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A Proposal for the Marketization of Housing in Cuba: The Limited Equity Housing Corporation - A New Form of Property

Stuart Grider

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OF HOUSING IN CUBA: THE LIMITED
EQUITY HOUSING CORPORATION — A
NEW FORM OF PROPERTY**

STUART GRIDER*

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I. INTRODUCTION

Most Cuba scholars and Cuba watchers generally agree that the near future will bring the fall of Fidel Castro and the formation of a new Cuban polity whose contours are unknown. It is unlikely that a post-Castro Cuba will experience the same relatively peaceful transformation from a communist-controlled, centrally-planned economy to a market economy as witnessed in other newly-elected democratic nations of the world.¹ For such a transformation to occur, planners must give serious forethought to the building of new institutions with sufficient popular legitimacy to replace the discredited institutions of the communist regime. The construction of new institutions will be perhaps the most vexing challenge in the housing context, an area which deeply concerns and divides Cuban nationals and exiles.² The formation of new housing institutions, whether new or borrowed from successful application elsewhere, will require a consensus between interested parties regarding the desired goals of property reform. One of the primary goals will undoubtedly involve the marketization through privatization of a large percentage of the housing stock. This task will prove to be extremely divisive and enormously complex. In order to begin the task and remain

1. See Enrique A. Baloyra, *Where Does Cuba Stand?*, in CUBA AND THE FUTURE 23, 36-38 (Donald E. Schulz ed., 1994).

2. This Article refers to Cuban citizens presently living on the island of Cuba as "Cuban nationals" or "nationals." Former residents of Cuba who were citizens at the time they left Cuba and now reside elsewhere are referred to as "Cuban exiles" or "exiles." When speaking of both groups in the abstract, the term "Cubans" is used.

focused on its long-term goals, Cubans must clearly understand why they are privatizing in the first place.

A. *Why Privatize?*

The primary goal articulated for the privatization of state-owned assets in the transformation of a socialist economy³ is to increase the nation's long-term economic efficiency.⁴ It is argued that placing capital and planning decisions in private hands will decentralize decision-making and unleash market forces, allowing the proper allocation of resources and eventually bringing long term health and stability to the economy.⁵ It is clear, however, that initially, privatization has the opposite effect: economies in transition shrink.⁶ This occurs because, as market forces are unleashed on the economy for the first time, the production of excess supply is curtailed and the need for input, particularly labor, is scaled back.⁷ It is not entirely clear, however, that privatization of all state-owned assets is required or even preferred, as there do exist numerous profitable state-owned enterprises (SOEs) throughout the world.⁸

The second most commonly articulated goal of privatization is the equitable redistribution of property rights. Because property and power were concentrated in the hands of a small elite under socialism, the *nomenklatura*, it is argued that privatization will enable the new regime to break the stranglehold of the

3. This Article does not consider the privatization of state-owned assets in a developed market economy, which is a phenomenon quite different from the privatization of state-owned assets in the transformation from a command to a market economy, especially where accompanied by a change from non-democratic to democratic governance. See David Lipton & Jeffrey Sachs, *Privatization in Eastern Europe: The Case of Poland*, in 2 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 231 (1990).

4. See Roman Frydman & Andrzej Rapaczynski, *Markets and Institutions in Large Scale Privatizations* 3, 3-7 (1993) (unpublished manuscript, on file with the Center for Law and Economic Studies, Columbia University School of Law) [hereinafter *Large Scale Privatizations*].

5. *Id.*

6. *Id.*

7. *Id.*

8. The Korean steel industry has been noted for efficient management. See *International Steel Industry Costly Status Symbols*, LONDON TIMES, Mar. 28, 1991, at 4.

4. For a discussion of the fundamentals of privatization theory, see David Sappington & Joseph Stiglitz, *Privatization, Information and Incentives*, 6 J. POLY ANALYSIS AND MGMT. 567, 567-82 (1987).

nomenklatura and redistribute property rights across a broader spectrum of the population. Unfortunately, the experiences in Eastern Europe have shown that privatization often has a minimal redistributive impact.⁹

In the transformation of a socialist economic and political structure, a wide-scale policy of privatization marks a new regime as decidedly different from the discredited old regime. It is therefore not surprising that one commentator, in her comparative study of privatization politics in Eastern Europe, concluded that privatization is less an economic choice than an ideological choice of political succession.¹⁰ Thus, when pursued within the parameters of developing a market economy, the privatization of any particular group of state assets should be understood not only in terms of long-term economic growth but, more importantly, in terms of the symbolic intent of the new regime.

B. *Cuba and the Experience of Post-Socialist Societies in Transformation*

The transformation of Cuba's command economy presents many of the classic problems faced in the transformation of former socialist economies. Economies in transition share a background of general problems that must be considered in any privatization or marketization scheme,¹¹ such as problems of equity in distributing national assets among competing interests and the valuation of assets where there is no functioning market in place.

The primary economic obstacle in designing a privatization scheme is the absence of an existing market for goods and services, which makes it impossible to accurately value state-held property.¹² This places a difficult burden on the state authority in charge of privatizing to establish terms of sale that are attractive to investors without making the authority liable to charges that it undervalued the national patrimony and sold too

9. Anna Gelpern, *The Laws and Politics of Reprivatization in East-Central Europe: A Comparison*, 14 U. PA. J. INT'L BUS. L. 315, 358 (1993).

10. *Id.*

11. Because this background has been well-documented in the legal, sociological and economic literature, it need only be outlined here.

12. See Large Scale Privatizations, *supra* note 4, at 11-15.

cheaply.¹³ Additionally, the restructuring of enterprises has led to mass unemployment and social dislocation in almost every instance where it has occurred, resulting in considerable political instability that further inhibits economic growth.¹⁴

Perhaps the single most disturbing question for lawyers contemplating property reform has been to determine *who is the rightful owner?*¹⁵ The question is not purely academic because the lack of clear property rights impedes economic development by discouraging investment and demoralizing the populace. The case of Nicaragua is particularly instructive for Cuba. In Nicaragua, the socialist *Sandinista* regime had appropriated approximately thirty-six percent of the total land of the country in its agricultural reform program.¹⁶ After the *Sandinistas* lost power, unclear ownership rights encouraged land invasions and violent confrontations, which law enforcement agencies were either unwilling or unable to prevent.¹⁷ Some commentators conclude that the uncertainty of property rights and the violence resulting from attempts to establish those rights are the most important factors inhibiting economic recovery in Nicaragua.¹⁸ The case of Nicaragua makes the point that a privatization scheme should not go forward until the ownership of property between the state, current occupants, and preconfiscation owners is resolved. In doing so, privatization scheme must be careful not to further entrench the privileges gained by the *nomenklatura* in the previous regime. Due to the fear that the *nomenklatura* will spontaneously privatize to itself state assets under its control, it is generally believed that the new regime must act quickly to divest the *nomenklatura* of state assets.

C. Multiplicity of Mechanisms and Speeds of Privatization

Privatization has been accomplished primarily through five different mechanisms for the transfer of property, employed

13. *Id.* at 17.

14. *See id.* at 8.

15. *See* Oleg T. Bogomolov, Who Will Own Nobody's Property? (Nov. 25, 1993) (unpublished manuscript, on file with the author).

16. Rolando H. Castañeda & George Plinio Montalván, Economic Factors in Selecting an Approach to Expropriations Claims in Cuba 9 (Jan. 26, 1995) (unpublished manuscript, on file with the author).

17. *Id.*

18. *Id.*

alone or in conjunction with one or more of the other mechanisms.¹⁹ The dominant mechanisms have been: (i) the *voucher*, where coupons representing an interest in a pool of state assets are freely transferred, or sold at nominal cost, to each citizen to be invested either directly in state property or in approved mutual funds; (ii) a *sale to citizens*, in which citizens winning an auction of state assets pay the state directly for ownership of those assets; (iii) a *sale to investors*, where typically foreign or expatriate investors winning an auction or negotiating directly with the state property authority pay the state directly for the ownership of state assets; (iv) *worker/manager privatization*, where, pursuant to adopted policy, the state allows the managers and workers in control of state property to formally take possession of the property; and (v) *spontaneous privatization*, where the persons in control of state assets, usually the management, workers or members of the bureaucracy, appropriate and often liquidate the assets. The fear of spontaneous privatization oftentimes requires the state to exert control over state assets immediately in an attempt to effect a disposition of the assets in a manner that benefits the citizens as a whole.

Privatization programs are also characterized by the speed with which they aim to divest the state of the means of production. Poland followed a "shock" privatization program, which tried to create a market economy through the immediate privatization of state assets without the prior construction of market institutional infrastructure.²⁰ At the other extreme, Hungary, already having the tradition of a mixed economy under socialism, implemented a more gradual privatization program.²¹ Regardless of the desired speed of privatization, even the best-planned, most rapid attempt at privatization (e.g., the "shock" privatization in Poland) takes years to accomplish due to the backlog of state-owned assets.²²

19. An excellent analysis of the dominant privatization mechanisms employed in Central and Eastern Europe is contained in Paul Hare, *Privatization in Comparative Perspective: An Overview of the Emerging Issues*, in *PRIVATIZATION IN CENTRAL AND EASTERN EUROPE* 31, 34-38 (Saul Estrin ed., 1994).

20. See Marek Mazur et al., *Privatization in Poland*, in *PRIVATIZATION AND ECONOMIC REFORM IN CENTRAL EUROPE* 175, 175-208 (Dennis Rondinelli ed., 1994).

21. See Kálman Mizsei et al., *Experiences with Privatization in Hungary: The Early Transition Period*, in *PRIVATIZATION AND ECONOMIC REFORM IN CENTRAL EUROPE* 41, 41-68 (Dennis Rondinelli ed., 1994).

22. See *Large Scale Privatizations*, *supra* note 4, at 16.

The events in Eastern Europe indicate that a "shock" privatization exacerbates the dislocations inherent in the transformation process.²³ Much of Eastern Europe remains on the brink of instability. In both Poland and Hungary, the former communists triumphed at the polls, vowing to slow the privatization process.²⁴ In Russia, to appease embittered nationalist sentiment, the government waged a brutal and expensive campaign against the rebelling Chechens, driving the budget deficit higher and risking the loss of critical IMF assistance.²⁵ A transformation program that is not seen as equitable or that does not acknowledge the tradition and culture of the country, including the socialist period, will be subject to retrenchment.²⁶ As evidenced in Eastern Europe, massive social and economic dislocation resulted at the initial transformation because the means of production were privatized before a market existed and without an established regime of private property, a stable fiscal or monetary medium, and financial or investment instruments.²⁷ Therefore, as one of the most prominent exile scholars on the Cuban economy has concluded, because a rapid privatization creates political and social risks for which the administrative, economic, human, and moral resources do not yet exist,²⁸ a "gradualist" approach to privatization is the only feasible solution as it allows the development of a market economy that incorporates the socio-cultural and socio-psychological order of the country.²⁹

This Article proposes the creation of a new form of property, the limited equity housing corporation, as the primary vehicle for the transformation of residential property from state ownership to private ownership in a reforming or post-socialist Cuba. The Article argues that hybrid forms of property, which are

23. See Vladimir Kollontai, *Social Aspects of Economic Reform in Russia* (Nov. 25, 1993) (unpublished manuscript, on file with author).

24. Paul Lewis, *World Markets: A Headlong Crawl Toward Capitalism*, N.Y. TIMES, Feb. 5, 1995, at 13.

25. *Id.*

26. David Stark, *Path Dependency and Privatization Strategies in East-Central Europe*, 6 EAST EUROPEAN POLITICS AND SOCIETIES 11, 35-38 (1992).

27. Antonio Jorge, *Small, Developing Economies in Transition: Prospects for Post-Castro Cuba*, in CUBA'S TRANSITION TO DEMOCRACY: LESSONS FROM THE FORMER SOVIET BLOC 92, 98-99 (Adolfo Leyva ed., 1992).

28. *Id.* at 95.

29. *Id.* at 92-103. By "gradualist" approach, Jorge means the gradual implementation of a full transformation, not the half-way implementation or partial transformation of a former socialist economy. *Id.* at 95.

familiar and continue to thrive in the capitalist west, can, by their voluntary nature, form the bridge between the state control of property and the private control of property. Part I looks primarily to the experience of Eastern Europe in examining the motives behind privatization and the various types and speeds of privatization applied to date. In seeking to root the new form of property in contemporary Cuba, Parts II and III explore the unique situation of Cuba among reforming post-socialist nations and the role of property under the socialist property regime, respectively. Part IV discusses the issue of restitution, arguing against providing restitution to former property owners and favoring instead a compensation scheme that encourages former owners to invest in the badly deteriorated housing stock to aid in the reconstruction of Cuba. Part V examines the range of successful market institutions created by law and the goals of a property rights regime in an economy in transition in arguing for a hybrid solution crafted particularly for Cuba. Part VI outlines the limited equity housing corporation.

II. THE CUBAN CONTEXT

A. *Political and Economic Conditions in Cuba*

Cuba is in a unique position vis-à-vis other post-socialist countries.³⁰ Because an independent civil society does not exist in contemporary Cuba, there is an almost complete absence of political dissent.³¹ Thus, dissident organizations with broad popular appeal, such as the Solidarity labor union and the Catholic church in Poland, the Protestant church in East Germany or Charter 77 in Czechoslovakia, do not exist in Cuba.³² Due to the limited access to information in contemporary Cuba, the future has become the major preoccupation of the Cuban people.³³ The government has sought to prevent this preoccupation from taking the form of dissent through constant surveillance and constant activity, such as the reported requiring of the construction of emergency bomb shelters under the streets of Havana.³⁴

30. Baloyra, *supra* note 1, at 23-24.

31. *Id.* at 24-26.

32. *Id.* at 26.

33. *Id.* at 27.

34. Donald E. Schulz, *Can Castro Survive?*, J. INTER-AM. STUD. & WORLD AFF.

Overall, the average Cuban national, citing the health and education achievements of the Revolution, remains surprisingly loyal to the Revolution.³⁵ This is especially true because the Castro regime is strongly identified with safeguarding the national identity, a position which has only been reinforced by the U.S. embargo.³⁶

Cuba, unlike other post-socialist nations whose transformation has been extensively studied, is a third world nation, a factor whose effect on the transformation process is unknown. Of the post-socialist countries of the former Soviet bloc, only Uzbekistan and Tajikistan have the same level of gross domestic product (GDP) as Cuba.³⁷ Even though the United Nations Human Development Index (HDI) ranks Cuba as having a medium level of human development, considerably higher than the Dominican Republic, Nicaragua or Haiti,³⁸ the real GDP of Cuba, only \$2000 per year, is actually somewhere between Haiti and Nicaragua.³⁹ In 1958, Cuba ranked third in Latin America, be-

89, 98 (1993).

35. *Id.*

36. *Id.* The United States initiated the embargo against Cuba with the export and import controls instituted against the island in 1962 under the Foreign Assistance Act of 1961. 22 U.S.C. § 2370(a)(1) (1982). In 1962, Congress enacted a comprehensive set of regulations governing trade with Cuba, the Cuban Assets Control Regulations (CACR), which are administered by the Treasury Department. 31 C.F.R. § 515 (1993). The CACR were issued under authority of § 5(b) of the Trading With The Enemy Act of 1917. 50 U.S.C. app. §§ 1-44 (1988). The embargo was strengthened by the Cuban Democracy Act, signed by President George Bush in October 1992, the so-called Torricelli Bill. 22 U.S.C. §§ 6001-6010 (Supp. IV 1988). The Cuban Democracy Act prohibits the foreign subsidiaries of American companies from trading with Cuba (the Mack Amendment) and empowers the President to impose sanctions on nations granting aid to Cuba. 22 U.S.C. §§ 6001(8), 6005(a)(1) (Supp. IV 1988). The embargo was further strengthened by the Cuban Liberty and Solidarity (LIBERTAD) Act of 1996, the so-called Helms-Burton Legislation [hereinafter Helms-Burton Legislation]. Act of March 12, 1996, P.L. 104-114, §§ 1-5, 101-16, 201-07, 301-06, 401 (codified at 22 U.S.C.S. §§ 6021-24, 6031-46, 6061-67, 6081-85, 6091 (1996)). The Helms-Burton Legislation provides that, among other things, U.S. nationals, including persons who at the time of the seizure of their property were Cuban nationals, can file claims in U.S. federal court against persons "trafficking" in (which is effectively defined as deriving any economic benefit from) such seized property. *See id.* at §§ 4, 103, 301-06.

37. United Nations Development Program, HUMAN DEVELOPMENT REPORT 129-31 (1994) [hereinafter HUMAN DEVELOPMENT REPORT] (All UNDP GDP statistics are given in Purchasing Power Parity terms using 1991 statistics). Compare the GDP of Cuba (\$2000) with Uzbekistan (\$2790) and Tajikistan (\$2180). *Id.*

38. *Id.* at 129-31, 223. Compare Cuba's HDI ranking (89th) with that of the Dominican Republic (96th), Nicaragua (106th) and Haiti (137th). *Id.* at 129-31.

39. *Id.* at 129-31. Compare the GDP of Cuba (\$2000) with the Dominican Re-

hind only Argentina and Venezuela, in GNP.⁴⁰ Today, Cuba ranks in the bottom quintile of GNP in Latin America.⁴¹

As the economic assistance from the former Soviet bloc, on whom Cuba was almost exclusively economically dependent, was withdrawn, the Cuban economy entered a tailspin.⁴² During this period of radical readjustment, the government, starting in 1990, developed a strategy referred to as the *Special Period in a Time of Peace*.⁴³ This strategy aims to deploy workers from the cities to the countryside to assist in agricultural production, reduce the consumption of oil and other imported products through more stringent rationing and control the misappropriation of government goods for sale on the black market.⁴⁴ Cuba also began a massive deindustrialization, which has been compared to the anti-industrialization policy implemented by Pol Pot in the former Kampuchea.⁴⁵ These macroeconomic changes have directly impacted the quality of life for the average Cuban; by mid-1993, many Cubans were reduced to eating only one and a half to two meals daily, resulting in serious health problems.⁴⁶ With the cut-off of Soviet oil, automobiles were jettisoned in favor of bicycles, tractors in favor of ox-drawn plows.⁴⁷ As the basic level of infrastructure deteriorated, Cuban nationals were asked to leave their manufacturing and office jobs to

public (\$3080), Nicaragua (\$2550) and Haiti (\$925). *Id.*

40. See CUBAN AMERICAN NATIONAL FOUNDATION, *Cuba: Past, Present and Future*, in CUBA'S TRANSITION 144, 153 (1992) [hereinafter *Cuba: Past, Present and Future*].

41. *Id.* Compare the 1991 GNP figures for Cuba (\$2000), Argentina (\$5120) and Venezuela (\$8120). HUMAN DEVELOPMENT REPORT, *supra* note 37, at 129-31.

42. Andrew Zimbalist, *Treading Water: Cuba's Economic and Political Crisis*, in CUBA AND THE FUTURE 7, 7-11. (Donald E. Schulz ed., 1994).

43. *Id.* at 11. Other aspects of the strategy include trying to attract foreign investment and facilitating selective structural economic reforms. *Id.*

44. *Id.*

45. See Jaime Suchlicki & Antonio Jorge, *Introduction*, in INVESTING IN CUBA: PROBLEMS AND PROSPECTS vii (Jaime Suchlicki & Antonio Jorge eds., 1994). The situation is so critical that the Castro regime quietly began the sale of European masterpieces from the Cuban Museum of Art on the international art market to earn hard currency. See Pamela S. Falk, *Cuba's Power Structure at the Crossroads*, in CUBA'S TRANSITION TO DEMOCRACY: LESSONS FROM THE FORMER SOVIET BLOC 19, 23 (Adolfo Leyva ed., 1992).

46. GILLIAN GUNN, CUBA IN TRANSITION: OPTIONS FOR U.S. POLICY 29 (1993) [hereinafter GUNN, CUBA IN TRANSITION] (citing Kathleen Barrett, *The Effect of the Collapse of the Soviet Union and Eastern Bloc on the Cuban Health Care System* (May 1992) (unpublished manuscript, on file at Georgetown University)).

47. *Id.* at 30.

"volunteer" in the fields.⁴⁸ Cuba currently finds itself at an impasse.

B. Inequality of Bargaining Power Between Cuban Exiles and Cuban Nationals

The transformation in Cuba presents problems of a different order than those faced in the transformation of Eastern European economies. This is due not only to unique features of the political and economic context within Cuba, but also, or even primarily, to unique features of the Cuban exile community. In the current Cuban situation, exiles who fled the island after Castro's assumption of power in 1959 stand in a position of strength and bargaining power vis-à-vis the Cubans who have remained in the country. This occurrence is without parallel in the Eastern European context.

The demographic realities of the Cuban exiles are markedly different from Czech, Polish or any other Eastern European exiles. Unlike Eastern Europe, an unprecedented percentage of Cubans, at least ten percent, left their homeland as political or economic exiles.⁴⁹ Unlike other exile communities that suffered from diaspora, the Cuban exile community has remained comparatively intact, concentrated primarily in one country in only two geographic regions, greater Miami and New Jersey.⁵⁰ Many in the community remain focused on events in Cuba.⁵¹ Most exiles are virulently anti-Castro: a full two-thirds of exiles favor a policy of "confrontation" with the Castro regime.⁵² This concentration, plus the fact that the Cuban-American community has assimilated less than many other previously mentioned exile groups, has led to a development of political power, sophistication, and influence unknown in the Eastern European context.⁵³ The muscle of the Cuban exile community in dictating

48. See DEBRA EVENSON, *REVOLUTION IN THE BALANCE: LAW AND SOCIETY IN CONTEMPORARY CUBA* 190 (1994).

49. HIMILCE ESTEVE, *EL EXILIO CUBANO EN PUERTO RICO [THE CUBAN EXILE IN PUERTO RICO]* 13-14 (1984). Esteve estimates that by the end of 1961, 10% of the population of Cuba had fled. *Id.* The percentage is undoubtedly higher today, as there have been several additional, although smaller, waves of emigration. *Id.*

50. Mark Falcoff, *Cuba and the United States: Thinking about the Future, in CUBA AND THE FUTURE* 117, 122 (Donald E. Schulz ed., 1994).

51. *Id.*

52. *Id.* at 120 n.4.

53. Gunn discusses the strong links between the Cuban exile community, par-

that the United States maintain a policy of hostility toward Cuba is well-documented.⁵⁴ In contrast to West Germany, which pursued its *Ostpolitik* of appeasement of the communist regime over the heads of embittered German exiles to the end,⁵⁵ the Cuban exile community in the United States continues to prevent any rapprochement.⁵⁶ In fact, any member of the exile community suspected of attempting to establish relations with the Castro regime is ostracized and intimidated in a most public manner.⁵⁷

Not surprisingly, there are profound demographic differences between the exile community and Cuban nationals. Cuban exiles are not only often affluent in an absolute sense, they are, more importantly, exponentially wealthy relative to their former countrymen. The exile community is overwhelmingly white and represented the professional class in pre-Castro Cuba.⁵⁸ Cuban nationals are predominately of African or mixed ancestry.⁵⁹ The sharp racial divide is a constant source of often unstated tension.⁶⁰ Furthermore, there is a profound psychological divide

ticularly the Cuban American National Foundation (CANF), and the Bush administration and the subsequent acquiescence of the Clinton administration to hard-line policies. See Gillian Gunn, *In Search of a Modern Cuba Policy*, in CUBA AND THE FUTURE 127, 129-131 (Donald E. Schulz ed., 1994) [hereinafter Gunn, *Modern Cuba Policy*].

54. *Id.* at 131-33. The Torricelli Bill and Helms-Burton Legislation are potent examples of the strength of the Cuban exile lobby in dictating United States foreign policy toward Cuba.

55. See Thomas F. O'Boyle, *Europe: Ostpolitik's Pull on the German Psyche*, WALL ST. J., Sept. 9, 1987, at 33; Thomas F. O'Boyle, *Soviets, Germans Warming to Each Other as Ostpolitik Comes Out of a Deep Freeze*, WALL ST. J., Jan. 19, 1988, at 24.

56. See Christopher Marquis, *Republicans Put Cuba on Front Burner*, MIAMI HERALD, Mar. 6, 1995, at A6; Paul Anderson & Don Bohning, *White House Denies Change in Cuba Policy*, MIAMI HERALD, Mar. 8, 1995, at A8.

57. See Gunn, *Modern Cuba Policy*, *supra* note 53, at 134-35. The orthodoxy required by the Cuban exile community is well-illustrated by the case of Mario Baeza. *Id.* President Clinton had considered naming Baeza, a prominent black Cuban-American partner at the law firm Debevoise & Plimpton in New York, as assistant secretary of state for Inter-American Affairs, until Baeza was ferociously attacked by the exile community for being "soft" on Cuba. *Id.* Baeza had affronted the exile community by appearing at a Euromoney conference on business opportunities in Cuba and by voicing public reservations about the Torricelli Bill. *Id.*

58. *Id.* at 13-14.

59. Cuba is presently 51% mulatto, 37% white, 11% black and 1% Chinese. See *Cuba: Past, Present and Future*, *supra* note 40, at 145.

60. GUNN, *CUBA IN TRANSITION*, *supra* note 46, at 36-37, 44. Gunn notes that considerable racial hostility was generated by the de-penalization of hard currency on July 26, 1993. *Id.* at 36-37. The access to hard currency by nationals with rela-

between the exile community and Cuban nationals. Many exiles find it traitorous that Cuban nationals, particularly Afro-Cubans and the disaffected, remain loyal to the Castro regime.⁶¹ The exile community and the nationals remain polarized.

Given the inequality of bargaining power between the exile community and Cuban nationals, there is considerable possibility that, upon a change in government in Cuba, the exile community will be in the position to shape the transformation agenda in a manner that best represents its interests. It is quite conceivable that the interests of Cuban nationals will be subordinated to the interests of their wealthier cousins to the point that Cubans nationals are dispossessed of their share of the national patrimony.

C. Visions for the Transformation of Cuba Proposed by the Cuban Exile Community

In anticipation of the perceived imminent demise of the Castro regime, many in the Cuban-American exile community have already begun to develop plans for the reclamation of their former property in Cuba.⁶² In 1990, the "Registry of Expropriated Properties in Cuba" was established by the Research Institute for Cuban Studies at the University of Miami and the Dade County Commissioners to enable former owners to register their claims.⁶³ In 1992, advertisements appeared in Miami papers inviting Cuban exiles to make claims through such newly-founded private organizations as the "Cuban Claims Bureau."⁶⁴ In the popular Spanish-language press in Miami, there is a continuous flow of articles in which exiles speak longingly and convincingly about returning to their former homes to demand the restitution of their property as the price of assisting in a post-

tives abroad, who tended to be white, has made them relatively "rich" in comparison to nationals without relatives abroad, a fact that has generated considerable tension. *Id.*

61. *Id.* at 42-43.

62. See Ramón A. Mestre, *Quién quiere reclamar su propiedad?* [Who Wants to Reclaim Their Property?], EL NUEVO HERALD, Aug. 10, 1990. Juan Manuel Cao, *Lo voy a reclamar en Cuba* [I Am Going to Reclaim It in Cuba], EL NUEVO HERALD, Aug. 1, 1990.

63. ANDRÉS OPPENHEIMER, CASTRO'S FINAL HOUR 323 (1992).

64. *Cuba Pronto Será Libre* [Cuba Will Soon Be Free] EL DIARIO LAS AMERICAS, Jan. 19, 1992, at A9.

Castro reconstruction of Cuba.⁶⁵ At the popular level, many, if not most, exiles believe that they will be able to return to their former homes.

To complicate matters, the Cuban government has actively and openly exploited the fears of the Cuban population regarding the security of their property interests if the exiles were to return.⁶⁶ In an address to the National Assembly that was radio broadcast, Castro warned the Cuban people that "in Miami, they are already parceling out our country, and dreaming of getting everything back, but that won't happen as long as there remains one single man or woman with a sense of dignity."⁶⁷ The message of these broadcasts fits in well with the overall propaganda strategy of the Castro regime, which tells Cubans that their options are limited to "Castro or Miami."⁶⁸

The more extreme view of former property owners, as outlined above, has been openly rejected by many prominent Cuban exiles, including important members of the Cuban American National Foundation (CANF).⁶⁹ CANF clearly stated in its *Transition Program for a Post-Castro Cuba (Transition Outline)* its intention, upon a restoration of democratic rule, "to prohibit the eviction of any Cuban from his/her home, residence or dwelling and recognize the resident's right of possession as the means to claim property before the courts."⁷⁰ Furthermore, the *Transi-*

65. Vicente Echerrri, *La polémica del derecho a la propiedad* [The Controversy of Rights to Property], EL NUEVO HERALD, June 11, 1992; *Terratenientes exilados responden a críticas* [Exiled Landowners Respond to Critics], EL NUEVO HERALD, Oct. 19, 1991; Mario Girbau, *Zapatos para mis surcos*, EL NUEVO HERALD, Dec. 7, 1991; Fermín Fernández Luzárraga, *Lo nuestro lo vamos a reclamar!* [We're Going to Reclaim What Is Ours!], EL NUEVO HERALD, Aug. 1, 1992; José Manuel Casanova, *El derecho de propiedad* [The Right to Property], DIARIO LAS AMERICAS, Dec. 3, 1993; Ariel Remos, *La devolución de propiedades industriales es básica para la reconstrucción de Cuba* [The Return of Industrial Property Is Basic to the Reconstruction of Cuba], DIARIO LAS AMERICAS, July 17, 1994; Rafael Portuondo, *Sin devolución no hay reconstrucción* [There Is No Reconstruction Without Restitution], EL NUEVO HERALD, Aug. 24, 1994. A 1992 poll conducted by Channel 23 in Miami revealed that thirty-three percent of exiles believed that exiles should be able to reclaim their homes. *Id.*

66. See OPPENHEIMER, *supra* note 63, at 324.

67. Fidel Castro, Address to National Assembly, Dec. 27, 1991, *reprinted in* OPPENHEIMER, *supra* note 63, at 324.

68. Rolando Bonachea, *Update: Social and Political Crisis in Cuba*, in CUBA'S TRANSITION TO DEMOCRACY: LESSONS FROM THE FORMER SOVIET BLOC 10 (1992).

69. Mestre, *supra* note 62.

70. THE CUBAN AMERICAN NATIONAL FOUNDATION, TRANSITION PROGRAM FOR A POST-CASTRO CUBA: OUTLINE 5 (May 1993) (italics in original) [hereinafter

tion Outline affirms the "basic principle" that the nationals "must be the primary beneficiaries of the privatization effort."⁷¹ Nicolas J. Gutiérrez, Jr., representing the Cuban Sugar Mill Owners Association, specifically excluded residential property from its list of properties that should be restored when calling for the "full restitution of all non-materially altered industrial, commercial and agricultural properties to their legitimate owners"⁷² Julio Romañach, a Cuban-American attorney active in Cuban issues, has developed proposed legislation that would prevent the forced eviction of national occupants by returning exiles, while simultaneously establishing a claims authority to rank property claims.⁷³

The *Transition Outline* also provides that the confiscation of all property and goods by the Castro regime without compensation to their owners was arbitrary and invalid.⁷⁴ The two provisions seemingly contradict. At best, the intent of the latter provision may simply be to establish a legal basis for compensation for former owners under a new legal regime. At worst, the provision granting a right of possession to current occupants may be merely a propaganda counter-offensive: a promise that would not be kept. In any event, it may be difficult for any interim transition government, no matter how well-intentioned, to prevent well-armed returning exiles from attempting to reclaim their property if they are so disposed.⁷⁵

TRANSITION OUTLINE].

71. *Id.* at 4.

72. Nicolas J. Gutiérrez, Jr., *The De-Constitutionalization of Property Rights: Castro's Systematic Assault on Private Ownership in Cuba*, Address at the American Bar Association 1994 Annual Meeting, New Orleans, La., reprinted in 1 *LATIN AM. BUS. LAW ALERT* 5, 19 (1994). Gutiérrez seems to have modified his position somewhat; in a survey of Cuban exile organizations conducted by La Sociedad Económica in December, 1993, Gutiérrez stated that housing should also be subject to claims from former owners. *Poll Results: How Do Cuba's Dissident and Exile Groups Envisage Cuba's Economic Future?* LA SOCIEDAD ECONOMICA, Bull. 38, at 5 (Dec. 6, 1993).

73. Julio Romañach, *En torno al proyecto de ley de viviendas urbanas y rurales* [Reconsidering the Project of Urban and Rural Housing Law], in *CUBA IN TRANSITION, 2ND MEETING OF THE ASSOC. FOR THE STUDY OF THE CUBAN ECON.* 93, 93-94 (1992).

74. TRANSITION OUTLINE, *supra* note 70, at 4.

75. See discussion of Nicaragua, *supra* notes 16-18 and accompanying text.

III. PROPERTY REGIME UNDER CUBAN SOCIALISM

The issue of property reform in Cuba cannot be understood unless placed in the context of the three distinct historical phases of property relations. The first phase of property relationships was the system of the *latifundia*, or landed estate, established during the Spanish colonial period.⁷⁶ The second phase of property relations, which commenced when the United States gained Cuba in the Spanish American War in 1898 and continued through independence until the socialist revolution, was a capitalist phase characterized by a neo-colonial relationship of dependence on American business interests, which dominated the economic life of the nation and owned the majority of productive assets.⁷⁷ The final phase of property relations, the socialist phase, sought to overcome the gross inequality and distortions that characterized the two preceding phases through the nationalization of all productive assets and institutionalization of socialist property law.

A. *Socialist Property Law*

Article 14 of the 1976 Constitution provides that the Cuban economic system is "based on the socialist ownership of all the people over the means of production and the elimination of the exploitation of man by man."⁷⁸ In addition to the traditional

76. For a discussion of the *latifundia* system, see JAMES LOCKHART & STUART SCHWARTZ, *CAMBRIDGE LATIN AMERICAN STUDIES* 46: *EARLY LATIN AMERICA: A HISTORY OF COLONIAL SPANISH AMERICA AND BRAZIL* (1983).

77. For a discussion of the pre-Revolutionary economic and political system in Cuba, see HUGH THOMAS, *CUBA: THE PURSUIT OF FREEDOM* (1971); PHILIP S. FONER, *A HISTORY OF CUBA AND ITS RELATIONS WITH THE UNITED STATES* (1962); Richard Millet, *Imperialism Intervention and Exploitation: Historical Context of International Relations in the Caribbean*, in *THE RESTLESS CARIBBEAN: CHANGING PATTERNS OF INTERNATIONAL RELATIONS* 3, 3-18 (Richard Millet & W. Marvin Will eds., 1979). Castañeda & Montalván note that before the Revolution, U.S. investors owned ninety percent of all electric generating capacity, the entire telephone system and the majority of the mining industry, as well as between 1.5 and 2 million acres of land. Castañeda & Montalván, *supra* note 16, at 13.

78. CONSTITUCIÓN DE LA REPUBLICA DE 24 DE FEBRERO DE 1976 art. 14 (Cuba) [hereinafter 1976 CONST.] amended by LEY DE REFORMA CONSTITUCIONAL [1992 CONSTITUTIONAL REFORM LAW] (July 13, 1992) [hereinafter 1992 CONSTITUTIONAL REFORM LAW].

forms of state⁷⁹ and personal property⁸⁰ under socialist law, the 1976 Constitution established a new form of property known as small farmer property.⁸¹ State property, which is owned by "the entire people," is broadly defined as all natural resources and all basic means of production, including farms, factories, banks, social and cultural enterprises, as well as any type of property appropriated from imperialists, large landholders or members of the bourgeoisie.⁸² The second major form of property, personal property, is defined as items intended for consumption to satisfy an individual's basic needs, which includes a household's dwelling unit.⁸³ However, the land under a dwelling unit would be considered state property because it is a natural resource.⁸⁴ Only the land owned directly by small farmers and their cooperatives is not owned by the state.⁸⁵ A fourth and new form of property, the mixed enterprise (*empresa mixta*), was established under Law-Decree 50 of 1992 (Law-Decree 50).⁸⁶ The mixed enterprise was defined as a commercial joint venture between a foreign entity and a Cuban state corporate entity.

B. *The Housing Sector in Cuba*

Urban housing was de-emphasized in revolutionary Cuba on both the symbolic and practical level. The socialist constitution of Cuba does not guarantee a right to housing.⁸⁷ Throughout

79. 1976 CONST. art. 25.

80. *Id.* art. 22.

81. *Id.* art. 20.

82. *Id.* art. 15.

83. *Id.* art. 22.

84. *Id.* art. 15.

85. *Id.* art. 24. The official reason that small-farmer property was treated as its own class of property separate from both state and personal property was in order to recognize that farmers would need a different method to transform them to socialism. See ALVAREZ TABÍO, COMENTARIOS A LA CONSTITUCION SOCIALISTA [COMMENTARIES ON THE SOCIALIST CONSTITUTION] 89 (1985). Consuegra-Barquín suggests that small farmer property was given a privileged and secure position in order to forestall immigration to the cities and encourage food production. Juan C. Consuegra-Barquín, *Cuba's Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, 46 RUTGERS L. REV. 873, 910 (1994).

86. Decreto-Ley 50 (Sobre asociación económica entre entidades cubanas y extranjeras) [Concerning economic association between Cuban and foreign entities], GACETA OFICIAL, Feb. 15, 1982 [hereinafter Law-Decree 50]. Law-Decree 50 was incorporated into the Constitution as Article 23 of the 1976 Constitution on August 1, 1992. See 1992 CONSTITUTIONAL REFORM LAW art. 23.

87. See 1976 CONST.; 1992 CONSTITUTIONAL REFORM LAW.

the term of the Revolutionary government, the construction of housing has been subordinated to agricultural and industrial production, particularly to the desire to increase the sugar cane harvest.⁸⁸ The construction of housing in metropolitan Havana was slighted in favor of housing construction at sugar production facilities in the provinces.⁸⁹ According to the Cuban housing scholar Jill Hamberg, new housing construction just barely accounted for population growth and housing loss through building collapse and demolition, which was particularly acute in older parts of Havana.⁹⁰ Hamberg reports that approximately one-half of the 1.4 million housing units built between 1959 and 1988 are substandard.⁹¹ Furthermore, extended and even unrelated families are often crowded together in a few small rooms⁹² because it is nearly impossible for new households to enter the housing system.⁹³ Nevertheless, almost half of the country's existing dwelling units were built since 1959.⁹⁴ The lack of adequate housing is considered by many experts to be the most pressing problem in Cuba today.⁹⁵

C. Primary Initiatives Relating to Residential Real Estate

The 1960 Urban Reform Law,⁹⁶ and the subsequent 1984 General Housing Law⁹⁷ and 1988 General Housing Law,⁹⁸ established two basic forms of urban tenure: home ownership and

88. See Jill Hamberg, *Cuba, in HOUSING POLICIES OF THE SOCIALIST THIRD WORLD* 35, 38 (K. Mathey ed., 1990) [hereinafter Hamberg, *Cuba*].

89. *Id.* Between 1946 and 1958, fifty-five percent of all new dwelling units were constructed in metropolitan Havana, compared with only twenty-five percent of all new dwelling units completed between 1959 and 1970. *Id.*

90. *Id.* at 40.

91. *Id.* at 37.

92. See Lynda Grove, *Hopes of Reviving Cuba's Capital Dry Up in Economic Drought*, CHI. TRIB., Aug. 16, 1992, at C21.

93. *Id.*

94. Hamberg, *Cuba, supra* note 88, at 40. Hamberg derives her estimate from the 1981 census.

95. See *Cuba: Past, Present and Future, supra* note 40, 41, at 153-54. Experts estimate that between 600,000 and 800,000 housing units are currently needed in Cuba. *Id.* at 154.

96. Ley de Reforma Urbana [Urban Reform Law], GACETA OFICIAL, Oct. 14, 1960 [hereinafter Urban Reform Law].

97. Ley No. 48, Ley General de la Vivienda [General Housing Law], GACETA OFICIAL, Dec. 31, 1984 [hereinafter 1984 General Housing Law].

98. Ley No. 65, Ley General de la Vivienda [General Housing Law], GACETA OFICIAL, Dec. 23, 1988 [hereinafter 1988 General Housing Law].

long-term lease-holding from the government.

The primary goal of the Urban Reform Law in its first stage was to replace rental arrangements with the ownership of dwelling units by their occupants. The Urban Reform Law declared null and void all existing leases of residential property.⁹⁹ All rental property was confiscated and legal title of property was conferred on the tenant or subtenant in each dwelling unit.¹⁰⁰ After deducting the rent already paid by the tenant, the newly formed Urban Reform Committee determined the compensation to be paid the former owner, establishing an "amortization" period between five to twenty years during which monthly payments would be made directly to the state.¹⁰¹ Even though the state was required to turn the monthly payment over to the former landlord, it evidently almost never did.¹⁰² The transfer of property without prior permission from the state was prohibited and the state reserved the right to repurchase any property at the price previously established by the Urban Reform Committee.¹⁰³ Eventually, the monthly payment was calculated based on an official approximation of the unit's quality, location and depreciation.¹⁰⁴ By the end of 1988, 450,000 former renters had taken advantage of this new policy.¹⁰⁵

Another important goal of the Urban Reform Law was to destroy the traditional mortgage by turning the government into the mortgagee.¹⁰⁶ The Urban Reform Law required cancellation of all existing mortgage agreements and required homeowners to

99. See Urban Reform Law, *supra* note 96, art. 5.

100. *Id.* art. 1. The Urban Reform Law had two rural analogs: the Agrarian Reform Laws of 1959 and 1963, which effectively granted tenant farmers title to their land. [Primera] Ley de Reforma Agraria [First Agrarian Reform Law], GACETA OFICIAL, June 3, 1959 [hereinafter First Agrarian Reform Law]; Segunda Ley de Reforma Agraria [Second Agrarian Reform Law], GACETA OFICIAL, Oct. 3, 1963 [hereinafter Second Agrarian Reform Law].

101. Urban Reform Law, *supra* note 96, art. 13; see also *id.* arts. 7-9, 29.

102. See Emilio C. Cueto, *Property Claims of Cuban Nationals* 16, Address at the Resolution of Property Claims in Cuba's Transition Workshop, Washington, D.C. (Jan. 26, 1995). Cueto hints that no compensation was paid. *Id.* I have found no definitive documentation indicating that the compensation guaranteed by the various Cuban expropriation laws aimed at Cuban nationals was actually paid.

103. Urban Reform Law, *supra* note 96, art. 29.

104. See Hamberg, *Cuba*, *supra* note 88, at 56.

105. Jill Hamberg, *Cuban Housing Policy*, in TRANSFORMATION AND STRUGGLE 236, 237-38 (Sandor Halesby & John Kirk eds., 1990) [hereinafter Hamberg, *Cuban Housing Policy*].

106. Urban Reform Law, *supra* note 96, arts. 30-36.

continue making payments to the government instead of the bank.¹⁰⁷ Landlords of mortgaged property had their property confiscated and were offered minimal or no compensation.¹⁰⁸ Persons or corporations holding the mortgages received no compensation, except for commercial banks, who were to receive Cuban government bonds.¹⁰⁹ The Urban Reform Law also mandated that the government use the proceeds of the mortgage payments to build new rental housing.¹¹⁰

Under the Urban Reform Law, monthly rental payments were capped at ten percent of household income, regardless of the size, location or quality of the housing.¹¹¹ One component of this plan involved the implementation of various programs whereby urban slum dwellers were recruited into teams to build their own new dwellings.¹¹² Because all maintenance of rental buildings was transferred to local governmental authorities, these structures soon fell into a state of chronic disrepair.¹¹³ The maintenance and repair of low-rise complexes was later delegated to "self-managed" resident councils.¹¹⁴ The maintenance of high rise complexes remained with local governmental authorities.¹¹⁵

The majority of lease-holders in government units, approximately 460,000 households representing one-fifth of all households, were converted to homeowners through the 1984 General Housing Law, which established an amortization schedule of twenty years.¹¹⁶

By 1970, the national housing shortage, estimated to be at one million dwelling units, had reached extreme proportions.¹¹⁷ In response, the government developed the concept of microbrigades: groups of twenty-five to thirty-five employees from a particular workplace who, under the direction of the Con-

107. *Id.*

108. See JILL HAMBERG, UNDER CONSTRUCTION: HOUSING POLICY IN REVOLUTIONARY CUBA 3 (1986) [hereinafter HAMBERG, UNDER CONSTRUCTION].

109. *Id.*

110. *Id.*

111. Urban Reform Law, *supra* note 96, art. 1.

112. Hamberg, *Cuba*, *supra* note 88, at 52.

113. *Id.*

114. *Id.* at 51.

115. *Id.*

116. *Id.* at 57.

117. *Id.* at 53.

struction Ministry, built housing units while the other members of the workplace remained in place maintaining production quotas.¹¹⁸ Units in the newly-built housing would then be distributed throughout the workplace based on workplace "performance,"¹¹⁹ or more exactly, political favoritism.¹²⁰ The microbrigades fostered a building boom, building half of all government-sponsored housing during the 1972 to 1975 period, and virtually dominated the provision of housing in urban areas.¹²¹ Microbrigades were responsible for building large-scale housing projects of four and five story walk-up buildings, using traditional construction methods, and Cuba's first urban renewal projects, in which twelve to eighteen story towers replaced urban slums.¹²² The rapid growth of the microbrigades continued until 1975, when the government finally recognized that microbrigade-produced buildings were both more expensive and of lower quality than buildings built by other methods and that the system was fundamentally unfair, as workers in workplaces that did not qualify for a microbrigade had almost no possibility of obtaining housing.¹²³ Due to the fact that a worker changing employment retained the right to inhabit the unit she helped build, some industries reported that fully twenty percent of their housing units were occupied by persons employed elsewhere.¹²⁴ Microbrigades continued at a slower pace, at least through the mid-1980s, as their relative importance diminished with state brigades increasingly entering the housing sector.¹²⁵ In 1987, the number of microbrigades devoted to housing construction was increased, just as all private contracting was eliminated.¹²⁶ Still, housing completions declined by five percent in 1988.¹²⁷

The focus of the economy on sugar production and the failings of official Cuban housing policy resulted in insufficient new housing construction. In fact, an even more severe housing

118. *Id.* at 53-55.

119. *Id.*

120. Interview with resident of Alamar Housing Project who constructed his apartment through a microbrigade program (May 28, 1995).

121. Hamberg, *Cuba*, *supra* note 88, at 38.

122. *Id.* at 49.

123. *Id.* at 61.

124. *Id.*

125. *Id.* at 64. Hamberg reports that by 1983, microbrigades had produced over 100,000 housing units. *Id.*

126. See *Cuba: Past, Present and Future*, *supra* note 40, 41, at 153-54.

127. *Id.*

shortage was forestalled only through the regime of self-built housing¹²⁸ and the large number of vacancies created by emigrating Cubans who "abandoned" their property. In addition, more than two-thirds of the units constructed from 1970 through 1981 were constructed through self-help.¹²⁹ Because the government provided no financing for self-help construction, financing was often diverted from state-sponsored home repair programs.¹³⁰ Self-help units were often built on vacant land sold privately, or more likely, on state-owned vacant land that had been confiscated and either sold to, or simply occupied by, the new owners.¹³¹ Evidently, it was possible for a citizen seeking a lot on which to build to identify the preferred site and then, using the machinery of the "vacant lot laws," force the owner to sell at a fraction of the actual value of the land.¹³²

The self-help sector represents a major failure of Cuban housing policy. As building codes were almost completely ignored, nearly half of the units built are of poor quality.¹³³ Because zoning regulations were not enforced, almost all of the self-help units are single family homes, oftentimes constructed on close-in land more suited to commercial or office use, resulting in urban sprawl.¹³⁴ In many instances, the required infrastructure has not reached such developments.¹³⁵ The 1984 General Housing Law brought self-help units under regulation by bestowing title on such units.¹³⁶

128. Hamberg, *Cuba*, *supra* note 88, at 59.

129. *Id.* at 59.

130. *Id.* at 60.

131. *Id.*

132. *Id.* "Vacant lot laws" (specifically Law-Decrees No. 691, No. 717 and No. 218), which were passed even before the Urban Reform Law, required land owners to commence building on all vacant land within six months or sell the property at an extortionate rate (four dollars (U.S.) per square meter) to someone willing to do so. *Id.* at 3. See Ley No. 691 [Law No. 691], Cuad. XV, Dec. 23, 1959, at 208; Ley No. 717 [Law No. 717], Cuad. XVI, GACETA OFICIAL, Feb. 4, 1960; Ley No. 218 [Law No. 218], Cuad. VI, Apr. 7, 1959, at 44.

133. See Hamberg, *Cuba*, *supra* note 88, at 59-60.

134. *Id.*

135. *Id.*

136. 1984 General Housing Law, *supra* note 97.

D. *Title to Property in the Cuban Context*

As of 1994, as many as ninety-one percent of households held title to their property.¹³⁷ However, it may be deceptive to take the concept of title in the Cuban context at face value, because "title" as conferred by the Urban Reform Law and subsequent laws is much more restricted than classical notions of title in the capitalist world.¹³⁸ For example, the new title was not freely alienable; any further transfer of title in any house or apartment required the approval of the Urban Reform Committee.¹³⁹ The state retained the right of first refusal at its officially determined price.¹⁴⁰ The only exception to this policy was the *permuta* arrangement instituted in the 1970s, whereby Cubans were allowed to exchange property on a bilateral or multilateral basis.¹⁴¹ Until the 1984 General Housing Law was implemented, housing tenure status in housing exchanges was based not on the unit, but on the household.¹⁴² Hence, title would automatically move with a family that transferred property and would not be alienated in the exchange. Furthermore, at deaths the right to remain on the property and to amortize the property was limited solely to persons living with the deceased for at least a full year before death.¹⁴³ If an individual died without such cohabitating survivors, the dwelling reverted to the state, with any heirs receiving only a proportional amount of the government-determined value.¹⁴⁴

E. *Survey of Housing in Havana Today*

One of the first tasks of the Housing Ministry should be to conduct a survey of the existing housing conditions in Havana.

137. *Cubans Respond to Questions*, MIAMI HERALD, Dec. 18, 1994, at A37.

138. Gutiérrez, *supra* note 72 (citing Douglas E. Matthews, Real Property Law under the Current Cuban Regime 1 (1993) (unpublished manuscript, on file with the author)).

139. *Id.* at 13 (citing Ignacio E. Sánchez, Cuban Property Rights and the 1940 Constitution 8-9 (1993) (unpublished manuscript)).

140. Hamberg, *Cuba*, *supra* note 88, at 59-60.

141. EVENSON, *supra* note 48, at 182-83.

142. *Id.* at 178-85.

143. *Id.* Inheritance rights were expanded by the 1984 General Housing Law to allow non-cohabiting heirs to inherit dwelling units.

144. *Id.*

An analysis of the housing fabric in Havana will determine a spectrum of housing types and locations. These will range from prime residential property, which will become the focus of gentrification, to various types of undesirable property that, without intervention, will become slum areas. Even without such a survey, the conceptual framework for developing sound policy based on understanding existing housing needs and anticipated market developments can be formulated.

The buildings which will be most prone to gentrification are the structurally solid and architecturally significant, low-rise buildings constructed before 1959. Those buildings that are located in areas close to the center of the city, near major transportation arteries or in primarily residential neighborhoods will be considered the most desirable.

On the other hand, architecturally undistinguished buildings constructed after 1959, with major structural problems will be least desirable. Such buildings are at severe risk of deterioration and disinvestment. Likewise, buildings that are far from major transportation arteries, in industrial or commercial areas, or in otherwise polluted areas will be considered least desirable.

IV. WEIGHING THE ISSUE OF RESTITUTION

The restitution of confiscated property has been a pivotal issue in American relations with Cuba since the Revolution. The confiscation of properties belonging to U.S. citizens without adequate compensation was the primary motivation behind the United States' embargo first imposed on Cuba in 1960.¹⁴⁵ Alonso and Lago estimated the claims of Cuban exiles to be \$6.9 billion in 1957 dollars, equivalent to approximately \$20.02 billion in 1993 dollars.¹⁴⁶ In addition, the issue of restitution is considerably more important in Cuba than in other post-socialist nations due to the unprecedented percentage of land that was nationalized in Cuba.¹⁴⁷ By 1988, 92% of all farm land had

145. Castañeda & Montalván, *supra* note 16, at 1. For a discussion of the embargo, see *supra* note 36.

146. José F. Alonso & Armando M. Lago, *A First Approximation of the Foreign Assistance Requirements of a Democratic Cuba*, in *CUBA IN TRANSITION*, 3D MEETING OF THE ASSOC. FOR THE STUDY OF THE CUBAN ECON. 168, 202-04 (1993).

147. Cueto, *supra* note 102, at 22 (citing Jan Svejnar & Jorge Pérez-López, *A Strategy for Economic Transformation of Cuba Based on the East European Experi-*

been nationalized in Cuba, compared with only 8% in Poland, 14% in the former Soviet Union and 17% in the former East Germany.¹⁴⁸

A. *The Legal Case for Restitution*

A number of mechanisms were used by the Revolutionary government in seizing property. The particular mechanism involved in each case may well determine the legal validity of the taking. Property takings involved both confiscation and expropriation. Confiscation is the seizure of private property without compensation, usually as a form of punishment related to the person subject to the taking, and not the property itself.¹⁴⁹ Expropriation involves the taking by the state of specific property for a public purpose independent of the identity of the owner.¹⁵⁰ The takings of property owned by Cuban nationals took place primarily by three different mechanisms:¹⁵¹ (i) the confiscation of property owned by officials of or collaborators with the Batista regime;¹⁵² (ii) the expropriation of property required to transform Cuba to a socialist state, as expressed in the Agrarian Reform Law of 1959 (First Agrarian Reform Law)¹⁵³ and the Urban Reform Law of 1960;¹⁵⁴ and (iii) the confiscation of property "abandoned" by fleeing emigrants under Law 989 of

ence, in CUBA AFTER THE COLD WAR 336 (Carmelo Mesa-Lago ed., 1993)).

148. *Id.*

149. BLACK'S LAW DICTIONARY 778 (4th rev. ed. 1968).

150. *Id.* at 616.

151. For an excellent overview of the mechanics of property expropriation, see Matías F. Travieso-Díaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217 (1995).

152. Article 24 of the Fundamental Law permitted the "recovery" of property that had been "misappropriated" during the Batista regime. Ley Fundamental, art. 24 GACETA OFICIAL, Feb. 7, 1959 [hereinafter Fundamental Law]. Article 24 was the stated legal authority for the promulgation of three subsequent laws putatively aimed at recovering the misappropriated property from three targeted groups: (i) officials of the Batista government, Law 112 (Feb. 27, 1959) [Law for the Recovery of Misappropriated Properties], amended by Law 151 (Mar. 17, 1959); (ii) collaborators with the Batista government, Law 438 (Feb. 19, 1959), amended by Law 746 (July 7, 1959); and (iii) persons fleeing the country to avoid jurisdiction of the Revolutionary courts, Law 664 (Dec. 23, 1959). Consuegra-Barquín argues that each of these three laws is unconstitutional because it exceeds the authority granted in Article 24 of the Fundamental Law. See Consuegra-Barquín, *supra* note 85, at 900-01.

153. See First Agrarian Reform Law, *supra* note 100.

154. See Urban Reform Law, *supra* note 96.

1961 (Law 989)¹⁵⁵ and the prior related Resolution Number 454.¹⁵⁶ Law 989 effectively confiscated the property of Cubans fleeing Revolutionary Cuba for economic and political reasons on the premise that the property they left behind was "abandoned" and therefore became state property.¹⁵⁷

There is no clearly recognized legal right in international law to the restitution of or compensation for property seized by one's own government.¹⁵⁸ It is well-established that international law principles provide only for the "prompt, adequate and effective" compensation where the property of *aliens* has been confiscated.¹⁵⁹ The argument has been made that the right of property is an emerging international human right, as evidenced by the implementation of restitution and compensation schemes in post-socialist Eastern Europe¹⁶⁰ and a 1974 position of the United Nations High Commission for Refugees recognizing a right to private property for stateless Asians whose property had been expropriated in Uganda.¹⁶¹ If the right to private property is a fundamental human right, then arguably a country confiscating the property of its citizens would be required to provide compensation at the least.¹⁶² However, considering the weight of authority to the contrary, there does not seem to be a plausible argument that international law currently recognizes such a right.¹⁶³ Therefore, any legal argument for the restitution of

155. Ley No. 989 [Law No. 989], GACETA OFICIAL, Dec. 6, 1961, at 23,705 [hereinafter Law 989].

156. Resolución No. 454 [Resolution No. 454], GACETA OFICIAL, Oct. 9, 1961, at 19,310.

157. See Law No. 989. All business property held by U.S. citizens was expropriated under different legal authority. Ley No. 851 [Law No. 851], GACETA OFICIAL, Aug. 6, 1960. See also MICHAEL W. GORDON, THE CUBAN NATIONALIZATIONS: THE DEMISE OF PROPERTY RIGHTS IN CUBA 69-108 (1975).

158. Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 861 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964); F. Palicio y Compañía, S.A. v. Brush, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), *aff'd per curiam*, 375 F.2d. 1011 (2d Cir. 1967); Banco Nacional de Cuba V. Farr, 272 F. Supp. 836, 838 (S.D.N.Y. 1965), *aff'd* 383 F.2d. 166, 184-85 (1967), *cert. denied* 390 U.S. 956 (1968); Jaffari v. Islamic Republic of Iran, 539 F. Supp. 209, 215 (N.D. Ill. 1982); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702, cmt K.

159. Shanghai Power Co. v. United States, 4 Ct. Cl. 237, 240 (1983); RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 185-90.

160. Consuegra-Barquín, *supra* note 85, at 886-892.

161. *Id.* at 889 (citing report of the High Commissioner for Refugees, 29 U.N. GAOR Supp. (No. 12A) at 9, U.N. Doc. A/9612/Add.1 (1974)).

162. *Id.* at 886-892.

163. Even the most recent edition of the *Restatement* does not recognize a right

or compensation for confiscated property in Cuba must proceed under an analysis of Cuban law.¹⁶⁴

Looking to Cuba's domestic legal structure to determine the validity of restitution and compensation claims is at best an extremely complex analysis. This complexity derives from the fact that the Cuban legal regime is an amalgam of multiple layers of law and legal culture dating from before Cuba's independence in 1902 to the present and that there is considerable argument concerning what legal authority governs today, or even what legal authority has governed since the Cuban Revolution began in 1959.

The Constitution of 1901 (1901 Constitution),¹⁶⁵ Cuba's first, was promulgated by the occupying U.S. military governor, who modeled it after the United States Constitution.¹⁶⁶ The 1901 Constitution contained the notorious Platt Amendment, Article VII, which allowed the United States to regulate actions of the Cuban government and made Cuba a virtual protectorate of the United States.¹⁶⁷

Following the 1933 revolution, the major political parties, representing a broad spectrum from right to left, convened to draft the new constitution promulgated in 1940.¹⁶⁸ The progressive Constitution of 1940 (1940 Constitution), considered to be a model for many Latin American constitutions, guaranteed the rights to employment and collective bargaining and estab-

to property. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). See sources *supra* notes 158-159.

164. Cuban-Americans are presumably barred from seeking compensation as foreign nationals because well-established international law principles limit a state to protecting the interests of only those individuals who were nationals of the state at the time of the expropriations. See D. W. GREIG, INTERNATIONAL LAW 530-31 (2d. ed. 1976). This principle has been violated by the United States in settling claims with both Czechoslovakia and Nicaragua, when, in each instance, the U.S. reached a settlement in the interest of nationals of those countries who later became American citizens. See Vrativlav Pechota, *Current Development: The 1981 U.S.—Czechoslovakia Claims Settlement Agreement: An Epilogue to Postwar Nationalization and Expropriation Disputes*, 76 AM. J. INT'L L. 639, 640 (1982); WASH. POST, Dec. 21, 1994 at A28.

165. CONSTITUCION DE LA REPUBLICA DE CUBA [Constitution] (Cuba) [hereinafter 1901 CONST.], GACETA OFICIAL, Apr. 14, 1902.

166. Franklin W. Knight, *Cuba*, in THE MODERN CARIBBEAN 169, 170-71 (Franklin W. Knight & Cohn A. Palmer eds., 1989).

167. 1901 CONST. art. 7. See UNITED STATES DEPARTMENT OF THE ARMY, CUBA: A COUNTRY STUDY 159 (1987) [hereinafter COUNTRY STUDY].

168. CONSTITUCION DE LA REPUBLICA DE CUBA [Constitution] (Cuba) [hereinafter 1940 CONST.], GACETA OFICIAL, Apr. 6, 1943.

lished a minimum wage, maximum work week, maternity leave and, perhaps most importantly, the right to private property.¹⁶⁹ The 1940 Constitution, which was honored only in the breach by the Batista regime, is considered by many exiles to be "the last legitimate expression of the constitutional will of the Cuban people" and therefore still in effect today.¹⁷⁰ The 1940 Constitution remains the putative object of restoration of the exile community, although arguably it was never really in effect.

After seizing power, the Revolutionary government amended the 1940 Constitution with the Fundamental Law of the Revolution (Fundamental Law) in February 1959.¹⁷¹ Even though the Fundamental Law was intended only to revise and supplement, rather than nullify, the Constitution of 1940,¹⁷² it made fundamental changes in the structure of government.¹⁷³ Most importantly, the Fundamental Law allowed the Council of Ministers, with the approval of the President, to amend the Constitution without following specified legislative procedures.¹⁷⁴ Although the Fundamental Law did not substantively change the guarantee of private property¹⁷⁵ or the expropriation clause¹⁷⁶ of the 1940 Constitution, it did allow the retroactive confiscation of the property of officials of and collaborators with the Batista government.¹⁷⁷

The 1976 Constitution was promulgated because of the constant need to amend the Fundamental Law.¹⁷⁸ The 1976 Con-

169. *Id.* arts. 60, 61, 66, 71, 72, 87.

170. Gutiérrez, *supra* note 72, at 18.

171. *See* Fundamental Law, *supra* note 152.

172. *Id.* The Fundamental Law contains no provision repealing the 1940 Constitution. Fidel Castro explicitly stated that the goal of the 1959 Revolution was to re-establish the 1940 Constitution, which had been flagrantly ignored by the Batista dictatorship. *See* Raúl Marrero, *La castración de un proceso democrático*, [The Castration of a Democratic Process], *EL NUEVO DIA*, Mar. 26, 1992, at 72.

173. *See* Fundamental Law, *supra* note 152, art. 232.

174. Article 232 of the Fundamental Law effectively nullified Article 285 (requiring a super-majority of a vote of Congress to amend the Constitution) and Article 286 (requiring a constitutional convention or plebiscite for major constitutional reforms) of the 1940 Constitution. *See* Travieso-Díaz, *supra* note 151, at 236.

175. *Compare* Fundamental Law, *supra* note 152, art. 87 with 1940 CONST., *supra* note 168, art. 87.

176. *Compare* Fundamental Law, *supra* note 152, art. 24 with 1940 CONST., *supra* note 168, art. 24.

177. *See* Fundamental Law, *supra* note 152, arts. 21, 24.

178. 1976 CONST. Evidently, one of the reasons the 1976 Constitution was so long in coming was the difficulty the drafters had in reconciling the existing Spanish Civil Code with socialist law concepts. *See* Consuegra-Barquín, *supra* note 85, at

stitution, modeled on the 1936 Soviet Constitution,¹⁷⁹ established a "socialist legality" as the juridical and legal foundation of the country in an attempt to curtail the excesses of revolutionary fervor embodied in the Fundamental Law, which allowed government officials to act beyond the law.¹⁸⁰ The 1976 Constitution clearly established the right of the state, in the name of the people, to all land, except that of small farmers and agricultural cooperatives,¹⁸¹ and left the expropriations clause intact.¹⁸²

A controversial issue in the Cuban exile community is whether the 1959 Revolution and all subsequent actions taken by the Revolutionary government should be accorded legal validity. If specific acts of the Revolutionary government, such as the seizure of "abandoned" property, can be proven to be unconstitutional, then Cuban domestic law alone will suffice to validate restitution claims. The laws permitting certain property seizures, such as the First Agrarian Reform Law and the Urban Reform Law, were based on the authority of the Fundamental Law, which fundamentally altered existing legal norms.¹⁸³ Despite arguments that the Revolutionary government did not have the power to fundamentally alter the existing legal norms,¹⁸⁴ it is well-established in international law that actions taken by revolutionary governments are valid and that, therefore, the Revolutionary government had the power to establish new legal norms.¹⁸⁵ For the acts of a revolutionary govern-

896-97.

179. See KONST. [Constitution] (U.S.S.R.) (1936). Compare, e.g., Articles 66-98, Supreme Organs of the People's Party of the 1976 CONST. (Cuba) with Articles 30-56, The Higher Organs of State Power in the Union of Soviet Socialist Republics of the 1936 Soviet Constitution.

180. COUNTRY STUDY, *supra* note 167, at 162.

181. 1976 CONST. art. 15.

182. *Id.* art. 25.

183. See First Agrarian Reform Law, *supra* note 100; see Urban Reform Law, *supra* note 96; see Fundamental Law, *supra* note 152.

184. See Jose D. Acosta, *El Marco Juridico-Institucional de un Gobierno Provisional de Unidad Nacional en Cuba* [The Juridical-Institutional Framework of a Provisional Government of National Unity in Cuba], in CUBA IN TRANSITION, 2ND MEETING OF THE ASSOC. FOR THE STUDY OF THE CUBAN ECON. 61, 78-82 (1992).

185. See HANS KELSEN, GENERAL THEORY OF LAW AND STATE 117, 187-88 (1961); Travieso-Diaz, *supra* note 151, at 241-42. Even under the most conservative analysis, which distinguishes between the legitimacy of a government (a non-judicable political and moral issue) and the legal validity of the government's acts (a judicable issue), the actions of the Revolutionary government are arguably legally valid; Tayvab Mahmud, *Jurisprudence of Successful Treason: Coup d'Etat & Common*

ment to be considered valid, international law norms require only that political control be exercised over the territory and that the population acquiesce in the newly established order.¹⁸⁶ These conditions were met from the start in Revolutionary Cuba.¹⁸⁷ As one scholar concluded, “[d]enying legal validity to the revolutionary laws is therefore denying reality.”¹⁸⁸ Even if the takings are considered constitutional, the Cuban government would still have an obligation to provide some form of compensation.¹⁸⁹ The Fundamental Law, under whose authority the expropriations were executed, requires that compensation be paid.¹⁹⁰

Other types of property seizures, such as the confiscation of “abandoned” properties under Law 989, could possibly be found unconstitutional because they violate the new legal norms established by the Revolution.¹⁹¹ Because Law 989 explicitly violates the requirements of the Fundamental Law that seized properties be taken for an express public purpose and that compensation be provided,¹⁹² it is arguably unconstitutional within the then-existing legal norms.¹⁹³ In fact, the seizure of property pursuant to Law 989 was not in recovery of assets “misappropriated” by the Batista regime as required under the Fundamental Law,¹⁹⁴ nor was the abandonment of such property voluntary. Thus, within the norms of the then-existing law, coerced abandonment is an illegal confiscation of the property of absentee owners and not the expropriation of abandoned property.¹⁹⁵ Furthermore, such property seizures were illegal because the seizure of items of personal consumption, such as private resi-

Law, 27 CORNELL INT’L L.J. 49 (1994).

186. See KELSEN, *supra* note 185, at 187-88. Travieso-Díaz notes that the test for determining the validity of a government’s acts is parallel to the test required by foreign countries in recognizing a revolutionary government. See Travieso-Díaz *supra* note 151, at 237 n.74. For citations to cases from numerous jurisdictions applying the principle within the past decade, see *id.* at 237 n.73.

187. The Cuban Revolution was overwhelmingly popular at the time the Fundamental Law, which was endorsed by numerous leaders in the Cuban legal community, was promulgated. See Cueto, *supra* note 102, at 14.

188. Travieso-Díaz, *supra* note 151, at 237.

189. *Id.* at 36.

190. See Fundamental Law, *supra* note 152, art. 24.

191. See Travieso-Díaz, *supra* note 151, at 235.

192. See Fundamental Law, *supra* note 152, art. 24.

193. See Consuegra-Barquín, *supra* note 85, at 904-06.

194. See Fundamental Law, *supra* note 152, art. 24; Law 989, *supra* note 155.

195. Consuegra-Barquín, *supra* note 85, at 904-06.

dences, was inconsistent with the general principles of socialist property law.¹⁹⁶ The confiscations were also arguably discriminatory in that they targeted a class of people based on their political beliefs.¹⁹⁷ Additionally, because the current civil code permits *usucapio* (the analog to adverse possession under Spanish civil law) pursuant only to good faith possession, property seizures might be invalid in a small number of instances where the former owner could prove bad faith possession.¹⁹⁸

The issue of restitution is further complicated by investments made by new parties pursuant to Law-Decree 50.¹⁹⁹ Determining the legal validity of investments made by foreign entities in properties that are the subject of restitution claims imposes further complication in the resolution of restitution claims. As permitted under Law-Decree 50, foreign enterprises have entered into hundreds of joint venture agreements with various corporate entities of the Cuban government.²⁰⁰ Many of these transactions arguably represent a fire sale of the national patrimony, making it probable that such transactions will be disregarded by a future regime.²⁰¹ Prominent Cuban exiles have made it clear that, in a post-Castro Cuba, any property rights obtained through the joint enterprise scheme will not be recognized,²⁰² a view that is certain to lead to extensive inter-

196. Travieso-Díaz, *supra* note 151, at 235.

197. Consuegra-Barquín, *supra* note 85, at 904.

198. *Id.* at 912-22, 926-28, Diagram. The 1889 Civil Code, which was inherited from Spain, recognized both good faith possession, with a minimum term of possession of ten years against a present proprietor and twenty years against an absent proprietor, and bad faith possession, with a minimum term of possession of ten years against any proprietor. CÓD. CIV. [CIVIL CODE], arts. 1940, 1959 (1889) (Cuba). The 1889 Civil Code was replaced by the Socialist Civil Code of 1988, which recognized good faith *usucapio* only, with a minimum term of possession of five years against any proprietor. CÓD. CIV. [CIVIL CODE] law 59, art. 186.1 (1988) (Cuba).

199. Law-Decree 50, *supra* note 86.

200. See Appendix II: *Current Investments in Cuba*, in INVESTING IN CUBA 172-176 (Jaime Suchlinki & Antonio Jorge eds., 1994).

201. Alberto Luzárraga, *Business Perspective on Investment in Cuba*, in INVESTING IN CUBA 63 (Jaime Suchlicki & Antonio Jorge eds., 1994).

202. In 1993, a group of eleven exile organizations co-authored an "Open Letter to Investors" warning foreign investors against investing in these enterprises under the Castro regime. Otto Reich, *Investing in Cuba: A Personal View*, in INVESTING IN CUBA 51, 54 (Jaime Suchlicki & Antonio Jorge eds., 1994). See also Christopher Marquis, *Investments in Cuba Are an Act of Collaboration*, MIAMI HERALD, Dec. 22, 1994, at A19. Jorge Mas Canosa delivered a letter on behalf of CANF to several foreign embassies in Washington, D.C. stating that "You are taking a major risk and will incur major losses by doing business in Cuba during the tenure of the dictatorship of Fidel Castro." *Id.*

national litigation. The Helms-Burton Legislation, enacted into law on March 12, 1996, grants U.S. nationals, defined to include persons who were Cuban nationals at the time their property was seized, the right to sue persons "trafficking" (which is effectively defined as deriving any economic benefit from) in such seized property.²⁰³ The Helms-Burton Legislation is certain to lead to extensive litigation and further cloud the issue of property rights.

Thus, there is no clear, overriding legal right to the restitution of residential property in Cuba. A legal analysis yields a complex set of results whereby a small minority of persons, primarily those whose property was confiscated because of their presumed affiliation with the Batista regime, may have a legal right to restitution, whereas the larger portion of the population may have, at most, a right to some form of compensation. From a strictly legal point of view, the level of compensation owed would be determined solely within the context of what is constitutionally required by Cuban domestic law, for which there is little or no precedent.

B. The Economic Case for Restitution

Economic arguments that are frequently made for the restitution of confiscated property by the exile community include that: (i) only by respecting the integrity of pre-Revolutionary Cuban law, which protected private property rights, can the stability necessary for growth be assured; (ii) given Cuba's poverty, compensation is not a possibility and restitution remains the only viable option; (iii) restitution will be the fastest way to jump-start and recapitalize the moribund economy; (iv) only former owners possess the necessary managerial skills required to transform the economy; and (v) restitution has been the key to economic success in other formerly socialist states in their privatization schemes.²⁰⁴

It is frequently argued that restitution is the fastest way to get the economy back on its feet. The development of a restitution scheme is, however, complicated and time-consuming. Restitution cannot simply be announced. A complex scheme that

203. See Helms-Burton Legislation, *supra* note 36, §§ 4, 103, 301-06.

204. See Castañeda & Montalván, *supra* note 16, at 12.

recognizes the multiplicity of interests and parties involved must be developed and implemented. The restitution of any parcel of confiscated property would involve a minimum of four parties: the original owner, the present occupant, the new Cuban governmental authority, and the government of the country of which the exile is now a citizen, as a "shadow party."²⁰⁵ In addition, any transfers of property during the Revolution through arrangements such as the *permuta*,²⁰⁶ or which occurred during later waves of emigration, such as the Mariel boat lift, would involve additional interested parties. Furthermore, any such procedure will involve administrative apparatus and competence for which an interim government will not be prepared. For example, the United States, in its adjudication of the 8,792 claims of U.S. citizens against Cuba, developed a matrix of twenty-eight different criteria for eight different types of property.²⁰⁷ An interim Cuban government will most likely be faced with hundreds of thousands of claims.²⁰⁸

In Eastern Europe, the implementation of restitution legislation precipitated a marked and immediate economic decline, as property disputes between former owners, current occupiers and other interested parties mushroomed, further obfuscating property rights and creating a climate of legal uncertainty.²⁰⁹ In the former Czechoslovakia, implementation of the restitution program led to a massive increase in litigation that brought the court system to a standstill.²¹⁰ Because of the uncertainty of the timing and ultimate resolution of the dispute, both foreign and local investment ceased and the occupants of contested property abandoned maintenance efforts.²¹¹ As several noted former Czechoslovakian economists had predicted, the restitution of property actually slowed down privatization and halted the influx of foreign capital.²¹² In effect, a restitution

205. Cueto, *supra* note 102, at 26.

206. *Permuta* arrangements often involved property that was confiscated from the original owner as abandoned property. *Id.* at 29-30.

207. *Id.* at 26-27.

208. Dresden, a relatively small city in the former East Germany, was deluged with over 40,000 claims for property restitution from former owners, for which it had only 60 property evaluators. FIN. TIMES, June 17, 1992.

209. Consuegra-Barquín, *supra* note 85, at 923.

210. CHERYL W. GRAY, EVOLVING LEGAL FRAMEWORKS FOR PRIVATE SECTOR DEVELOPMENT IN CENTRAL AND EASTERN EUROPE 4, 49 (World Bank Discussion Paper No. 209, 1993).

211. Consuegra-Barquín, *supra* note 85, at 923.

212. Gelpert, *supra* note 9, at 324-25 (summarizing *Group of Economists Express*

scheme brings the affected sector of the economy to a virtual standstill until claims are resolved.

Still, it is argued that restoring property to its former owners would most efficiently allocate resources because the former owners alone possess the unique entrepreneurial skills necessary to transform the economy.²¹³ This argument is premised on rather faulty logic: it assumes that the high standard of living that Cuba enjoyed before the Revolution was due primarily to the efforts of Cuban entrepreneurs, and that these entrepreneurs could achieve the same results again.²¹⁴ Such reasoning fails to recognize that thirty-seven years later most of these same entrepreneurs are probably either retired or deceased. Their heirs may have little or no interest or experience in business. Furthermore, the former affluence of Cuba relative to that of other Latin American countries may be due to many other factors — including higher levels of foreign investment, proximity to the hemisphere's largest market, greater investment in more advanced technology — other than to specific skills or expertise of the former entrepreneurial class.

Furthermore, as business analysts have predicted, because many nationals will greatly resent attempts by exiles to reassert themselves in Cuban economic and political life, there will be an unavoidable measure of social unrest in any event.²¹⁵ A controversy over restitution would only serve to inflame an already tense situation, further delaying economic recovery and discouraging foreign investment. From both an economic and an equitable point of view, restitution would lock Cuba into a 1959 pattern of the distribution of wealth and production, which would not only be unacceptable to the Cuban people, but would probably inhibit integration into the modern global economy.²¹⁶ A purely economic analysis clearly argues against restitution.

As concluded by two noted commentators on Eastern European events, Claus Offe and Frank Bönker, restitution has a net negative economic impact on post-socialist states because it

Concern Over Restitution Bill, BBC Summary of World Broadcasts, Feb. 15, 1991, available in LEXIS, World Library, AllWld File.).

213. Gutiérrez, *supra* note 72, at 17.

214. *Id.*

215. BUSINESS INTERNATIONAL CORPORATION, DEVELOPING BUSINESS STRATEGIES FOR CUBA (SPECIAL REPORT) 78 (1992).

216. Castañeda & Montalván, *supra* note 16, at 13. See *supra* note 76.

potentially misallocates societal assets, muddles property rights, recreates anachronistic land distribution that is inefficient in a modern economy, encourages rent-seeking behavior, strains states with limited financial and administrative resources, and makes a lasting social consensus difficult to achieve.²¹⁷

C. The Case for Restitution Based on the Practice of Eastern Europe

The evolving, post-Cold War practice has been to provide limited restitution of property confiscated from nationals of the country.²¹⁸ The actual practice of restitution in Eastern Europe has, however, been animated primarily by arbitrary interests and resentments.²¹⁹ Restitution has been given primarily for property loss, but not for human rights violations, because of the "strategic importance attached to property reform and the greater political leverage of former property owners compared with other victims of the communist regime."²²⁰ In fact, the institution of a legal regime focused on the restitution of property to its former owners has occurred primarily where the former communists and their allied technocratic elite were so discredited that they were not able to capitalize on public awareness of the country's severe economic problems.²²¹ In states where the former communist regime had been most successful in eradicating the private ownership of property and enforcing nationalization and collectivization of property, the call for restitution was the greatest.²²² In the former Czechoslovakia, strong restitution laws were favored largely as a reaction to the fact that socialist state property had become the focus of hostility for all communist abuses.²²³ The post-socialist Czechoslovakian emphasis on restitution, which was roundly criticized as "impractical," was defended by Czechoslovakian leaders as required by a "greater moral awareness" of the duty to return seized property.²²⁴

217. Claus Offe & Frank Bönker, *Forum on Restitution*, 2 EAST. EUR. CONST. REV. 32 (1993).

218. Consuegra-Barquín, *supra* note 85, at 883.

219. Offe & Bönker, *supra* note 217, at 31.

220. *Id.*

221. Gelpern, *supra* note 9, at 318.

222. *Id.* at 324-25.

223. *Id.* at 324. Czechoslovakia had undergone the most large-scale collectivization in the eastern European region. *Id.* at 324-25.

224. *Czechs To Return Seized Property*, N.Y. TIMES, Feb. 27, 1991, at A10.

The most successful restitution program instituted to date is probably that of the former East Germany.²²⁵ The extensive program in East Germany gave priority in the reversion of property to the former owner, excluding situations where the property had been purchased by a third person in good faith, altered through substantial investment, dedicated to public use, or used as a housing project or commercial enterprise where reversion would severely impair the property.²²⁶ The German program, however, was possible solely because of the financing and administrative expertise provided by the former West German state, a fortunate circumstance that was without parallel elsewhere in Eastern Europe.²²⁷ The sole party capable of providing the requisite level of financial and administrative resources to Cuba, the U.S. government, will not have the political legitimacy, much less domestic mandate, to do so. It is therefore beyond hope that a restitution program as extensive as the German program could be replicated in Cuba.

D. *Legitimate Bases for Providing Restitution*

The most convincing argument for restitution seems to be that, by firmly breaking the monopoly of the *nomenklatura* over state assets, restitution helps legitimize the new and fledgling property system and thereby support the democratization process.²²⁸ There may, however, be more efficient and socially acceptable means other than restitution in which to break the corrosive power of the *nomenklatura*.

Offe and Bönker have identified three conditions for determining when the restitution of appropriated property is legitimate: (i) the seizure of property must be determined to have been unlawful (*i.e.*, unconstitutional); (ii) the successor govern-

225. Thomas Raiser, *The Challenge of Privatization in the Former East Germany: Reconciling the Conflict between Individual Rights and Social Needs*, in *A FOURTH WAY? PRIVATIZATION, PROPERTY, AND THE EMERGENCE OF NEW MARKET ECONOMIES* 3-18 (Gregory S. Alexander & Grazyna Sapska eds., 1994).

226. *Id.* at 7-11.

227. See Domenico Mario Nuti, *Economic Inertia in the Transitional Economies of Eastern Europe*, in *IMPEDIMENTS TO THE TRANSITION IN EASTERN EUROPE* 25, 29-30 (Milica Uvalic et al. eds., 1993). Nuti notes that the unified German government spent \$79 billion in 1991 and \$105 billion in 1992 on the transformation program in the former East Germany. *Id.* at 30 n.5.

228. Stephen Holmes, *Forum on Restitution*, 2 *EAST. EUR. CONST. REV.* 32-33 (1993).

ment must have a duty to rectify the injustices of the regime it has displaced; and (iii) the duty of restitution must take precedence over other duties imposed on the new state,²²⁹ such as preventing the return to power of the previous regime, jump-starting a moribund economy or forestalling civil strife. In fact, many Cuban-American business leaders, echoing Offe and Bönker, urge that economic restructuring take precedence over the restitution of property because restitution would paralyze the economy in endless litigation and delay economic revival.²³⁰ If restitution is accomplished at all, it should be deferred until the economy is revived and later implemented according to a predetermined formula for the settlement of claims.²³¹ Without the strong support of the business community, who will be asked to bear the risk, restitution is not a viable option.

E. Compensation as the Preferred Alternative

Restitution favors those who previously possessed physical assets over those who possessed financial assets, valid contract rights, or human capital.²³² Restitution privileges those people who suffered the deprivations of physical property over those who suffered non-property related deprivations such as human rights abuses. Some scholars have taken the following view:

*[C]laims against the Cuban state should not be limited to property claims, but should include all manner of torts — involuntary or uncompensated work, unjust imprisonment, loss of life or limb, loss of loved ones, physical or psychological abuse, and harassment by agents of the state, discontinuance of pension payments, etc. The people of Cuba, especially those currently residing in that country, have suffered incalculable losses. We see no legal or moral basis for assigning priority to settling claims against physical property over those claiming civil damages such as those suggested above.*²³³

229. Offe & Bönker, *supra* note 217, at 30-31.

230. Rudi Dornbusch, *Getting Ready for Cuba after Castro*, BUS. WK., May 24, 1993, at 19.

231. Jorge Sanguinety, *The Transition Towards a Market Economy in Cuba: Its Legal and Managerial Dimensions*, in *TRANSITION IN CUBA — NEW CHALLENGES FOR U.S. POLICY* 463, 479-81 (Lisandro Perez ed., 1993).

232. See Castañeda & Montalván, *supra* note 16, at 7.

233. *Id.* at 10-11 (emphasis in original).

The assertion is not absurd. In Romania, a tort compensation system was introduced where, instead of cash, injured parties were granted benefits such as free public transportation and job seniority.²³⁴ In fact, one scholar suggests that the majority of Cuban exiles would assign a higher priority to the compensation of those who suffered human rights abuses than to those who suffered property losses.²³⁵ CANF, in its *Transition Outline*, has stated that the proceeds of privatization will go to, among other things, the compensation of "Cuban citizens" for human rights violations committed by the communist government.²³⁶

Schemes that focus primarily on compensation were instituted in several Eastern European countries, most notably Hungary.²³⁷ In the Hungarian compensation scheme, claimants were offered state-issued bonds, or "compensation coupons," yielding seventeen percent interest.²³⁸ These bonds could be exchanged for property or shares in property directly from the state, for land from farm cooperatives, for housing from local councils, for a fixed pension with the state social security fund, or used as collateral for bank loans or sold on the secondary market.²³⁹ The Hungarian scheme has been suggested as a realistic model for economically-ravaged Cuba because it takes into account the interests of the current occupants of property

234. *Id.* at 14.

235. Cueto, *supra* note 102, at 25.

236. See TRANSITION OUTLINE, *supra* note 70, at 4. By using the term "Cuban citizen," the *Transition Outline* clearly intends that the provision would apply to both exiles and nationals.

237. See GRAY, *supra* note 210, at 70; see also ROMAN FRYDMAN ET AL., THE PRIVATIZATION PROCESS IN CENTRAL EUROPE 138 (1993).

238. FRYDMAN ET AL., *supra* note 237, at 138.

239. The first FT 200,000 of each claim is compensated in full. *Id.* For claims over this amount, the compensation provided by the state decreases on a sliding scale, with claims over FT 500,000 receiving only ten percent of the claim. See GRAY, *supra* note 210, at 70. The maximum amount of compensation that any individual can receive is capped at FT 5 million. FRYDMAN ET AL., *supra* note 237, at 138. Land was directly auctioned by the state to the highest bidder. *Id.* The former owners of land, who did not receive preferential treatment, could repurchase their land using their coupons only if they were the highest bidder. *Id.* See also KATHERINE SIMONETTI, COMPENSATION AND RESOLUTION OF PROPERTY CLAIMS IN HUNGARY 69-72 (paper presented at the American Bar Association's 1994 Annual Meeting, New Orleans, LA, 1994). In Hungary, property valuation for non-agricultural real estate was calculated based on square footage and location. Location was classified as central city [Budapest], provincial towns, villages and vacant lots. See Gelpert, *supra* note 9, at 344.

and avoids the costs and delays of direct restitution schemes.²⁴⁰ The Hungarian scheme, however, can be faulted for the relatively low level of compensation provided per individual claimant and the difficulty the general populace encountered in effectively using the system.²⁴¹

One commentator analogizes the situation of Cuba to that of a bankrupt debtor, arguing against restitution as a norm and for compensation through a *pro rata* distribution of assets among prioritized classes.²⁴² Despite arguments to the contrary, such a scheme would no more weaken the respect for private property and the rule of law than does the bankruptcy code.²⁴³ Because there cannot be restitution for all, a bankruptcy treatment would be more easily accepted by successful claimants, because all claimants would lose equally and no claimant would be left without compensation; and by non-claimants and unsuccessful claimants, who would bitterly oppose any restitution scheme that left them out.²⁴⁴

Compensation is, however, fundamentally unfair when viewed from the perspective of nationals who did not receive seized property. Even if the costs of compensation are spread equally among exiles and nationals, those with property claims and those without, compensation still unjustly enriches the recipients of seized property. It has been argued that, in essence, the benefits of socialized society that were received by all nationals — free education, health care, etc. — were the fruits of seized property, and hence, the nationals have already been compensated.²⁴⁵ Even so, the recipients of seized property received the benefit of the seized property *in addition to* any benefits of socialist society. Furthermore, many of the recipients of seized property, which includes some of the most desirable prop-

240. See Travieso-Díaz, *supra* note 151, at 250-51.

241. *Id.* at 251. Travieso-Díaz suggests that other forms of payment that might be used include annuities, bonds, promissory notes, stock certificates in privatized enterprises, and combinations of the above. *Id.*

242. Cueto, *supra* note 102, at 28-29.

243. *Id.* at 29. Arguably the moral hazard dilemma posed in an actual bankruptcy scenario, wherein debtors assume greater risk than they otherwise would absent bankruptcy protection, does not apply in the context of infrequent socialist revolutions.

244. *Id.* at 31 n.68.

245. *Id.* at 33. Even though Cueto makes the point only rhetorically, the point reflects a sentiment held by many in the exile community.

erty in Cuba, received that property through their positions as government officials or as rewards for serving the regime. It seems quite unfair to usher in a new "democratic" system that rewards the old guard by vesting them with clear property rights and saddles everyone else with only the debt. The situation will undoubtedly become more complex if, as happened in Nicaragua, the communist government, recognizing the end of state socialism, privatizes state property by officially vesting title in individual members of the *nomenklatura*.

Like restitution, compensation would ultimately be a complex, time-consuming and expensive process. In fact, if the compensation plan were predicated upon payment in cash or cash equivalent out of general revenues, it would be "dangerous," considering the already exceedingly weak financial base of the country.²⁴⁶ Given the current (1993) estimate of Cuban exile claims of \$20.02 billion, paying the full value of these claims "diminishes the annual rate of recovery of the Cuban economy by 0.5% to 0.7%."²⁴⁷ Furthermore, considering the paucity of assets currently available, the cash compensation that any one individual would receive is in all probability a very small amount, perhaps as little as two-hundred dollars.²⁴⁸ Indeed, if all of the effort is for as little as two-hundred dollars, perhaps it is best to forego the whole compensation exercise.²⁴⁹ Therefore, a future commitment to shares of privatized state firms or future rights or preferences might be preferable.²⁵⁰ Arguably, many Cuban-Americans have already been compensated for their property losses in Cuba by the American government, which allowed exiles meeting specific tests both business and personal federal income tax deductions for property seized by the Cuban government.²⁵¹ In taking advantage of such

246. Castañeda & Montalván, *supra* note 16, at 15.

247. Alonso & Lago, *supra* note 146, at 16 (emphasis added). Note that this figure does not include the claims of non-nationals who suffered property deprivations.

248. Romañach has calculated that the average compensation award would only be two-hundred dollars, given the limited financial resources available for compensation. Romañach, *supra* note 73, at 97.

249. Cueto, *supra* note 102, at 32.

250. Castañeda & Montalván, *supra* note 16, at 15.

251. See I.R.C. § 161(c), (i) (1964). Deductions for both business losses, permitted pursuant to general casualty and loss provisions of § 161(c)(1) and (2), and for personal losses, specifically permitted pursuant to § 161(c)(3) and (i), were allowed for former Cuban citizens whose property was confiscated after they became U.S. resi-

deductions, claimants arguably transferred their claims to the U.S. government and all claims between such claimants and the Cuban government should be considered extinguished.

It can also be argued that, after thirty-seven years of civil and political liberty and material success in the United States and other countries, the exiles have been adequately compensated, especially as seen in relief against the lack of liberty and increasing economic deterioration experienced by the nationals. As one national living in a seized home answered when told that the former owner wanted his house back: "Tell . . . [him] that I hope he wants his house back. He is welcome to it, if only he will trade places with me."²⁵²

F. *Rejection of Classical Liberal Ownership*

Allowing the occupant of each housing unit (who under the Urban Reform Law possesses a very restricted notion of title more akin to a right of occupancy)²⁵³ to acquire classical liberal title through continued "amortization" payments to the state (or the former owner), may prove to be a somewhat Pyrrhic victory for the individual home owner and for society as a whole. In post-socialist Romania, where no equivalent of the Urban Reform Law was ever implemented and the majority of dwelling units were owned by the state, individual units were sold to their occupants in order to provide classical liberal ownership rights.²⁵⁴ This type of sale was considered to be a great success

dent aliens. *Id.* at § 161(c)(1)-(3).

252. Dee Rivers, *Whose Cuba is It?*, ST. PETERSBURG TIMES, Apr. 24, 1994.

253. See the discussion of title granted by the Urban Reform Law, *supra* notes 138-144 and accompanying text.

254. FRYDMAN ET AL., *supra* note 237, at 256-57. Decree-Law No. 61/1990 Concerning the Sale of State-Owned Housing (Romania) permitted tenants to purchase their apartments or homes directly from the state. *Id.* Privately-built housing accounted for 45.7% of new housing built in the 1951 to 1990 period in Romania. *Id.* The program is further elaborated in Government Resolution No. 88/1991 Concerning Measures for the Sale of State-Owned Housing and Government Resolution No. 562/1991 Concerning Down-Payments and Installment Payments for the Sale of State-Owned Housing. *Id.* Only housing in which there were no potential reprivatization (restitution) claims was included in this program. *Id.* The demand of the program was tremendous. *Id.* As Frydman reports, by May 31, 1992, two million apartments had been sold to their tenants, with 2.3 million apartments still under state control, for which already more than 600,000 applications had been submitted. *Id.*

because of the number of units sold.²⁵⁵ However, the sale price and interest rates offered had to be below market rates in order to be politically feasible, resulting in a substantial loss of revenue to the state.²⁵⁶ Furthermore, the new homeowners, who alone became responsible for the condition of their housing, were unable to improve their substandard housing due to a lack of financial resources.²⁵⁷ Considering the alarmingly dilapidated state of much of the former rental housing in Romania, "ownership" might not have been in the best interest of many of these former renters, who might have been quite happy to pay rent in exchange for investment in their buildings.²⁵⁸

V. TOWARD A NEW FORM OF PROPERTY IN CUBA

A. *The Spectrum of Successful Market Institutions Created by Law*

Property relations are frequently understood only within the terms provided by the antipodal constructs of "passive" socialist and "active" capitalist property relations, in which the state or the propertied individual, respectively, has the effective right of control and possession over property. Because the socialist construct is currently discredited, it would seem that only the capitalist construct would hold validity for the transformation process. Even so, the concept of a "market" economy is so broad as to encompass systems as divergent as *laissez faire* American capitalism and social democratic European capitalism, systems in which the differences are at least as marked as the similarities.²⁵⁹ Furthermore, within any of these variants of the market system, a multiplicity of forms of successful hybrid property

255. *Id.*

256. *Id.* The Government Resolutions established a formula that determined the sale price of a unit based on the cumulative rent paid and degree of depreciation of the building. *Id.* Particularly where a high degree of depreciation was calculated, sale prices were quite low. The sale could be financed by a twenty-five year mortgage with a required "down-payment" of ten percent, which could also be borrowed. *Id.* The interest rate provided by the program was so low as to be negative, given the high annual inflation rate, requiring continuing government subsidy of the program. *Id.*

257. *Id.*

258. Cueto, *supra* note 102, at 21.

259. See Lester Thurow, *Communitarian vs. Individualistic Capitalism*, in *THE RESPONSIVE COMMUNITY: RIGHTS AND RESPONSIBILITIES*, Fall 1992, at 24.

arrangements have evolved. Many of these hybrid forms of property relations, such as charitable trusts, partnerships, and cooperatives, continue to thrive, despite the fact that each arrangement varies greatly from the classic notion of private property. In fact, today passive pension funds are the primary holders of the shares of corporations, a situation that has been criticized for fostering contempt for shareholder prerogatives and which turns the classical liberal notion of ownership upside down.²⁶⁰ Indeed, ownership in the capitalist West is, in many respects, as "passive" or "paternalistic" as was ownership in former socialist countries.²⁶¹

Furthermore, the economic organization of a given society and the property regime it supports are hardly spontaneous developments. The dominant form of twentieth century economic organization in the United States, the modern corporation, came into prominence not because, in a neutral framework of competition between competing institutional types, the corporate form won in a process of natural selection.²⁶² Rather, the modern corporation in the United States was consciously created by state legislatures and continually strengthened and validated by the judiciary at numerous levels.²⁶³ Clearly the German Parliament and judiciary, in promulgating and validating the limited liability company instead of the American-style corporation, reached a different set of conclusions.²⁶⁴ Property regimes are the conscious product of policy decisions enacted through law.

Ultimately, the underlying dilemma faced in designing any property regime is a question of policy: who should benefit? Who should have the power of the state to enforce her property interest at the expense of others? The question is therefore not a question of law or economics that dictates a single path, but a

260. The dominant mode of capital ownership in the United States today, corporate shareholding through institutions such as pension funds, creates a mode of ownership that strongly reduces the degree of personal responsibility called for in the liberal paradigm of property ownership. See Gregory S. Alexander, *Pensioners in America: The Economic Triumph and Political Limitations of Passive Ownership, in A FOURTH WAY? PRIVATIZATION, PROPERTY, AND THE EMERGENCE OF A NEW MARKET ECONOMY* 33, 33-34 (Gregory S. Alexander & Grazyna Skapska eds., 1994).

261. *Id.*

262. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 111-114 (1992).

263. *Id.*

264. Thurow, *supra* note 259, at 24.

question of policy. What type of society does Cuba want to become?

B. Goals of a Property Rights Regime in an Economy in Transition

Because property regimes are created through conscious policy choices, it is crucial that the new regime's desired goals be clearly articulated and understood. This task must be given the highest possible priority because once the new property regime is established, vested interests will be spawned that will fight tenaciously to retain their privileges.

Given the severe housing shortage in Cuba today and the deplorable housing conditions that exist, it is crucial that any new property regime provide increased incentives for investment and foster higher housing standards. During the Revolution, neither land nor capital were allocated in the most efficient manner, creating gross inequilibrium between societal and individual needs and resources that, due to the questionable accuracy of Revolutionary statistics, has never been adequately measured. It is therefore imperative that the new regime provide for the mobilization of capital to fulfill unmet needs in the most efficient manner as the dimensions of those needs become clear. The new regime must also provide for the continued reallocation of capital to its most efficient use. Furthermore, because the previous regime made no accommodation for individual preferences in housing expenditure, the new regime must allow the citizen to choose what proportion of his income to allocate to housing. In order to reflect the dynamic character of housing needs, the regime must also provide the citizen with flexibility to alter her housing arrangements as new needs arise.

As the experiences of Eastern Europe have demonstrated, the transformation from a planned economy to a market economy requires not only the destruction of the communist state's administrative apparatus, but, more importantly, the termination of the communist party's virtual monopoly over every sector of society.²⁶⁵ Simultaneous with the technical goal of restruc-

265. Alexander M. Yakovlev, *Transforming the Soviet Union into a Rule of Law Democracy: A Report from the Front Lines*, THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1991, at 129.

turing property rights and relations to achieve greater economic efficiency, the new property regime must, therefore, facilitate the growth of new institutions to replace the discredited communist institutions. In Cuba, this task will perhaps be more difficult than in most other post-socialist societies, due to the more marked unfamiliarity and fear associated with market mechanisms and democratic processes and the concomitant increased reliance on individual initiative required under a capitalist regime. It is therefore essential that the new property regime facilitate the growth of institutions that encourage active citizen participation through mutually beneficial voluntary means that simultaneously help develop individual autonomy. The new property regime must help build universal respect for the rule of law to the point that the new order of property becomes self-enforcing. The state must make clear that it will no longer rely on ad-hoc determinations.

C. *Hybrid Proposals*

In order to achieve the goals articulated above, as well as other goals yet to emerge, the market economy as it already exists in any given society cannot be slavishly imitated. New institutions must be developed that disaggregate the bundle of property rights and create new hybrid forms of property with an eye to nurturing those goals. The legal scholar Gregory Alexander identifies proposals for developing these new institutions, characterized by active participation, democratic control, and social inclusion, as representing a "fourth way."²⁶⁶ These proposals reject simultaneously the "first way" of laissez faire capitalism, the "second way" of state socialism and the "third way" of utopian market socialism.²⁶⁷

Such hybrid proposals often refer to the "social-republican" vision, drawing on historical strains including Pierre-Joseph Proudhon in France and Thomas Jefferson and Andrew Jackson in the United States.²⁶⁸ The social-republican vision seeks to

266. Gregory S. Alexander & Grazyna Skapska, *Introduction: A Fourth Way?, in A FOURTH WAY?: PRIVATIZATION, PROPERTY, AND THE EMERGENCE OF NEW MARKET ECONOMIES* xvi-xix (Gregory S. Alexander & Grazyna Skapska eds., 1994).

267. *Id.* at ix.

268. See William H. Simon, *Republicanism, Market Socialism, and the Third Way, in A FOURTH WAY?: PRIVATIZATION, PROPERTY, AND THE EMERGENCE OF NEW*

foster citizen participation in an enhanced community through property arrangements that encourage the owner to take a long-term view of her property interest.²⁶⁹ Social-republican property relationships are characterized by restraints on alienation, the limitation of membership in the community to active participants with a stake in the community, and restraints on accumulation, limiting the inequality among members of the community.²⁷⁰ A classic example of a social-republican property arrangement is limited equity cooperative ownership, where typically the cooperative authority will restrain both the right to alienation and accumulation.²⁷¹ The cooperative authority will typically restrain alienation by requiring resale only through it or by retaining a right of first refusal, limiting purchasers to persons who occupy the unit as a primary residence and fall within certain income criteria.²⁷² The cooperative authority will typically restrain accumulation by requiring that gains from the resale of the unit accrue to the cooperative authority.²⁷³ Such a restraint will often limit the unit owner's share to his initial investment and capital improvements and thereby reap all surplus value gains for the collective.²⁷⁴

Social-republican arrangements are criticized as fostering both inefficiency and exclusiveness.²⁷⁵ Due to the fact that social-republican arrangements are by definition characterized by the incomplete commodification and intentional illiquidity of the property relationship, certain inefficiencies are created.²⁷⁶ However, by making exit more difficult or costly, the arrangements arguably induce greater individual investment by reducing the risk of subsequent opportunistic withdrawal by other parties.²⁷⁷ Social-republican arrangements are criticized for fostering exclusiveness due to the fact that admitting new members on equal terms with founding members would be a direct and

MARKET ECONOMIES 286-87 (Gregory S. Alexander & Grazyna Skapska eds., 1994).

269. Simon describes the social-republican model of property as a middle path between capitalist and socialist concepts of property. *Id.* at 287.

270. *Id.* at 287-88.

271. *Id.* at 289-94.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

uncompensated transfer of built-up wealth from founding to new members.²⁷⁸ There exists in such arrangements a strong incentive to limit membership or, given the necessary broad discretion to manage their affairs, selectively admit into the community in a manner that produces social or economic homogeneity, possibly as a result of invidious discrimination.²⁷⁹ Given the potential class and racial conflict inherent in the Cuban situation, the problem of exclusivity cannot be easily overlooked. The exclusivity dilemma is not easily resolved.²⁸⁰ Exercising governmental control to the degree required to insure equal entry, through a random lottery process, forced admission, or the subsidized entry of individuals or the formation of new social-republican institutions, would so dilute the self-reinforcing glue of social-republican claims that they would simply wither away.²⁸¹ Just as it is clear that the body politic can aid in developing community (even if the body politic cannot itself create community where there is none), it is equally clear that the body politic can easily destroy a fragile community where it has blossomed. The key to formulating property arrangements must be to provide incentives such that each autonomous community, allowed to operate through its own style and processes of decision making, favors diversity over exclusivity.

D. Additional Considerations Regarding a New Property Regime

As no market exists in an economy in transition, a new property regime must be established without the benefit of proper valuation. Because the values of state-held property are not known, it is impossible to equitably allocate the properties. Therefore, a poorly conceived property regime that does not account for the fact that properties have different values, even if those values are not as yet reflected in the market, may further exacerbate income inequalities.

Any new property regime runs the risk of unfairly allocating societal benefits, particularly to the *nomenklatura*. Simply

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

granting the title to each unit to the occupant of that unit would disproportionately benefit individuals already living in desirable neighborhoods or buildings. Therefore, the Housing Ministry must take steps to alleviate the difference between neighborhoods by using a portion of the proceeds of privatization to provide amenities, such as parks, playgrounds and schools in less desirable neighborhoods.

Once market mechanisms begin to function, there will be a strong, if not inescapable, impetus for housing preferences, suppressed for so long, to take on a renewed vigor, resulting in a select few areas becoming gentrified and numerous other areas devolving into slums. The new property regime must aim to minimize the cycles of gentrification and decay. On the other hand, the regime must recognize that because much of the housing is deteriorated, it is only logical that the expression of housing preferences would result in a rejection of substandard housing by those who can afford to do so. The Housing Ministry should adopt a housing rehabilitation scheme that targets resources at improving substandard housing, while allowing for the demolition of substandard housing that cannot be rehabilitated.

VI. PROPOSAL FOR A NEW FORM OF PROPERTY

A. *Overview*

The Limited Equity Housing Corporation (LEHC) scheme provides no actual restitution of property to former property owners. A limited form of compensation is provided, however, in a manner that encourages investment and participation in the reconstruction of Cuba by former owners. The LEHC scheme recognizes that Cuba is an impoverished country in which the need for investment in the housing sector is immense, due to the housing shortage and because at least half of all housing units will need to be replaced because they are of substandard construction or were built on land that is more suitable for other purposes. The scheme also recognizes that the Cuban nationals paid the greatest cost during the Castro regime. A scheme that favored the simplistic restoration of property rights would result in the questionable massive redistribution of property, reinstating an anachronistic structure of income and wealth

distribution that is generally agreed to be undesirable and was at some level the ultimate cause of the socialist revolution. Such a redistribution would undoubtedly exacerbate anticipated tensions between exiles and nationals and lead to widespread social unrest. Furthermore, any restitution scheme would result in administrative difficulty and delay that would cloud property rights for years and discourage productive foreign investment. Therefore, compensation bonds will be given to claimants in lieu of restitution for use in either passive or active investment in housing in a manner that allows claimants to recoup their compensation at a faster rate than non-claimants.

B. Property Registration Scheme

The first task of the Housing Ministry will be the registration of all occupants of residential property in order to establish the ownership of each dwelling unit and other legal rights. The land underlying any housing will continue to belong to the state. No one who occupies a unit after the established registration period will be entitled to participate in the housing marketization program. Records established by the Urban Reform Committees²⁸² will be used to prepare a tentative list of property occupiers. However, because the official housing registers of the Urban Reform Committees do not reflect illegal leasing or sub-leasing, self-help housing or other informal arrangements, they cannot be relied on exclusively.

The Housing Ministry will assign each unit a contingent "value" based on ranked valuables, including location, architectural significance, condition of building, unit size and amenities assigned to the housing group to which the unit belongs, such as parking structures or playgrounds. An assignment of 100 will establish a unit as the "average" unit.

C. Formation of a Limited Equity Housing Corporation

The Housing Ministry will aggregate individual dwelling units into housing groups, the building block for the housing

282. See discussion of the Urban Reform Committees, *supra* notes 101-103 and accompanying text.

marketization scheme. Each housing group will consist of approximately twenty to one hundred similar units, the land underlying the units and the minimum amount of ancillary land that is integral to the housing group. Amenities such as parking structures and playgrounds, as well as unbuilt park or other unbuilt land, will be included in the housing group only where necessary to form a cohesive whole. Once established as a housing group, the occupants will have the option to enter the government's housing marketization scheme as a LEHC, as determined in an election where each unit is given one vote. The primary benefit to the housing group of entering into the program will be to obtain free and clear title to the underlying land and ancillary amenities. Additional benefits will include specified tax incentives to form housing corporations, which will specifically target profits reinvested in severely deteriorated housing stock for a tax holiday of five years.

In order to minimize the concentration of power in the Housing Ministry and the associated bureaucratic procedure, costs, and actors involved, housing groups will be allowed to "self-privatize" through a type of regulated spontaneous privatization. In order to self-privatize, a prospective housing group must hire a private, independent property evaluation consultant registered with the Housing Ministry.²⁸³ The consultant will evaluate the financial position and potential of the property, guiding the housing group through the transformation process, including the auction or negotiations process and chartering of a LEHC, following established guidelines. The Housing Ministry will be required to accept the results of the self-privatization, absent a showing of violation of established guidelines. Allowing housing groups to self-privatize will not only reduce delays, it will create greater demand and expertise in the private sector

283. In 1991, Hungary established a "self-privatization" scheme for small business enterprises. See FRYDMAN ET AL., *supra* note 237, at 135-36. In the Hungarian scheme, a state-owned enterprise could initiate and complete the privatization process by employing an independent property evaluation consultant from a state-approved list in lieu of going through the established privatization process with the State Property Agency. *Id.* The consultant's fee was a percentage of the sale proceeds. *Id.* The State Property Agency was required to accept the outcome of these contracts, unless a violation of stated legal regulations could be shown. *Id.* Consultants wishing to perform such services were required to prove prior experience in asset evaluation and have a specified minimum capitalization. *Id.* The first stage of this process, involving some 400 small enterprises, was successful enough that a second stage was planned. *Id.* See also Miszei et al., *supra* note 21, at 57-60.

for sophisticated property services and immediately introduce market mechanisms.

D. Capital and Voting Structure

There will be two classes of shares in a LEHC, occupant shares and investor shares, as well as compensation bonds. Only occupant and investor shares will have voting rights. Sixty-seven percent of the voting shares will be occupant shares and thirty-three percent of the shares will be investor shares. Once the LEHC has been established, the Housing Ministry will publish a list of LEHCs and commence a staggered auction of investor shares in the properties.

One hundred occupant shares will be allocated to each unit. Each 100 occupant shares will grant the occupant the perpetual right to occupy a particular unit. After the initial waiting period is over, occupant shares can be alienated with the approval of a majority of voting shares. When selling the unit, the occupant will receive forty percent of the surplus value of the unit. Occupant shares can be left to heirs without prior approval of any kind. Disaggregating the shares can be accomplished only with approval of a super-majority of all voting shares. Occupants will be free to make improvements in their units, requiring approval only where major structural work is involved or where the exterior appearance of the housing group will be negatively impacted.

Investor shares will grant the bearer a proportional interest in all property held by the housing corporation in common, including all appurtenant land, amenities, and commercial spaces. This interest will include the right to a stream of revenues from the rent of commercial spaces and a share in the resale of units. There will be no restraints on the alienation of investor shares. Investor shares can be purchased at a twenty-five percent discount using compensation bonds. After the waiting period is over, investors will be free to buy out individual occupants of their occupant shares. The day-to-day operation of the facility will be delegated to the owners of investor shares, who may choose to hire an outside management service.

Former owners will be compensated with compensation bonds.²⁸⁴ The number of compensation bonds granted to each citizen will be determined by the Claims Commission. Compensation bonds will grant the bearer a revenue stream based on total profits and the sale of units of the housing corporation. Compensation bonds can be used to purchase investor shares in the following manner: the person holding the compensation bonds will bid for a housing group through the established procedure; the actual purchase price paid by the bearer will be twenty-five percent less than the winning bid; the bearer will then exchange her compensation bonds for investor shares on a one for one basis. Compensation bonds that are not converted to investor shares will draw ten percent of the net profits of the housing corporation for thirty years, at which point the bonds will mature without any additional payment.

A super-majority (67%) of shareholders must approve all non-ordinary activities of the housing corporation, such as major building improvements, any reduction or increase in the number of units, any increase in building charges greater than five percent in a one year period and any capital expenditures over a pre-determined amount. A super-majority will be required in order to insure that investors can act only with the approval of a majority of the occupants. For instance, investors will not be able to gentrify the building by extortionately raising building charges and forcing poorer occupants out.

E. Moderate Restraints on Alienation

No sales of units will be allowed within two years of the establishment of a LEHC in order to prevent occupants from selling their interests too cheaply and then becoming a societal burden. This moderate restraint will permit each interest group to better understand how it can realize its own needs and interests vis-à-vis the interests of other parties. The waiting period will enable a nascent market to emerge, allowing investors and developers a chance to evaluate and rank properties, while simultaneously allowing occupants to develop familiarity with the

284. In addition, occupants registered as living in units with less than "average" value will be compensated with the proportion of compensation bonds necessary to bring their compensation level up to average.

operation of market mechanisms and to assess their own housing needs. Likewise, occupants will have the opportunity through media campaigns conducted by the Housing Ministry to become cognizant of the fact that the reduced social welfare net of the state will not be able to provide alternative housing should the occupant sell her unit, while simultaneously allowing the state to begin development of a realistic social safety net, including the implementation of a system of emergency short-term housing. During the entire waiting period, speculators and developers will be permitted to negotiate with housing corporations and individuals concerning selling particular units, or even entire complexes. However, any contract entered into before the waiting period is over will be considered unenforceable, with possible criminal sanctions.

The corporation will have the right to approve the sale of all unit shares. If the corporation does not approve the sale, it must purchase the shares at the bona fide third party offer price. This mechanism will prevent occupants from cheating the corporation and the Housing Ministry by selling their units to third parties at reduced rates in exchange for cash under the table, so-called "key money." The mechanism will also prevent the corporation from unduly interfering with the unit owner's right to alienate his property interest: if the corporation considers the reason not to sell to be compelling, it must be able to come up with the money. The abuse of this mechanism must be limited by the strict enforcement of laws aimed at preventing invidious discrimination. A statement of the anti-discrimination policy should appear prominently on all sales contracts and be featured prominently in all media campaigns initiated by the Housing Ministry.

The housing corporation, the occupant, the Housing Ministry and bondholders will share in the capture of the surplus value generated by sales and rentals. Upon the sale of a unit, the surplus value will be distributed as follows: 40% to the occupant, 40% to the housing corporation, 10% to the Housing Ministry to help underwrite additional housing initiatives, including the construction of new housing, and 10% as payment toward compensation bonds. Allowing the corporation to capture a full 40% of surplus value will encourage the corporation to make additional capital improvements. Since the corporation is directly compensated on a dollar for dollar basis for capital improve-

ments as they are built, the scheme will encourage the LEHC to make investments that add value to the corporation. Furthermore, allowing the corporation to profit from the sale of units by occupants will encourage the corporation to be vigilant in monitoring the sale of units and thereby help discourage the formation of a gray market. Allowing the occupant to capture 40% of the surplus value will give the occupant the opportunity to sell and repurchase in order to obtain the optimal housing expenditure for her household. In addition to the 10% of the proceeds from the sale of a unit that will be paid to compensation bondholders, 10% of the net profits generated by the housing corporation by other activities, such as the rental of commercial space, will also be paid to such bondholders.

Occupants will be permitted to rent their units for a period of not more than two years. When the unit is rented, the surplus value of the rent is shared: with 40% retained by the occupant, 40% assigned to the corporation, 10% to the housing ministry, and 10% to the compensation bondholders.

VII. CONCLUSION

The marketization of housing in Cuba will be possible only within the framework of a privatization scheme that takes into account the realities of contemporary Cuba, including the poverty of the island and the tension between the exile community and Cuban nationals. A successful transformation will not be spontaneous: new institutions must be crafted that help bridge the gap between the two communities by emphasizing joint reconstruction and strengthening the rule of law, while promoting economic efficiency and the proper allocation of societal assets. The Limited Equity Housing Corporation is a prototype for transformation that should be tested in post-socialist Cuba and adjusted to reflect the changing circumstances of the transformation as it develops.