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Moving from *Colonias* to *Comunidades*: A Proposal for New Mexico to Revisit the Installment Land Contract Debate

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MOVING FROM COLONIAS TO COMUNIDADES: A PROPOSAL FOR NEW MEXICO TO REVISIT THE INSTALLMENT LAND CONTRACT DEBATE

Elizabeth M. Provencio*

Communities of Mexican Americans in the Southwest, known as colonias, have provided many low-income buyers with affordable opportunities. Affordability, however, comes at a high price for the colonias residents. Most of the buyers live in colonias pursuant to installment land contracts, devices which allow buyers to spread the purchase price of property over a number of years but leave them without legal title or equity under New Mexico law. The buyers sacrifice their legal rights to "own" small, unimproved lots of land in developments that are often without electricity, gas, a sewage system, and indoor plumbing. The author argues that New Mexico could allocate rights to buyers under installment land contracts while maintaining the reasonable cost of colonia housing and preserving the communities. She posits several alternatives for the state legislature and judiciary, including the adoption of a statutory definition which treats the contracts as mortgages and a more flexible interpretation of the forfeiture clauses in the contracts pursuant to mortgage and contract law. The Note concludes with suggested outreach strategies to inform colonia residents of their rights under installment land contracts and to provide them with legal assistance to enforce their rights.

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[A] woman seeking a mobile home permit produced as proof of land ownership a signed agreement handwritten in Spanish on a half-sheet of paper. The location description of the lot: "near the water tank in Hatch."¹

INTRODUCTION

New Mexico's burgeoning class of landowners living in *colonias* often holds nothing more than a scrap of paper as evidence of ownership. The term *colonias* includes both incorporated and unincorporated rural subdivisions lacking basic infrastructure that are located along the United States-Mexico border.² The conditions in *colonias* have been shaped by immigration patterns,³ discrimination,⁴ housing shortages, poverty, opportunistic land developers, and the geographic restrictions of agricultural industry.⁵

1. Deborah Baker, *The American Dream Is More of a Nightmare for Many State Residents*, LAS CRUCES SUN-NEWS, May 14, 1995, at D1. The Village of Hatch is a farming community in an agricultural valley in Doña Ana County, New Mexico. Doña Ana County, located in the southwest corner of the state, borders Texas and Mexico.

2. Doña Ana County Planning Dep't, *Colonias in Doña Ana County 2* (Apr. 1994) (unpublished report, on file with author) [hereinafter *Colonias in Doña Ana County*]; see also Baker, *supra* note 1, at D1 (describing the hand dug wells and the dirt roads that become impassable in bad weather); *Colonias Hous. and Community Dev. Assistance: Hearings on H.R. 4606 Before the Subcomm. on Hous. and Community Dev. of the House Comm. on Banking, Fin. and Urban Affairs*, 100th Cong. 6 (1988) [hereinafter *Hearings*] (testimony of Representative Ronald Coleman) ("[W]e found [that] many people [had] purchased properties, lands, that had no roads dedicated, no water, no sewer facilities ever envisioned, and it is for that reason that we see large regions, large areas along the United States-Mexico border with living conditions that are really intolerable.").

3. See *Colonias in Doña Ana County*, *supra* note 2, at 1 ("[R]esidents of *Colonias* are mostly Mexican American; many work as seasonal farm laborers and are recent immigrants.").

4. In a recent exclusionary zoning case brought by private plaintiffs and the U.S. Department of Justice in the Village of Hatch, Doña Ana County, statements in the complaint alleged that discriminatory behavior contributed to the growth of *colonias*. Complaint, *United States v. Village of Hatch*, No. CIV 95-0636 (D.N.M. June 15, 1995) (on file with author). In this case, the Village Trustees enacted zoning ordinances regarding mobile homes so that farm laborers of Mexican national origin effectively could not move into the Village. The complaint stated that the discriminatory behavior of the Village Trustees forced farmworkers and their families to move out of the Village to a *colonia*. *Id.* at 3. A consent decree was filed in December of 1996 resolving all claims in both the action brought by the private plaintiffs and the action brought by the Justice Department. Consent Decree, *Ayala v. Village of Hatch*, No. CIV 94-0493 (D.N.M. Dec. 12, 1996) (on file with author).

5. See Guadalupe T. Luna, "Agricultural Underdogs" and International Agreements: *The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV. 9, 30-32 (1996) (discussing various factors that have contributed to the rapid growth of Texas *colonias*, including high demand for housing, profit-seeking developers, and farm labor).

Colonia landowners often use installment land contracts⁶ to finance the purchase of their land.⁷ Installment land contracts permit a seller to retain legal title to the land while a buyer makes monthly payments. In the event of a missed payment, the seller can reclaim the land without a foreclosure proceeding. Under strict interpretation of the contracts, the buyer holds only equitable title and, unlike a conventional mortgagor, has no right in the event of default to restitution for prior payments made on the land or a redemption period.⁸ In taking advantage of the flexibility of the

6. An installment land contract may also be termed a "land sale contract," "contract for deed," "long-term land contract," an "agreement for deed," see GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* § 3.26, at 91 (3d ed. 1993), a "vendor's lien," "bond for title," or "lease-sale contract," see Joel Rebecca Donelson, Comment, *The Bond For Title: A Modern Look at Alabama's Land Installment Contract*, 46 ALA. L. REV. 137, 139 (1994).

7. See Nancy L. Simmons, *Memories and Miracles—Housing the Rural Poor Along the United States-Mexico Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Doña Ana County, New Mexico*, 27 N.M. L. REV. 33, 70 (1997) (stating that *colonia* land purchases are often financed by installment land contracts); Luna, *supra* note 5, at 31 (observing that "sellers convey property through the use of [installment land contracts]").

8. In comparing land installment contracts to conventional mortgages, Mark Styles noted:

[t]he definition of "mortgage covenants" includes the representation that the mortgagor is lawfully seized in fee simple of the granted premises. As a result, mortgage covenants would be violated at the time of inception of the mortgage if the mortgagor only held a purchaser's interest in the real property pursuant to [an installment land contract]. In New Mexico, the purchaser under [an installment land contract] merely holds equitable title in the real estate and is therefore not lawfully seized in the real estate. . . . The seller under [an installment land contract], on the other hand, holds legal title.

Mark Styles, *Mortgages in New Mexico*, 20 N.M. L. REV. 585, 588 (1990) (citing *Marks v. City of Tucumcari*, 595 P.2d 1199 (N.M. 1979); *Bank of Santa Fe v. Garcia*, 698 P.2d 458 (N.M. 1985)).

For many years the question of whether to treat installment land contracts as mortgages, contracts, or leases has been discussed by many scholars and courts. See Arthur L. Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013 (1931); Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low Income Purchaser*, 62 N.Y.U. L. REV. 293 (1987) [hereinafter Freyfogle, *Installment Land Contract as Lease*]; Eric T. Freyfogle, *Vagueness and the Rule of Law: Reconsidering Installment Land Contract Forfeitures*, 1988 DUKE L.J. 609 [hereinafter Freyfogle, *Vagueness*]; John Mixon, *Installment Land Contracts: A Study of Low Income Transactions, with Proposals for Reform and a New Program to Provide Homeownership in the Inner City*, 7 HOUS. L. REV. 523 (1970); Grant S. Nelson & Dale A. Whitman, *The Installment Land Contract—A National Viewpoint*, 1977 BYU L. REV. 541; Charles F. Becker, Comment, *Remedying the Inequities of Forfeiture in Land Installment Contracts*, 64 IOWA L. REV. 158 (1978); Matthew Cole Bommuth, Casenote, *Real Estate—The Wyoming Installment Land Contract: A Mortgage in Sheep's Clothing? Or What You See Isn't What You Get*, 28 LAND & WATER L. REV. 309 (1993) (discussing land installments under

installment land contract, developers and landowners in the Southwest have forced buyers and their families to leave their homes.⁹ Thus, *colonia* residents possess unstable and unpredictable ownership rights.¹⁰ The fragile status of their property rights requires a reexamination of the contract-mortgage debate surrounding installment land contracts.

Because the legislature has remained silent, the task of defining the rights of installment land contract holders, however limited, has been left to the courts in New Mexico. The New Mexico Supreme Court, upholding a strict forfeiture clause, stated that "the advantages [of installment land contracts] far outweigh [the disadvantages, as the benefits] are derived by thousands of people who have been enabled to purchase property by merely paying for it over many years in a manner likened to rent"¹¹ Installment land contracts may facilitate the initial purchase of land, but the strict interpretation applied to them by the New Mexico courts eradicates any benefits once envisioned for low-income buyers.

Wyoming law); Lisa A. Danielson, Comment, *Installment Land Contracts: The Illinois Experience and the Difficulties of Incremental Judicial Reform*, 1986 U. ILL. L. REV. 91; Donelson, *supra* note 6; Allen K. Montgomery, Jr., Comment, *Forfeiture and the Land Installment Contract: Sebastian v. Floyd*, 72 KY. L.J. 917 (1984).

9. Jane Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179, 194 (1995) (unpublished manuscript, on file with author) (citing Robert Lee Maril, *Contracts for Deed and Colonia Residents in the Lower Rio Grande Valley of Texas* 6, 11 (Aug. 1992)).

10. Although this Note addresses a specific low-income Mexican American community in the Southwest, this issue affects low-income people everywhere. As Professor Freyfogle states:

[t]he typical installment contract home buyer has long appeared to courts as a poorly advised, poorly protected, often lower-income purchaser. These purchasers are typically ill-prepared to unravel the textual ambiguities and considerable risks of the installment contract and to undertake needed protective steps. . . . [T]hey do not benefit from the precautions demanded by typical mortgage lenders: inspections, appraisals, title reports, termite certificates, and other evidence of a property's value. Although lenders seek to protect their own interests, their demands for caution also benefit borrowers.

Freyfogle, *Installment Land Contract as Lease*, *supra* note 8, at 305.

11. *Bishop v. Beecher*, 355 P.2d 277, 279 (N.M. 1960). Although the *Bishop* court readily acknowledges the similarity of an installment land contract to a lease, the court does not suggest that the rights partnered with a lease should be partnered with an installment land contract. *Bishop* was decided in 1960, however, and the implied warranty of habitability, one of the most important rights of tenants, was not adopted until 1978. See N.M. STAT. ANN. § 47-8-20 (Michie Supp. 1995) (codifying the warranty). While treating an installment land contract as a lease might be beneficial to the low-income buyer, this Note does not address this issue because *colonia* buyers usually purchase plots of land. See Maril, *supra* note 9, at 3 (discussing the process of *colonia*-building). Leasing rights would not be helpful due to the difficulty of extending tenancy rights, namely a warranty of habitability, to a plot of land.

Where the buyer cannot pay the full contracted price¹² or the seller mishandles the title of the property,¹³ the buyer is deemed to have breached the installment land contract. Forfeiture clauses in these contracts state that both the land and all prior payments made on the land go to the seller. Thus, the buyer cannot redeem any of the equity in the land and gains no benefit from the purchase.¹⁴ By retaining all prior payments made on the land as damages for the buyer's breach, the seller is placed in an even better position than before the contract was made. This result patently contradicts contract principles which, in the event of breach, aim to place both parties in the position they held prior to entering the contract.

Other states have mitigated the harsh consequences of installment land contracts by creating a hybrid of mortgage and contract law to address forfeiture issues.¹⁵ In the event of default, the buyer is entitled to any money left after the land is resold and the amount due under the contract is paid off. This hybrid reaches a more predictable and equitable end for both buyers and sellers. The *Restatement (Third) of Property-Security* ("Restatement") also takes the position that all installment land contracts should be treated as mortgages.¹⁶ Consequently, New Mexico should take legislative

12. One study suggests that *colonia* families often make their monthly payments, despite their poor financial status:

an analysis of the monthly payments of five different colonia families over a six year period clearly supports this trend [of making timely payments]. Four families over this time period never missed a payment. One family missed two payments over a six year period, but made them up in subsequent months. These figures are very remarkable, given the financial status of these individuals, and demonstrate the determination of these families to make their payments regardless of the various economic forces which make it difficult for them to sustain regular monthly incomes.

Maril, *supra* note 9, at 13.

13. For a discussion of the title problems created by sellers, see Nelson & Whitman, *supra* note 8, at 566-73.

14. The argument that the buyer should recover a part of his investment has been framed within contract law with results similar to those in mortgage law. Professor Corbin addressed the inequity of strict interpretation of forfeiture clauses. He argued that the buyer should be granted restitution for past payments made; otherwise, courts are punishing the buyer who has partly performed more harshly than the seller "who has not performed at all." Corbin, *supra* note 8, at 1014, 1018.

15. Becker, *supra* note 8, at 176-79; see also OKLA. STAT. tit. 16, § 11A (West Supp. 1976); Act of June 17, 1995, S.B. No. 663, ch. 994, 1995 Tex. Sess. Law Serv. 4982 (West), cited in Larson, *supra* note 9, at 210-11 & 210 n.162. For a detailed discussion of the Oklahoma and Texas statutes, see *infra* note 91 and accompanying text.

16. RESTATEMENT (THIRD) OF PROPERTY-SECURITY (MORTGAGES) § 3.4 (Tentative Draft No. 2, 1992); see also Nelson & Whitman, *supra* note 8, at 559-62 (discussing the trend of state cases in the 1970s treating installment land contracts similarly to mortgages).

measures to yield a spectrum of rights for buyers under installment land contracts.¹⁷

This Note focuses on *colonias* in New Mexico and proposes regularizing land title through legislative or judicial reform of the law regarding installment land contracts. To illustrate the precarious position of installment land contract holders involved in *colonia* transactions, Part I of this Note provides a brief history of *colonias* in southern New Mexico. Part I.A describes how, in defining *colonias*, federal legislators reveal political, economic, cultural, and geographical influences. Part I.B discusses the inherent value of *colonias* despite the economic barriers facing *colonia* residents.

The opportunity to own affordable land should not be lost in an attempt to yield more rights for buyers under installment land contracts.¹⁸ Part II examines *colonia* transactions in order to find a predictable and equitable solution for buyers and sellers of low cost land in New Mexico under installment land contracts. Part II.A provides an overview of the installment land contract debate. Part II.B discusses current law in New Mexico governing installment land contracts. Part II.C argues that New Mexico law should be amended so that the payments made on the installment land contracts are treated as equity, similar to a mortgage.

Increasing the rights given to buyers under the law is futile unless the buyers are aware of their rights and possess the necessary resources to exercise them. Part III thus proposes a community outreach strategy to provide education and legal assistance.

I. COMUNIDADES COMO COLONIAS¹⁹

A. Defining Colonias

In 1990, Congress established the Community Development Block Grant Funds ("CDBGs"), designated for the improvement of *colonia* infrastructure, with the enactment of the Cranston-Gonzalez National Affordable Housing Act.²⁰ In the statute, Congress defines a *colonia* as:

17. Scholars have argued that statutory reform is more favorable in regulating installment land contracts because it stabilizes land titles. See Nelson & Whitman, *supra* note 8, at 545.

18. See Becker, *supra* note 8, at 179.

19. *Comunidades como colonias* means "communities in the form of *colonias*."

20. Pub. L. No. 101-625, § 916, 104 Stat. 4079, 4396 (1990), reprinted in 42 U.S.C.A. § 5306 note at 702 (West 1997). The statute was amended in 1992 and 1996 to continue assistance program beyond years designated in the original act. The results in New Mexico of the CDBGs are discussed *infra* note 33.

any identifiable community that—(A) is in the State of Arizona, California, New Mexico, or Texas; (B) is in the United States-Mexico border region; (C) is designated by the State or county in which it is located as a colonia; (D) is determined to be a colonia on the basis of objective criteria, including lack of potable water supply, lack of adequate sewage systems, and lack of decent, safe, and sanitary housing; and (E) was in existence and generally recognized as a colonia before the date of the enactment of this Act.²¹

This definition encapsulates the objective characteristics of *colonias*.²²

The usage of the term *colonia* and its historical significance were addressed in a 1988 hearing before the Subcommittee on Housing and Community Development.²³ The Congressional Chairman, Henry B. Gonzalez, a resident of San Antonio, described the history of the Mexican Revolution and the large-scale immigration of Mexicans to San Antonio during the war.²⁴ This relocation resulted in the formation of *colonias* by the newly arrived residents from Mexico:

[s]o the word "colonial" was referred [to] in a sort of self-descriptive way with pride. La Colonial [sic] Mexicana, the Mexican colony, meaning our area, our folks. Human beings tend to group together for self defense when they come to a foreign or somewhat hostile environment. So the word "colonias" I think is very proper. Because in your area it still has a significance. It is talking about a separate entity living its own life cycle. In this case it is an entity living in poverty.²⁵

While the current congressional definition of a *colonia* fails to reveal that the majority of *colonia* residents are Mexican American, the use of the Spanish term symbolizes its Mexican American element.²⁶

21. *Id.* § 916(e).

22. For other regional and historical explanations of *colonias*, see Simmons, *supra* note 7, at 33–34, 39–40.

23. *Hearings*, *supra* note 5, at 5–6 (testimony of Representative Coleman and remarks of Chairman Gonzalez).

24. *Id.*

25. *Id.* at 6.

26. Mexican Americans constitute 97% of the population in *colonias*. Texas Department of Human Services, *The Colonias Factbook: A Survey of Living Conditions in Rural Areas of South and West Texas Border Counties 2–3* (1988) (unpublished report, on file with author) [hereinafter *Colonias Factbook*]. Although this report details statistics for *colonias* in southern Texas counties, the data is highly relevant to any examination of New Mexico *colonias*, given their geographic proximity.

As Congressman Gonzalez suggested, the federal definition reflects the history of poverty in the *colonias*. Families live in mobile homes, trailers, travel trailers, school buses, and shacks made of wood, cardboard, and cereal boxes.²⁷ Dangerous butane tanks, bought in Mexico, are used for heating and cooking.²⁸ Many *colonias* lack adequate drinking and wastewater systems.²⁹ Even if a household has electricity, it is often supplied through extension cords that are run from trailer to trailer.³⁰

In all, New Mexico has designated ninety-two of its communities as *colonias*.³¹ Many *colonias* are located within subdivisions created by developers who reneged on their promises to provide adequate infrastructure.³² In contrast, other *colonias* are long-settled

27. As Professor Larson observed:

[h]omes in these subdivisions are a collection of concrete-block bungalows, trailers, shacks, and an occasional conventional frame house. Construction usually is substandard, violating even the minimum habitability standards imposed elsewhere by building and housing codes. Decrepit trailers, shacks made of wood slats, tin, or cardboard nailed onto scavenged pallets, and condemned homes moved from the city are common sights.

Larson, *supra* note 9, at 191; *see also* Luna, *supra* note 5, at 32 (“Colonia housing stock ranges from brick ranch-style homes and mobile homes to units built from materials such as discarded lumber, cereal boxes, and other inferior construction materials.”).

28. *Colonias* in Doña Ana County, *supra* note 3, at 8.

29. *Id.* at 3. Studies have shown that the inadequate waste disposal leads to the contamination of drinking water with pollutants ranging from bacteria to heavy metals. *Id.* at 7–8.

30. *Id.* at 8.

31. Baker, *supra* note 1, at D1. The distribution of the 92 *colonias* in New Mexico includes: “(i) 38 in Grant County; (ii) seven in Hidalgo County; (iii) five in Luna County; (iv) three in Eddy County; (v) one in Otero County; (vi) three in Sierra County; and (vii) 35 in Doña Ana County.” Deborah Baker, *Subdivider: I’m Not a Bad Guy*, LAS CRUCES SUN-NEWS, May 14, 1995, at D1.

32. *See* Larson, *supra* note 9, at 193–94 (citing Maril, *supra* note 9, at 11, and Ida Hilda Acuña Patrick, *Quality of Life Perceptions Among Residents of Rural Unincorporated Subdivisions in Hidalgo County, Texas* 31 (1990) (unpublished Ph.D. dissertation, Texas A & M University) (on file with author)). Larson writes:

[a]s an inducement to purchase, *colonia* developers often promise buyers that public services and basic infrastructure will be available “soon” (typically, when “just a few more lots have sold”). The conditions described . . . make clear that such promises often are not kept. Both *colonia* residents and the legal professionals who work with them report fraud and abuse by a significant number of developers in land purchase transactions. Lee Maril found that developers of two of the seven Rio Grande Valley *colonias* that he studied had falsely promised buyers at the time of the purchase that water “would soon be available.” In another survey of forty-nine *colonia* households, almost a quarter of families reported some type of deception in the purchase of their lots, ranging from

mining towns or historic communities that qualify as *colonias* because their existing infrastructure has deteriorated to the extent that they fall within the federal definition.³³ As the individual *colonia* communities differ so greatly, the term *colonia* itself presents problems for those seeking to improve conditions within the *colonias*.³⁴

B. Somos Comunidades³⁵

Reformers have supported plans to slow the growth of *colonias*, or even relocate residents, due to the infrastructural problems and

misrepresentation of the purchase price or the interest rate to unfulfilled promises about the services to be provided.

Id.; see also Luna, *supra* note 5, at 31.

33. Baker, *supra* note 1, at D1. These "established" *colonias* have applied more aggressively for federal funding. For example, in the context of the CDBG set-asides created by the Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 916, 104 Stat. 4079, 4396 (1990), the villages and counties that have been most active in applying for CDBGs have been incorporated and well established mining villages and towns in Grant County. Villages in Grant County have applied for funding every year since the CDBGs became available, whereas Doña Ana County, a county with more severe *colonia* problems, has not applied for funding since 1993. DEPARTMENT OF FINANCE & ADMINISTRATION LOCAL GOVERNMENT DIVISION, STATE OF NEW MEXICO CDBG COLONIAS GRANT AWARDS, 1991-1996 (1996) (unpublished report, on file with author) (compiling grant award tables).

The Cranston-Gonzalez Act has provided \$6,337,000 to counties and municipalities on behalf of *colonias* in New Mexico. The following chart indicates the distribution by year:

<u>Year</u>	<u>Amount</u> (in dollars)
1991	700,000
1992	843,000
1993	1,372,000
1994	1,350,000
1995	636,000
1996	1,436,000
TOTAL	6,337,000

Id. Out of those totals, Doña Ana County received \$1,223,800, Grant County received \$2,438,302, Hidalgo County received \$170,063, Otero County received \$870,000, Socorro County received \$300,000, Eddy County received \$547,409, Luna County received \$694,035, and Chavez County received \$92,590. *Id.* The figures above represent grant awards to each county. Each of the counties, except for Chavez and Socorro, received awards for more than one village or city located within its boundaries. *Id.*

The dearth of applications from counties facing crisis conditions should cause concern about the distribution process of the CDBGs. These results should be considered when developing future *colonia* grant programs.

34. See generally Simmons, *supra* note 7.

35. *Somos Comunidades* means "we are communities."

poor living conditions in the *colonias*.³⁶ These measures, however, ignore the inherent value of the *colonias*: they are communities. As one *colonia* advocate observed: "I applaud the efforts to curb abuse. However, I fear that the current efforts in the legal community obscure the value of rural settlements. . . . My hope is that in planning . . . policymakers will take note of the positive aspects of colonia formation"³⁷

Colonias are existing communities. In the predominately Mexican-American-populated *colonias*,³⁸ an underlying commonality exists among the residents aside from the location of their property. Ethnic ties create an environment that fosters trust and comfort. In addition, many *colonia* residents are low-income.³⁹ Historically, as Latinos are displaced economically and politically, they become increasingly concentrated in ethnically and residentially homogeneous neighborhoods or *barrios*.⁴⁰ *Barrios* have been recognized as communities showing initiative, enterprise, and autonomy.⁴¹ As in other Latino *barrios*, *colonias* "reflect a history of conquest, immigration, and a struggle to maintain cultural identity."⁴²

Further, *colonia* residents purchase property with the expectations of ownership.⁴³ Professor Larson has stated that "[i]n the face of this poverty, the determination of *colonia* families to own their own homes suggests that homeownership represents something more than a shelter choice. Rather it is a powerful symbol of self-reliance, personal dignity, and family advancement."⁴⁴

This combination of building bonds through shared experiences and the common goals of homeownership enables residents to

36. See, e.g., Joann Matthiesen, *What Now For the Texas Colonias*, 27 N.M. L. REV. 1, 9, 25 (1997) (discussing subdividing rules enacted in Texas to curb the growth of *colonias* and proposing the option of moving residents to subsidized housing).

37. Simmons, *supra* note 7, at 66.

38. See *supra* note 26.

39. *Id.* at 3-3, 4-3, and 5-3 (indicating that 65% of *colonias* residents have no health insurance, two-thirds of adults did not finish high school, and unemployment exceeds 40%).

40. ALFREDO MIRANDÉ, *GRINGO JUSTICE* 26 (1987).

41. SARAH DEUTSCH, *NO SEPARATE REFUGE* 7 (1987).

42. Joan Moore & Raquel Pinderhughes, *Introduction* to *IN THE BARRIOS: LATINOS AND THE UNDERCLASS DEBATE* at xvii (Joan Moore et al. eds. 1993).

43. A survey conducted by the Doña Ana County planning department in 1994 found that "[c]olonias are permanent communities. Of those interviewed, sixty-eight (68) percent own or are buying their homes. Ninety-five (95) percent of the respondents plan to remain as permanent residents of their respective communities." *Colonias* in Doña Ana County, *supra* note 3, at 1. In addition, the Texas Department of Human Services surveyed 1200 Texas *colonia* households and reported that 85% of *colonia* residents own their homes. *Colonias Factbook*, *supra* note 26, at 6-3.

44. Larson, *supra* note 9, at 206.

form communities.⁴⁵ Thus, rather than encouraging residents of *colonias* to leave their land, their homes, and their neighbors to live in "better" housing, reform efforts should instead focus on providing better infrastructure and more stable property rights in order to facilitate self-determination.⁴⁶

II. THE CONTRACT ISSUES INVOLVED IN COLONIA TRANSACTIONS

A. Overview of the Debate on Installment Land Contracts

The primary instrument used in *colonia* transactions is an installment land contract. Under this contract, the purchase price is financed through the seller instead of through a third-party lender as in a conventional mortgage.⁴⁷ The seller retains legal title throughout the term of the contract. Without legal title the buyer has no assurance of clean title and lacks the rights associated with homeownership, such as a redemption period, equity, or mortgage-based financing for home improvements.⁴⁸ Reforming state

45. It is important, however, not to examine *colonias* in isolation. Although *colonias* exhibit many strong attributes, the conditions and cultural dynamics in the outside world are far from ideal. A historian has asserted that by "depicting the barrio . . . as an arena of autonomy and choice, harsh barriers of occupational discrimination and residential segregation can fade to a shadowy backdrop." DEUTSCH, *supra* note 41, at 7-8. Indeed, as the Department of Justice has recently alleged, discrimination has contributed to the growth of *colonias*. See Complaint, United States v. Village of Hatch, No. CIV 95-0636 (D.N.M. June 15, 1995) (on file with author); see also *supra* note 4 (discussing the *Village of Hatch* complaint). Yet the communities within *colonias* have developed despite the harsh realities on the outside, and, thus, they should be valued for symbolizing self-determination. But see DEUTSCH, *supra* note 41, at 8 (criticizing a historian for lauding the ability of Mexican Americans in Texas to define themselves despite a "hostile environment") (citation omitted).

46. In his testimony, Representative Ronald Coleman illustrates the perfect fit between the aspirations of *colonia* residents and the "American Dream:"

[w]hat you have got to do in America is work. You have got to get a job. You have got to earn your keep. You need to build a home, educate your children. We all understand that as being a part of what this great country meant, what democracies provided for us, what freedom really means. You know that is what these people have done who live in *colonias*.

Hearings, *supra* note 5, at 6.

47. See generally Allen R. Myerson, *This Is the House That Greed Built*, N.Y. TIMES, Apr. 2, 1995, § 3, at 1 (describing the methods that *colonias* developers use to profit from impoverished Mexican immigrants).

48. In states other than New Mexico, "the case law recognizes the proposition that the vendee's interest is mortgagable." Nelson & Whitman, *supra* note 8, at 573 (citations omitted). Professor Luna outlines the deficiencies of federal legislation designed to address rural housing needs. Luna, *supra* note 5, at 32. Specifically, she illustrates the problems created by installment land contracts. These security

law regarding installment land contracts will increase buyers' rights, improve the quality of housing for *colonia* residents, and support individual initiative.⁴⁹

The debate concerning installment land contracts is not new.⁵⁰ Because installment land contracts function like purchase money mortgages,⁵¹ courts, scholars, and practitioners have argued that these contracts should be interpreted so that they produce results akin to purchase money mortgages.⁵² It has also been argued that installment land contracts, with low-equity buyers, are similar to leases, and that the buyers thus should be treated as tenants so that they would be afforded the protection of a warranty of habitability.⁵³

Others have favored strict interpretation of installment land contracts, claiming that the harsh consequences of strict interpretation is mitigated by the benefits of these contracts—particularly that they provide people who cannot afford large down payments or high monthly payments with homeownership opportunities.⁵⁴

instruments fail to meet the requirements for Farmers Home Administration (FmHA) loans. *Id.* at 34. Professor Luna also states that installment land contracts are not the sole problem in financing rural home development and illustrates other shortcomings of the legislation. *Id.* at 32.

49. Professor Larson cites a comparison of government self-help projects that found that, in a community where the government purchased land and sold it directly to residents, housing quality and individual initiative increased. Larson, *supra* note 9, at 240 (citing Alex Stepick & Arthur D. Murphy, *Comparing Squatter Settlements and Government Self-Help Projects as Housing Solutions in Oaxaca, Mexico*, 39 H.U.M. ORG. 339, 340–41 (1980)).

50. See sources cited *supra* note 8.

51. Purchase money mortgages are mortgages which provide the buyer with money to purchase the property. The property is then used to secure the mortgage. NELSON & WHITMAN, *supra* note 6, § 3.26, at 91.

52. Freyfogle, *Installment Land Contract as Lease*, *supra* note 8, at 304–08 (discussing the various steps taken to provide safeguards for the buyer under an installment land contract); Nelson & Whitman, *supra* note 8, at 548–62 (discussing decisions by state courts to provide alternatives to strict forfeiture).

53. See, e.g., Freyfogle, *Installment Land Contract as Lease*, *supra* note 8. As Professor Freyfogle notes:

courts have recently shown a willingness to ignore the free contract aspects of an installment land contract. . . . This transformation of installment land contract law, however, has done little for the low-equity purchaser under an installment contract. Low-equity purchasers need protection of a different sort, their concern is not equity protection but clean, safe, livable housing.

Id. at 294–95. For a discussion as to why this Note does not propose treating the installment land contract as a lease, see *supra* note 11.

54. See generally *Hatfield v. Mixon Realty Co.*, 601 S.W.2d 894 (Ark. Ct. App. 1980) (implying from its facts that a buyer's ability to obtain an installment land contract enabled that buyer to purchase land while making a substantially small down payment); Freyfogle, *Installment Land Contract as Lease*, *supra* note 8, at 304 (“[R]esidential installment contracts are executed by low income purchasers who lack

Another cited benefit of installment land contracts is that they permit quick forfeiture, which enables the sellers to keep the prices of land low.⁵⁵ It is also argued that if sellers were to incur the costs of long redemption periods and endure other requirements of mortgage law, the costs of property would increase and be too expensive for low-income buyers.⁵⁶

Considering the potential for litigation and the unfairness of the terms to the buyers, the economic advantages of the installment land contract are not as desirable as they seem:

no vendor today can count on forfeiture under a land contract as being either quick or cheap; indeed, it is an invitation to litigation. Second, no procedure, however quick or cheap, can be justified if it amounts to foul play. . . . “[T]he vendor continues to use the installment [land] sale contract despite its deficiencies with regard to remedies because he is willing to gamble that the vendee’s rights under the device will never be asserted and his own contractual advantages will not be challenged.”⁵⁷

Thus, ignoring the inequitable consequences and focusing solely on the economic repercussions, both sellers and buyers face high costs when dealing with installment land contracts. Sellers must incur the expense of litigation in order to enforce the forfeiture clause. As for buyers, the seemingly low price for the land financed

access to normal mortgage financing.”). For a discussion of the historical uses of an installment land contract see Becker, *supra* note 8, at 164–67.

55. See Freyfogle, *Vagueness*, *supra* note 8, at 611. The benefits of an installment land contract in the residential context have been outlined by Professor Freyfogle:

[f]irst, closing costs on an installment sale can be kept to a minimum. Purchasers can avoid paying for legal assistance, title reports, title insurance, and the appraisals and . . . up-front fees or “points” that lenders often charge. Moreover, installment contracts typically offer the possibility of lower down payments. When a home is fairly priced, the relative ease and low expense of the forfeiture remedy can justify a low down payment. In many cases, however, vendors inflate sale prices a bit, aware that low-equity, often low income, purchasers have few other purchase options and that no independent appraisal will reveal the amount of inflation. With prices inflated, vendors have an even greater ability to sell for little or no money down.

Freyfogle, *Installment Land Contract as Lease*, *supra* note 8, at 305 (citations omitted).

56. See Becker, *supra* note 8, at 162–63; Freyfogle, *Vagueness*, *supra* note 8, at 611.

57. Nelson & Whitman, *supra* note 8, at 561–62 (citing William Warren, *California Instalment [sic] Land Sales Contracts: A Time for Reform*, 9 UCLA L. REV. 608, 633 (1962)). For a discussion of the argument that forfeiture provisions are unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment, see *id.* at 562–65.

by an installment land contract has, in effect, a hidden "balloon payment" when the high costs of forfeiture are factored into the overall cost. Buyers must forfeit both the land and all of their prior payments.

If state law treated installment land contracts as mortgages, the legislature could take the appropriate steps to expedite mortgage foreclosure proceedings.⁵⁸ Therefore, providing more rights to the buyer under an installment land contract may actually lower the costs of foreclosure and forfeiture and create an economic incentive to reform installment land contract law.

B. Contemporary Judicial Interpretation of Installment Land Contracts in New Mexico

New Mexico courts apply a strict interpretation to installment land contracts. Under New Mexico law, the buyer in an installment land contract has an equitable interest in the land that is extinguished upon default.⁵⁹ Therefore, as the New Mexico Supreme Court has held, the buyer has no right to reclaim his or her interest in the land despite offering to remit the remaining balance of the purchase price at the time of default.⁶⁰ Further, the seller is under no obligation to compensate the buyer for improvements that the buyer made to the property.⁶¹

58. *Id.* at 561-62.

59. *See, e.g.,* Bishop v. Beecher, 355 P.2d 277, 279-80 (N.M. 1960). Although this case was decided nearly 40 years ago, it is decisive authority on installment land contracts under New Mexico law.

60. *Id.* at 280. The buyers, who had made previous payments totaling one-third of the purchase price, failed to make a payment for at least two and a half months. *Id.* at 278-79. The contract provided that the seller could either require the buyers to pay the purchase price in full or terminate the contract and retain all of the buyers' payments as rent. *Id.* at 278. Although the buyers offered to pay in full, the court permitted the seller to force the buyers to forfeit the property. *Id.* at 280.

61. *But see* N.M. STAT. ANN. § 42-4-17 (Michie 1978) (establishing the right for lessees, as distinguished from holders of installment land contracts, to sue lessors for the value of their improvements to the property). The law states in relevant part:

[w]hen any person or his assignors may have heretofore made, or may hereafter make any valuable improvements on any lands, and he . . . [has] been or may hereafter be deprived of the possession of said improvements in any manner whatever, he shall have the right, either in an action of ejectment which may have been brought against him for the possession, or by an appropriate action at any time thereafter within ten years, to have the value of his said improvements assessed in his favor . . . and the said value so assessed shall be a lien upon the said land and improvements, and all other lands of the person who so deprived him of the possession thereof situate in the same county, until paid.

In contrast, courts in other states have held that installment land contracts function as security devices.⁶² This interpretation provides the buyer with legal rights and alternatives to total loss in the event of default. In these states, courts have mitigated the harshness of installment land contracts by theories of waiver, equitable redemption, restitution, or mortgage foreclosure.⁶³ New Mexico courts have rejected such alternative interpretations, and have not even been willing to treat the contract as a lien on the property.⁶⁴

Although New Mexico courts agree that the property secures the buyer's purchase price of the land, they have held that the seller maintains legal title as trustee for the buyer, who holds only equitable title until the buyer makes the final payment.⁶⁵ As a result, New Mexico courts categorize land installment contracts as executory contracts rather than security devices, because the seller, who maintains legal title, does not render full performance until the seller delivers legal title to the buyer.⁶⁶ The buyer fully performs when the buyer pays the full purchase price. Since neither party has rendered full performance, the contract is executory on both sides.⁶⁷

This relationship during the life of the contract burdens the buyer with all of its risks while the seller assumes none. Because legal title is not included in the buyer's ownership rights, the buyer's possessory and equitable interests are subject to mishandling by the

Id. New Mexico courts require a tenant to possess color of title in order to pursue an action under this statute. See *Sandoval v. Perez*, 191 P. 467 (N.M. 1920); *Speartex Grain Co. v. West*, 645 P.2d 447 (N.M. Ct. App. 1982). Currently, buyers under an installment land contract cannot sue under this provision because they do not have color of title. Cf. *Slemmons v. Massie*, 690 P.2d 1027 (N.M. 1984) (finding that a party to a real estate contract did not possess color of title for purposes of adverse possession where the instrument "both on its face and under New Mexico law" did not purport to convey title to that party).

62. See *In re Patch Graphics*, 32 B.R. 373 (Bankr. W.D. Wis. 1983) (construing a real estate contract as the functional equivalent of a mortgage); *In re Charles Cox*, 28 B.R. 588 (Bankr. D. Idaho 1983). Several states have incorporated a period within which late payments must be accepted. See NELSON & WHITMAN, *supra* note 6, § 3.28, at 94 (discussing the grace periods that different states have adopted via legislation).

63. See sources cited *supra* note 8.

64. See, e.g., *Bishop*, 355 P.2d at 279-80.

65. *Marks v. City of Tucumcari*, 595 P.2d 1199 (N.M. 1979); *Trickey v. Zumwalt*, 491 P.2d 166 (N.M. 1971); *Bank of Santa Fe v. Garcia*, 698 P.2d 458 (N.M. Ct. App. 1985).

66. *Rancho Chamberino Inc. v. B.F.W. Enterprises, Inc.*, 89 B.R. 597 (Bankr. W.D. Tex. 1987) (relying on *Shaw v. Dawson*, 48 B.R. 857 (Bankr. D.N.M. 1985)). Trustees in bankruptcy often argue, albeit unsuccessfully, that when a contract for deed has been executed and the deed for the land is placed in escrow by the seller, this placement constitutes the seller's full performance rendering a contract non-executory. See, e.g., *id.*

67. *In re Rehbein*, 60 B.R. 436 (B.A.P. 9th Cir. 1986).

seller.⁶⁸ In addition, the buyer, without legal title, still must pay property taxes, maintain the premises, and purchase property insurance upon purchasing the land.⁶⁹

Scholars, courts, and practitioners have identified the forfeiture provisions in installment contracts as the primary source of inequity under these contracts.⁷⁰ Forfeiture clauses require the seller to make a written demand for any missed payment. According to common contract terms, sellers are not permitted to exercise their options to demand all payments due or terminate the contract until thirty days after this demand has been made. If the seller terminates the contract, the seller reclaims the land. The seller is permitted to keep all prior payments as rental payments.⁷¹ In New Mexico, forfeiture clauses in installment land contracts are valid and frequently enforced.⁷²

In order to determine whether a seller will be allowed forfeiture, New Mexico courts have applied principles of equity.⁷³ The New Mexico Supreme Court outlined several factors that courts should consider when determining whether forfeiture should be relieved: "the amount of money already paid; the period of possession of the realty; the market value of the real property at the time of default compared to the original sales price; and the rental potential and value of the real property."⁷⁴ By applying equitable

68. See sources cited *supra* note 8.

69. NELSON & WHITMAN, *supra* note 6, § 3.26, at 91.

70. See, e.g., Freyfogle, *Installment Land Contract as Lease*, *supra* note 8, at 295 ("Courts have ignored installment contract terms largely to protect purchasers from the possibly harsh consequences of forfeiture. When forfeiture occurs, purchasers can lose their property as well as the payments they have made on their contracts. Courts have attacked forfeiture clauses with vigor . . ." (citations omitted)).

71. See, e.g., *Martinez v. Logsdon*, 723 P.2d 248, 249 (N.M. 1986) (outlining the provisions in a typical contract for deed). Although the prior payments are treated as rental payments, the court does not afford the buyer the same rights as a tenant. Professor Eric Freyfogle argues that when a low-equity purchaser buys a home under an installment contract, the purchaser is in the same position as a tenant. When the installment contract is functionally equivalent to a lease, Professor Freyfogle argues, an implied warranty of habitability should be extended to the buyer. Freyfogle, *Installment Land Contract as Lease*, *supra* note 8, at 293.

72. See *Russell v. Richards*, 702 P.2d 993 (N.M. 1985); *Jacobs v. Phillippi*, 697 P.2d 132 (N.M. 1985); *First National Bank in Alamogordo v. Cape*, 673 P.2d 502 (N.M. 1983); *Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.*, 654 P.2d 548 (N.M. 1982).

73. *Yu v. Paperchase Partnership*, 845 P.2d 158, 166 (N.M. 1992) (applying equitable considerations and holding that a buyer must be notified of default and given an opportunity to cure the default where buyer has significant equity in the property).

74. *Logsdon*, 723 P.2d at 251 (citing *Russell*, 702 P.2d at 995). In *Logsdon*, the buyers-subvendees had improved the land by erecting a mobile home, skirting, septic tank, water pump, electrical pole, fence and tool shed. *Id.* The buyer was also willing and able to pay the amount due on the original vendee's obligation to the vendor. *Id.* The court held that permitting the vendor to terminate the contract with the buyer-subvendee would be sufficiently unfair to shock the conscience. *Id.*

principles, however, courts have acknowledged an "equitable exception"—forfeiture is permitted unless the result would shock the conscience of the court.⁷⁵

Although New Mexico courts apply a strict interpretation to installment land contracts, the courts have clouded the contracts with some uncertainty by considering equitable factors and permitting exceptions to forfeiture. Thus, the seller cannot automatically assume that the forfeiture clause will be enforced as written. For example, in *Martinez v. Martinez*,⁷⁶ the court required the seller to provide notice of intent to forfeit and a reasonable period for the buyer "to cure the default"—not less than thirty days—even though the contract did not contain these terms.⁷⁷ The application of this exception by the courts is fact specific, however, and remains unpredictable.⁷⁸ Thus, despite its occasional benefits, the exception cannot be relied upon to stabilize land title for buyers.

C. Legislative Reform: Treating the Installment Land Contract as Mortgage

In order to promote equity as well as certainty, New Mexico should adopt the position of the *Restatement*.⁷⁹ The *Restatement* treats any attempt to create an installment land contract as a mortgage. Even under contract analysis the buyer should be granted restitution if the "money so paid is in excess of the injury caused to the vendor

75. See, e.g., *Cape*, 673 P.2d at 505.

76. 678 P.2d 1163 (N.M. 1984).

77. *Id.* at 1167-68. The court determined that the buyer was given, at the most, only two weeks notice to cure the default. *Id.* at 1167; see also *Huckins v. Ritter*, 661 P.2d 52 (N.M. 1983) (holding that seller's retention of a \$45,000 down payment on a house shocked the conscience of the court because (1) the house had retained its retail value, (2) the buyers had only lived in it for three months, and (3) the seller had regained the title through the buyers' default); *Eiferle v. Toppino*, 565 P.2d 340 (N.M. 1977) (allowing an equitable exception to forfeiture because purchasers had paid delinquency on time pursuant to the bank's demand letter and were merely late with a \$25 fee).

78. See *Bishop*, 355 P.2d at 279-80 (finding that forfeiture would not shock the conscience of the court despite the fact that the buyers had paid one-third of the purchase price and were willing to pay the remainder at the time of default). Since *Bishop* the New Mexico Supreme Court has stated that it will construe the contract and acts of the parties so as to avoid a forfeiture if at all possible, *Davies v. Boyd*, 385 P.2d 950, 952 (N.M. 1963) (Moise, J., concurring), but it has not followed its own directive. See, e.g., *Cape*, 673 P.2d at 505-06 (refusing to permit an equitable exception where a buyer—who had made payments using his wife's account—defaulted soon after his wife's death and the seller refused to allow her estate to cure the default and retained all payments).

79. RESTATEMENT (THIRD) OF PROPERTY-SECURITY (MORTGAGES) § 3.4 (Tentative Draft No. 2, 1992).

by the breach."⁸⁰ The buyer should have the opportunity to recoup part of his or her investment in the property through a foreclosure proceeding pursuant to mortgage law. The buyer, in a transaction involving an installment land contract, often assumes the same duties as a mortgagor and therefore should be afforded the same entitlements as a mortgagor.

Under current New Mexico mortgage law, a mortgage serves as a security device⁸¹—specifically, as a lien.⁸² The buyer, or mortgagor, has the right to possession.⁸³ In many instances, the installment land contract functions like a mortgage. The statutes require the mortgagor to assume certain duties, such as paying property taxes, preventing waste, and purchasing insurance.⁸⁴ If a buyer under an installment land contract maintains these duties, or similar duties, the legislation should require the seller to treat the installment land contract as a mortgage.

New Mexico mortgage law contains several provisions which would be particularly useful in addressing the problems of installment land contracts. New Mexico law subjects mortgages to foreclosure if any of the conditions of the mortgage are breached.⁸⁵ To ensure a fair return to the mortgagor, the property cannot be sold "for less than two-thirds of the appraised cash value,"⁸⁶ and the proceeds of a foreclosure sale are applied to the current amount of

80. Corbin, *supra* note 8, at 1023. In the context of installment land contracts, New Mexico courts do not attempt to make an estimation of actual damages incurred by the seller. "Thus, the damages awarded the vendor by the forfeiture remedy are not the 'reasonable forecast of just compensation for the harm that is caused by the breach' required of a valid liquidated damages clause." Becker, *supra* note 8, at 169 (citations omitted).

81. See *State ex rel. Truitt v. District Court of the Ninth Judicial Dist.*, 96 P.2d 710 (N.M. 1939) (citing *Cleveland v. Bateman*, 158 P. 648 (N.M. 1915)).

82. *Slemmons v. Massie*, 690 P.2d 1027, 1028 (N.M. 1984) ("It is well established in New Mexico that a mortgage is merely a lien and passes no title to the mortgaged property.").

83. N.M. STAT. ANN. § 48-7-1 (Michie 1978). Typically a note is executed in conjunction with the mortgage to secure the obligation from the mortgagor to the mortgagee. New Mexico courts treat the two transactions as one instrument. *Gonzales v. Tama*, 749 P.2d 1116, 1118 (N.M. 1988). In the event of default by the mortgagor, the mortgagee can foreclose on the mortgage and concurrently sue on the note. *Kepler v. Slade*, 896 P.2d 482, 484 (N.M. 1995). In addition, a deed may constitute a mortgage. *Styles*, *supra* note 8, at 586-87.

84. N.M. STAT. ANN. § 47-1-41 (Michie 1978).

85. *Id.*

86. N.M. STAT. ANN. § 35-5-5 (Michie Supp. 1991). This requirement has been held to apply only to a sale under a writ of execution and not to a court-supervised foreclosure sale. *Armstrong v. Csurilla*, 817 P.2d 1221 (N.M. 1991).

debt secured by the mortgagor.⁸⁷ Courts in New Mexico have shown that they will enforce the statute to insure a fair sale. This issue was addressed in *Crown Life Insurance Company v. Candlewood, Ltd.*,⁸⁸ in which the New Mexico Supreme Court held that, based on equitable considerations and the inadequate purchase price, the trial court erred in failing to set aside a foreclosure sale.⁸⁹

New Mexico law also prescribes a nine-month redemption period.⁹⁰ During this time a mortgagor is permitted to redeem the property upon payment of the purchase price. The statutory period within which redemption may occur begins to accrue nine months from the sale date of the property under decree of forfeiture.

Consistent with the *Restatement*, New Mexico legislators should draft a provision that would require sellers, or third-party lenders, to treat installment land contracts as mortgages. This provision would subject the sellers or lenders to the requirements of mortgage law. Oklahoma legislators, for example, have enacted a similar law which provides:

[installment land contracts] for the purchase and sale of real property made for the purpose or with the intention of receiving the payment of money and made for the purpose

87. § 47-1-41. The statute provides:

in the event any of the following terms, conditions or obligations are broken by the mortgagor, this mortgage (or deed of trust) shall thereupon at the option of the mortgagee, be subject to foreclosure and the premises may be sold in the manner and form provided by law, and the proceeds arising from the sale thereof shall be applied to the payment of all indebtedness of every kind owing to the mortgagee by virtue of the terms of this mortgage or by virtue of the terms of the obligation or obligations secured hereby

Id.

88. 818 P.2d 411 (N.M. 1991).

89. *Id.*

90. N.M. STAT. ANN. § 39-5-18 (Michie Supp. 1991). The courts have construed this provision along with § 39-5-17 to permit an additional month for redemption. *Springer Corp. v. Kirkeby-Natus*, 453 P.2d 376 (N.M. 1969). Section 39-5-17, N.M. STAT. ANN. § 39-5-17 (Michie Supp. 1991), provides:

[n]o real property shall be sold under any judgment or decree of court foreclosing any mechanic's or materialman's lien, mortgage, mortgage deed, trust deed or any other written instrument which may operate as a mortgage, until thirty days after the date of entry thereof, within which time the then owner of the real estate, his heirs, personal representatives, assigns or any junior lienholder may pay off the judgment or decree and avoid the sale by depositing in the office of the clerk of the district court in which the judgment, decree or order was entered the amount necessary to make payment thereof, including accrued interest and costs of suit.

of establishing an immediate and continuing right of possession of the described real property, whether such instruments be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, *shall to the extent be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.*⁹¹

In determining what options should be provided to buyers and sellers, the New Mexico legislature could also consider the reason for default, the contract terms, the amount paid, and the injury of the breach.⁹² Factors favoring the seller should include "the length of the delay, the loss of rents and profits if the [buyer] has had possession, the depreciation in value of the land, [and] the removal of minerals from the land."⁹³ The factors favoring the buyer would include the amount of payments made, the interest paid, the improvements made, and whether the buyer was responsible for the property tax and property maintenance.⁹⁴

Consideration of these factors would improve the flexibility and utility of the installment land contract without compromising certainty. The seller would assume the responsibility for the

91. OKLA. STAT. tit. 16, § 11A (West Supp. 1976) (emphasis added). Texas also has begun to address the issue by statutory reform. See Act of June 17, 1995, S.B. No. 663, ch. 994, 1995 Tex. Sess. Law Serv. 4982 (West), cited in Larson, *supra* note 9, at 210-11 & 210 n.162. Although the Texas law does not explicitly treat installment land contracts as mortgages, the law applies equitable concepts similar to those discussed above. Where a buyer's actions trigger default under an installment land contract and the buyer has paid 40% or more of the purchase price or has made 48 payments, that buyer is entitled to any money left over after the land is resold and the amount due under the contract is paid. Larson, *supra* note 9, at 210. Texas law also protects buyers from unscrupulous developers who sell land which lacks adequate infrastructure and clean title:

[t]he new law requires written disclosures at the time the contract is signed regarding (1) the availability of basic services; (2) details about the developer's title; (3) any restrictions on the property; and (4) financing and purchase terms: If the contract was negotiated in Spanish the disclosures also must be in Spanish. The buyer may cancel the contract within 14 days. Throughout the term of the contract the seller may cancel the contract within 14 days. Throughout the term of the contract the seller must provide an annual accounting statement. Late fees are limited to eight percent of the monthly payment. Once final payment has been made, the seller must promptly provide title to the buyer. Buyers may pledge the amount paid under the contract as collateral for any type of loan permitted by state law.

Id. at 210 n.162.

92. Corbin, *supra* note 8, at 1015.

93. *Id.* at 1026.

94. *Id.*

maintenance, repairs, and property insurance during the term of the contract to reduce the amount that would go to the buyer in the event of default. By bearing more of the costs associated with the property, the seller then could reduce the amount of "equity" being paid in by the buyer. If the buyer defaulted, the seller could subtract the costs of the property from the "equity" paid in by the buyer.

Absent legislation, the judiciary should apply a less strict interpretation to installment land contracts or consider mortgage principles when construing the contracts. Either approach could reach the same result. Under a contract interpretation, the buyer should be granted restitution for prior payments made.⁹⁵ Pursuant to mortgage principles, the buyer should be entitled to the equity—previous payments made on the property—upon foreclosure. In addition, many installment land contracts contain provisions similar to mortgage redemption clauses, and, thus, the courts should treat them similar to mortgages.

III. OUTREACH STRATEGIES TO REACH LANDOWNERS

With or without law reform, it is critical to relay information to residents of *colonias* about their installment land contract terms. Professor Maril notes that:

[c]olonia lot owners were very hesitant to seek legal counsel when cheated by developers. There were many reasons for this reluctance, including access to attorneys and ignorance of legal rights and the functioning of the legal system. Rarely will an individual *colonia* resident have the confidence or knowledge to challenge a predatory developer. *Colonia* residents remain very easy victims for these kind of developers.⁹⁶

Community outreach is vital to effectuate the purpose of reforming state law regarding land installment contracts. Community organizations in southwestern New Mexico that can reach *colonias* effectively must be identified.

Several organizations have worked extensively with residents of *colonias*. These organizations may be utilized due to their proximity to *colonias* as well as their previous experiences with residents, farm laborers, and rural issues. They possess the skills and relationships to convey the necessary information to buyers regarding their rights. In addition, some of these organizations

95. See discussion *supra* note 14.

96. Maril, *supra* note 9, at 17.

would be able to provide the legal services necessary to enforce the rights of the buyers. A few of these organizations are discussed below.

Tierra del Sol is a nonprofit housing corporation in Las Cruces, New Mexico that has been operating since 1979. The corporation provides "housing to low-income residents of southern New Mexico" by rehabilitating and managing housing for elderly residents and farm laborers.⁹⁷ Tierra del Sol has conducted valuable assessment surveys among farm laborers. In addition, the organization coordinates programs for first-time home buyers and mortgages.

Two other organizations involved with the farm labor community in Doña Ana County are Southern New Mexico Legal Services and the Catholic Diocese. Southern New Mexico Legal Services provides housing services and legal representation to low-income residents, including farm laborers and *colonia* residents.⁹⁸ Its contact with farm workers results from its previous work through its affiliate organization, Centro Legal Campesino.⁹⁹

The Catholic Diocese, in conjunction with other community groups, created a grass-roots nonprofit corporation, the *Colonias Development Council (CDC)*.¹⁰⁰ The CDC has helped to define the needs of the residents of *colonias* by conducting surveys within the communities. In addition, the CDC facilitated the development of water systems in the El Milagro *colonia* in Doña Ana County, New Mexico.¹⁰¹

Students from a clinical program at the University of New Mexico School of Law and the founder of the Grass Roots Justice Center began the El Milagro *Colonia* Project in El Milagro, New Mexico.¹⁰² When the attorneys from the project met with the residents to discuss legal concerns, the residents stated that their primary concern was that they lacked the deeds to their land.¹⁰³ Thus, the project focused on property issues affecting residents in the El Milagro community. As of September 1997, the project had "cleared title to five 'parcels,' and obtained surveys of five more 'parcels.'"¹⁰⁴

97. Simmons, *supra* note 7, at 39 n.25; see also Luna, *supra* note 5, at 30 n.116.

98. Interview with Olga Pedrosa, Attorney at Southern New Mexico Legal Services, in Las Cruces, N.M. (Sept. 19, 1997).

99. *Id.* Centro Legal Campesino performs legal services regarding farm labor issues for workers. It has been downsized significantly.

100. Simmons, *supra* note 7, at 33 n.1.

101. *Id.* at 33.

102. *Id.* at 35.

103. *Id.* at 36.

104. *Id.* at 36 n.11.

In the health care area, another organization effectively brought health care issues in *colonias* to the forefront. Through a program at the University of Arizona, Border Vision Fronteriza,¹⁰⁵ *colonia* residents receive federal funds for health issues affecting *colonias*. The supervisory council distributes funds based on the proposals of selected organizers from each *colonia*.

Using the Fronteriza outreach model as an example, advocates can relay information on installment land contracts to the residents through meetings with the organizers. In this way, advocates would be able to provide necessary information to *colonia* residents with greater efficiency and success.

CONCLUSION

Using installment land contracts, residents of *colonias* are buying their land, and improving it, under the assumption that the payments made constitute equity.¹⁰⁶ To the misfortune of *colonia* buyers and, to some degree, sellers, the installment land contract has proven to be an inefficient and often unfair tool. In addition the installment land contract "creates and allows for a number of both grave misunderstandings and consistent abuses by land developers."¹⁰⁷ The outcome of forfeiture under current New Mexico law indicates that the appropriate equitable interests are not being considered. As a result, New Mexico should take active measures to construe the installment land contract as a mortgage.

Reforming the law on installment land contracts is only a small part of the actions that must be taken in New Mexico and other *colonia* states.¹⁰⁸ As Congressman Ortiz pointed out, "correcting one

105. Interview with James Langell, Coordinator of the Border Outreach Model Working Group in Tucson, Arizona (Sept. 9, 1997).

106. Maril, *supra* note 9, at 9.

107. *Id.* at 18.

108. Professor Larson proposes several reforms that legislatures should consider to improve *colonias*:

- (i) regularize land title held under contract for deed into mortgages; (ii) make credit available at market rates to low income households for land purchase and home construction, and also for home improvement; (iii) adopt policies supporting self-help housing and abandon current "no-growth" policies directed at *colonias*; (iv) delegate general ordinance-making powers to counties; (v) enact minimal but appropriate land use regulations that apply both to new and existing housing in the *colonias*; (vi) mandate extension of municipal water and sewer service to high-density population areas in unincorporated areas outside of city limits; and (vii) extend the franchise in local government elections to noncitizen permanent residents.

component of the border's situation will not be enough to automatically provide an acceptable quality of life for the border's residents"¹⁰⁹ As a result, any strategy for improving the conditions in *colonias* must address a multitude of issues relating to poverty.

Despite the bleakness of these poverty issues, and despite the fact that improvements occur slowly, the future looks promising for *colonias*.¹¹⁰ These communities hold a wealth of potential, a fact that should not be lost in an attempt to provide *colonia* residents with better living conditions and housing opportunities. As Gerald Lopez writes, "Self-determination movements and economic development projects perhaps inevitably put into issue what it means to be self-respecting, what it means to care for your own, and what it means to be part of a community."¹¹¹

Larson, *supra* note 9, at 238–39. In addition, Professor Luna proposes federal agricultural law reform to address the need for adequate infrastructure in rural areas. Luna, *supra* note 5, at 34–46.

109. *Hearings, supra* note 5, at 54. Congressman Ortiz continued:

[f]unding for improvements in sewage disposal and treatment are [sic] required, but without adequate housing to accompany improved sewage service, a practical and compatible solution is unattainable. Upgrading sewage and water service to individual homes will not lessen the high disease rate unless public streets and alleys are improved to allow for proper drainage.

Id. at 55. Further, an advocate for the *colonias* testified at the hearing that the following are necessary to improve conditions in the *colonias*:

[1] federal grant monies that can be mixed with low-interest loans to construct affordable sewer and water systems and assist in the connections of individual homes to the sewer systems. . . . [2] a major investment of public works capital which could be used for other infrastructure projects, including transportation, parks, schools and hospitals. . . . [3] a jobs program, an affordable housing strategy, job training monies and a commitment to education.

Id. at 52 (testimony of Amalia Lerma, Executive Committee Member, Valley Interfaith, representing the Texas Industrial Areas Foundation). "Valley Interfaith is a coalition of 36 churches representing more than 55,000 families across [a Texas] four-county area . . ." *Id.* at 49. The Industrial Areas Foundation "build[s] broad-based organizations in Texas . . . to give poor and politically disenfranchised citizens vehicles for participation in the democratic process." *Id.*

110. Cecilia Martinez-Avila, *Colonias Residents Remain 'Forgotten,'* HISPANIC, July/Aug. 1997, at 12.

111. Gerald P. Lopez, *Economic Development in the 'Murder Capital of the Nation,'* 60 TENN. L. REV. 685, 688 (1993).