

12-1970

"Fair Market Value," "Just Compensation," and the Constitution: A Critical View

W. Harold Bigham

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

W. Harold Bigham, "Fair Market Value," "Just Compensation," and the Constitution: A Critical View, 24 *Vanderbilt Law Review* 63 (1970)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol24/iss1/3>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

“Fair Market Value,” “Just Compensation,” and the Constitution: A Critical View

*W. Harold Bigham**

Fair market value is . . . the amount of money which a purchaser willing but not obligated to buy the property would pay to an owner willing but not obligated to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied.¹

‘[M]arket value’ is not an end in itself, but merely a means to an end, the ultimate object being the ascertainment of “just compensation.” Ordinarily, where the value of the land is to be ascertained, and it is of such kind and so situated as to be available for sale in the ordinary course of dealing, market value is perhaps the best test and under such circumstances is generally adopted.²

I. INTRODUCTION

It has become almost an article of faith that “fair market value” constitutes the only fair and workable measure of damages for a landowner whose real property has been taken for public use.³ The courts apply it woodenly;⁴ the magic words are solemnly intoned to jurors,

* Professor of Law, Vanderbilt University. B.A., 1954, University of the South; J.D., 1960, Vanderbilt University.

The writer is a member of a land condemnation commission appointed under Federal Rule of Civil Procedure 71(A)(h) by the former chief judge of the United States District Court for the Middle District of Tennessee, the Honorable William E. Miller, now a member of the United States Court of Appeals for the Sixth Circuit. The views expressed herein are not those of the Commission, nor, to the extent that they reflect variations from existing law, do they represent the principles applied by the author in the carrying out of his duties as a member of the Commission, under the explicit instructions of the court. This paper was prepared, in part, under the terms of a grant from the Urban and Regional Development Center of Vanderbilt University and the author gratefully acknowledges the help and encouragement of the Center.

1. 4 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 12.2[1] (rev. 3d ed. J. Sackman 1962) (footnotes omitted).

2. *Id.* § 12.2 (footnotes omitted). See, e.g., Berger & Rohan, *The Nassau County Study: An Empirical Look into the Practices of Condemnation*, 67 COLUM. L. REV. 430 (1967); Hershman, *Compensation—Just and Unjust*, 21 BUS. LAW 285 (1966).

3. See, e.g., Crouch, *Valuation Problems and Procedures Under Eminent Domain*, in AMERICAN BAR ASSOCIATION NATIONAL INSTITUTE, *CONDEMNATION, COMPENSATION AND THE COURTS* 31 (1969); Dolan, *Just Compensation: Indemnity or Market Value?*, 34 APPRAISAL J. 353 (1966); MacLeod, *Adequacy of Compensation in Condemnation*, 31 APPRAISAL J. 477 (1963); Sengstock & McAuliffe, *What is the Price of Eminent Domain?*, 44 J. URBAN L. 185 (1966).

4. “For purposes of the compensation due under the Fifth Amendment, of course, only that ‘value’ need be considered which is attached to ‘property,’ but that only approaches by one step the

commissioners, and arbitrators.⁵ Even the learned scholars in the field

problem of definition. The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). *See also* *United States ex rel. TVA v. Powelson*, 319 U.S. 266 (1943); *United States v. Miller*, 317 U.S. 369 (1943); *McCandless v. United States*, 298 U.S. 342 (1936); *Olson v. United States*, 292 U.S. 246 (1934); *United States v. New River Collieries Co.*, 262 U.S. 341 (1923); *Seaboard Air Line Ry. v. United States*, 261 U.S. 299 (1923).

5. A fair example, and a correct statement of the law, is the following extract from the *Instructions to Commissioners* given by Judge William E. Miller.

"The method by which to determine the just compensation to be paid to the property owner for the taking of a part of his property is, as a general rule, to compare the fair market value of the property before and after the taking; that is to say, by subtracting the fair market value of what remains after the taking from the fair market value of the whole immediately before the taking.

. . . .

"Just compensation is not a question of the value of the property in question to the defendant, on the one hand, nor its value to the Government on the other. Therefore, in determining the fair market value of the property in question on the date of taking you shall not consider or be influenced by the fact that the United States needs the property or that these proceedings are pending, nor shall you consider or in any way be influenced by the fact that the United States is able and willing to pay for the property or that the defendant is or may be unwilling to sell. It would be improper for you to permit such matters to affect your findings.

"In every condemnation proceeding the problem is to determine what the property owner has lost as a result of the taking, and not what the Government may have gained.

"Just compensation is intended to cover the loss caused the owner by the taking of his property for public use and not the value of the property as applied to the public use. How much the property taken may be worth to the public for those purposes to which it will be applied is not to be considered by you in any way in arriving at the fair market value of the property at the date of the taking by the Government.

"So, in determining fair market value at the time of the taking, you are not to consider the fact that the Government intends to take the land; instead you are to fix the fair market value on the date of taking at a time immediately before the taking, without regard either to the imminency of the taking or the pendency of any proceedings to take the land.

"In determining the fair market value of the estate or interest taken, you may not consider the Government's need for the property, nor whether or not the defendant owner wanted to sell it. Your task is to find what was the fair market value of the tract involved in this trial, as of the time of the taking, uninfluenced in any way by either the necessities of the Government or the wishes or wants or desires of the owners.

"By fair market value is meant the price in cash or its equivalent that the property would have brought at the time of the taking, considering its highest and most profitable use, if then offered for sale in the open market in competition with other similar properties at or near the location of the property, with a reasonable time allowed to find a purchaser.

. . . .

"You are to assume that the purchaser in such a transaction was desirous of buying the property, but not forced to buy, and that the seller was desirous of selling the property, but not forced to sell; and that both buyer and seller were fully informed on that date as to all circumstances and factors favorable and unfavorable with respect to the property, and as to all uses to which the property was then being put, and as to the highest and best use and all other uses for which the property was at that time actually and potentially suitable and adaptable.

"In arriving at your estimate of fair market value, you should take into account all factors

give it at least implicit recognition.⁶ Moreover, it continues to flourish despite widespread public dissatisfaction with both the substantive test for damages and the procedures through which the land is obtained.⁷ The taking of private property for the federal interstate highway and urban renewal programs, for example, has left a trail of unhappy landowners who have lost all faith in the ability or willingness of government to deal fairly with its citizens.

The discontent with existing condemnation compensation practices stems from the failure of condemning authorities using the fair market value test to make whole those who are forced to give up their property for public use.⁸ The fifth amendment's command that "private property

which could fairly be suggested by the seller to increase the price paid, and all counter-arguments which the buyer could fairly make to reduce the price to be paid by him, to the extent that you believe such matters would have been considered in the bargaining as to price. Your determination is to be made in the light of all facts affecting value as shown by the evidence, together with any facts which, although not shown by the evidence, are of such general knowledge in the community as not to require proof." (Judge Miller's order of instruction is retained on file in the federal district court for the Middle District of Tennessee.)

6. E.g., AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, CONDEMNATION APPRAISAL PRACTICE 4-8 (1961); L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN §§ 11-15, 17 (2d ed. 1953).

7. Even the courts recognize the hardship. See *United States v. General Motors Corp.*, 323 U.S. 373, 382 (1945); *City of Newark v. Cook*, 99 N.J. Eq. 527, 538, 133 A. 875, 879 (Ch. 1926).

During 1963 and 1964, hearings were conducted around the country by the Select Subcommittee on Real Property Acquisition of the Committee of Public Works of the United States House of Representatives. These hearings, dealing with real property acquisition practices and adequacy of compensation in federal and federally assisted programs, revealed a deep, pervasive distrust of governmental motives and practices in land acquisition programs. See *Hearings on Real Property Acquisition Practices and Adequacy of Compensation in Federal and Federally Assisted Programs Before the Select Subcomm. on Real Property Acquisition of the House Comm. on Public Works*, 88th Cong., 2d Sess. (1964). The study, a considerable portion of which is reproduced in PRACTICING LAW INSTITUTE, REAL ESTATE VALUE IN CONDEMNATION 255-98 (1969), points out that present practices are not doing substantial justice to the condemnees, and it suggests that the market value standards limiting compensation to the value of the property taken were adopted by the courts in a comparatively uncomplicated time in our nation's history when land was plentiful and government acquisitions skirted cities and by-passed homes and businesses, causing few displacements and relatively little damage. The gist of the report is that it is the responsibility of the Congress to determine whether other losses suffered by public owners or tenants should be absorbed by the public. See also Slaritt, *More Inequities and Injustices of Condemnation Practice*, 43 CONN. B.J. 89 (1969).

8. For a vivid description of the adverse psychological effect see Fried, *Grieving for a Lost Home: Psychological Costs of Relocation* in J. WILSON, URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 359 (1966). See also Weisl & Cohen, *Federal Condemnation Law and the Public Interest*, in 1968 INSTITUTE ON EMINENT DOMAIN 45. Not all of the dissatisfaction, however, lies with the landowners. Governmental officials sometimes believe that the public is forced to pay more for the property than is fair. See, e.g., *United States v. Merchants Matrix Cut Syndicate, Inc.*, 219 F.2d 90 (7th Cir.), cert. denied, 349 U.S. 945 (1955); *United States v. 0.84 Acres of Land*, 112 F. Supp. 828 (N.D. Cal. 1953). Then, too, courts themselves are becoming aware that present

[shall not] be taken for public use, without just compensation” has been construed to mean that the condemnor must pay only for the property taken. The adoption of the fair market value standard for valuing property, coupled with judicial interpretation of the terms “property” and “taken,” has resulted in denial of recovery for sundry incidental damages. For instance, compensation is not allowable for the unwillingness of the owner to part with his property,⁹ the loss of business or future profits,¹⁰ the frustration of the owner’s plans, loss of opportunities, or other so-called consequential or indirect damages.¹¹

Although the fair market value test has been widely utilized, another view of the extent of the government’s obligation to the dispossessed landowner may reasonably be evolved from an accommodation of the constitutional power of eminent domain and the constitutional right to just compensation. This is the theory that the landowner has the right to be made whole—to be put in as good a pecuniary position as he would have been in if his property had not been taken.¹² This approach, known pejoratively as the “indemnity theory,” frames the question in terms of “what has the owner lost, not what has the taker gained.”¹³ When the interests of society are balanced against those of the condemnee, it seems clear that there is no compelling justification for not *completely* indemnifying the landowner for his loss. The object of the fifth amendment’s just compensation clause is to effect a distribution of certain losses inflicted by public improvements among the public generally rather than upon those whose property is taken.¹⁴ It

condemnation practices and damage-measuring procedures do not even approximate the rendering of justice:

“In this era of the law explosion no phase of judicial administration is more ripe for reform than eminent domain valuation. Trial judges, lawyers and appraisers are willy-nilly players in a super-charged psychodrama designed to lure twelve mystified citizens into a technical decision transcending their common denominator of capacity and experience. The victor’s profit is often less than the public’s cost of maintaining the court during the days and weeks of trial.” *State v. Wherity*, 275 Cal. App. 2d 279, 290, 79 Cal. Rptr. 591, 598 (Ct. App. 1969) (Friedman, J., dissenting).

9. *United States v. Miller*, 317 U.S. 369 (1943).

10. *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923); *Bothwell v. United States*, 254 U.S. 231 (1920); *United States v. Honolulu Plantation Co.*, 182 F.2d 172 (9th Cir. 1950).

11. *See generally* *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *Mitchell v. United States*, 267 U.S. 341 (1925).

12. *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

13. *Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910).

14. There are many losses to redistribute. For example, the cost of the rights of way on the 41,000 mile interstate highway system has been conservatively estimated to be 5 billion dollars. H.R. Doc. No. 300, 85th Cong., 2d Sess. I, 6 (1958).

is sometimes said that the law does not require the condemnee to bear more than his fair share of the burden of the public improvement for which his land is being taken. To the extent that the existing use of the fair market value test prohibits compensation for consequential damages, however, the landowner's compensation is inadequate, and he is in fact paying more than his fair share.

While it is recognized that a few state and federal statutes have provided some relief from the procrustean bed that is the test of fair market value, it is the thesis of this article that the time is rapidly approaching when merely peripheral and palliative remedies will no longer suffice to suppress the widely-held view that government is unconstitutionally refusing to "pay the piper" in its public operations requiring the taking of private property. The purpose of this article is to consider the areas in which it appears that the "fair market value" test fails to give the condemnee "just compensation" and to suggest procedural reforms in condemnation administration. Additionally, alternative valuation standards will be examined through a review of the expropriation procedures of several foreign countries.

II. "FAIR MARKET VALUE" AND THE RELUCTANT LANDOWNER

A. *In General*

With respect to the fifth amendment's prohibition against the taking of property without just compensation, former Attorney General Ramsey Clark has said: "There is no more vital concept in the Constitution, for it protects the citizen in his property, and freedom cannot exist in a propertyless state. Property affords the opportunity for the exercise of liberty."¹⁵ It is an axiom of basic property law that the ownership of real property involves a bundle of rights. If the government is to compensate for only a portion of the bundle, then it should be forthright enough to admit it. If the courts believe that the Constitution requires only that government pay what it can afford for public-use property, it would be less of an irritation for them to say so than to continue to mouth pious incantations about "fair market value." At the same time, however, "there is as much, if not more, need for thoughtful consideration to be given as to how best the entire public interests can be protected as there is for concern about the individuals whose property is acquired for public use."¹⁶ One has little patience or sympathy, for

15. Attorney General Clark's statement is reprinted in Weisl & Cohen, *Federal Condemnation Law and the Public Interest*, in PROCEEDINGS OF THE EIGHTH INSTITUTE ON EMINENT DOMAIN 45 (1968).

16. Weisl & Cohen, *supra* note 15, at 51.

instance, with the kind of grasping landowner described in *United States v. Merchants Matrix Cut Syndicate, Inc.*:

All too frequently, profit seeking motives creep into condemnation cases. This observation, no doubt, will be distasteful to those who envisage the public treasury as fair game in such proceedings. Though competitive existence in our society may stimulate such desires, just compensation, only, remains the yardstick in eminent domain proceedings.¹⁷

Lack of public planning¹⁸ and failure to anticipate the need for public property can result in apparent raids on the public treasury, particularly when the value of land is steadily appreciating.

With the foregoing perspective, the discussion now turns to some of those areas in which the fair market value test results not only in an inability to do substantial justice, but also in a failure to meet the constitutional imperative of "just compensation."

B. *Disruption, Disturbance, and Demoralization*

The definition of "fair market value" assumes valuation based on the "highest and best use"¹⁹ to which the property can be put as of the date of taking. At least at this point it is clear, however, that the condemnee is not constitutionally entitled to compensation for the incidental taking of his business. Since the landowner presumably can carry on his business elsewhere, a requirement that the condemning authority "pay for the business" would result in an exorbitant condemnation value. Moreover, since the property's highest potential is a factor in determining market value, and since the present use of the property may represent its highest potential, it has been argued that the landowner is, in fact, indirectly compensated for the loss of his business.²⁰ If, for example, the landowner is using the property to operate a service station, and if the property would be valued higher in the market place for that than for any other potential use, then the landowner's compensation should make him whole since the value of the service station is included in the valuation of the land. This reasoning, however, ignores damages attributable to such factors as business

17. 219 F.2d 90, 98 (7th Cir.), *cert. denied*, 349 U.S. 945 (1955). Anthony Lewis has recently described, from his English perspective, the unhappy experiences of public officials in their attempt to obtain the so called "Burling Park" on the Virginia palisade of the Potomac in Fairfax, Virginia. Lewis, *The Making of a Park*, N.Y. Times, Sept. 28, 1970, at 41, col. 1 (city ed.).

18. For a description of the pervasive effect of long-range planning of land use patterns in England see text accompanying notes 65-67 *infra*.

19. For an excellent discussion of "highest and best use" see Crouch, *A Perspective Look at Highest and Best Use*, 34 APPRAISAL J. 166 (1966).

20. See, e.g., *Olson v. United States*, 292 U.S. 246 (1934).

interruption, the loss of going concern value and goodwill when the business cannot relocate without a substantial loss of its patronage, the loss of ability to continue in business when there is inadequate capital or credit to finance a new operation, the loss of the services of an elderly proprietor or others with inadequate training or health to withstand the competitive pressures and risks of relocation, transportation costs and expenses of search for replacement property, and costs of moving personal property and dismantling and reinstalling machinery and equipment. Claims for expenses incident to the taking of property have, nevertheless, been regularly rejected on the grounds that they are too speculative, that they confuse the issue, or that consideration of the property's "highest and best use" necessarily includes these elements of damage.²¹ These objections all reflect skepticism of the expedience of a "value to the owner" standard, which, it is argued, is not only administratively infeasible but gives the landowner a windfall at the expense of society in general. Very frequently, however, the unarticulated reason that proof of "value to the owner" damages for loss of business is rejected can be traced to a basic lack of faith in the ability of the trier of fact to arrive at a rational result in the face of confusingly large amounts of data.

Few would deny that land is often "worth" more to a particular landowner than it is to anyone else. It is certainly not difficult to conclude that the fair market value test creates substantial injustice when the family homestead is being taken and no replacement property is available, or when a black or poor white family has paid off a home in a ghetto and cannot find comparable shelter for the small price they receive for their home. There is a certain lack of persuasiveness to the argument that the trier of fact, even with proper instructions, cannot measure the value of these factors when triers of fact regularly assess and award damages for such obviously subjective ailments as pain and mental anguish.

The existence of the problems described has been recognized and

21. *Id.* For many years in England a landowner was entitled in an eminent domain proceeding to receive the value of the land *to him*. G. CHALLIES, *THE LAW OF EXPROPRIATION* 87 (2d ed. 1963). Similarly there has been recognition, in Canada and elsewhere, that a condemnee is entitled to a premium merely because he is an unwilling seller. *See, e.g.,* *Lock v. Furze*, 19 C.B. (N.S.) 96 (1865); *In re Wilkes' Estate*, 16 Ch. D. 597 (1880). In recent years the Congress of the United States has given statutory recognition to the legitimacy of such claims. For an excellent discussion of federal statutes of this nature see Note, *The Interest in Rootedness: Family Relocation and an Approach to Full Indemnity*, 21 *STAN. L. REV.* 801 (1969). *See also* PRACTICING LAW INSTITUTE, *REAL ESTATE VALUATION IN CONDEMNATION* 191-253, 301-405 (1969). With regard to state condemnations, however, the picture is much less attractive.

discussed, not in terms of constitutional prerequisites, but in terms of pure utilitarianism.²² The constitutional issues, however, are clearly the same, and the following balance of these interests should be persuasive as to constitutional requirements as well. If society makes the pragmatic decision that the *total* loss suffered by the landowner whose business or home is taken for public projects, including expenses of replacing the taken property, outrage and anger at the governmental taking and any other tangible or intangible but measurable loss is so great that it outweighs the public benefit of the acquisition, then the public project should be abandoned or compensation should be made for all of the loss. If the loss remains uncompensated, society must suffer what Professor Michelman calls the demoralization costs.²³

III. FAIR MARKET VALUE AND PROCEDURAL DIFFICULTIES

In assessing the fairness of the "fair market value" approach, the difficulties that have arisen in the procedural application of substantive condemnation principles cannot be ignored. There is, for example, a constant struggle between condemning agencies and landowners over who should be the trier of fact. Condemnees and their attorneys are convinced that substantially more in the way of an award can be obtained from a jury than from a judge or a commission. Not only is there no empirical proof for this proposition, the available evidence indicates that the factual confusion that attends the trial of eminent domain cases is much more likely to result in a lower award from a jury of laymen than from a judge or an experienced and sophisticated

22. Perhaps the best known discussion is Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). See also Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963); Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954). For cases dealing with the balancing concept see *Malman v. Village of Lincolnwood*, 61 Ill. App. 2d 55, 208 N.E.2d 884 (1965) and *Rochester Business Institute Inc. v. City of Rochester*, 25 App. Div. 2d 97, 267 N.Y.S.2d 274 (1966).

23. Michelman, *supra* note 22. A very plausible argument can be made that, even if we are to adhere to the "fair market value" test as a constitutionally sufficient standard for governmental expropriations, when quasi-public agencies such as utilities, railroads and universities are granted the power of eminent domain, all losses must be compensated. The exception would be justifiable on the ground that, although the quasi-public agencies are serving a vital public function, they are nevertheless profit-making organizations whose publicly established rate structures can be, and are, adjusted to give a reasonable return on investment. It is considerably more difficult, however, to explain why "just compensation" is not the same in both cases, since the fifth amendment addresses itself specifically to the *government's* deprivations.

commission or arbitration tribunal.²⁴ Regardless of the form of the tribunal or the procedure adopted, however, the fact that the goal is the establishment of "fair market value" inevitably renders the proceeding chaotic.²⁵

A. The "Comparable Sales" Dilemma

The courts frequently refer to "comparable sales" as the "best evidence" of market value.²⁶ Presumably, evidence of comparable sales provides the least confusing guide to market value, and the definiteness and ascertainability of such evidence lends an air of objectivity to the testimony of the appraiser-experts. If the sales are in fact "comparable," they are excellent indicators of the value of the subject property. A free and open sale of the *same* property, not too remote in time, would in fact be the *best* evidence of the fair market value of the property as of the date of taking, but this is a happy situation not frequently encountered. Several difficult problems attend the utilization of comparable sales data.

In the first place, with the possible exception of very unattractive subdivision tracts, no two pieces of property are exactly alike.²⁷ Almost

24. See L. WALLSTEIN, REPORT ON LAW AND PROCEDURE IN CONDEMNATION (1932). A Massachusetts study described in Note, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 73, 87 (1957), suggested that jury trials usually do not materially increase the amount available to the property owner over what he would have obtained in a settlement. On the other hand, there are many cases in which juries appear to have acted arbitrarily to give compensation for incidental losses, despite directions to the contrary. *E.g.*, *Reeves v. City of Dallas*, 195 S.W.2d 575 (Tex. Civ. App. 1946).

25. It has been suggested that the price of "splitting the difference," generally followed in the trial of eminent domain cases before juries, makes it possible "to adjust the rigid rules of law to the requirements of justice and indemnity in each particular case." *Park Comm'n v. United States*, 143 F.2d 688, 692 (2d Cir. 1944), quoting L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN 810, 837 (1st ed. 1936). It seems more likely that dispensing this kind of "fireside equity" will result in injustice.

26. See *United States v. 329.05 Acres of Land*, 156 F. Supp. 67, 71 (S.D.N.Y. 1957), *aff'd sub nom. United States v. Kooperman*, 263 F.2d 331 (2d Cir. 1959) ("[s]ales of the same property or those of a comparable character in the same neighborhood in recent times constitute the best evidence upon which to establish value in a condemnation proceeding"). See also, *United States v. 5139.5 Acres of Land*, 200 F.2d 659 (4th Cir. 1952); *United States v. 70.39 Acres of Land*, 164 F. Supp. 451 (S.D. Cal. 1958); Dolan, *Federal Condemnation Practice—General Aspects*, 27 APPRAISAL J. 15 (1959).

27. There are inadequacies in the market data technique. These have been summarized from an appraiser's perspective as follows:

"1. Sales are historical evidences of past actions in the market.

"2. The essence of value is the relationship between people and property. The actual transactions reflect not only the influence of the individual property but also the personalities and motives of the buyer and seller. The probable behavior and performance of individuals is not subject to exact prediction.

all eminent domain proceedings are afflicted with unseemly wrangles about the comparability of the sales being used. The sales may not be comparable, for example, because of their geographical distance from the subject property and their remoteness in time from the date of taking.²⁸ It may even develop that there have been no sales of comparable property within reasonable geographical and calendar proximity. The introduction of evidence of comparable sales, therefore, may lead to trial of collateral issues, and the absence of evidence of comparable sales may leave the trier of fact hopelessly uninformed. Moreover, since almost every allegedly qualified appraiser has a different concept of what is meant by a comparable sale, the use of comparable sales data often results in compromise awards somewhere between the highest and lowest appraisal, without any real reference to the intrinsic value of the property. The use of the comparable sales approach to arrive at "fair market value" has been recently characterized in uncomplimentary terms:

It is advanced herein that the dual tendency of the courts to limit the presentation of market value to the comparative sales approach and to label this method the "best evidence" constitutes an unwarranted and often erroneous simplification of the value problem. Such an approach is blind to the advancement of appraising techniques and, more so, to the marketplace. In an effort to achieve expediency and simplicity, it reconstructs a Procrustean bed; if the subject does not fit comfortably—and with *comparative* ease—upon the ready-made bed, then the victim's head or feet are cut down to the convenient size. . . .

Buying and selling in the mid-twentieth century is far different in the marketplace from the way it is viewed from the courthouse.²⁹

Considerable controversy has raged over the years on the question

"3. No comparison can be expected to furnish the exact dollar value for the subject property

"4. There are differences in physical similarities in market circumstances in the 'justified' and 'actual' sales. Distinction between the two must be recognized in their respective interpretation of the fair market value

"5. The mathematically adjusted indications are not true market conditions. They are unrealistic and conjectural based on ephemeral assumptions and not reflective of true market conditions.

"6. Each property has its own specifics, individuality, character and capacity. No two pieces of property are alike

"7. The assignment of percentage values to each of the factors can become arbitrary, unrealistic, and theoretical in nature and relegates itself under the realm of mysticism.

"8. Piecemeal adjustments by mathematical percentages of the so-called 'comparables' tend to invalidate the composite evidentiary picture of the transactions by increasing the chances for error or judgment by omission or exception." Lum, *Comparison and Use of Market Data in Preparation for Expert Testimony*, 31 APPRAISAL J. 178, 181 (1963).

28. For a general discussion of the comparability problem see Sengstock & McAuliffe, *What Is the Price of Eminent Domain?*, 44 J. URBAN L. 185, 197-206 (1966).

29. 3 CAL. L. REVISION COMM'N REP., RECOMMENDATIONS & STUDIES A-25 to -26 (1961).

of whether sales of comparable property made subsequent to the date of taking should be considered in arriving at fair market value.³⁰ The most frequently cited criticism of the use of this evidence is that the condemnation proceedings often cause an increase in property values in the vicinity, with the result that subsequent sales may not accurately reflect the value of the subject property at the exact date of its taking, which is the only proper time for the fixing of value. The short answer to this argument is that adjustments are necessary in order to make evidence of comparable sales usable, whether they occur *before* or *after* the date of taking. If conditions have been changed to the extent that the sale can no longer be said to be "comparable," then evidence of the sale can be excluded for that reason alone. As the California Law Revision Commission recently pointed out:

Not only is the admission of subsequent sales justified on the ground that they indicate what the value would have been on the date of taking, but they are especially important when prior sales are (1) few in number or (2) considerably more remote on the date of taking than are the subsequent sales. Furthermore, subsequent sales may indicate a trend in the market.³¹

When a public works project is of any magnitude, such as a dam and reservoir, an interstate highway, or an urban renewal project, the failure of condemning authorities and their appraisers to be consistent and uniform in their offers can create great difficulty. Public dissatisfaction with apparent unequal treatment inevitably results since there is no practical means by which the confidentiality of the condemnor's offers can be maintained. Notwithstanding the apparent inequities of inconsistent offers, the overwhelming majority of the cases exclude from evidence testimony of both offers made and sales amounts actually paid to other condemnees for similar property in the project areas,³² no matter how comparable in terms of geography, time, and potential use. Three reasons are normally assigned for refusing to admit evidence of such sales. First, the sale is not, by definition, a voluntary sale in a free and open market. Secondly, in partial taking cases the condemnor's sales price may include not only the value of the property taken but damages for remaining property as well. Finally, the admission of evidence of other sales in the project area would allegedly introduce "aggravating and time-consuming collateral issues tending to

30. See, e.g., *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925); *United States v. Brooklyn Union Gas Co.*, 168 F.2d 391 (2d Cir. 1948); *County of Los Angeles v. Hoe*, 138 Cal. App. 2d 74, 291 P.2d 98 (Dist. Ct. App. 1955); *Dolan*, *supra* note 26.

31. 3 CAL. L. REVISION COMM'N REP., RECOMMENDATIONS & STUDIES A-37 (1961).

32. See 5 P. NICHOLS, *supra* note 1, §§ 21.3[1], .4[1]; 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 147 (2d ed. 1953); Annot., 174 A.L.R. 386 (1948).

promote confusion rather than clarity.”³³ These reasons are not persuasive. Although sales to the condemnor are not “voluntary,” there should at least be an element of estoppel working against the condemnor’s attempt to resist admission of evidence of such sales. This would not place an undue burden on the condemnor, since any attempt on the part of landowners’ appraisers to rely on sales to the condemnor could be attacked through cross-examination on the basis that different conditions rendered the sales not comparable. Moreover, it does not seem that review of the condemnor’s explanation for inconsistent sales prices would involve the court in the examination of collateral issues. On the other hand, the admission of proof of these sales would have the salutary effect of compelling the condemnor, on pain of having his failure to do so disclosed in open court, to deal with similarly situated landowners on a fair and uniform basis.³⁴

Much of what has been said about sales to condemnors can also be said about so-called “forced sales.” Evidence of sales of comparable property by an executor or administrator, foreclosure sales, sales to settle estates, and any other sales made under legal duress or coercion, is not admissible.³⁵ As soon as it appears that the sale falls into one of these categories, the trier of fact may not hear about it, even though it may have been conducted in a free and open manner, even including an auction sale. No satisfactory explanation has been given why the appraiser could not adjust for the forced nature of the sale as he does for geographical or temporal disparities. Both sides have experts who are free to question the alleged comparability of sales. It is the height of folly, therefore, to refuse to allow the trier of fact to hear of a foreclosure auction sale, in connection with a foreclosure, of property adjacent to the taken property, made only a day or two prior to the date the subject property is taken, and conceded by an objective, experienced appraiser to have been fair in every respect. After all, there is an element of necessity connected with all sales, even those made in the ordinary course of business.³⁶

Finally, offers to buy or to sell property, including the subject

33. *Blick v. Ozaukee County*, 180 Wisc. 45, 48, 192 N.W. 380, 381 (1923).

34. At least one state has recently held that evidence of sales to the condemnor is admissible to prove value, notwithstanding the coercion allegedly inherent in such transactions. *See County of Los Angeles v. Faus*, 48 Cal. 2d 672, 312 P.2d 680 (1957).

35. *See, e.g., Redevelopment Land Agency v. 61 Parcels of Land*, 235 F.2d 864 (D.C. Cir. 1956); *Baetjer v. United States*, 143 F.2d 391 (1st Cir. 1944); *Wyman v. Lexington & W. C. R.R.*, 54 Mass. 316 (1847).

36. *Cf. Hickey v. United States*, 208 F.2d 269 (3d Cir. 1953), *cert. denied*, 347 U.S. 919 (1954) (attempting to expand the area of forced sales and excluding even the private business sale when made under compulsion).

property, are generally considered inadmissible, even for the purpose of challenging a witness's credibility.³⁷ These offers are inadmissible even if made voluntarily and in good faith. Certainly the relevance of bona fide offers to buy the subject property is clear:

When the conduct of others indicating the nature of a salable article consists in offering this or that sum of money, it creates the phenomena [sic] of *value*, so-called. For evidential purposes, Sale-Value is nothing more than the nature or quality of the article as measured by the money which others show themselves willing to lay out in purchasing it. Their offers of money not merely indicate the value; they *are* the value; *i.e.* since value is merely a standard or measure in figures, those sums taken in net potential result are that standard.³⁸

Nevertheless, courts consistently cite a multitude of reasons why such testimony of offers to buy or sell property should be excluded: pure speculation may have induced the offer; the purchaser may have wanted the land for some purpose disconnected with its value; the offeror cannot be cross-examined; or the offer may have been a mere expression of opinion by one who was without serious intention or who had no resources.³⁹ Although in individual cases there may very well be merit to the objections listed, a failure to even consider such evidence indicates a

37. See, e.g., *Sharp v. United States*, 191 U.S. 341 (1903). See also Annot., 7 A.L.R. 2d 781 (1949); 1 L. ORGEL, *supra* note 32, § 148; Note, *Methods of Proving Land Value*, 43 IOWA L. REV. 270 (1958).

38. 2 J. WIGMORE, EVIDENCE § 463, at 503 (3d ed. 1940). See also *County of Los Angeles v. Faus*, 48 Cal. 2d 672, 677, 312 P.2d 680, 683 (1957).

39. The following quotation from *Los Angeles City High School Dist. v. Kita*, 169 Cal. App. 2d 655, 663, 338 P.2d 60, 65 (Dist. Ct. App. 1959) expresses the conventional view:

"Much has been said about the propriety of receiving in evidence unaccepted offers to buy similar property. An offer to pay a certain amount does not necessarily involve an estimate that such is its full value and should have been taken into consideration in forming an opinion of market value. At best, such offers are but expressions of opinion. They are a species of indirect evidence of the opinion of the offerer as to the value of land. An unaccepted offer places before the jury an absent person's declaration or opinion of value while depriving the adverse party of the benefit of cross-examination. The offerer may have such slight knowledge on the subject as to render his opinion of no value. He may have wanted the land for some particular purpose disconnected with its value. Pure speculation may have induced the offer, a willingness to take chances that some new use of the land might later prove profitable. The person making the offer may not have been competent in a legal sense to express an opinion on the subject. Offers may be glibly made without serious intention or the required resources. The offer may contain contingencies, as in the present case. The area for collateral inquiry is far broader than in the case of consummated sales, as is also the opportunity for collusion and fraud. The assertion that the offerer tendered his money might give such hearsay opinion more weight with the jury than an opinion given by a witness before them, not thus supported. If evidence of an unaccepted offer is to be received, it is important to know whether the offer was bona fide and made by a man of good judgment acquainted with the value of the property, and whether made with reference to market value or to supply a particular need or to gratify a fancy. Unaccepted offers are unsatisfactory, easy of fabrication, and even may be dangerous in their character."

very limited confidence in the ability of courts to examine evidence objectively and to exclude that which requires an excessive amount of collateral investigation. The result is that in many instances sales of scant evidentiary value are presented to the trier of fact, while offers that provide a much more rational basis for valuing the subject property are excluded out of hand.

What has been said, of course, reflects discontent with the refusal of courts to hear what is in many cases reliable evidence concerning the value of property. Realistically, it must be admitted, however, that use of the fair market value approach with its concomitant reliance on the market data or comparable sales approach makes inevitable the evidentiary rules discussed. These exclusionary rules have their origin in a jury trial atmosphere, which the courts believe compels a high degree of judicial selectivity. In that regard, more will be said later about possible alternative tribunals for the setting of just compensation.

B. "Fair Market Value" Minus the Attorney's Fee

While it may be somewhat sacrilegious to say so, the application of the "fair market value" test in the context of traditional eminent domain proceedings results more often than is necessary in the hiring of an attorney, with the result that the attorney's fee must be subtracted from the amount the landowner receives for his property.⁴⁰ The following review of typical condemnation practice demonstrates why an attorney is so often needed. Very often, especially in condemnation proceedings at the state level and in those carried out by quasi-public agencies granted the power of eminent domain, an appraisal is made sometime prior to the actual contemplated date of taking by either an appraiser who is only moderately qualified—very frequently an employee of the condemning agency—or by an independent expert. If the agency is financially unable to employ an appraiser to reappraise the property as of the date of the taking, then the deposit that is finally paid into the court, when settlement with the landowner is not possible, is based on an erroneous appraisal. The problem is particularly acute when there has been a steady appreciation in the value of the land from the time of the initial

40. "To require the defendants in this case to pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of the [condemnor], would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs." *City & County of San Francisco v. Collins*, 98 Cal. 259, 262, 33 P. 56, 57 (1893).

The best study of this problem is contained in Note, *Attorneys' Fees in Condemnation Proceedings*, 20 HASTINGS L.J. 694 (1969).

negotiations for the purchase until the dispute is taken to court. Even if the landowner was unreasonable in his demands prior to the filing of the litigation, he may be willing to settle rather than litigate if a new offer is made based on the realistic value of the land at the date of taking. Where a new offer is not made, however, the landowner has no choice but to hire counsel and pay the attorney's fee.

Under the typical arrangement, the attorney's fee is from one-third to one-half of the amount by which the final award exceeds the condemnor's deposit or final firm offer. In many instances, the final award represents the value of the property *as of the date of taking*. In these cases, the landowner has been forced to pay a sizeable attorney's fee to obtain compensation to which even the condemning agency admits he is entitled.⁴¹

Public officials, including negotiators for condemnors, are well aware of the burden that an attorney's fee places upon the recalcitrant landowner, and it is not at all unusual for them to exploit this obstacle to litigation to force the landowner to settle out of court. Indeed, recent studies have shown that in many instances the first offer is less than the condemning agency's own appraisal.⁴² As reprehensible as this conduct may appear, it is not as deplorable as another practice that is sometimes

41. Even when there is a legitimate difference of opinion between the experts employed by the landowner and those used by the condemning authority, the net compensation received by the landowner, if it develops that he is correct and the agency is wrong, must be diminished by the attorney's fee and other expenses. A few states have enacted statutes which grant the landowner a measure of protection as to his attorney's fees, most notably Florida, North Dakota, Iowa and Oregon. For citations to the relevant statutes in these states see Note, *supra* note 40, at 704-08.

Florida's statute is of special interest:

"The petitioner shall pay all reasonable costs of the proceedings in the circuit court including a reasonable attorney's fee to be assessed by that court." FLA. STAT. ANN. § 73.091 (Supp. 1970).

"The petitioner shall pay all reasonable costs of the proceedings in the appellate court, including a reasonable attorney's fee to be assessed by that court, except upon an appeal taken by a defendant in which the judgment of the trial court shall be affirmed." *Id.* § 73.131(2).

42. See *Hearings on S. 1351 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 26, 36-38 (1968); *Hearings on Real Property Acquisition Practices and Adequacy of Compensation in Federal and Federally Assisted Programs Before the Select Subcomm. on Real Property Acquisition of the House Comm. on Public Works*, 88th Cong., 1st Sess. 368-81, 383-91 (1963); Berger & Rohan, *The Nassau County Study: An Empirical Look Into the Practices of Condemnation*, 67 COLUM. L. REV. 430 (1967).

Section 504 E of the proposed Model Eminent Domain Code under consideration by the Committee on Condemnation Law of the Real Property, Probate and Trust Section provides:

"Where the ultimate award is more than the offer of the condemnor, the Trial Judge shall have the authority to cause the condemnor to reimburse the condemnee for his . . . attorneys' fees and other reasonable expense, but his authority shall exist only in those instances where the Trial Judge finds affirmatively that to do otherwise would invoke serious hardship on the condemnee . . ."

used. The landowner may be given a firm offer, told that it is a "take it or leave it" proposition, and notified that it is the agency's intention to deposit *less* than the firm offer in court if the offer is rejected. This kind of high-handedness is of course aided and abetted by the generally accepted rule that precludes discovery of the opinions of the condemnor's experts concerning the fair market value of the property.⁴³

The solution to these problems may lie in the appointment of a "condemnation proctor" or "public defender" for eminent domain proceedings—a publicly paid, but independent counsel who would represent the interests of the landowner. One suspects, however, that empirical experience with such a drastic measure would reveal that the landowner, in the long run, would be economically better off with private counsel, with all the attendant expenses, since the independence of public counsel would seem to be very difficult to preserve.⁴⁴ A more reasonable solution lies in the improvement and modernization of condemnation procedure.

The fair conclusion from the foregoing would be that the quest for fair market value in the context of a highly-structured judicial atmosphere, with the accompanying technical rules of evidence and procedure, leaves a great deal to be desired. There seems to be general recognition of this fact. As stated above, any attempt to remove eminent domain proceedings from the courts is met with stern resistance on the part of landowners—resistance which, in the long run, is probably shortsighted.⁴⁵

43. See *City of Chicago v. Harrison-Halsted Bldg. Corp.*, 11 Ill. 2d 431, 143 N.E.2d 40 (1957). *But cf.* *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968). See also Varney, *The Use of Prior Appraisals in Condemnation Cases* in ABA SECTION OF LOCAL GOVERNMENT LAW, REPORT OF COMMITTEE ON CONDEMNATION AND CONDEMNATION PROCEDURE 377 (1968). A California study has shown that unless the award exceeds the offer by \$3,000 to \$5,000, the unrecoverable costs of defending such a case will exceed the increase in compensation. 1969 CAL. L. REVISION COMM'N REP. 128 n.10.

44. Unlike "public defenders" for criminal cases, a condemnation proctor inevitably would develop the type of close working relationship with the condemning authority and local appraisers that makes neutrality impossible.

45. See Berger & Rohan, *supra* note 2, at 440. At least one type of federal condemnation proceeding, that of the Tennessee Valley Authority (TVA), has partially moved from a commission type hearing to a jury trial procedure. Section 25 of the Tennessee Valley Authority Act was amended to abolish the commission system as the sole method for determining just compensation for TVA takings. Act of September 28, 1968, Pub. L. No. 90-536, 80 Stat. 885, *amending* 16 U.S.C. 831x (1964). Since TVA takings are now on the same basis as all other federal condemnation, if the requisite findings can be made, the federal district judge can appoint a commission under FED. R. CIV. P. 71A(h).

C. *Alternative Tribunals to Ascertain "Fair Market Value"*

The deluge of valuation problems caused by use of the fair market value test is not being handled efficiently or effectively by the courts. Even if it is assumed that the standard itself should not be rejected, it seems clear that administration of the test must be reformed. The removal of eminent domain proceedings from the courts may provide part of the solution.

Several states have established permanent arbitration tribunals staffed with experienced personnel as an alternative to the judicial forum for condemnation proceedings. Along these lines, the American Arbitration Association (AAA) has recently promulgated eminent domain arbitration rules,⁴⁶ and the California Law Revision Commission (CLRC) has recommended that the State legislature adopt arbitration rules that provide for the determination of just compensation by a panel of arbitrators.⁴⁷ Significantly, neither the AAA nor the CLRC rules provide an alternative to the "fair market value" test. Given the variables involved and the difficulty of charging lay jurors, the arbitration expedient seems particularly promising, especially if the "fair market value" test is retained.

Another procedure that has worked satisfactorily is the use of a commission appointed by the court. Rule 71A(h) of the Federal Rules of Civil Procedure provides for a jury trial in condemnation cases "unless the court in its discretion orders that, because of the character, location, or quantity of the property condemned, or for other reasons in the interest of justice the issue of compensation shall be determined by a committee of three persons appointed by it."⁴⁸ In *United States v. Merz*,⁴⁹ the Supreme Court outlined the standards that district courts should apply to a commission appointed under rule 71A(h), the duties of the commission in making findings, the duties of the litigants, and the duties of the district court vis-a-vis the report of the commission.⁵⁰ The

46. AMERICAN ARBITRATION ASSOCIATION, EMINENT DOMAIN ARBITRATION RULES (1968).

47. 1969 CAL. L. REVISION COMM'N REP. 131.

48. Beginning in 1951, bills have been introduced in Congress from time to time to strip the district court of its discretionary power to deny a demand for a jury trial. In support of such legislation, the American Bar Association argues that jury trial had been enjoyed under the old conformity act and was improperly taken away by rule 71A. See ABA, *Report of the Committee on Amendment of Rule 71A of Federal Rules of Civil Procedure*, 81 A.B.A. REP. 386 (1956). Interestingly enough, however, the cases that have reached the appellate courts indicate that it is usually the government, not the landowner, that complains of denial of a jury trial. See, e.g., *United States v. Leavell & Ponder, Inc.*, 286 F.2d 398 (5th Cir. 1961); *United States v. Chamberlain Wholesale Grocery Co.*, 226 F.2d 492 (8th Cir. 1955).

49. 376 U.S. 192 (1964).

50. *Id.* at 197-200.

commission's finding on "fair market value" and just compensation can be overturned by the district court only if it is "clearly erroneous." The preliminary draft of the Model Code on Eminent Domain, prepared by the Real Property, Probate and Trust Section of the American Bar Association, however, recommends a more liberal standard of judicial review of commission decisions.⁵¹ While this position is not surprising in view of the Bar Association's resistance to the 71A(h) commission, its reasonableness is subject to the challenge that the right to a trial de novo before the court reduces the commission proceeding to a waste of time.

IV. A COMPARATIVE STUDY

The foregoing discussion has been oriented primarily toward the inequities created by judicial efforts to serve the constitutional mandate of "just compensation" through the "fair market value" test. Undoubtedly, many of the problems considered could be more simply and effectively disposed of by substituting another standard for that of fair market value. Suggestions of this nature, however, are frequently met with the charge that any other method of arriving at just compensation would work an injustice on the public, give a windfall to the landowners, and deter the undertaking of worthwhile and necessary public projects. Since this position apparently has been accepted unquestionably in the United States, it seems appropriate to challenge the presumption through a comparative examination of eminent domain policy and methods of valuation in several other countries, including an examination of procedure where apposite. All of the countries chosen are nontotalitarian in nature and have governmental systems that protect the ownership of private property. Moreover, it may be safely assumed that in these countries public projects requiring the expropriation of private property occur with regularity and that somehow these societies have been able to obtain a balance between the rights of the public and the private property interests of the landowners.

A. *Canada*

There is in Canada no constitutional principle that private property cannot be taken without due process of law, like the fifth and fourteenth constitutional amendments in the United States. It has been said of the Imperial Parliament that it can do anything except make a man a woman. The Dominion Parliament and the Provincial Legislatures within their spheres are just as supreme. 'As to the question whether Parliament has the power to expropriate land for public purposes without compensation, there cannot be any doubt.'⁵²

51. "The right to appeal [from the commission's finding] shall be absolute and the trial shall be de novo." Model Code on Eminent Domain § 504 (Prelim. Draft, 1968).

52. G. CHALLIES, *THE LAW OF EXPROPRIATION* 75 (2d ed. 1963).

Despite the Canadian landowner's lack of constitutional protection, an examination of the cases and the various provincial and federal Canadian statutes reveals that the landowner is much more likely to be made whole in Canada than in the United States. The Canadian courts have repeatedly stated that when private property is taken for public use "the value to be paid for is the value to the owner . . . not the value to the taker" ⁵³ The following quotation accurately expresses the approach of the Canadian courts to the valuation problem:

The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the land he gives up [its] equivalent, *i.e.* that which [it is] worth to him in money. His property is . . . not diminished in amount but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands and any and every element of value which they possess must be taken into consideration insofar as they increase the value to him. ⁵⁴

As expressed in the recent case of *Zeta Psi Elders Association v. University of Toronto*:

The value of a property to its owner is identical in amount with the adverse value of the entire loss, direct and indirect, that the owner might expect to suffer if he were to be deprived of the property.

Value to the owner means the price at which the owner would value his property if he made an intelligent valuation in the light of data available on valuation date. ⁵⁵

In estimating the amount that should be paid to the owner whose land is taken, the court, arbitrator, or board must consider all the circumstances in order to determine the sum that will restore the owner to a position that is as nearly as possible identical to the position he occupied before the expropriation. ⁵⁶ In those cases in which there are buildings or lands of exceptional character, or premises suitable for a business only under special conditions or by means of a special license, compensation includes the right to "reinstatement." Reinstatement,

53. See, *e.g.*, *Woods Mfg. Co. v. The King*, [1951] 2 D.L.R. 465; *Belanger v. The King*, [1918] 42 D.L.R. 138; *Lucas v. Chesterfield Gas & Water Bd.*, [1909] 1 K.B. 16 (C.A. 1908).

54. *Lucas v. Chesterfield Gas & Water Bd.*, [1909] 1 K.B. 16 (C.A. 1908), quoted in *G. CHALLIES*, *supra* note 52, at 87.

55. [1967] 2 O.R. 185, 187.

56. *Diggon-Hibben Ltd. v. The King*, [1949] 4 D.L.R. 785, 787: "The owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it."

defined as "placing the owner from whom property is taken in a substantially equivalent position by means of substituted property,"⁵⁷ is analogous to the American doctrine that allows reproduction costs less depreciation when there is no comparative market data by which to arrive at fair market value.

In recent years, the major controversy in Canada has swirled around the so-called "allowance" for compulsory dispossession.⁵⁸ While there are statutes granting recovery for so-called "injurious affection,"⁵⁹ interest and costs, there apparently is no express statute authorizing the practice of granting an allowance.⁶⁰ The allowance, which ranges from an average of ten percent to as high as 50 percent, is awarded to the reluctant landowner simply because he is an unwilling seller. Although it has often been said that the allowance is granted because of the difficulty in arriving at value to the owner, recent cases have suggested that it is awarded to cover the "expense and inconvenience of moving elsewhere, the loss of benefits enjoyed by the owner due to location of the property taken and, where a business is carried on which the owner proposes to continue elsewhere, the loss due to the dislocation of the business carried on and the loss of profit in the interval before it can be established elsewhere, moving costs and other unavoidable expenses."⁶¹

While a great many Canadians feel that the existing law gives landowners only their fair due, a new federal expropriation bill for Canada has been proposed to correct what some believe to be a landowner-oriented bias in the law.⁶² Bill C 200 would give the landowner additional power to challenge the necessity of the public taking, but it would, in a substantial number of cases, substitute the "fair market value" test for the "value to the landowner" standard. Although the proposed bill purports to abolish the ten percent allowance for compulsory taking, it provides for allowances for costs, including moving costs, expenses, and disturbances, which combined may exceed the ten percent "allowance."

57. G. CHALLIES, *supra* note 52, at 153.

58. See *Drew v. The Queen*, [1961] 29 D.L.R.2d 114; Todd, *The 10% Allowance in Assessing Compensation Payable for Property Expropriated Under Statutory Authority*, 2 U.B.C.L. REV. 623 (1958). For a thorough discussion of the "allowance," sometimes called "indemnity for forceable dispossessions" see G. CHALLIES, *supra* note 52, at 206.

59. This is another name for severance damages, or, as they are sometimes referred to in Canada, "consequential damages." See G. CHALLIES, *supra* note 52, at 131.

60. The earliest case in which the "allowance," an import from England where it was abandoned in 1919, appeared was *Symonds v. Rex*, 8 Can. Exch. 319 (1904).

61. *Drew v. Regina*, [1961] Can. S. Ct. 614, discussed in G. CHALLIES, *supra* note 52, at 207.

62. See Safian, *Bill C200: Federal Expropriation Bill*, 34 SASK. L. REV. 299 (1969).

B. England

The existing law in Canada accurately describes the English expropriation law prior to the passage of the Acquisition of Land Act of 1919.⁶³ The Act abandoned the "value to the owner" rule and provided that "[t]he value of the land shall . . . be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise."⁶⁴ No provision is made in the Act for an allowance for the compulsory nature of an acquisition.

The English law dealing with expropriation of land is best understood when considered in conjunction with the various planning acts.⁶⁵ The Town and Country Planning Act of 1947,⁶⁶ as well as earlier planning and development acts, consisted of a pervasive system and plan of land use development. This scheme tended to affect the fair market value of property by severely restricting its potential uses. For some time, the "open market" value of property could only be computed with reference to its existing use and any possible deterrents to its development, including development fees. Now, according to a leading authority:

Valuation is, in general, to be made not only on the basis of any planning permissions which at the date of the notice to treat have actually been granted, but also on the basis of any planning permissions likely to be granted. Thus if the land is being acquired for some specific purpose, it is to be assumed that planning permission would be given for that purpose; and it is to be assumed permission would be given to develop the land in accordance with the development plan.⁶⁷

Significantly, the Acquisition of Land Act of 1919 does recognize a right to compensation for "disturbance," as well as a right to recover for severance damages, or "injurious affection."⁶⁸ Additionally, when the land has no market value, the doctrine of reinstatement⁶⁹ continues to apply in England. The various planning acts also recognize that the previous application of land use controls can, under certain circumstances, constitute a taking that is compensable under the law.

63. Acquisition of Land (Assessment of Compensation) Act of 1919, 9 & 10 Geo. 5, c. 57, § 2, rule 2. Indeed, English cases prior to 1919 are freely cited by the Canadian federal and provincial courts. 3 CAL. L. REVISION COMM'N. REP., RECOMMENDATIONS & STUDIES A-17 (1961).

64. Acquisition of Land (Assessment of Compensation) Act of 1919, 9 & 10 Geo. 5, c. 57, § 2, rule 2. It has been suggested that the "value to the owner" rule may be for various reasons, more realistic in Canada than in England. Safian, *supra* note 62, at 307.

65. See Megarry, *Compensation for Compulsory Acquisition of Land in England*, in LAW AND LAND 212 (C. Haar ed. 1964).

66. 10 & 11 Geo. 6, c. 51.

67. Megarry, *supra* note 65, at 221.

68. *Id.* at 222-23.

69. *Id.*

C. Sweden

The Swedish Law on Expropriation provides as follows:

Article 7. Compensation shall be made for real estate that is expropriated in amount corresponding to the value of the real estate, especially with regard to the comparative value and productive value of the real estate. If a part of the real estate is expropriated and the remainder sustains damage or encroachment through the expropriation or the use of the expropriated part, compensation for this shall be made. If damage otherwise arises for the owner through the expropriation, such damage shall also be compensated.

Article 8. When deciding on the compensation for real estate, no consideration shall be given to a change in the value that occurs as a consequence of the expropriation or the accomplishing of the intended purpose.

Article 9. If a part of real estate is expropriated and the expropriation or the use of the expropriated part causes damage or depreciation of the residue, but in another respect causes it to appreciate, compensation shall be paid only when the depreciation is greater than the appreciation.⁷⁰

The compensation must be paid according to the market price of the real estate—the price that can be expected through usual transactions due to the quality, nature, and location of the real estate, without taking into account unusual or personal circumstances.⁷¹ When deciding market price, consideration is given primarily to the comparative value.⁷² When deciding on the comparative value, earlier transactions used for comparison must be representative in location, kind, nature of the ground, size, age, condition of buildings, and so on, and the prices compared cannot be outdated.⁷³ Changes resulting from the increase or decrease of purchase power are also taken into consideration in the examination of comparable sales. As is the case in all of the countries studied, the Swedish expropriation law does not, as a general rule, compensate for sentimental values of the owner. Severance damages, however, are recognized and compensated.

Article 7 of the Law on Expropriation states that all damages shall be compensated. This means, for instance, compensation for special damages, such as loss of business, which frequently remain uncompensated in the United States. Consistent with general damage compensation theory, compensation for loss of business requires a determination of the extent to which the business would have developed,

70. Law of May 12, 1917, concerning the Law on Expropriation, [1969] Sveriges Rikes Lag B114-30 (Swed.). See generally V. Ollikainen, Regulation of Eminent Domain in Sweden, December 1969 (unpublished private study on file with the *Vanderbilt Law Review*).

71. M. HERNMARCK, LÖSESKILLING VID EXPROPRIATION FÖR TATBEYGGELSE 103 (2d ed. 1967).

72. *Id.* at 110.

73. V. Ollikainen, *supra* note 70, at 2-3.

had the expropriation not occurred. This is established by the so-called "difference principle,"⁷⁴ which requires that the amount of compensation be decided after comparing business losses that have occurred in connection with expropriation with those that might have occurred independently of expropriation.⁷⁵ If the business is discontinued, the compensation is estimated on the basis of the usual projected net profits. Compensation is also given for goodwill and other business values. Significantly, expropriation matters are adjudicated in special expropriation courts on which expropriation technicians serve. Notwithstanding their specialization, however, the courts apparently have not been very effective and condemnation proceedings are, according to the authorities, quite frequently prolonged.⁷⁶

D. France

Article 17 of the Declaration of Rights of 1789 as reaffirmed by the Constitution of 1946 proclaims:

Property being a sacred and inviolable right, no one can be deprived of it unless a legally established public necessity evidently demands it, and on the condition of a just and prior indemnity.⁷⁷

"Just and previous indemnity" has been defined to encompass recovery for "the entire damage, direct, material and certain, caused by the condemnation."⁷⁸ Precise and complex rules concerning the methods of evaluating condemned property and the elements of damage have been established to prevent private persons from making sacrifices for public purposes.⁷⁹ According to the principles established by court practices, reestablishment of the landowner to the same or similar status is considered "just."⁸⁰ Although the indemnity must cover the entire damage caused by the condemnation, it is limited to direct, material, and

74. SVENSKA KOMMUNAL-TEKNISKA FÖRENINGEN, EXPROPRIATIONS TEKNIK 375 (1968).

75. Practice attempts are made to calculate the net losses the business may suffer. V. Ollikainen, *supra* note 70, at 4.

76. For a discussion of the expropriation courts see V. Ollikainen, *supra* note 70, at 5. Prior to 1950, article 7 of the Law of Expropriation required that "just compensation" be paid for the voluntary taking of real property. It is generally believed, however, that the change in the wording of article 7 has not resulted in a change in the basis for estimated compensation. 1948 STATENS OFFENLIGA UTREDNINGAR No. 4, 85.

77. J. BRISSAUD, A HISTORY OF FRENCH PUBLIC LAW 545 (1915).

78. See D. Krivickas, Regulation of Eminent Domain in France 1 & n.3, December 1969 (unpublished study on file with the *Vanderbilt Law Review*).

79. For a complete study of these rules see D. Krivickas, *supra* note 78.

80. D. MUSSO, LE NOUVEAU REGIME DE L'EXPROPRIATION ET SES. MODALITES D'APPLICATION M1 (2d ed. 1965).

certain damage. Demoralization loss, for example, is excluded. Although the methods for evaluating condemned property vary according to the existing use of the property, the basis for the evaluation is always market value, which is defined as "[t]he value which tribunals and the Court of Cassation defined as the price for which a reasonable man agrees to acquire an estate, taking into consideration the market price of the real estate of the region where the realty is located."⁸¹

E. Italy

The Italian Civil Code provides that "[n]o one shall be deprived, wholly or in part, of his property except for legally declared reasons of the public interest"⁸² and then only upon the payment of "just indemnity."⁸³ This expropriation for the public benefit may be described as a contribution that the landowner is compelled to make for the achievement and benefit of all.⁸⁴ As a result of this approach, there has been some controversy concerning whether an indemnity should correspond to the value of the expropriated object or should consist of a smaller amount in view of the fact that the public need exists.⁸⁵ The present Italian expropriation rule, however, is that indemnity should consist of a just price that has been established by experts exactly as it would have been established for a sales transaction.⁸⁶ In effect, the law grants full indemnity to the owner as if he were making the sale of his own free will.⁸⁷ The paramount intent of the law is to fully satisfy the just price; it reflects the need to balance the interest of the public with that of the private landowner. The indemnity "must exclude an unjust sacrifice as well as unjustified enrichment."⁸⁸

81. J.M. AUBY, L'EXPROPRIATION POUR LA CAUSE D'UTILITE PUBLIQUE 20 (1968). For an extensive discussion of evaluation methods in France see F. FERBES & G. SALLES, EXPROPRIATION ET EVALUATION DES BIENS (2d ed. 1969).

82. A considerable portion of this study is based upon K. Vokopola, Regulation of Eminent Domain in Italy, December 1969 (unpublished study on file with the *Vanderbilt Law Review*).

83. The expression "just indemnity," coming immediately after the other preconditions concerning the declaration of the public interest makes it clear that such payment is the *sine qua non* for a lawful exercise of the power of eminent domain.

84. Under Italian legal doctrine it is commonly held that an indemnity for the expropriation of private property for a declared public interest and need is not a "price," and therefore, does not constitute a valuable consideration in a transaction of exchange.

85. There is some authority for the latter viewpoint. Constitutional Court Decision No. 61, reported in 2 REVISTA DI DIRITTO AGRARIO 250 (1957).

86. K. Vokopola, *supra* note 82, at 5.

87. P. CARUGNO, ESPROPRIAZIONE PER PUBBLICA UTILITÀ 309 (6th ed. 1967).

88. K. Vokopola, *supra* note 82, at 6. See also P. CARUGNO, *supra* note 87, at 265. There has been special legislation, frequently applied in connection with slum clearance. The determination of

F. Germany

In Germany, compensation in eminent domain cases is provided for in the constitution. The basic expropriation law provides that:

Expropriation shall be admissible only for the well-being of the general public. It may be effected only by legislation or on the basis of a law which shall regulate the nature and extent of compensation. The compensation shall be determined after just consideration of the interests of the general public and the participants. Regarding the extent of compensation, appeal may be made to the ordinary courts in cases of dispute.⁸⁹

The German Code contains more specific compensation standards; compensation shall be given for eminent domain and it shall be awarded:

1. For the loss of rights occurring as a consequence of eminent domain;
2. For other damage in property occurring as a consequence of eminent domain.⁹⁰

Section 93(3) of the Code debits the landowner with any special benefit that may accrue to remaining properties as a result of the public project. Section 95 of the Code provides that compensation shall be ascertained according to the "market value" of the real property to be expropriated. The Code precludes recovery for "changes in value which have arisen as a consequence of the impending eminent domain," and there is, in addition, a rather peculiar provision that excludes "increases in value which have occurred after the time when the property owner could have accepted an equitable purchase or exchange offer made by the petitioner to avoid the expropriation." This "in terrorem" provision has not been found in any other country.

Section 96 of the Code authorizes compensation for "other property damage"—presumably consequential and incidental damages—and for the "temporary or continuous loss which the previous owner suffers in his professional activity, business activity, or in the fulfillment of duties which are basically imputable to him, however, only to the extent of the expenditures which are necessary to use another property in

the just price contained in this legislation states that the "indemnity due the owners of expropriated property shall be determined on the basis of the average commercial value or of the rents for the past ten years." P. CARUGNO, *supra* note 87, at 309.

89. The Bonn Constitution. Washington, D.C., U.S. Government Printing Office, 1949. For a general study of evaluation problems in Germany see W. Sólyom-Fekete, Regulation of Eminent Domain in the Federal Republic of Germany, December 1969 (unpublished study on file with the *Vanderbilt Law Review*). According to Sólyom-Fekete, "the literal translation of the term 'Bundesbaugesetz' would be Federal Law on Construction. This Law is a comprehensive code of urban development planning, and will be referred to as the 'Code'." *Id.* at 1 n.4.

90. The text of the Code, commentaries thereto, and its implementing statutes may be found in S. HEITZER & E. OESTREICHER, *BUNDESBAUGESETZ* (1968).

the same way as the property to be expropriated was used."⁹¹ Finally, the section provides for compensation for necessary moving expenses and incidental damage to remaining land.

Valuation is rendered by independent "expert commissions" set up for that specific purpose. Either the condemnee or the condemnor may request the expert evaluation of the commission. The market value that the expert commission seeks is explicitly defined by Section 141 of the Code:

(1) The expert commission shall establish the common value (market value).

(2) The market value shall be determined by the price which can be realized in the regular business at the time at which the appraisal is made, according to the qualities and other conditions as well as the location of the piece of real property, with no regard to special or personal circumstances.

(3) In the case of developed properties, the market values for the land and for the buildings shall be ascertained separately if this is possible on the basis of comparative prices; these shall be separately indicated in the expert opinion.⁹²

Two rather unusual provisions not encountered elsewhere should also be noted.⁹³ First, in certain cases, upon the request of the former owner, compensation must or may be rendered in the form of exchange property of no higher value than the fair market value of the expropriated property. This provision is most often invoked when the property taken is a single-family home. The decision on whether to grant the request for exchange property rests with the authorities who decided on the request for eminent domain. The second oddity is that the former owner of the expropriated property may request that compensation be paid in regular installments or in a lump sum.

G. Belgium

The complex system of expropriation for the public interest in Belgium was inherited from France.⁹⁴ It dates back to the Declaration of the Rights of Man and of the Citizen of August 26, 1789. The ideas set forth in Article 17 of this Declaration⁹⁵ were incorporated in the Belgium Constitution and the Belgium Civil Code.⁹⁶ Belgium has replaced the

91. The tone of the section is set by a provision that "compensation shall be determined after just consideration of the interests of the public and the affected parties." BGBI § 96, 1, at 341 (1960).

92. *Id.* § 141.

93. W. Sólyom-Fekete, *supra* note 89, at 7-8.

94. For a thorough study of expropriation problems in Belgium see V. Stoicoiu, Regulation of Eminent Domain in Belgium, December 1969 (unpublished study on file with the *Vanderbilt Law Review*).

95. See note 77 *supra* and accompanying text.

96. V. Stoicoiu, *supra* note 94, at 1-2.

French concept of "public necessity" with the concept of "public interest."⁹⁷ Since the Belgium Code deals only briefly with condemnation indemnity, expropriation policies have developed primarily in the case law through broad judicial interpretation of the legislative mandate that expropriation shall only be effected "with the condition of a just and previous indemnity."⁹⁸

To be "just," compensation must be full and equitable—it must cover all damage caused by the expropriation. For writers of the nineteenth century, it was sufficient if all rights and advantages taken from the owner by expropriation, as well as any prejudices caused, were replaced by a pecuniary compensation.⁹⁹ More recently it has been said that "the judge must compare what would be the price without expropriation and what would happen (to the price) if expropriation took place. It is the balance of these two situations which constitutes the loss in an expropriation in which the compensation for expropriation must pay."¹⁰⁰ Still another view is that a person whose property has been expropriated should be put, as nearly as possible, in a position to obtain for himself, with the help of the compensation, the same rights and advantages as those of which he has been dispossessed.¹⁰¹

Compensation is not "just" unless it completely indemnifies the former owner.¹⁰² Just compensation is composed of two elements: the market value of the property and reparation of the prejudice resulting from the expropriation.¹⁰³ The definition of market value as "a price which could normally be obtained for the property if it were sold publicly on the day when the court ruled that the administrative formalities had been completed and ordered the transfer of ownership" is not surprising.¹⁰⁴ Generally "future value," the potential that the property has apart from its use at the date of taking, has also been considered.¹⁰⁵ Other factors considered in determining just compensation include a supplemental indemnity for settlement charges to which the landowner is

97. M. VAUTHIER, *PRECIS DU DROIT ADMINISTRATIF DE LA BELGIQUE* ¶ 239, at 290 (1928).

98. L. BELVA, *L'EXPROPRIATION POUR CAUSE D'UTILITÉ PUBLIQUE* ¶ 987 (1955).

99. V. Stoicoiu, *supra* note 94, at 8. Compensation must not include more than the prejudices that are an "immediate and direct" consequence of the expropriation; here the antecedents in French law are obvious. See V. Stoicoiu, *supra* note 94, at 8.

100. 5 *REPertoire PRATIQUE DU DROITE BELGE* No. 571, ¶ 2 (1950), *quoted in* V. Stoicoiu, *supra* note 94, at 9.

101. V. Stoicoiu, *supra* note 94, at 9.

102. *Id.* at 10.

103. *Id.*

104. *Id.* at 11.

105. *Id.* at 12.

subject in acquiring an equivalent property,¹⁰⁶ and a "convenience value."¹⁰⁷ The "convenience value" would appear to be analogous to the "allowance" of the Canadian law, although it has been stated that courts refuse to consider "sentimental values."¹⁰⁸ If a person is obliged to suspend his activities at his present location and move to another place, and in so doing encounters disruptions in his commercial business, resulting in damage, the Belgium courts and legal writers are in agreement that this prejudice requires a special indemnity.¹⁰⁹

V. CONCLUSION

It is an inescapable conclusion that a delicate balancing is involved in condemnation cases between public and private interests. Public funds, on the one hand, are becoming increasingly inadequate to finance needed public improvements and therefore desperately need to be safeguarded. On the other hand, private interests plead for increasing recognition of the elements of damage, some of which are real but many of which are fancied. Use of the "fair market value" test to strike this balance of public and private interests has not been satisfactory; its application has precluded recovery for many elements of actual damage that accrue as a result of the taking of private land for public use. The search for "fair market value" is a snipe hunt carried on at midnight on a moonless landscape.

The hackneyed expression that "there is nothing so powerful as an idea whose time has come" may very well be apropos here. The decisions of the United States Supreme Court usually are not very far behind public sentiment. Already the criticisms of eminent domain procedures in this country are growing louder and louder. There is an observable general sentiment that government at all levels owns too much land, and that there is general insensitivity on the part of public officials to the suffering wrought by the taking of private property. Heretofore, the Supreme Court's reading of "just compensation" has involved an

106. *Id.* at 14.

107. *Id.* at 15.

108. *See, e.g.,* United States v. Petty Motor Co., 327 U.S. 372, 377-78 (1946). *See also* 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 39 (2d ed. 1953); Weisl & Cohen, *Federal Condemnation Law and the Public Interest*, in 1968 INSTITUTE ON EMINENT DOMAIN 45.

109. V. Stoicoiu, *supra* note 94, at 15-17. If a landowner excepts to the administrative determination of the amount to be paid for his land and appeals to the courts, the costs in courts of first instance are paid by the state; but if he appeals further and loses, he must bear the court costs and other expenses. *Id.* at 21. Although it has been argued to the contrary, courts have held that attorneys' fees are not "costs," and that the hiring of a lawyer is purely a voluntary act of the owner. *Id.* at 23.

interpretation of expediency, promoted by public officials who waved banners of private greed. It is herein predicted that the time is rapidly approaching when the Supreme Court is going to insist, as a matter of constitutional law, that the landowner be paid for all he surrenders. The cases themselves admit that "fair market value" does not indemnify the landowner. A good case can be made for the proposition that the elements of damage now denied the landowner on the ground that they are incapable of measurement, are in fact measurable if the proof is adduced in a tribunal having expertise in condemnation problems. And, surely, the argument that allowing presently prescribed damages would make the costs so high that the public could not pay its own way is going to be finally met by the response that, if that is the situation, neither can it ride on the train.

Almost without exception, the foreign countries discussed in this paper are doing a better job of compensating the deprived landowner than is the United States. It may be, if the United States is unwilling to streamline its condemnation procedures and tribunals, that the "allowance" utilized by Canada is the most feasible solution. It certainly would go a long way toward allaying the fears and soothing the irritations that existing evaluation methods and procedures have created.

