels as models for the future. However, at the same time, there is an obvious unfairness in selecting a previously productive estate for expropriation just because it cannot double or treble its own past successes. These difficulties suggest that a standard based upon average production is workable only when the land in question has been classified and its present production is measured against averages for its class; thus, the administrative difficulties associated with classification still are not avoided.

(4) In Mexico, since the adoption of the Alemán administration's 1947 amendments to the constitution and the Agrarian Code, it has been possible for holders of exempt small properties[93] to obtain from the government certificates of non-affectability, immunizing them from expropriation and entitling them to judicial protection in the event of administrative disregard of their immunity.[94] It has been tentatively suggested that a similar immunity might be given to land that is fulfilling its social function, principally for the purpose of making the land safe for investment.[95] But, while measurements of land area tend to stay the same, the adequacy of cultivation of the land is less constant. And once a system of periodic inspection is added, along with the possibility of revocation of the immunity, much of the reason for a certificate of non-affectability is lost. From the investor's viewpoint, there is little security in an immunity that can be withdrawn if some official makes a new

certain minimum facilities, on which soil conservation measures were taken, etc. The regulations defined "rational cultivation" in terms of above-average production. Decree No. 38,828, art. 18, § 1, April 14, 1961. See note 134 *infra*.

Under the new Peruvian law (arts. 23, 31, 34), a landowner may increase the area which he reserves from expropriation if his exploitation of the land has exceeded by a specified percentage (25% or 30%) the average per-hectare figures in his region or valley in four out of the following five departments: (a) production; (b) capital investment; (c) labor costs, including housing and other "indirect" wage equivalents; (d) taxes paid; and (e) stimulation of agricultural development. The latter element is not specifically defined.

93. Up to one hundred hectares of irrigated land, or correspondingly larger parcels of land that is less favored, may be immunized. Each member of a family may be a small property owner, entitled to a certificate; the result is that there are many large holdings in Mexico that are exempt from affectability.

94. Mexico, Constitution of 1917, art. 27, paras. XIV, XV. See also Reglamento de Inafectabilidad Agrícola y Ganadera, Aug. 14, 1947, *Diario Oficial*, Aug. 16, 1947.

95. O'Byrne, *op. cit. supra* note 81, at 3.

determination that the cultivation of the land fails to meet the statutory standard, which is itself susceptible to more than one interpretation. A minimum term for immunity that would be acceptable to potential investors (for example, five years), however, would probably be regarded as too long by a reforming government.

Although there is not much that can be done to improve upon the rather vague statutory standards of adequate cultivation, it might still be possible to secure an increased measure of certainty, or at least consistency, by providing for review of determinations of affectability, either at a higher level of administration[96] or in court. However, there should be no illusions about the supposed advantages of judicial review. Those advantages all rest upon assumptions concerning the judiciary's independence that simply are not valid in the Latin-American context. Even when an individual judge wishes to be independent, there is an undeniable tendency to rely upon the technical evaluations of the government's agronomists, who are apt to be the only experts consulted in an expropriation proceeding.[97] And, when the legislative standards are so broad, the modest goal of consistency of treatment is difficult even for judges to achieve.

Despite those serious problems, some form of higher-level administrative review of affectability determinations is justified. Administrators who know that their determinations will be examined (if only by other administrators) probably will try harder to follow the statutory standards, even if those standards are less than precise. Furthermore, the reviewing officer or board will construct over a period of time a body of knowledge or experience that is concentrated upon the application of the statutory standards. Officials who make the initial determinations of affectability, however, are prevented from concentrating their attention upon the legal issues in such cases, because in every case of expropriation their responsibility extends to a great number of other functions. Nonetheless, since the cost of administrative review is relatively low, any government undertaking a land reform should not fail to secure whatever degree of concentrated attention and consistency such a review might afford.

Conscientiously applied, the "social function" standard would

96. Radical reformers in Mexico bemoan the fact that the normal expropriation procedure requires the concurrence of both the state governor and the president of the Republic. More review means more opportunity for the exercise of political influence to delay or entirely defeat a distribution.

97. The Venezuelan case referred to in note 91 *supra* is a good illustration of the government's monopoly on expertise.

not reach most North-American land investments. This country's investors have not put their money in the hacienda system, but, instead, have financed commercial agriculture. Typically, plantation products—principally bananas and sugar—are raised for export.[98] These enterprises generally cannot be criticized on grounds of economic inefficiency; they are generally highly efficient, producing a good profit on their investment.[99] Land reform, conceived as the division of large estates into small ones, makes no sense in such a context. A family simply could not efficiently operate its share of a banana plantation. Thus, the inevitable result of such a break-up of plantation holdings would be a severe drop in production; and, since these crops are often the countries' principal sources of foreign exchange, a sudden production decrease might be disastrous for the entire economy.

There are, however, some points at which North American agricultural interests may be influenced by programs labeled "land reform." In the long run, it is probably to the advantage of a country whose economy is dominated by one or two export products to diversify. Just as Venezuela needs to "sow petroleum," using oil money to lay the foundation for a more broadly-based economy, so the Central-American countries may need to lessen their dependence on bananas and coffee.[100] It may be thought wise to change gradually a substantial portion of such a country's agriculture to the production of crops necessary to feed a growing domestic population. In such a situation, the government may add to the content of the "social function" test a requirement of not only intensive or efficient farming, but also of farming the "right" crops. Although expropriation is by no means necessary to achieve this change, it

98. United States agricultural investment in Latin America has recently been concentrated in Central America and the Caribbean. Before the Cuban confiscations, nearly half of such investment was in Cuba, and about forty per cent was in Central America, the Dominican Republic, and Haiti. U.S. DEP'T OF COMMERCE, U.S. INVESTMENTS IN THE LATIN AMERICAN ECONOMY 148-49 (1957). United States investment in Latin-American agriculture declined during the period 1929-1940, no doubt partly as a result of takings of land in the Mexican land reform. Since 1940, the total value of such direct investments has steadily increased; agricultural investment is now dwarfed, however, by North-American investment in petroleum, mining, and manufacturing. *Id.* at 111; *cf.* INTER-AMERICAN ECONOMIC AND SOCIAL COUNCIL (OAS), FOREIGN INVESTMENTS IN LATIN AMERICA (1955).

99. Concerning profits, see U.S. DEP'T OF COMMERCE, *op. cit. supra* note 98, at 111, 121. Even severe critics admit the economic efficiency of the foreign-owned plantations. See FLORES, TRATADO DE ECONOMIA AGRICOLA 279-99 (1961).

100. In the short run, a decision to make a sudden conversion to a diversified agriculture may be most unwise, as recent Cuban experience suggests.

may be used as a threat, an ultimate sanction to be applied in the event of noncompliance with the national food policy.

Beyond that long-range concern about the plantation economy, there is the obvious and immediate concern for fair labor relations. Agricultural companies from North America employ workers in significant numbers.[101] Whether or not it is wise policy, it surely is not unconscionable to include in the definition of "social function" a standard of substantial compliance with laws protecting agricultural labor.[102] A change in land tenure structures is made, not for its own sake, but rather for the purpose of changing relations among men. Therefore, if the hacienda system may legitimately be abolished for the purpose of redistributing agricultural income, it cannot be less legitimate to use expropriation as a threat to force a redistribution in the form of better wages and working conditions in the plantation setting. Objection to this by some United States investors in Latin-American agriculture is surprising, considering the liberality of their labor policies as those policies are described in the "authorized" company biographies.[103]

Land reform thus appears not to be a serious threat to the continuation of United States agricultural investment in Latin America so long as the "social function" test is the real test for affectability of land.[104] But, with regard to such investment, it is likely that the reforming countries will adopt measures short of expropriation. Just as Venezuela has taxed, rather than expropriated, North American oil investments, investors in agriculture can expect tougher bargaining over taxes, concessions, prices, labor costs, and the like. This kind of tightening is not fairly equated with confiscatory takings on the Cuban model, and the tone of the complaints of investors threatened by higher taxes and harder bargaining is more than a little reminiscent of the rumblings about Bolshevism that accompanied the domestic business regulation of the 1930's.[105]

101. North American agricultural interests employ about the same number of persons in Latin America as do North American manufacturing companies, although direct investment in manufacturing is about two and one-half times greater in dollar amount. See U.S. DEP'T OF COMMERCE, *op. cit. supra* note 98, at 111, 122.

102. The term "unconscionable" is used in this connection in O'BYRNE, *op. cit. supra* note 81, at 11.

103. See, *e.g.*, MAY & PLAZA, THE UNITED FRUIT COMPANY IN LATIN AMERICA 200-09, 243-43 (7th case study on United States Business Performance Abroad, National Planning Association, 1958).

104. In Cuba, of course, the real tests for affectability were political, and virtually all United States interests were confiscated. See note 143 *infra*.

105. See Folsom, *The Outlook for the Alliance for Progress—1964*, 8 A.B.A. SECTION OF INT'L AND COMP. L. BULL. 21 (1964).

### B. *The Argument for Selective Confiscation*

The "social function" test, while aimed at eliminating the hacienda system,[106] is not in itself confiscatory; it is used to make the selection of land for expropriation, and the question of compensation is arguably separable. But, given the compensation formulas that have been adopted into the same reform legislation, almost all expropriation for land reform purposes is at least partially confiscatory.[107] Thus, in its effect, the test used for selecting land to be expropriated is really a test for confiscation, and its legitimacy must be considered with that result in mind.

One doctrinal support for the principle that rural land must fulfill a social function is the notion that the state holds the underlying title to all land. This eminent domain theory was adopted in the Mexican Constitution:

> "Ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property."[108]

The idea is not that the state has all of the rights of ownership in all of the land, but rather that the recognition of private rights in land came originally from the state and properly depends for its continuance upon the satisfaction of community needs.[109] Whether or not similar language is enacted into law, this original right theory, or something akin to it, has had influence in a number of Latin American countries.[110]

In several land reform laws, there are provisions for the "reversion" of uncultivated lands to the state.[111] One arguable justification might be that the state has granted private rights in land subject to the condition that the land be cultivated; if the condition is broken, the ownership reverts. However, there are difficulties with

106. See Honduras, art. 1; Venezuela, preamble; *cf.* Betancourt, *La Reforma Agraria,* in POSICION Y DOCTRINA 121 (1959).

107. See sections II and III *supra.*

108. These are the first words of article 27.

109. Two exceptionally good analyses, emphasizing that property rules are rules for relations among men, are M. R. Cohen, *Property and Sovereignty,* 13 CORNELL L.Q. 8 (1927), and F. S. Cohen, *Dialogue on Private Property,* 9 RUTGERS L. REV. 357 (1954).

110. The long colonial period, during which the Spanish crown consistently asserted such rights, is surely partly responsible for much of the theory's continued authority.

111. *E.g.,* Bolivia, art. 67; Colombia, ch. VII. The Colombian provision dates from a 1936 law, which—depending upon one's point of view—was or was not effective to improve the position of the rural poor and to decrease rural violence. For a relatively favorable description of the law's effects, see HIRSCHMAN, *op. cit. supra* note 40, at 107-13.

such reasoning: much of the vacant and uncultivated land in question has been in private hands for generations, while the state's interest is only now asserted; furthermore, the original grants normally did not contain express conditions requiring cultivation, except in the case of grants of land in colonization programs similar to those established by the homestead laws in the United States.

A more realistic explanation of the recent uncompensated takings of uncultivated land is that there has been a frank acceptance of governmental responsibility for implementing the social function theory. The Bolivian land reform law of 1953, after declaring that all land belongs to the nation by "original right," says: "The State shall recognize and guarantee private agrarian property where it serves a purpose benefiting the national community."[112] An easily-derived corollary is that the state may properly impose sanctions on uses of land that it considers anti-social. Those sanctions may stop short of expropriation, as in the case of schemes of progressive taxation.[113] But a more extreme economic sanction is the confiscation of those property rights that are abused.

North American lawyers, before they register shock, should consider such features of our own law as the uncompensated condemnation of decaying slums,[114] the uncompensated withdrawal of public utility franchises for failure to serve the public convenience and necessity,[115] and even the uncompensated abolition of slavery.[116] It is not a sufficient distinction to say that a franchise is not

112. Bolivia, art. 2.

113. See text at note 135 *infra*.

114. The "public nuisance" theory and its limitations are outlined in Annot., 14 A.L.R.2d 73 (1950).

115. It has to be conceded that the instances of such withdrawals are rare. The relevant cases tend to approve the principle that franchises may be terminated "for cause" (*e.g.*, inadequacy of service or abandonment of the franchise), but most frequently deny the existence of the asserted cause. See cases cited in PUR DIGEST and PUR DIGEST (N.S.) (1963) at *Franchises*, §§ 8, 54, 55, and at *Public Utilities*, § 3. Although the Civil Aeronautics Board has the power to suspend a carrier's service, "there has not been a substitution of one trunk carrier by another after a finding of inadequate service." STAFF OF SENATE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 87TH CONG., 1ST SESS., NATIONAL TRANSPORTATION POLICY 707 (Comm. Print 1961).

116. Before and during the Civil War, a great many proposals were made for gradual or compensated emancipation. For a variety of such schemes, see CHILD, AMERICANS CALLED AFRICANS 102 (1833); COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY clxxi-clxxii (1858); COLEMAN, VIRGINIA SILHOUETTES, app., 54-56 (1934); HALL, THE TWO-FOLD SLAVERY OF THE UNITED STATES (1854); OWEN, THE WRONG OF SLAVERY, THE RIGHT OF EMANCIPATION 150-55 (1864). Lincoln's own early preference was for a solution that was not confiscatory, and compensation was to be paid to slaveowners in the District of Columbia. 12 STAT. 376, 538 (1862). See SELBY, ABRAHAM LINCOLN: THE EVOLUTION OF HIS EMANCIPATION POLICY (1909); WILSON, HISTORY OF ANTISLAVERY MEASURES OF THE THIRTY-SEVENTH AND THIRTY-EIGHTH UNITED-STATES CONGRESSES: 1861-

"property" or that one cannot own another man. Conclusory statements of that sort only hinder the analysis of reasons for taking some kinds of interests without compensation while requiring compensation for other takings. Instead, the arguments in justification of confiscation must be tested by reference to considerations that are legislative in nature—"considerations of what is expedient for the community concerned."[117] It is important to remember that the principal "community concerned" is not our own highly developed, broadly educated, and well fed community, but a cluster of communities ranging from underdeveloped to undeveloped, from semiliterate to illiterate, and from underfed to starving.[118] In such contexts, it is surprising that traditional, Western, legal-constitutional protections of property have survived so long.

We must begin with the goals of the men who create land reforms.[119] Their basic political motive—to get and keep power—cannot be denied. The political allure of confiscation as the basis for a share-the-wealth program has not been ignored by Latin-American politicians. In Mexico, confiscatory land reform was a huge political success: it stopped the fighting, and it secured the

65, at 79-91 (1865). The confiscation of property other than slaves was popular on both sides, and followed a pattern set by similar legislation in the colonies during the Revolutionary War. See VAN TYNE, THE LOYALISTS IN THE AMERICAN REVOLUTION 275-81, 335-41 (1902). After the Civil War, a presidential amnesty restored much of the land confiscated in the South. Before that time, proposals had been made for dividing the confiscated land among the freed slaves, in the fashion of what we should now call a land reform. See WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 469-78 (43d ed. 1871).

These measures have found their parallel in twentieth-century Latin America, both in Zapata's proposal to confiscate the land of opponents of the revolution and in the Cuban government's confiscation of property held by Batista adherents and by United States interests. These confiscations produced so much land for the Cuban land reform that in the first two years of the reform only twenty-five per cent of the area of land marshalled for the reform came from the enforcement of the "basic" land reform law. See Chonchol, *Análisis Crítico de la Reforma Agraria Cubana,* 30 EL TRIMESTRE ECONOMICO 69, 97 (1963).

117. HOLMES, THE COMMON LAW 35 (1881).

118. This description does not really fit Argentina, Uruguay, some of southern Brazil, or important parts of Chile. Its accuracy, even for some of the relatively advanced countries of Latin America, is supported by a few representative figures. Literacy rates (around 1950): Brazil, 49%; Mexico, 57%; Peru, 47%; Bolivia, 32%; Haiti, 11%. Number of persons per doctor: Argentina, 800; Brazil, 2,500; Guatemala, 6,400; Haiti, 28,000. The figures are taken from Cabezas de González, *Diagnóstico Económico-Social de America Latina,* in VISION CRISTIANA DE LA REVOLUCION EN AMERICA LATINA at 53, 63 (1962) (special issue of MENSAJE, a Jesuit magazine of Santiago); *cf.* SZULC, THE WINDS OF REVOLUTION, ch. 2 (1963); Schaefer, *Nutrition and the Population Explosion in Latin America,* in EXPLOSIVE FORCES IN LATIN AMERICA 127 (TePaske & Fisher ed. 1964).

119. See Barraclough, *supra* note 3.

loyalty of the rural population to the government.[120] Our inquiry, however, is not into the popularity of confiscation, but instead into justifications that may bear upon its legitimacy. Although the two questions surely are not wholly separate, narrowly political arguments are often assumed to lack the moral force that our traditions assign to other rationalizations for legislative decisions. Consequently, we must turn to social and economic justifications that may have a validity independent of "politics."

In the long run, land reformers seek to effect a greater equality among men. Giving rights in land to the *campesinos* is instrumental to feeding and housing them better, replacing their old attitudes of servility with a new sense of community responsibility, giving them a voice in the management of their lives, and giving them an incentive to educate their children. Other aims of land reformers are to break the restrictions on economic activity that are implicit in a hacienda society and to promote the development of the economy, partly through increased agricultural production (with some corresponding increase in the rural sector's demand for other products) and partly through an improvement in the level of investment.

Those goals are obviously laudable. However, it is less obvious that confiscation is a necessary step in their achievement. Here the analysis must be tentative, for the evidence presently available permits little in the way of definite conclusions and even less in the way of generalization. In the following discussion, statements are made positively in order to avoid the exasperations induced by continual hedging. The statements, however, should be taken as examples of arguments in justification of confiscatory land reform, and not as assertions of tested truth.

The only large-scale land reforms that have taken place in Latin

120. The last armed revolt in Mexico is now thirty-five years in the past. See HERRING, A HISTORY OF LATIN AMERICA 372 (2d ed. 1961). There are new population pressures on the land, only partially relieved by the *bracero* program of temporary jobs for Mexican migrant workers in the United States. One result has been a new series of *campesino* invasions. See the open letter to the President of the Republic from the Regional Livestock Association of the State of Chihuahua in Excelsior, Mexico City, June 2, 1963, p. 17-A; *cf.* Carroll, *The Land Reform Issue in Latin America*, in LATIN AMERICAN ISSUES: ESSAYS AND COMMENTS 117-20 (Hirschman ed. 1961); 15 HISPANIC AMERICAN REPORT 789-91 (1962). Another symptom of unrest is the recent formation of an independent—*i.e.*, not tied to the official party—*campesino* organization, the Central Campesino Independiente, under the nominal leadership of General Cárdenas, who still symbolizes the vigorous agrarianism of the 1930's as well as an anti-*yanqui* position which is probably more extreme than the General's own views. In any case, the *total* agricultural production in Mexico has been growing (1952-1959) at the remarkable rate of 7.1% per year, far outstripping growth rates in countries that have superior land resources, such as Argentina and Chile.

America—those of Mexico, Bolivia, Venezuela, and Cuba—have achieved real progress in the highly intangible area of social attitudes. The beneficiaries of the land reforms now regard themselves as men, as citizens. They are building schools with their own labor, electing their community leaders, and managing their affairs—all in striking contrast to the attitudes and activities of the pre-reform era.[121] Where the rural populations include strong indigenous elements, steps toward social equality are also steps toward racial equality.

It is the *distribution* of rights in land, rather than the manner of acquisition of the land, that apparently has produced these social benefits. It is, therefore, necessary to defend confiscation by arguing that distribution would not have been possible if compensation of the landowners had been required, for, given the severe limitations on the government's resources that inevitably accompany underdevelopment,[122] the only promising source of funds for compensating the expropriated owners is the distributed land itself. The government might exact payments from the beneficiaries of the distribution; it might levy a tax on the land's future production; or, it might control farm prices in such a way as to effect an indirect tax. The obvious problem created by any such decision is that land values—whether or not calculated by capitalizing earnings—are likely to be high enough that their recapture, through taxes or other periodic payments by the beneficiaries, would consume a high proportion of the income the land produces. Accordingly, although the beneficiary would be an "owner," his net income would approximate day wages. And, to the extent that land values might be juggled downward for the benefit of beneficiaries who may have to pay for the land, the owners' property would be confiscated. Thus, it is readily seen that in a land reform the goals of compensation and increased *economic* equality are, to a significant degree, inconsistent.

121. See Patch, *Bolivia: U.S. Assistance in a Revolutionary Setting*, in ADAMS, ET AL. SOCIAL CHANGE IN LATIN AMERICA TODAY 108, 137-51 (1960); FLORES, LAND REFORM AND THE ALLIANCE FOR PROGRESS 7 (1963). My own observations, particularly in Venezuela, but also in Mexico, lend support to these authors' comments.

122. The one exception is Venezuela; but, even there, the competition for government revenues is keen, and it is not surprising that roads, schools, and housing tend to be preferred over compensation for the expropriated owners. In the Venezuelan reform, for example, only about one-third of the total cost of the land reform in its early years went to compensate landowners. The comparable ratio in the postwar Italian land reform was only twelve per cent, the rest of the cost going to land development, farm credit, and other investments aimed at consolidating the reform. CARROLL, REFLECTIONS ON INCOME DISTRIBUTION AND AGRICULTURAL INVESTMENT 2 (English mimeo ed. 1964) (Spanish version in 1 TEMAS DEL BID 19 (1964)).

In Mexico, increased economic equality did not result, even though the distribution of land was confiscatory. The beneficiaries did not have to pay for their land directly, but, through market controls, the whole agricultural sector of the economy was forced to contribute capital for the development of other sectors.[123] Yet the land reform did produce the social advantages enumerated.[124] Therefore, the implication is that there is no necessary connection between the achievement of greater economic equality and the achievement of greater social equality; still, it seems doubtful that the social benefits would have resulted if the *campesinos* had not expected more than they ultimately received in the way of economic benefits from the Revolution.

The question remains whether any land distribution of sufficient scale to produce important social gains can be carried out if compensation is paid. The probationary answer, based mainly upon what we know about the Mexican reform, is affirmative, but a gloomy qualification that dispels hope for nonconfiscatory solutions must be added. The qualification is that a reforming government seemingly cannot have land distribution, compensation, *and* rapid industrial growth at the expense of the agricultural sector. If the beneficiaries of the land reform are to be bled in order to promote non-agricultural development, they cannot, at the same time, finance the purchase of the land that has been distributed to them. The social and economic cases for confiscation thus blend together, and it is to the more strictly economic arguments that we now must turn.

Economists can construct models for underdeveloped economies that show clear gains to be realized from confiscation of property in order to divert its income from consumption to investment in a forced-draft expansion;[125] it behooves laymen not to try to challenge the validity of such demonstrations. However, the historical record

123. It is generally assumed that the extractive sectors—agriculture, forestry, mining, etc.—must provide an important part of the initial accumulation of capital for a developing country's "take-off." See ROSTOW, THE STAGES OF ECONOMIC GROWTH 21-24 (1960).

124. One writer comments that it is still true that blue-eyed blondes have the advantage in the social pages of Mexico City newspapers, but that for political success there is nothing like dark skin. FLORES, REFORMA AGRARIA EN MEXICO 460 (Univ. of Chile mimeo, 1962).

125. *E.g.*, Bronfenbrenner, *The Appeal of Confiscation in Economic Development*, 3 ECONOMIC DEVELOPMENT AND CULTURAL CHANGE 201 (1955) (emphasis given to Soviet and Chinese experience). *Cf.* Garnick, *"The Appeal of Confiscation" Reconsidered: A Gaming Approach to Foreign Economic Policy*, 11 ECONOMIC DEVELOPMENT AND CULTURAL CHANGE 353 (1963), and Bronfenbrenner, *Second Thoughts on Confiscation*, 11 *id.* at 367.

in Latin America remains cloudy, whatever may be the case in Eastern Europe. It is true that Mexico has experienced a more rapid development than have other Latin-American countries, and, arguably, its largely confiscatory land reform was an important cause of the growth. The argument runs as follows:[126] Land reform brought an end to the Mexican caste system, giving rural workers new possibilities for improvement of their position and new incentive for efforts in that direction. In a horizontal sense, the land reform also contributed to an increased mobility; farm workers were able to leave the countryside in order to seek city employment.[127] The expropriated landowners did not lose all their property; instead, for the most part, they retained their investments in urban land. With the growth of the cities, this land rapidly increased in value, so that much of the former landed class provided a nucleus of capital for the new industrialization. Roads and irrigation projects took on urgent importance. A major share of the government's meager resources was devoted to these ends and could not be used to compensate expropriated landowners. The construction industry faced an unprecedented demand, not only for the items of social overhead capital, but also for urban housing. Subsidiary industries developed. Also, the abandonment of the hacienda system required its replacement by a market economy in agriculture. Through these changes enough internal capital was formed to sustain the nation's growth without substantial foreign investment, which was frightened away and did not return until World War II.

The economic growth argument finally comes to this: The hacienda society is static, uninterested in investment. A redistribution of land requires a reorientation of the economy toward "modern" goals—*e.g.*, profit and full employment—which, in turn, forces new investment. With Keynes, the reformers argue that an increase in consumption (and thus demand for products) is a function of *increases* in investment. The conclusion is that the Mexican ex-

126. This sanguine picture of the Mexican reform is taken mainly from the writings of Dr. Edmundo Flores, whose works are cited frequently in these notes. It is reaffirmed by Glade, *Revolution and Economic Development*, in GLADE & ANDERSON, THE POLITICAL ECONOMY OF MEXICO 3, 52-71 (1963); *cf.* VERNON, THE DILEMMA OF MEXICO'S DEVELOPMENT 78-86 (1963); Hirschman, *Ideologies of Economic Development in Latin America*, in LATIN AMERICAN ISSUES: ESSAYS AND COMMENTS 3, 29-35 (Hirschman ed. 1961). A more general analysis, emphasizing the importance of land distribution in encouraging low-level development decisions, is in Raup, *The Contribution of Land Reforms to Agricultural Development*, 12 ECONOMIC DEVELOPMENT AND CULTURAL CHANGE 1 (1963).

127. Country-to-city migration may also be explained on the basis of the repulsions of rural life. See INTERNATIONAL LABOUR ORGANIZATION, WHY LABOR LEAVES THE LAND (Studies and Reports, n.s., 1960).

perience tends to validate Keynes' thesis that the magnitude of a nation's income is a function of the equality of its distribution.[128]

Those who urge the foregoing analysis cannot claim that the rural population has shared evenly in Mexico's economic growth. The opposite seems to be true; if any class may be said to have financed the development process in Mexico, the *campesino* class seems a likely candidate.[129] Nor can it be claimed that the lands distributed in the reform have been substantially more productive than they might have been in the absence of a confiscatory distribution.[130] The agriculture that feeds the non-farm population is the technically advanced, large-scale agriculture located in areas that have never been heavily populated and that were, in great measure, outside the area of cultivation at the time of the early distributions of land.[131] It is arguable, however, that these lands have been opened up to production because of the aid of the road-building and irrigation projects that the reform brought and that might not have resulted in the absence of a reform. An even more persuasive argument is that these lands might never have been freed for commercial agriculture if there had not been a breakup of the haciendas. Finally, it is questionable that new foreign capital, particularly new capital from the United States, was wholly barred or withheld from the Mexican economy during the stated period. There are those who say that new North American investment continued in very large quantities during the Cárdenas era through the use of front-men who were Mexican, despite local "Mexicanization" requirements and despite the threat of confiscation.[132]

128. See FLORES, TRATADO DE ECONOMIA AGRICOLA 89-94 (1961).

129. This is not to say that the reform has failed to benefit the *campesinos*. The fall in infant mortality in the Mexican countryside surely reflects the basic fact that the *campesinos* began to eat better immediately after the distribution. They had an understandable tendency to regard cattle as food rather than as a capital item, with the result that herds were decimated at the outset of the reform. See FLORES, *op. cit. supra* note 124, at 455-56.

130. Dr. Flores notes that much land is being used more intensively because of rapid urbanization: industrial uses, dairy farms near cities, and truck farms have all increased in number. Those uses, however, are at best indirect results of the land distribution.

131. "Productivity, the basic factor in real income, has risen for the private sector of the Laguna economy but, on average, has fallen for the *ejidal* sector [comprised of land distributed in the reform]." SENIOR, LAND REFORM AND DEMOCRACY 189 (1958). The same author goes on to explain the difference and to warn "against any generalization that the cooperative ejido is *inherently* less productive than the private farm." *Id.* at 193. (Emphasis added.) Other students of Mexican agriculture, however, are willing to make this generalization, at least with respect to *historical* production levels. Interview with Dr. Donald Freebairn, Rockefeller Foundation, in Mexico City, March 27, 1963. Out of some five million-plus units of agricultural exploitation in Mexico, around four million are estimated to be subsistence farms. Interview with Ing. Arnaldo Lerma Anaya, in Mexico City, April 16, 1963.

132. Such an assertion is hard to verify, because it rests on assumptions about con-

The trouble with this sort of evaluation is that there is no "control" nation that sufficiently resembles an unreformed Mexico to permit an unqualified assertion that the Mexican reform has or has not played an indispensable role in the country's growth. In the face of this appeal to history, however, it is proper to consider some of the alternatives that have been advanced as measures with which to achieve some of the benefits of a confiscatory land reform, without some of its disadvantages.

Two such alternatives can be dismissed as illusory: mechanization and colonization. Speaking generally, the introduction of machinery does not create substantially greater per-acre productivity; it *can* radically improve productivity per worker, but the chief result is the displacement of labor to the urban unemployed class, not a more intensive cultivation.[133] Machines are costly, particularly when there is a large and often-idle rural population available to do the same work. Moreover, the use of machinery does not improve the wages or the living conditions of rural labor. Colonization, on the other hand, can increase production by putting new land to use. Further, the living conditions of the beneficiaries of colonization are undeniably improved. But the trouble with colonization is its staggering cost.[134] No doubt, effective (though costly) colonization projects are possible in some areas, such as the lowlands of Bolivia, where fertile lands are underpopulated; nonetheless, to suggest colonization as a substitute for the distribution of land is unrealistic in the extreme.

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cealment. Even if it is true, it does not necessarily justify an anti-reform conclusion, for it amounts to an assertion that, to an important extent, foreign capital was not frightened away by the reform. See VERNON, *op. cit. supra* note 126, at 22.

133. One early (1939) study in Mexico indicated only a slight advantage for mechanized farms in per-hectare production, and a substantial advantage per man-day. Quoted in SENIOR, *op. cit. supra* note 131, at 174. The presence of machinery may indicate a more businesslike attitude on the part of the individual farmer; that does not suggest that mechanization is a general solution to the problem of low production. The introduction of some kinds of machinery, *e.g.*, water pumps in arid areas, may put new land to work and cause an increase in the need for labor. See FLORES, TRATADO DE ECONOMIA AGRICOLA 216 (1961). For the view that small farms, using little machinery but intensive labor, can be highly efficient, see SCHULTZ, *op. cit. supra* note 79, at 122-24.

134. Officials of the Inter-American Development Bank have privately estimated the cost of some colonization projects supported by the Bank at levels which reach twenty thousand dollars to fifty thousand dollars per family settled. Colonization on public land avoids some costs, such as those of acquiring privately owned land; but it more than makes up for that saving in its demands for social overhead capital items such as roads, sanitation facilities, and electric power installations, not to mention housing, schools, or even irrigation projects. See Bernal, *Land Tenure Problems of Colombia*, in LAND TENURE 289 (Parsons, Penn & Raup ed. 1956); *cf.* FLORES, LAND REFORM AND THE ALLIANCE FOR PROGRESS 8-9 (1963).

Certain other alternatives that have been suggested are more plausible. They fall into two broad categories, taxation and labor-tenancy regulation. Even these two may blend together, as in the State of São Paulo's (Brazil) abortive land reform law, which imposed a progressive property tax (according to size of holdings) on rural land but excepted from the tax's application landowners who complied with detailed regulations of living and working conditions for their labor force.[135] Viewed abstractly, progressive-rate taxation can be just as effective as a land reform in producing a redistribution of income. The fact is, however, that income redistribution through levelling forms of taxation has historically taken place only in highly developed countries. In the underdeveloped world, such a proposal is apt not to be taken seriously, principally because no tax system is any better than its machinery for administration and enforcement. Not only is there a long tradition of tax evasion and official corruption in these countries, but there is also the usual shortage of trained personnel to man the administration that an effective tax system demands. Furthermore, taxation is a year-to-year proposition. While today's administration may be sympathetic to the goals of a tax reform, tomorrow's may take a more relaxed attitude toward enforcement; it is more difficult to undo a redistribution of land.

Regulations aimed at improving the security, income, and living conditions of rural tenants or agricultural laborers are equally suspect in the eyes of reformers who favor more radical solutions, at least partly for similar reasons.[136] The labor legislation of many countries of Latin America is sufficiently advanced that it might serve as a model for more developed countries, but its enforcement often seems to depend upon the presence of a strong union or some special political motivation such as an approaching election. Any continuing obligation requires supervision, and, at present, there are not even enough administrators to run such existing government programs as the tax and agricultural extension systems.[137]

Ultimately, all these alternative solutions are rejected by some

135. Law No. 5,994, Dec. 30, 1961. Opponents of this legislation sabotaged it by an impressive political end run; they persuaded the National Congress to transfer the functions of assessment and collection of property taxes from the states to municipalities, which were more amenable to suggestion from the landowners. For a rosier view of tax reform in Latin America, see Martin, *Future of the Alliance for Progress*, 47 DEP'T STATE BULL. 951, 955 (1962); *cf.* Kaldor, *Will Underdeveloped Countries Learn To Tax?*, 41 FOREIGN AFFAIRS 410 (1963).

136. See text accompanying note 81 *supra*.

137. Uruguay and Argentina are exceptions, but they do not belong in the same class of underdevelopment as the rest of the region. See text accompanying note 82 *supra*.

radical reformers precisely because they are not sufficiently revolutionary and do not imply destruction of the power of the landed class any more than they imply any substantial redistribution of income. Those who support a more fundamental kind of land reform argue that genuine changes in the pattern of income distribution are not possible so long as political and economic power remain in the hands of those who would be called upon to give up some of what they have.[138] Thus, confiscation serves an additional political purpose which may be instrumental in achieving the social and economic goals of a reform. It is this attitude on the part of fundamental reformers which no doubt causes less radical alternatives to be proposed by those who stand to lose the most if the radicals have their way.

So much for the arguments for confiscation. They are presented here in their most favorable light, not for purposes of advocacy, but rather that they might be seen for what they are: rather traditional appeals to traditional values. It should be obvious, however, that the arguments lose much of their force when all moderate-sized to large rural holdings are confiscated indiscriminately, whether or not their ownership has produced the evils that make reform necessary. The legislative principle of the social function of ownership comes in here—or, more accurately, ought to come in here.

Consider first the issue of capital formation. Confiscation does not, by itself, form capital. Indeed, the short-range effect of a uniformly confiscatory policy is surely the discouragement of private investment, both domestic and foreign. But confiscation does give control to the government over income produced by the confiscated capital, which income can then be invested. A consistent policy limiting confiscation to rural land, the ownership of which was failing to fulfill its social function, would discourage primarily that private investment which exploits land in a manner that ought to be discouraged. However, if the government should be concerned about preventing capital flight or compelling investment of the income derived from land that is producing effectively, there are legislative ways other than confiscation to achieve the desired ends, such as controls over the exportation of capital or tax incentives for local invest-

138. FLORES, *op. cit. supra* note 134, at 12, arguing that the action of the United States in entrusting a social revolution to "the safe conservative element," *i.e.*, the various Latin-American governments, "is the same as if Abraham Lincoln had expected the Southern slave owners to expropriate themselves." Still, the alternatives to working with the existing Latin-American governments are not immediately apparent. *Cf.* KAUTSKY, POLITICAL CHANGE IN UNDERDEVELOPED COUNTRIES: NATIONALISM AND COMMUNISM 47 (1962) (Intellectuals "press for land reform not because of anything it will do *for* the peasants, but because of what it will do *to* the aristocracy").

ment.[139] It seems unwise to take land solely for the purpose of controlling the investment of its income when the land is already cultivated intensively by a well-paid and secure labor force. Although the threat of expropriation may be useful to a government that wishes to encourage local investment, for this purpose expropriation ought to be a last resort.

It was stated earlier that intensive farming, using labor that is paid a living wage in cash, is inconsistent with the most basic features of the hacienda.[140] In the present context, it may be remarked that this kind of large-scale commercial farming does not result in the evils that justify a land reform: the labor force is mobile in a horizontal sense, for its principal economic tie to the land is a cash wage, and, when better wages are offered elsewhere, an economically rational choice may be made; vertical mobility depends less upon land ownership than upon such things as the erosion of social caste boundaries, the education of the rural population, and the ability of the *campesino* to comprehend that there is a way up. When ownership performs the labor-relations portion of its social function, there is no need for a distribution of land title to be the *first* rung on the "agricultural ladder."[141]

Apart from the support offered by the theory of restitution, much of the legitimacy of confiscation depends upon faithful adherence to the principles that go by the name of "the social function of ownership." Tested against that standard, and leaving Mexico aside, the only recent land reform in Latin America that can be given high marks is that of Venezuela. No doubt it will be said that Venezuela is a special case because of the government's revenue from petroleum. True enough, Venezuela can better afford to pay compensation than can either Bolivia or Cuba. But the foregoing analysis does not assume even a relatively wealthy government. The point is, when ownership has been fulfilling its social function, there is normally no need to expropriate at all, in a confiscatory manner or otherwise.[142]

139. See Ross & Christensen, Tax Incentives for Industry in Mexico (1959). The administrative problems implicit in a program to prevent capital flight are similar to those suggested for other programs of regulation or taxation; see text at note 135 *supra*. Enforcement of anti-capital-flight legislation would perhaps be somewhat easier, because fewer individuals would require supervision.

140. See text at note 79 *supra*.

141. This is "the time honored scale of tenure rights ranging from the landless laborer through tenancy to indebted owner and unencumbered ownership." Parsons, *Land Reform and Agricultural Development*, in Land Tenure 3, 13 (Parsons, Penn & Raup ed. 1956).

142. However, even the Venezuelan law (in art. 33) provides for the expropriation of land, the ownership of which is fulfilling its social function, "when it becomes necessary to organize land in a given place, and when the existence thereat of one or

Ownership of that kind is making an effective contribution to the nation's development and is not likely to be improved upon by the newly distributed ownership interests created during a land reform. Any minimal gains realized from the confiscation of these lands will be more than offset by the temporary dislocations of the reform process and by the harder to calculate, but probably more lasting, effects upon private investor psychology.

Fundamental land reforms have, in the past, proceeded from revolutionary governments. It is not easy for such a government to heed counsels of moderation, especially when they come from the outside, even from investor nations. The degree to which a revolutionary government can limit its confiscations to interests that "deserve" to be confiscated will depend upon the measure of its control over the forces that have made the revolution. This is not a question of legitimacy but of power.[143] The conclusions reached here with regard to the legitimacy of various confiscatory practices are, however, based upon justifications as they might appear to an expropriating government; they are not based upon international standards, which may be suspect in the eyes of reformers since they have been established by capital-exporting nations.[144]

more properties forms a technical or economic obstacle to proper execution of the scheme . . . ." In such a case, the most desirable bonds (class "C": 10-year terms, with interest at the market rate) are given, and cash payment is made for all improvements, livestock, and mortgages incurred for development purposes. An owner in Venezuela thus has a motive for arguing that his ownership has fulfilled its social function; and, even though he may not expect to prevent expropriation, he may convince the court that he deserves this less confiscatory form of compensation. See the record cited in note 91 *supra*. A similar provision is contained in Honduras, art. 42, copied in part from the Venezuelan law.

143. This article might have contained another section, dealing with confiscation as a form of punishment. Confiscation on this basis, urged by Zapata against opponents of the Revolution, see note 20 *supra*, has been used widely only by the government of Cuba, although other countries have also enacted "malversation" laws aimed at recovering the ill-gotten gains of ousted dictators and their friends. See Pérez Jiménez v. Aristeguieta, 311 F.2d 547, 562-63 (5th Cir. 1962), *cert. denied*, 373 U.S. 914, *petition for rehearing denied*, 374 U.S. 858 (1963), discussing the charges of malversation against the former Venezuelan dictator in an extradition proceeding. Concerning confiscation as a political weapon, see CUBA AND THE RULE OF LAW 110-11, 123-25, 241-45 (Int'l Comm'n of Jurists, 1962). Because theories of war indemnity and punishment are apt to become identified with the need to reduce the power base of the political opposition, such theories may be irresistibly attractive to a revolutionary government. The informal execution of punitive confiscations in Cuba lends little support for the legitimacy of the theory.

144. For a modern effort to formulate standards that are appropriate for developing nations' expropriations in connection with social reform, see COMM. ON INT'L TRADE AND INVESTMENT (A.B.A.), THE PROTECTION OF PRIVATE PROPERTY INVESTED ABROAD (1963); Dawson & Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation?*, 30 FORDHAM L. REV. 727 (1962); Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 553 (1961); *cf.* Domke, *Foreign Nationalizations*, 55 AM. J. INT'L L. 585 (1961). The tradi-

## V. The Utility of Rationalizations

One way or another, every land reform in Latin America has been confiscatory.[145] Granting that, why do grown men engage in elaborate let's-pretend games in order to avoid the charge of confiscation?

A predictable reply is that the reforming governments are afraid to irritate the governments and private investing interests of investor countries such as the United States. But, although it is undoubtedly true that international respectability is important even to revolutionary governments, this explanation is misleadingly over-simple. North American interests that are affected by a land reform are not so unsophisticated that they will fail to notice the extent to which their property is confiscated; nor are they likely to fail to call the attention of the United States Government to their plight. The word will quickly pass among private investors and international lending agencies, who will certainly look beyond self-serving descriptions by the reforming governments to the effects of their reforms. Yet it would be wrong to dismiss the various rationalizations for confiscation as unimportant to development. Although the connections may be more easily felt than articulated, an attempt to identify them is worth a try.

Whatever the degree of state control over the economy, development depends upon a great many decisions, the making of which is often necessarily decentralized. Planning at any level, public or private, is likely to be successful in fairly direct proportion to the predictability of the future. Decisions that promote development, particularly decisions to save or invest, are easier to make in a climate of relative stability and security, and those terms imply predictions about the future. Like all expressions of probabilty, assertions about security are estimates based upon incomplete knowledge and, therefore, are not helpful unless they are explicitly identified with the standpoint of some observer. For the purposes of the present analysis a variety of observers must be considered, not all of whom share the same perspective. The expropriated owner of a hacienda will not be deceived into thinking that compensation in long-term agrarian bonds, at a valuation based upon the hacienda's history of low production, is the same as immediate payment in cash for the land's

tional international standard of prompt, full, and effective compensation was advocated in an aide-mémoire to the Guatemalan government, protesting, among other things, the use of agrarian bonds for compensation. *Expropriation of United Fruit Company Property by Government of Guatemala*, 29 Dep't State Bull. 357 (1953); *cf.* Kunz, *The Mexican Expropriations*, 17 N.Y.U.L.Q. Rev. 327, 349-59 (1940).

145. Here "land reform" is equated—as it should be—with "fundamental" reforms. See note 90 *supra* and text accompanying notes 1-3 *supra*.

market value. But his estimate of the future—his security—is the least of our concerns. Instead, the reforming government ought to worry about the effect of its reforms upon other investors in the agricultural and other sectors of the economy. What effect will the rationalizations for confiscation have upon the investment decisions of the efficient operator of a large-scale agricultural enterprise, or of the banker who is considering an agricultural loan, or of the small farmer who is thinking about buying a tractor? How will those rationalizations affect decisions to buy, build, or finance urban housing? How will they affect decisions to finance the expansion of manufacturing plant capacity?

It is necessary to narrow these questions even further and to relate them to particular rationalizations. Deferred payment and reduced valuation are sufficiently transparent that they can fool only those decision-makers at the very lowest levels of sophistication; certainly, they will not fool the entrepreneurs and lending institutions who will make the most important individual decisions to save or invest. But the other basic rationalizations—the theory of restitution and the doctrine of the social function of ownership—do not rest upon delusion. They do reinforce investment security because they give important assurance about the future to potential investors.

The great beauty of the restitution theory is that it purports to protect property interests, restoring to the "true" owners what is their own. In operation, restitution may have an equalizing effect, but it is not explicitly premised upon achieving equality. It is, by its own terms, not so likely to recur and, therefore, not so likely to raise those insecurities about which Bentham warned a century and more ago:

> "If equality ought to prevail to-day it ought to prevail always.... How make another distribution without taking away from each that which he has? And how despoil any without attacking the security of all? When your new repartition is disarranged—that is to say, the day after its establishment—how avoid making a second? Why not correct it in the same way? And in the meantime what becomes of security? What is happiness? Where is industry?"[146]

One important reason why Mexico's post-reform economy eventually prospered was that potential investors were convinced that the land reform did not imply a governmental dedication to continual leveling. The fact that investments in urban land and most industrial

146. BENTHAM, THEORY OF LEGISLATION 119-20 (1876). (The two quotations are reversed in order. The citation is to Hildreth's 1908 re-translation from the French version of Dumont.)

investments were left untouched was important not only in leaving a reservoir of capital to be invested, but also in giving security to investors of the future.

The social function doctrine is even more useful. As that doctrine is now interpreted, one of the principal grounds for expropriation is inadequate investment. Conversely, if the social function principle is carefully applied, one who invests knows that his investment is secure as long as he produces effectively and compensates his labor force adequately. These are capitalist virtues; just as the Mexican Revolution "laid the bases of Mexican capitalism,"[147] so all the reforming governments of Latin America—with Cuba the lone exception—have made it clear that they propose, not the abandonment of capitalism, but rather an adjustment to make of modern capitalism an effective successor to the curious combination of mercantilism and feudalism that prevailed before.[148]

In this process even deception has its place. The pretense that compensation is being made to the expropriated landowners may, for example, help to assure the beneficiaries of the land distribution that their own titles are secure—that the land has been purchased, not stolen, from its former owners. A small farmer whose title is secure is more likely to save and invest than is his counterpart who lacks confidence in his future as an owner. If the establishment of security of tenure for the reform's beneficiaries is an important objective of a reforming government, then it is not objectionable to try to reinforce the beneficiaries' legal protections with the psychological support that may come from the fiction of compensation for landowners. For the small farmer as well as for the industrial investor, security is first of all a state of mind.

Apart from the direct encouragement of low-level development decisions, there is another more important reason for maintaining the myth of compensation. A social revolution, whether or not it is accompanied by widespread violence, is necessarily disorderly and disruptive. The maintenance of order is the first great task of a revolutionary government, and it is as important as any task that faces a non-revolutionary government that seeks to make its social revolution without violence. In the countries of Latin America, most of

147. Carlos Fuentes, quoted in Hirschman, *supra* note 126, at 31.

148. This position recalls Franklin D. Roosevelt, who once described the New Deal as "a revolution of the Right" to save capitalism. The New Dealers, many of them lawyers, knew the value of tying their social reforms to precedent. See Freund, *Social Justice and the Law*, in SOCIAL JUSTICE 93, 116-17 (Brandt ed. 1962): "The accommodation between stability and change is representative of the ultimate task of the law—the resolution of the ambiguities and antinomies of human aspirations . . . ."

which have seen major upheavals in every generation since their independence, the need for stability is particularly acute. Stability implies respect for law, either voluntary or coerced or—surely most typically—a mixture of both. Any open disavowal by the government of one of the institutions of the established order carries with it the risk of a lessening of public respect for the order generally. Open confiscation of rural land does not compel other repudiations of established rights, but it does make those repudiations politically more difficult to resist. To the extent that confiscation is successfully disguised, the leaders of a reforming government may reduce the popular pressure for immediate, disruptive extension of the social revolution to every corner of the nation and may, at the same time, avoid the invitation to lawlessness that is implicit in a frankly confiscatory reform.[149]

Finally, even if all efforts to conceal the confiscatory nature of a land reform fail, there is some utility in continuing to assert the principle of compensation. There is no intention on the part of any reforming government in Latin America to abandon the rule of just compensation as a principle of post-reform general application. The period of a land reform is a period of social emergency; that emergency will not last forever. If it is necessary during the emergency to subordinate one or another constitutionally protected interest, it is probably better to do so covertly, all the while professing the continued vitality of the constitutional protections. When the emergency passes, it will perhaps be easier to give real protection to those interests than it might be if they had been frankly disavowed during the time of crisis. Our own constitutional history can provide models that will serve very well.[150]

Latin-American opinion makers, educated in Western traditions of legality, find confiscation distasteful and difficult to admit even to themselves. Thus, the needs of the collective conscience of the leadership group combine with the indispensable demands of orderly development to require formal repudiation of confiscation. While it seems to be true that "either we pay for the land or we make a land reform,"[151] the need to rationalize the reform with traditional standards of legitimacy makes deception inevitable.

149. Even in the Soviet Union, the expropriation of property is now compensated at "market" value (in the case of immovables, a fixed price controlled by the government). 2 GSOVSKI, SOVIET CIVIL LAW 79-81 (1949).

150. *Compare Ex parte* Quirin, 317 U.S. 1 (1942), *and* Korematsu v. United States, 323 U.S. 214 (1944), *with* Duncan v. Kahanamoku, 327 U.S. 304 (1946); *cf.* Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 191-93 (1962).

151. CHONCHOL, LA REFORMA AGRARIA EN AMERICA LATINA 26 (Univ. of Chile, mimeo, 1962).