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## Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law

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Pragmatism and Postcolonialism: Protecting Non-Owners in Property  
Law

## ARTICLES

### PRAGMATISM AND POSTCOLONIALISM: PROTECTING NON-OWNERS IN PROPERTY LAW

RASHMI DYAL-CHAND\*

*Property law has a particular problem with non-owners. Although property law clearly identifies the rights of property “owners,” the rights of “non-owners” are vague. This problem is significant because modern property law is often called upon to balance the rights and needs of owners and non-owners. Property law cannot adequately perform this function without clearly establishing both sets of rights. The New Jersey Supreme Court case State v. Shack exemplifies this problem because it purports to be a case about protecting non-owners. This Article examines both the case and the texts upon which the court relied to argue that the New Jersey Supreme Court could not adequately protect the non-owners in the case because the court could not understand their rights. Instead, in its effort to evince a set of rights powerful enough to overcome the property owner’s rights, the court eliminated the voices of the migrant workers it claimed to protect.*

*This Article draws upon postcolonialist theory both in examining the problem and in prescribing a solution. In its prescription, the Article proposes a pragmatic form of postcolonialist inquiry as a theoretical foundation for protecting non-owners in property law. Relying on the less iconic case of Hilder v. St. Peter, this Article proposes three devices within the common law*

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\* Professor, Northeastern University School of Law. I am grateful to Libby Adler, Muneer Ahmad, Gregory Alexander, Benjamin Ericson, Daniel Medwed, Mark Poirier, Joseph William Singer, and participants in the Progressive Property Conference at Loyola University New Orleans College of Law and the American Association of Law Schools (AALS) Midyear Meeting Workshop on Poverty, Immigration and Property. Seth Purcell provided superb research assistance, and Elliott Hibbler of the Northeastern University Law Library provided indispensable research support.

*tradition that are well suited to the task of representing and protecting non-owners. As Hilder demonstrates, legal decision-makers can more fully consider and protect the rights and needs of non-owners through the pragmatic use of storytelling, the personalization of claims, and the precise matching of remedies to harms and needs.*

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#### INTRODUCTION

In 1971, the New Jersey Supreme Court enhanced its well-deserved reputation as a progressive and “activist” court<sup>1</sup> with its holding in the

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1. For discussions of the New Jersey Supreme Court's “activism” and “progressive” ideals, see, e.g., John B. Wefing, *The New Jersey Supreme Court 1948–1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 701–06, 710 (1998) (reviewing examples that typify the court's “activist tradition” and listing “factors

famous property case of *State v. Shack*.<sup>2</sup> In that case, the court held that a legal services attorney and a field worker for a non-profit organization providing services to migrant workers were not guilty of criminal trespass.<sup>3</sup> The defendants were charged with criminal trespass after they refused to leave the property of a landowner who employed and housed migrant workers on his large farm.<sup>4</sup> In the course of creating a broad exception from the venerable property right to exclude, the court stated: “Property rights serve human values. They are recognized to that end, and are limited by it.”<sup>5</sup> With this statement, the court reaffirmed its commitment to making important decisions on the basis of rights and needs in context, even if doing so meant abandoning the comfort and stability of precedent.<sup>6</sup> In *Shack*, the rights at issue were the civil and political rights of *non-owners* of property, namely the migrant workers to whom the two defendants were attempting to provide legal and other important services.<sup>7</sup> For many property scholars, the decision is a thrilling example of a legal decision-maker working hard to strike a balance between property and other rights upon recognizing the extraordinary distributive effects of exclusionary rights in property.<sup>8</sup>

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[that] have led to the court’s reputation as a leading liberal, activist, and reformist court”); Kevin M. Mulcahy, Comment, *Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court and What California Can Learn*, 40 SANTA CLARA L. REV. 863, 865–79 (2000) (explaining that the New Jersey Supreme Court has afforded criminal defendants “greater rights to those accused of crime than under the federal Constitution” and that it has been progressive in such areas as the right to refuse medical care, rape shield laws, and education reform).

2. 277 A.2d 369 (N.J. 1971).

3. *Id.* at 374–75.

4. *Id.* at 370.

5. *Id.* at 372.

6. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 809 (2009) [hereinafter Alexander, *The Social-Obligation Norm*] (observing that the *Shack* court took the migrant workers’ precarious situation into account when deciding that their enjoyment of basic rights such as medical care were deeply connected to their employer’s property rights); Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 940 (2009) (arguing that “*Shack* departs substantially from foundational principles of trespass”).

7. *Shack*, 277 A.2d at 371.

8. See, e.g., Alexander, *The Social-Obligation Norm*, *supra* note 6, at 808–09 (analyzing the role of health and affiliation rights in allowing a limited form of public access to private land); Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 663–67 (1991) (exploring the *Shack* “balancing analysis” as well as how common law courts might apply the *Shack* public-forum doctrine to private lands); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 883–84 (2009) (concluding that the court’s decision upheld the farmworkers’ rights to receive visitors on the farmer’s land without disregarding or unduly intruding on the farmer’s autonomy over his land); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 675–77 (1988) [hereinafter Singer, *Reliance Interest*] (surveying different situations in which members of the public have a right to access private property); Madhavi Sunder, *IP<sup>3</sup>*, 59 STAN. L. REV. 257, 291–94, 296–97 (2006) (calling *Shack* “property law’s ‘social enlightenment’—

*Shack* stands out in these respects. It is justifiably a famous case in the property canon.

But while *Shack* gives property lawyers much to admire, it also exemplifies a core problem in property law. Behind the grandeur of the statement that property serves human values lies the question of whose values property serves, and moreover, of who determines what those values are. In *Shack*, the court claimed that it was upholding the rights of a particular group of unprivileged individuals,<sup>9</sup> and many legal scholars agree.<sup>10</sup> But both as a technical matter, because no migrant workers were parties to the case,<sup>11</sup> and more importantly as an analytical matter, the opinion of the New Jersey Supreme Court prevented those individuals from speaking. The court's inattention to the individual voices of the migrant workers in the case should lead readers to ask how much those workers really mattered to the decision. In this respect, *Shack* also ought to be the subject of a powerful critique.

The purpose of this Article is to mount that critique. I argue that in the process of constructing a set of rights powerful enough to overcome the property owner's right to exclude, the court effectively eliminated the voices of the migrant workers it claimed to protect. As I discuss, this analytical approach is a quintessential example of the

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the recognition that in a complex and increasingly interconnected society, property rights will inevitably conflict with other vital interests, from . . . health, to speech, to civil rights," and analogizing the New Jersey Supreme Court's balancing of property rights and other vital rights with the international social movement to limit intellectual property rights to guarantee access to affordable medicine); A.J. Van Der Walt, *Property and Marginality*, in PROPERTY AND COMMUNITY 81, 81 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010) (contending that the centrality society gives to property condemns certain individuals to the margins of society and of the law); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 343, 345–46 (1998) (suggesting that in referencing human dignity, the court was utilizing religious language to articulate its intuition about limits on property rights); cf. Helen Hershkoff, "Just Words": *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1566, 1568 (2010) (arguing that, while some view *Shack* as "iconic," the *Shack* court should have looked to the state constitution in promulgating the rule that it announced).

9. The following statements exemplify the court's assumptions in this regard: "[A] decision in nonconstitutional terms is more satisfactory, because the interests of migrant workers are more expansively served in that way[.]" *Shack*, 277 A.2d at 372. "Here we are concerned with a highly disadvantaged segment of our society." *Id.* "The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility." *Id.* at 374.

10. See, e.g., Alexander, *The Social-Obligation Norm*, *supra* note 6, at 809 (explaining that the court's decision was an effective way to protect the "rootless," "isolated," and "fragile" migrants' rights); Peñalver, *supra* note 8, at 883–84 (explaining that recognizing the migrants' visitation rights "enhance[d] their ability to flourish").

11. The case is a prosecution for violation of a criminal trespass statute. *Shack*, 277 A.2d at 370.

dilemma identified by postcolonialist scholar Gayatri Chakravorty Spivak.<sup>12</sup> In attempting to understand and indeed protect the postcolonial subject (or as Spivak says, the “subaltern”),<sup>13</sup> the court “represented” the subject in a unified portrait that eliminated the fragmented space in which the subject could genuinely speak.<sup>14</sup> In so doing, the court skillfully deployed an analytic that lies at the heart of precedential decision-making in Western law. The court unified strands of factual information and policy analysis in such a way as to build a cohesive argument. Indeed, the court’s skill was indispensable given its challenge of finding a legitimate means by which to curtail the venerable property right to exclude.<sup>15</sup> But the court’s very proficiency in achieving this result was the mechanism by which it so completely eliminated the voices of the non-owners in the case. Simply put, their voices were not helpful to making the case. This failure in *postcolonial* representation is associated with its own significant costs, which the literature on *Shack* has thus far failed to recognize.

The lack of genuine representation in a progressive icon such as *Shack* highlights the expansiveness and depth of the problem of representation in property law. In this sense, *Shack* is a particularly troubling example of a foundational problem in property law. Property law cannot claim to be about, for, or available to a broad range of subjects—immigrants, the poor, racial minorities, and other socially or economically marginalized communities—unless and until it can provide more robust and meaningful approaches to representing them. It cannot evaluate and protect rights unless it obtains a more grounded sense of what those rights are. And it is simply wrong, as this Article shows, to assume that the basic values addressed by property law are so universally shared as to be obvious to legal decision-makers without the need to listen to the voices of subaltern subjects.

The imperative of genuine representation is thus a precondition for the application of economic and other analyses of the law. Progressive scholars have already explicated the dangers of monism in property law.<sup>16</sup> It is only by recognizing that property rights are

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12. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271, 271 (Cary Nelson & Lawrence Grossber eds., 1988) [hereinafter Spivak, *Can the Subaltern Speak?*] (defining the dilemma as involving “the discourses of the West and the possibility of speaking of (or for) the subaltern woman”).

13. *Id.*

14. *Id.* at 277–78.

15. *Shack*, 277 A.2d at 374–75.

16. See, e.g., Gregory S. Alexander, *Pluralism and Property*, 80 *FORDHAM L. REV.* 1017, 1035–42 (2011) [hereinafter Alexander, *Pluralism and Property*] (discussing the value monist and value pluralist approaches of property theorists, and criticizing

rivalrous that we can understand the extent to which property rights have distributional consequences.<sup>17</sup> But, as this Article argues, property law cannot stop there. The inquiry must extend also to understanding what those pluralistic rights are in any given case. Property law must develop the capacity to accept, protect, and respond to the inevitable conflicts and fragmentation that will result from carefully listening to the voices of non-owners. Without doing so, we cannot accurately define and apply such basic analytical devices as welfare maximization or distributional justice.

But responding to subaltern voices in property law also requires adapting postcolonialist inquiries to the process of legal decision-making and, in particular, to the process of precedential decision-making as it is generally used within property law. Decision-making in property law cases must change to permit better listening to subaltern voices, but postcolonialist critiques must also be altered to work within our system of lawmaking. In recognition of this reality, this Article proposes a modified version of postcolonialist inquiry—pragmatic postcolonialism—that actively investigates and creates space for subalternity and recognizes that, at the end of the dispute, courts must make rational decisions about the allocation of important resources. Taking the much less famous property case of *Hilder v. St. Peter*<sup>18</sup> as its example, this Article proposes three devices to achieve this critical balance. All three have the beauty of tradition: they have long been important conventions in the common law. But they also are well-suited to the task of exposing and protecting subaltern voices, often those of non-owners.

Part I describes *Shack's* contributions to property law as well as its limitations. Part II lays out the theoretical frameworks both for critiquing the case and for more fully incorporating subaltern perspectives into property lawmaking. The theoretical basis for the critique is postcolonialism as developed by Spivak. The theoretical basis for the prescription is pragmatic postcolonialism, my own adaptation of the postcolonialist inquiry designed to operate effectively within our system of precedential decision-making. In Parts III and IV, I apply both theoretical frameworks. In Part III, I critique *Shack* as a problem of representation. In doing so, I analyze

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value monism for attempting to reduce all moral goods to a single standpoint that does not reflect reality).

17. *Id.* at 1035–36, 1042; see also Gregory Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009) [hereinafter Alexander et al., *Progressive Property*] (arguing that property law “should establish the framework for a kind of social life appropriate to a free and democratic society”).

18. 478 A.2d 202 (Vt. 1984).

the main writings relied upon by the New Jersey Supreme Court in constructing a unified and powerful image of the workers whom it sought to protect. I also expose the costs associated with the court's detachment from subaltern perspectives. In Part IV, I develop the pragmatic postcolonialist mode of inquiry by examining *Hilder v. St. Peter* as a more successful treatment of the subaltern voice. In particular, I use *Hilder* to develop three devices for exposing and protecting non-owners within property law. These devices, all master achievements of the common law tradition, are the custom of storytelling, the personalization of claims, and the precise matching of remedies to harm and need. I conclude by reconsidering *Shack* from a pragmatic postcolonialist perspective to demonstrate the radical effect of such a perspective on the way the case was decided.

## I. STATE V. SHACK AS PROGRESSIVE ICON

### A. A Rhetorical Tour de Force

It is no small wonder that *State v. Shack* has achieved iconic status in property law, particularly among property scholars who identify (or are identified) as progressives.<sup>19</sup> Even the most abbreviated description of the case communicates its rather extraordinary perspective on the traditional law of trespass. *Shack* is a criminal case that arose after Tedesco (a landowner in New Jersey who employed migrant workers to work on his land) demanded that Shack (a legal services attorney) and Tejeras (a field worker for a poverty relief organization) leave his property.<sup>20</sup> Shack and Tejeras had entered Tedesco's land to find two migrant workers who they claimed required legal and medical services.<sup>21</sup> As the two were making their way to the campsite where Tedesco provided housing for the migrant workers who worked on his farm, Tedesco confronted them, asked their intentions, and ultimately demanded that they leave his property.<sup>22</sup>

As many a first-year law student has come to understand in the somewhat hapless search for precedent to support the court's holding in *Shack*, the case is doctrinally noteworthy because it created such a broad exception to the traditional law of trespass when narrower grounds for decision were quite tenable. The court

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19. See Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 117–18 (2013) (discussing the interest in the case among several progressive property scholars).

20. *Shack*, 277 A.2d at 370–71.

21. *Id.* at 370.

22. *Id.* at 370–71.

rejected both an argument grounded in state landlord-tenant law (that tenants have the right to receive visitors)<sup>23</sup> and federal constitutional arguments (involving the First Amendment freedom of association and the supremacy of certain federal statutes protecting migrant farm workers)<sup>24</sup> in favor of a broadly worded limitation on the right to exclude founded on “a maxim of the common law.”<sup>25</sup> Even without resort to constitutional claims or landlord-tenant law, narrower exceptions to trespass law were available. The court could reasonably have concluded that the medical needs of one of the migrant workers whom the defendants were trying to find necessitated the defendants’ intrusion. The court laid a foundation for this conclusion<sup>26</sup> but did not rely on it in its holding.<sup>27</sup> Alternatively, the court could have held that, by choosing to house workers on his property, Tedesco implicitly consented to entry by his workers’ visitors as well.<sup>28</sup>

Instead, the court used the general doctrine that “one should so use his property as not to injure the rights of others”<sup>29</sup> as an instrumental, doctrinal constraint on the right to exclude. Using its equitable powers<sup>30</sup> in a very full sense of that term and with a view towards standard setting,<sup>31</sup> the court held in its broadest statements:

[T]he employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties.<sup>32</sup>

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23. *Id.* at 374.

24. *Id.* at 371.

25. *Id.* at 373.

26. *See id.* (stating, “it has long been true that necessity, private or public, may justify entry upon the lands of another”).

27. *See id.* at 374 (holding that there was “no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, State, or local services, or from recognized charitable groups seeking to assist him”).

28. Indeed, Professor Singer has argued that the broad public policy exception to trespass on which the court relied in the case was grounded on the principle of consent: “The court held that once the farmowner had opened his property to migrant farmworkers, he effectively waived part of his right to exclude non-owners from his property. The court therefore created a public policy exception to the right to exclude under trespass doctrine.” Singer, *Reliance Interest*, *supra* note 8, at 675–76.

29. *Shack*, 277 A.2d at 373.

30. *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578 (1988) (examining how courts have blurred and complicated property rules that were previously clear and distinct).

31. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1695–96 (1976) (discussing the merits of standards versus rules and commenting that strictly applied rules may be over or under inclusive while standards may risk arbitrary or uncertain results).

32. *Shack*, 277 A.2d at 374–75.

It was, as the court said, “unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker’s well-being.”<sup>33</sup>

But *Shack*’s greater influence has been on property norms rather than on property doctrine.<sup>34</sup> In generalized form, *Shack* is a doctrinal symbol that the right to exclude in property law is anything but absolute. To the extent that the law of trespass is the purest manifestation of the right to exclude, *Shack* demonstrates that there are numerous and critical limitations on that right and, moreover, that some of these can be so broad as to reflect and preserve the “human values” of “health, welfare, [and] dignity.”<sup>35</sup> In essence, *Shack* exemplifies what Professor Singer has described as the “public interest” exception to trespass.<sup>36</sup> *Shack* thus epitomizes that strain of American property law that resists the Blackstonian view of property as exclusionary. In this view, which has seen a tremendous groundswell of active scholarship in the last five years, property law’s critical function(s) cannot be reduced to the erection of boundaries that protect the private space required for individuals to act in pursuit of individualized gains.<sup>37</sup>

Instead, according to this view, the essential function of property law is to provide a framework for the pursuit of relationships and interconnection.<sup>38</sup> Viewed in this light, *Shack*’s value is in highlighting several sets of relationships. The most obvious, perhaps, is the connection between the migrant workers and those who sought to provide them with services that the court, Congress, and others

33. *Id.* at 374.

34. Rosser, *supra* note 19, at 154 (noting the limited doctrinal impact of the case); see Claeys, *supra* note 6, at 939–40 (suggesting that the legal issue in *Shack* was narrower than other legal scholars suggest); Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 984 (2009) (arguing that the generalized balancing test the *Shack* court claimed it was establishing was more of a rhetorical strategy than one applied literally).

35. *Shack*, 277 A.2d at 372.

36. Singer, *Reliance Interest*, *supra* note 8, at 675–76 (noting that the legal system has a variety of rules allowing members of the public access to private property based on need or “on some other important public policy”).

37. Professor Singer has used Sir. Edward Coke’s castle powerful tendency in property law. Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309 (2006) [hereinafter Singer, *Ownership Society*] (internal quotation marks omitted).

38. See JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 203–04 (2000) [hereinafter SINGER, ENTITLEMENT] (suggesting that “[p]roperty is a paradox” because in order to protect the rights of others, a limit must be imposed on property rights); Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1638–39 (2010) (highlighting the “interconnected nature of property”); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152 (1971) (arguing that the use of one’s own parcel of property is simultaneously the use of property beyond the user’s border).

deemed necessary to improve their lives.<sup>39</sup> The court's concern over this connection was in promoting the migrant workers' greater integration with the surrounding community so that they could take advantage of the opportunities that existed there.<sup>40</sup> A second set of relations that seemed important to the court, but about which it made only general statements, were the interactions among the workers themselves.<sup>41</sup> Finally, there was the interdependence of Tedesco and the migrant workers in a web of economic activity. Each required the other, with Tedesco providing the land and financing to work the land and the workers providing the labor on the land to yield marketable products at a competitive price.<sup>42</sup> For each, the value of the land was greater as a result of the contributions of the other. The court acknowledged this relationship in its resistance to the idea that the relationship was one solely of "dominion" by the owner over the non-owners.<sup>43</sup> Ultimately, although the court failed to capture these relationships in a doctrine of lasting precedential value, it succeeded in powerfully articulating the normative import of some of the interconnections (and more broadly, the context) underlying the case.<sup>44</sup>

*Shack* also serves as a high point in property jurisprudence for scholars who argue that property law imposes social obligations on landowners vis-à-vis non-landowners. In developing the idea that the duties of ownership play an important role in property law, Professor Alexander has used *Shack* to demonstrate the quite specific ways in which the court defined the owner's duty to promote the "flourishing" of property non-owners:

The property right to receive visitors to the farms where they work and live was virtually the only effective means of providing them with access to such basic necessities as medical care, which are constitutive of the capability of life.

Affiliation will also enter into the analysis. In the context of *Shack*, affiliation takes on a more fundamental meaning, literally grounding the capability of life . . . . Affiliation is, moreover, the foundation for creating just social relations in the migrant farm

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39. *Shack*, 277 A.2d at 372 (discussing federal and state statutes enacted to provide support and services to migrant workers).

40. *Id.* at 372-73.

41. *Id.* at 372 (explaining that migrant workers are a distinct community that is isolated from the local community).

42. *Id.* at 370.

43. *Id.* at 372.

44. Rosser, *supra* note 19 at 154-55.

community by providing the workers with equality and dignity otherwise denied them by their employer's treatment.<sup>45</sup>

According to Alexander, the social-obligation norm in property law requires owners to create physical space for non-owners to engage in the "socializing activity" of affiliation.<sup>46</sup> He demonstrated this point using both *Shack* and a number of public trust doctrine cases. Interestingly, in describing modern public trust doctrine cases, Alexander was able to identify the activities associated with affiliation (baseball games and beachcombing) with specificity,<sup>47</sup> while in describing the need of affiliation in *Shack*, he was more basic and abstract in his assumptions about the role affiliation plays in that particular community of migrant workers.<sup>48</sup>

Writing from a postcolonial perspective, Professor Sunder has used *Shack* to make much the same point. Sunder has argued that *Shack* represented a unique moment when property law recognized the distributional impact of property rights on non-owners.<sup>49</sup> It was, as she described it, a moment of "social enlightenment" in property law.<sup>50</sup> Both Sunder and Alexander applauded the court's use of social context to recognize, as a legal matter, that the migrant workers on Tedesco's farm did not have access to the same things as members of the surrounding community.<sup>51</sup> For them, *Shack* was a uniquely powerful reminder of the effect of property ownership on "Others."<sup>52</sup>

#### B. *A Case about Self-Restraint, but Not Self-Expression*

The particular combination of doctrine and norms in *Shack* achieved a quite specific result in property law, although the specificity of *Shack's* impact has receded into the shadows as it has

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45. Alexander, *The Social-Obligation Norm*, *supra* note 6, at 809.

46. *Id.*

47. *Id.* at 809–10.

48. *Id.* at 809.

49. Sunder, *supra* note 8, at 291–93, 297 (highlighting that *Shack's* balancing of property interests vis-à-vis other fundamental values can be seen in the World Trade Organization's efforts to balance intellectual property rights with access to affordable life-saving medical treatments).

50. *Id.* at 291 (describing *Shack* as an example of "social enlightenment" because the court recognized that, in an increasingly interconnected society, property rights will be at odds with other vital interests).

51. *Id.*; see also Alexander, *The Social-Obligation Norm*, *supra* note 6, at 809 (noting that migrant workers were "unaware of the opportunities that exist[ed] for them").

52. Spivak coined this term, too. See BILL ASHCROFT ET AL., *POSTCOLONIAL STUDIES: THE KEY CONCEPTS* 188 (3d. ed. 2013) (explaining that "othering," as coined by Spivak, refers to the process through which imperial discourse creates its colonized subjects).

become more famous and symbolic.<sup>53</sup> It is worth pausing, therefore, to consider what exactly *Shack* achieved and what it did not achieve.

Despite the astute observations by progressive scholars about values and norms that *Shack* protected on behalf of non-owners, it is important to note that the case did not really focus on the non-owners. To the extent *Shack* can be said to protect the rights of non-owners, those rights can be defined only broadly or, if the rights are defined more narrowly, only speculatively. For example, Professor Sunder observed that *Shack* is extraordinary because it recognizes the workers' poverty as a force that conflicted with the rights of property owners, ultimately requiring such rights to give way to the conflicting rights of those in poverty.<sup>54</sup> It is difficult, though, to put a finger on a more precise vision of what poverty really meant for the class of people who were poor in *Shack*. They were described as "rootless," "isolated," "highly disadvantaged," and "without economic or political power."<sup>55</sup> But these descriptions do not tell us what the workers felt, experienced, or understood about their impoverished situation.

Similarly, Professor Alexander picked out the value of affiliation to the non-owners in *Shack*. The affiliation right is a version of the doctrinal claims in later cases that *Shack* was a case about privacy and assembly, core civil rights protected by the First Amendment.<sup>56</sup> But again, there was no analysis or evidence in the case about the relative importance, meaning, value, or indeed relevance of these rights to the migrant workers who worked on Tedesco's farm. It could be argued that these rights were props, or class-based claims that we (and, as Part III discusses, the court<sup>57</sup>) could assume people in such a position would hold up as important. But there is no evidence that those workers did in fact hold them up as important or why they might have done so.

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53. See Rosser, *supra* note 19, at 154–55 (cautioning that *Shack* alone cannot transform property law as it exemplifies the challenge of converting formal rules into meaningful, substantive rights).

54. Sunder, *supra* note 8, at 291–92.

55. State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

56. See, e.g., State v. Schmid, 423 A.2d 615, 615, 629 (N.J. 1980) (reasoning that even though a private university was not subject to First Amendment obligations, it could nevertheless be required to honor First Amendment rights if its property was sufficiently devoted to public uses); Freedman v. N.J. State Police, 343 A.2d 148, 150–51 (N.J. Super. Ct. Law Div. 1975) (suggesting that furnishing property for dwellings is an activity that is regulated by public interest considerations under the First Amendment); see also N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 760 (N.J. 1994) (holding that based on citizens' free speech rights "embodied in [the New Jersey] Constitution," regional and community shopping centers had to allow leafleting on societal issues).

57. See *infra* Part III.A.1 (explaining that the court's perception of workers was influenced by the Federal Economic Opportunity Act).

The workers were not parties to the case.<sup>58</sup> Their rights and needs were voiced by the defendants, who claimed to represent them for quite narrow purposes.<sup>59</sup> Neither the particular stories of the two workers with whom the defendants sought to meet, nor the stories of those with whom those workers worked, appeared to be relevant to the New Jersey Supreme Court. We do not know what they would have said. It is thus not appropriate to understand *Shack* as a case that defined the rights, needs, and voices of the particular “Others” who were the subjects (though here, it is well to acknowledge that they were rather more the objects) of the case.

Instead, the real focus of *Shack* was on the rights of Tedesco and other property owners. The point of *Shack* was really to re-cast the image of property ownership as requiring entitled owners to fulfill certain duties. These duties might variously include the duties to share and exercise self-restraint,<sup>60</sup> to act as a good host,<sup>61</sup> or to balance one’s personal and property needs and rights against the personal and property rights of others.<sup>62</sup> Regardless of how these duties are described, they ultimately limit an owner’s ability to build insurmountable walls around herself.

Correlatively, then, *Shack* was about the limits of property rights rather than about their expansive potential. It was a case that took very seriously the notion that rights of ownership are not boundless.<sup>63</sup> It was not, however, a case that defined which rights exactly ought always or sometimes to take priority over the right to build walls and

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58. *Shack*, 277 A.2d at 370.

59. *Id.*

60. See Peñalver, *supra* note 8, at 880–84 (arguing that because the system of private property is meant to allow members of the community to “flourish,” property owners have an obligation to share their surplus property to satisfy others’ fundamental needs).

61. See Singer, *Reliance Interest*, *supra* note 8, at 674–77 (discussing the “public trust doctrine,” which “preserves public rights of access to private property that the public needs at the present time,” as well as other doctrines that compel landowners to host members of the public and only to exclude them from private property for “good reason . . . on a case by case basis”). See generally Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1321 (1996) [hereinafter Singer, *No Right to Exclude*] (arguing that there is no good justification for limiting the common law duty to serve the public just to innkeepers and common carriers).

62. See Alexander, *The Social-Obligation Norm*, *supra* note 6, at 809 (highlighting that the only way the migrant workers could have access to basic necessities, such as medical care, was by allowing them to receive visitors on the farm); Peñalver, *supra* note 8, at 880 (arguing that because the private property system is designed to facilitate the flourishing of the members of a community, property owners’ rights are limited by an obligation to share surplus property with those in need).

63. *Shack*, 277 A.2d at 373 (“A man’s right in his real property of course is not absolute.”).

exclude.<sup>64</sup> Being true to the spirit of *Shack* would require us to acknowledge that the case was not really about affiliation or any other particular personal or property right of the migrant workers. Rather, it was about limiting the venerable right to exclude.

This description of the limitations of *State v. Shack* is by no means intended to belittle declarations of self-restraint. *Shack* was an exemplary moment of self-reflection, a commentary on what each of us can do to define and personify our duties through property ownership. It was an extraordinary example of acknowledging the effects of power through property on those who are property-less and thus, in important respects, powerless. *Shack* opened an inquiry that scholars such as Professors Alexander and Singer have undertaken into the pragmatic potential of self-restraint in property ownership.<sup>65</sup> From a Legal Realist perspective, viewing the judges on the New Jersey Supreme Court as individuals with a certain status in society,<sup>66</sup> it would be difficult to imagine a more honest adjudication on the basis of personal position and experience. The adjudicators were true to themselves.

## II. POSTCOLONIALISM IN CRITICAL AND PRAGMATIC FORMS

The problem with *State v. Shack*, then, lies not in what the case said about property ownership, but in what it said about the particular property non-owners in the case. The purpose of this Part is to present two theoretical frameworks—one for exploring that problem and a second for fixing it. Section A presents postcolonialist theory as the basis for critiquing the problem. This Section focuses on Gayatri Chakravorty Spivak's analysis of the problem of representing subaltern voices. Section B describes why Spivak's inquiry is so difficult to incorporate into common law decision-making and, in particular, into property lawmaking. In short, Spivak's understanding of representation is intensely deconstructionist, thereby threatening to paralyze the very process of rational legal decision-making. Section C presents a second theoretical framework that adapts

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64. Rosser, *supra* note 19, at 154 (cautioning that *Shack* has had limited doctrinal impact).

65. See SINGER, ENTITLEMENT, *supra* note 38, at 17 (discussing the role of trust in property ownership as well as the interplay of liberty interests and property obligations that come with ownership); Alexander, *The Social-Obligation Norm*, *supra* note 6, at 809–10 (arguing that an owner's obligation to contribute to the flourishing of others requires that the owner supports rights of affiliation); Singer, *Reliance Interest*, *supra* note 8, at 675–76 (highlighting that the right of access in *Shack* rested on the farmworkers' needs and vulnerability).

66. Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 710–11 (1931) (proposing seven characteristics of realist jurisprudence).

Spivak's inquiry for use in legal decision-making. In doing so, it proposes a new theoretical construct: pragmatic postcolonialism.

A. *Critical Postcolonialism*

My critique of *State v. Shack* is that it provided no opportunity for the migrant workers described in that case to “speak” through the case. This is a problem identified by postcolonialist scholars.<sup>67</sup> It is a concern with representation and voice and a recognition that certain individuals and classes of individuals who have been the objects of colonization and its postmodern effects have very little space in which to speak.

Professor Gayatri Chakravorty Spivak may well be the best narrator of the problem of representation that I claim inheres in *State v. Shack*. In 1985, Spivak published one of the defining essays of the postcolonialist movement, “Can the Subaltern Speak?”<sup>68</sup> Spivak's central inquiry in the essay concerned the problem of “represent[ing]”<sup>69</sup> the subaltern “masses”<sup>70</sup> who have experienced the effects of colonialism.<sup>71</sup> For Spivak, the problem of representation occurs largely because of the pressure Western intellectuals feel to understand the postcolonial subject. They respond to this pressure by “conflat[ing]” two different understandings of the verb “to represent.”<sup>72</sup> These understandings are captured by Karl Marx's use of the German verbs *vertreten* and *darstellen* in *The Eighteenth Brumaire of Louis Bonaparte*.<sup>73</sup> Spivak interpreted *vertreten* to mean political representation and *darstellen* to mean aesthetic representation<sup>74</sup> and described the former as “proxy” and the latter as “portrait.”<sup>75</sup> Spivak insisted that it is critical to the postcolonial subject and, in particular, to the problem of giving the postcolonial subject her voice, to acknowledge that these two forms of representation expose a fragmented voice.<sup>76</sup> Indeed, Spivak argued, it is the possibility of

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67. See, e.g., ASHCROFT ET AL., *supra* note 52, at 244–47 (defining “subaltern” as “of inferior rank,” explaining how the term has been used in postcolonial South Asian studies, and explaining that, in India, the bourgeoisie “failed to speak” for the subaltern groups and thus for the nation as a whole).

68. Spivak, *Can the Subaltern Speak?*, *supra* note 12.

69. *Id.* at 275 (internal quotation marks omitted).

70. *Id.* at 274 (internal quotation marks omitted).

71. *Id.* at 283.

72. *Id.* at 274.

73. *Id.* at 276–78.

74. *Id.* at 278.

75. *Id.* at 276.

76. *Id.* at 275, 279; see also JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 94–95 (2006) (describing Spivak's analysis of

remaining cognizant of and “expos[ing]” the different representations (*vertreten* and *darstellen*) of the subaltern that gives the subaltern subject the most space to speak.<sup>77</sup> By contrast, the Western intellectual is driven to attempt to unify these distinct forms of representation to create a voice that is more intelligible to the Western intellectual but also (let us acknowledge) a voice that has more pragmatic thrust in the *progressive* Western intellectual’s quest to defend the rights of the subaltern.<sup>78</sup>

Why was the preservation of fragmented voice so terribly important for Spivak? The answer lies partly in the relationship between the subaltern subject and those who have the capacity to represent her in the political (or legal) sense of that word.<sup>79</sup> Such representation is riven with conflicted meanings, aspirations, and motivations. Specifically, Spivak took from Marx the point that the class of people represented is only a class to the degree that they live under a distinctive set of economic conditions.<sup>80</sup> They are not, however, a class in the sense that they share a feeling of community as a result of that condition.<sup>81</sup> This fragmentation and, in particular, the lack of representative consciousness of class condition, appears to require that the subaltern subjects be represented by someone other than themselves.<sup>82</sup> But this particular form of representation creates the problem that the class is represented by an authority that both protects and controls it. The consequence, as Spivak argued, is *darstellen*, portraiture, in addition to *vertreten*, proxy, by someone other than the subject *as well as* a narrowing of such representation to that which is perceived and imposed by that someone.<sup>83</sup>

Lest readers are tempted to think that this problem of representation only exists at relatively more advanced levels of existence—in other words that there are certain basic conditions that are unambiguous in how they could be represented—Spivak provided brutally defiant examples. The first was the example of *sati*,

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divergent views of Indian women, namely as a postcolonial subject or as an Indian nativist representation).

77. Spivak, *Can the Subaltern Speak?*, *supra* note 12, at 277 (discussing different formations of community in creating class consciousness).

78. *Id.* at 276, 279–80.

79. *Id.* at 276–77.

80. *Id.* at 277 (adding that “[i]n so far as . . . the identity of their interests fails to produce a feeling of community . . . they do not form a class” (internal quotation marks omitted)).

81. *Id.*

82. *Id.* at 276–77.

83. *Id.* at 277–78.

or widow, sacrifice in India,<sup>84</sup> and the second was a particular case of suicide by a woman in Calcutta in 1926.<sup>85</sup> In each of these examples, Spivak traced multiple interpretations—appearing in multiple texts—about what motivated the women who died. In the case of *sati*, for example, was it the women’s choice to free themselves of their bodies and join their husbands in eternal celestial pleasure, as claimed by Hindu religious texts?<sup>86</sup> Or was it the pressure from their dead husbands’ relatives in whose way the widows stood in inheriting the property as “P.V. Kane, the great historian of the *Dharmasāstra*” suggested?<sup>87</sup> The answer to this question of course drives the legal response.<sup>88</sup> Time and again in these examples, Spivak showed the unremitting challenge in finding the voice of the women who died. Even with respect to the basic capability of *life*, Spivak argued, it is a terrible mistake to assume complicity between *vertreten* and *darstellen*. This may explain why Amartya Sen, the originator of the measurement of human flourishing as a means of defining the condition of poverty, has resolutely refused to adopt a specific and universal list of capabilities.<sup>89</sup> Sen argues instead that such a list must be left to be divined by local and democratic processes attuned to particular places and times.<sup>90</sup>

Two additional features deserve attention in this description of Spivak’s postcolonialist perspective on representation. The first is that it differs from—indeed, it disputes—the Foucaultian ideal that individual narrative is crucial.<sup>91</sup> It could be argued that “rebellious” lawyers absorbed Foucault’s message and applied it in raising a variety of legal claims on behalf of marginalized clients, even if the lesson

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84. *Id.* at 297–98 (noting the British abolished the practice but acknowledging that its abolition “has been generally understood as a case of ‘White men . . . saving brown women from brown men’”).

85. *Id.* at 307–08 (describing the young teenaged woman as having committed suicide when she could not “confront the task” of assassinating a political figure during struggles for Indian independence).

86. *Id.* at 303.

87. *Id.* at 300.

88. Indeed, the legal response, namely the colonial British law outlawing *sati*, is Spivak’s beginning point in her critical analysis. *Id.* at 298.

89. Amartya Sen, *Conceptualizing and Measuring Poverty, in* POVERTY AND INEQUALITY 34–35 (David B. Grusky & Ravi Kanbur eds., 2006) (resisting the impulse to develop a specific list of capabilities); see also Martha Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21, 21 (2007) (discussing this resistance on Sen’s part).

90. Sen, *supra* note 89, at 30, 37 (giving the example that “a person in New York may well suffer from poverty despite having a level of income that would make him or her immune from poverty in Bangladesh or Ethiopia”).

91. STEVEN BEST & DOUGLAS KELLNER, *THE POSTMODERN TURN* 275–76 (1997) (discussing Foucault’s influence on the development of a “micropolitics” of individualized struggle and personal narrative).

was less apparent in property law.<sup>92</sup> Examples of such practices include the protection and indeed exaltation of client “storytelling” as part of the process of legal representation.<sup>93</sup> Spivak argued, however, that it is nothing less than an abdication of responsibility for the Western intellectual to assume that the subaltern can speak for herself.<sup>94</sup>

The second feature is that Spivak’s view of representation defies the Hegelian notion of “property as personhood”<sup>95</sup> and thus challenges the possibility that progressive property law could respond to the postcolonialist problem of representation by recognizing classes of property that are more “personal”<sup>96</sup> or that might be managed using more personalized principles such as “stewardship.”<sup>97</sup> Part of the problem with the Hegelian prescription, at least as it is currently deployed, is that from a pragmatic perspective, it requires a relatively cohesive sense of what is “personal” to a given class,<sup>98</sup> a cohesion at the core of Spivak’s opposition. Moreover, the idea of using property as a device for constituting oneself assumes a level of *vertreten*, of community identification with a class-based set of interests, that Spivak may argue often does not exist.

While Spivak’s claims about voice and representation may seem quite compelling when built upon examples from colonial and postcolonial India, it is reasonable to ask how, why, and to what

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92. See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* 33 (1992) (discussing the work of rebellious lawyering, such as broader community engagement, through the narrative of a legal aid attorney).

93. See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 485–86 (1994) (suggesting that, although “lawyers have always seen their work as in part ‘storytelling,’ . . . only recently has legal scholarship framed lawyering in these terms” (footnote omitted)); see also Louise G. Trubek, *Lawyering for Poor People: Revisionist Scholarship and Practice*, 48 U. MIAMI L. REV. 983, 987 (1994) (articulating the evolving focus on attorney and client interactions in legal practice); Lucie E. White, *Seeking “. . . the Faces of Otherness . . .”: A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499, 1509–11 (1992) (recounting an encounter with a client, a “seventy-two year old former sharecropper in rural North Carolina,” through a Foucaultian lens and also noting that “this lens reveals only a partial reality”).

94. Spivak, *Can the Subaltern Speak?*, *supra* note 12, at 274–76.

95. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 971–72 (1982) (explaining that under Hegel’s theory, “[p]ersonal property is important precisely because its holder could not be the particular person that she is without it”).

96. *Id.* at 960.

97. Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1028–29 (2009) (arguing that “cultural property claims are often better explained and justified through a stewardship model that effectuates the dynamic pluralism of group-oriented interests”).

98. See Radin, *supra* note 95, at 961 (“But if property for personhood cannot be viewed as other than arbitrary and subjective, then personal objects merely represent strong preferences, and to argue for their recognition by the legal system might collapse to a simple utilitarian preference summing. To avoid this collapse requires objective criteria differentiating good from bad identification with objects in order to identify a realm of personal property deserving recognition.”).

extent such a critique is applicable to American property law. Specifically, who is “subaltern” in modern property disputes? Spivak’s own definition of subaltern centers on the concept of social and cultural access, coalescing around the concept that subaltern individuals are those who so lack “social mobility” as to be incapable of “a recognisable basis of action.”<sup>99</sup> In her 1985 essay, Spivak also quotes the definition propounded by the leading representative of the term as used by the “Subaltern Studies” group.<sup>100</sup> Like Spivak, this group uses subaltern to define those who are left out of the “elite achievements” in their society that amount to participation.<sup>101</sup> These may include the development of nationalist movements with the strength to overcome colonial rule.<sup>102</sup>

Using these definitions, the migrant workers in *Shack* seem subaltern. Arguably, their only digression from the definition is that they were not situated in the Indian subcontinent. As the legislative history for the Economic Opportunity Act depicts, the migrant workers lacked social mobility in American society.<sup>103</sup> But it is reasonable to assume that many were also at the economic margins of their home countries. Using migrant workers from Mexico as an example, partly as a result of Mexico’s colonial past, economic opportunity was stratified in such a way as to force those outside of the social and cultural lines of power and access to leave their homes in order to earn enough income to provide for their families.<sup>104</sup> These individuals were essentially a product of an implicit economic agreement that required their marginalization and cheap labor.<sup>105</sup>

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99. Gayatri Chakravorty Spivak, *Scattered Speculations on the Subaltern and the Popular*, 8 POSTCOLONIAL STUD. 475, 475–76 (2005).

100. Spivak, *Can the Subaltern Speak?*, *supra* note 12, at 283–84 (defining this group as comprising “a collective of intellectuals that *must* ask, [c]an the subaltern speak?”).

101. *Id.* at 283. In significant respects, Spivak disputes the Subaltern Studies group’s understanding of subalternity, but there is this basic and important overlap, grounded in a cultural and social exclusion, and resulting lack of options.

102. *Id.*

103. See *infra* Part III.A.1 (summarizing the legislative history of the Economic Opportunity Act).

104. See Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 620 (1981) (citing “socioeconomic imbalances between regions” as a cause of mass migrations); see also Margaret F. Brinig & F. H. Buckley, *The Market For Deadbeats*, 25 J. LEGAL STUD. 201, 202–03 (1996) (explaining different policies that favor or discourage certain types of migrants); Mae M. Ngai, *The Civil Rights Origins of Illegal Immigration*, 78 INT’L LAB. & WORKING-CLASS HIST. 93, 98 (2010) (arguing that, in the 1920s, the United States-Mexico border was open and easy to cross for those without documentation so as to encourage the growth of a disposable labor force from Mexico).

105. See MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 95 (2004) (“The agricultural labor market and [U.S.] immigration laws worked in tandem to create a kind of imported colonialism.”); Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, in IMMIGRANTS OUT! THE

While it is dangerous to make too many assumptions from their demographics, the facts suggest a desire, but also an inability, to remain connected to the economic, social, and cultural communities in those countries.<sup>106</sup> As one of the few quotations from migrant workers in the legislative history expressed, “We go everywhere and we don’t belong nowhere.”<sup>107</sup>

While the meaning of subaltern has changed and become more nuanced in the decades since Spivak first published her essay—and even in the near-decade since she defined subaltern as a lack of social mobility—the meaning retains several features that distinguish it from the broader category of subordinate individuals. Two features among the many in this evolution are useful for my purposes here. First, while acknowledging that “colonialism [is] a diverse, changing bundle of historical forces rather than . . . a comprehensive structure,”<sup>108</sup> the term “subaltern” is still grounded in a colonialist social and cultural history. Second, as Spivak has repeatedly emphasized, subalternity is fundamentally about heterogeneity, both as compared against individuals who are not subaltern and within the category itself.<sup>109</sup> Subaltern individuals are not a unitary class in most of the respects that matter. As I will discuss in Section II.C., this Article adopts these two features of the more modern definition of subalternity. But while subalternity is important to my theoretical framework, I also am using subaltern inquiries as a means of developing tools to respond to the broader issue of property law’s response to subordination. In particular, the frameworks I deploy in

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NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 190, 190 (Juan F. Perea ed., 1997) (characterizing migrant employment by “harsh working conditions, enormous amounts of physical labor, and minimal remuneration”); Lopez, *supra* note 104, at 683–84 (expounding on the marginal economic status of the landless rural working class, a situation that remains in modern migration trends).

106. See S. REP. NO. 91-83, at 4–5 (1969) (explaining trends in the migrant laborer population, namely that the majority were under twenty-five and male, often with active ties to their home countries).

107. *Id.* at 18.

108. David Ludden, *Introduction: A Brief History of Subalternity*, in *READING SUBALTERN STUDIES: CRITICAL HISTORY, CONTESTED MEANING, AND THE GLOBALISATION OF SOUTH ASIA* 1, 26 (David Ludden ed., 2001).

109. See GAYATRI CHAKRAVORTY SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT* 282–83 (1999) (discussing the challenge of considering the subaltern woman as “subject,” a challenge that is difficult in part because of the inevitability of comparing the subject to different identity categories); GAYATRI CHAKRAVORTY SPIVAK, *IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS* 204 (1988) (“Different knotting and configurations . . . , determined by heterogeneous determinations which are themselves dependent upon myriad circumstances, produce the effect of an operating subject.”); see also Spivak, *Can the Subaltern Speak?*, *supra* note 12, at 280–81 (“[O]ne must nevertheless insist that the colonized subaltern *subject* is irretrievably heterogeneous.”).

this Article teach us about the contribution of detailed, historically grounded inquiry. That is a lesson that has far broader applicability than just to subaltern individuals and causes.

*B. The Existentialist Challenge to Law Posed by Critical Postcolonialism*

To understand *State v. Shack* as a representational problem from a postcolonialist perspective, it is important to think about the case as an instrument and source of law, and in this case, property law. This Section thus considers the ways in which property law, but also the process of legal decision-making, shapes the question of representation.

Perhaps more than other areas of law, property law appears to demand a unitary voice.<sup>110</sup> The doctrinal imprimatur of ownership may be the driving force behind the search for cohesion in property law. As *Shack* and so many cases demonstrate, ownership, once proven, stands for a great deal.<sup>111</sup> Ownership is widely viewed as a consolidating force that allocates great control over resources once the hurdle of ownership is cleared.<sup>112</sup> Its power is more potent by virtue of its designation (at least in lay minds) as one of the few most fundamental of human rights.<sup>113</sup> Over the last decade, a number of

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110. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 355 (1967) (“In effect, an owner of a private right to use land acts as a broker whose wealth depends on how well he takes into account the competing claims of the present and the future.”).

111. For influential discussions of the importance of property ownership, see GARY D. LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* 1 (1989) (stating that, in addition to defining certain privileges, property rights determine who are the economic actors and define the distribution of wealth in a society); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1327 (1993) (arguing that allocating individual property rights more effectively creates a positive social product than does using group ownership); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1728 (2004) [hereinafter Smith, *Property and Property Rules*] (discussing remedies enforcing exclusion as a means of protecting ownership).

112. Ellickson, *supra* note 111, at 1369; see also LIBECAP, *supra* note 111, at 5 (positing that the thrust of contracting for property rights involves balancing allocations for those advantaged and harmed by the assignment of exclusive decision making).

113. The public’s response to the U.S. Supreme Court’s decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), is one example of such lay opinion coming to a head. See David A. Dana, *The Law and Expressive Meaning of Condemning the Poor after Kelo*, 101 NW. U. L. REV. 365, 365 (2007) (discussing the “firestorm” of legislative reform in various states post-*Kelo*); Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 241–42 (2007) (explaining that the Court’s decision in *Kelo* raised questions “about how much compensation governments should pay when they take people’s homes” and “generated widespread public outrage”); see also George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45, 51–52 (2008) (discussing measures taken by states to prohibit condemnation of unblighted properties). See generally D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 256 (2006) (explaining that “[h]omes are different in meaningful ways from other types of property,” and suggesting that “their unique nature [often] justifies a favored legal status”).

legal scholars have leveled a powerful critique of ownership as a force of consolidation and rational decision-making.<sup>114</sup> My purpose in this Article is to contribute to that critique by demonstrating that Spivak's basic concern can be captured and applied in property law and that doing so can aid the understanding of ownership as just one of many useful concepts in deciding property cases.

But ownership is not the only example of the consolidating impulse in property law. There is something about the control of finite resources, which in the case of land and many other forms of property are rivalrous in nature, that causes many people to seek balance between interests by limiting the number of options or "packages" in which ownership can exist—hence, the overarching principle of the *numerus clausus* in property law.<sup>115</sup> It appears to be widely believed that less consolidation of property rights could lead to too much fragmenting of property use, access, marketability, and other important features of property ownership.<sup>116</sup> Property would be under-utilized.<sup>117</sup> Information costs would be too high.<sup>118</sup> People could not function vis-à-vis property in an effective (or efficient) manner without such consolidation. Ownership and, more generally, rights to property appear to signify a few really important things.<sup>119</sup>

Given this consolidating impulse in property law, cases like *Shack* accentuate the necessary countermoves. What *Shack* appears to make

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114. See, e.g., SINGER, ENTITLEMENT, *supra* note 38, at 6–7 (criticizing the ownership model as self-interested and absolutist and one that fails to recognize conflicts with other personal rights); Alexander, *The Social-Obligation Norm*, *supra* note 6, at 747–48 (arguing that property rights are relational and that, as a result, property owners have certain obligations to others); Alexander et al., *Progressive Property*, *supra* note 17, at 743–44 (conceiving of property as an idea and an institution that promotes values, such as full social and political participation).

115. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3–4 (2000) (explaining that the principle that property rights only exist in a finite number of forms is seemingly universal today); see also Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1601 (2008) (“[S]tandardization is a near-universal feature of property systems because the phenomenon facilitates the use of property law to define, control, and regulate the public aspects of private legal relations with respect to things—the foundational top-down element of property law.”); Avihay Dorfman, *Property and Collective Undertaking: The Principle of Numerus Clausus*, 61 U. TORONTO L.J. 467, 468 (2011) (arguing that *numerus clausus* is “a restriction on private legislation of new forms of property right[s]”).

116. Ben W.F. Depoorter & Francesco Parisi, *Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes*, 3 GLOBAL JURIST FRONTIERS 1, 19–21 (2003) (detailing some of the consequences of over-fragmentation under economic theory).

117. See, e.g., Ellickson, *supra* note 111, at 1369 (espousing the advantages of perpetual private property ownership).

118. See, e.g., Smith, *Property and Property Rules*, *supra* note 111, at 1724 (discussing the information-cost advantages of classic property methods).

119. As with ownership, this Article disputes this broader consolidating impulse in property law.

clear is that to effectively overcome property ownership (or equivalent rights over resources), the opposition must be unequivocal and forceful.<sup>120</sup> In a dispute with a property owner over her land, it will not do to provide shaded, half-hearted, or (as among a group of opponents) conflicting positions or even positions that are less than unanimous. Such equivocation would be seen as simply unfit as a basis for overcoming the core right of property ownership. Additionally, for this reason, the most powerful bases for opposing property ownership seem to have their source in co-equal human rights, such as the civil and political rights of speech,<sup>121</sup> association,<sup>122</sup> racial equality,<sup>123</sup> and life (as in the cases of necessity).<sup>124</sup> Indeed, it is not just the substance of conflicting rights but often also the process by which they are proven and protected that bespeaks the supremacy of property in the hierarchy of rights. Thus, for example, conflicting rights may need to be proven by means of “clear and convincing evidence,”<sup>125</sup> or they may be remedied just with damages rather than injunctive relief.<sup>126</sup>

This instrumentalist cohesion in property law is undergirded by a much more foundational cohesive drive in law more generally. As Karl Llewellyn so artfully expressed in *The Bramble Bush*, the art of using precedent lies in the judge’s (and the lawyer’s) ability to “capitaliz[e] welcome precedents” by analogizing the facts and policy issues in a given dispute to prior cases that are useful “springboard[s]” for deciding the dispute, while also “cutting” away “unwelcome precedents” that unhelpfully appear to “bind” the

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120. *State v. Shack*, 277 A.2d 369, 374–75 (N.J. 1971) (stating that the rights of the workers “are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties”).

121. *See, e.g., State v. Schmid*, 423 A.2d 615, 630 (N.J. 1980) (formulating a “multi-faceted test” under the New Jersey law to ascertain the parameters of the rights of speech and assembly upon privately-owned property).

122. *See, e.g., Shack*, 277 A.2d at 372 (emphasizing the rights of the migrant workers to associate with the defendants and others who sought to provide them with essential services).

123. *See Singer, No Right to Exclude, supra* note 61, at 1283, 1297 (“The absolute right to exclude, enshrined in the common law, is a relic of the Jim Crow era, and as such, authorizes the creation of racially discriminatory practices.”).

124. *See United States v. Schoon*, 955 F.2d 1238, 1239–40 (9th Cir. 1991) (invoking the necessity defense in a criminal action against protesters who entered Internal Revenue Service offices to protest U.S. actions in El Salvador), *amended by* 971 F.2d 193 (9th Cir. 1992).

125. *See, e.g., Brown v. Gobble*, 474 S.E.2d 489, 494 (W. Va. 1996) (claiming most courts have used the “clear and convincing” standard to protect important property interests).

126. *See Rashmi Dyal-Chand, Sharing the Cathedral*, 46 CONN. L. REV. 647, 678 (2013) (arguing that, under an outcome-centered analysis, property disputes should lead to an array of outcomes, including injunctions and damages); Smith, *Property and Property Rules, supra* note 111, at 1726–30 (highlighting potential inefficiencies associated with paying damages).

judge.<sup>127</sup> The process of legal decision-making in which judges and lawyers use precedent to decide and argue cases fundamentally opposes Spivak's argument that by exposing fragmentation in the subaltern subject, we can create the most space for her to speak. On the one hand, legal reasoning requires lawyers to create classes, to define them according to certain commonalities, to assign them rights, and then to argue that these rights deserve protection because similar classes have received protection for similar rights.<sup>128</sup> On the other hand, Spivak urges lawyers and other "intellectuals" committed to a postcolonialist agenda to resist cohesion in representing the classes we might seek to protect.<sup>129</sup>

### *C. Theorizing Pragmatic Postcolonialism*

These two systems of "representation" seem so fundamentally irreconcilable that an attempt to harmonize them may seem at best existential and at worst pointless. Such an attempt at least raises the question whether the particular system of legal decision making based on precedent simply is too entrenched a (Western) institution to be capable of incorporating a prescriptive version of Spivak's critique except at the margins. My purpose in this Section is to answer that question by theorizing a form of postcolonialist inquiry that is sufficiently prescriptive to be capable of being applied at the core of property law—to resolve everyday property disputes. Doing so requires me to diverge from pieces of Spivak's critique, which is what I describe in the first part of this Section. I then describe the basic theoretical contours of the more prescriptive version of postcolonialism that I advocate applying within property law. I call it "pragmatic postcolonialism."

While Spivak provides a quite convincing and forceful critique of Western progressive thought, with which I (and many others) empathize, her critique can also rightly be described as existentialist and, at times, paralyzing.<sup>130</sup> At least in law, without class formation, it

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127. K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 68 (1930) (emphasis omitted).

128. *Id.* at 82–84. Civil rights law, with its categories of protected classes, is a paradigmatic example.

129. Karen Engle repeatedly confronts this conflict between law and representation in her recent book. See KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* 275–77 (2010) (promoting economic justice strategies that incorporate an evolving understanding of cultural and ethnic identity).

130. See, e.g., ASHA VARADHARAJAN, *EXOTIC PARODIES: SUBJECTIVITY IN ADORNO, SAID, AND SPIVAK* 89 (1995) (arguing that Spivak "uses the master's tools [to] dismantle the master's house" (alteration in original) (internal quotation marks omitted)).

is hard to win pragmatic change. And if Spivak is right both that subaltern individuals have no space in which to speak and articulate their own class *and* that the intervention by an “authority” from the outside contributes to their muteness,<sup>131</sup> then it is hard to envision a pragmatic way forward. In this respect, Spivak’s critique appears to prioritize deconstruction over instrumentalism.<sup>132</sup> This is the first respect in which I diverge from Spivak’s critique. While taking deeply to heart her call to specify and account for the individual details of the lives and histories of subaltern individuals, I claim that such an accounting can be accomplished within a prescriptive structure.

This prescriptive ambition is the basis for my second divergence from Spivak. Spivak is uncompromising in her insistence on the importance of separating, and indeed fragmenting, political and aesthetic representations of subaltern individuals.<sup>133</sup> Her priority appears to be the creation of an alternative intellectual history of subaltern peoples.<sup>134</sup> Given that priority, rhetorical speech can be an important tool. Because Spivak appears to believe that consolidation between the political and the aesthetic is the greatest threat to subaltern voices, she elevates fragmentation and deconstruction above all else. Given the instrumentalist work of the law, I propose a more compromising position on the question of fragmentation. Representation in property law simply cannot accommodate Spivak’s understanding of representation in its purest form. I would rather incorporate some of her postcolonialist inquiry into property law with compromise than none of it without compromise. This effort at accommodation leads me to recognize Spivak’s understanding of representation by applying the pure version of her critique to *State v. Shack*. But my *response* to her critique in the form of pragmatic postcolonialism requires me to focus more on subalternity and voice than on her pure vision of representation. Thus, as is evident from

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131. Spivak, *Can the Subaltern Speak?*, *supra* note 12, at 276–77.

132. In referencing instrumentalism here, I am primarily making a disciplinary point: as a literary theorist and postcolonial scholar, Spivak has disciplinary space in which to critique a set of laws and practices without necessarily feeling the imperative to propose a pragmatic alternative. Because of my disciplinary perspective as a legal scholar, I do feel the imperative to propose a pragmatic alternative. Spivak has a freedom that I do not have. My critique of *State v. Shack* is instrumentalist because I follow it with a proposed alternative to the New Jersey Supreme Court’s analysis and disposition of the case.

133. Spivak, *Can the Subaltern Speak?*, *supra* note 12, at 294–95 (asserting that even well-intentioned efforts to give voice to the subaltern are often more appropriately characterized as “ferocious standardizing benevolence” that in fact continue to silence those voices).

134. For numerous perspectives on this agenda, including Spivak’s, *see generally* MAPPING SUBALTERN STUDIES AND THE POSTCOLONIAL (Vinayak Chaturvedi ed., 2000).

my application of this theory in Part IV, I propose creating some space for fragmented voices *within* a framework that remains grounded in establishing a cohesive class for the purpose of achieving certain more commonly defined rights.<sup>135</sup> Stated differently, I propose a dispute resolution process in which representation requires consolidating in some phases and deconsolidating in others.

These points of difference, then, lead me to state the theoretical contours of pragmatic postcolonialism. First, as distinguished from Spivak's version, my version of postcolonialist theory prioritizes rational decision-making *equally* with the protection of subaltern voices. In so doing, I aim to protect judges' ability to make the difficult choices between conflicting values even though, at times, that will narrow the space in which subaltern voices can be heard.<sup>136</sup> My point in doing so is to prioritize the instrumental over the rhetorical.

Second and relatedly, it does not suffice in my view to give space for speech if the speech produces a sense of empowerment without a change in the law. Legal change is the outcome I seek from creating room for subalternity in property law. Thus, in contrast to Spivak, I am not as focused on protecting subaltern voice for the purpose of creating an accurate historical record. Nor am I as confident as Foucault and perhaps as some of the scholars advocating for the importance of individual narratives that there is much independent value and achievement in allowing the subaltern to speak for herself.<sup>137</sup> Rather, I am interested in exposing those voices for the purpose of providing legal remedies to subaltern individuals. From this theoretical perspective, fragmentation is still important, but for a different reason than that articulated by Spivak. Rather than serving to deconstruct, fragmentation here recognizes that claims and remedies must be tailored to the particular individuals who pursue them. Given this difference in purpose, I argue that it is therefore not necessary for the fragmentation between political and aesthetic representation to be so zealously preserved.

Third, the subalternity of individuals is a uniquely important perspective to probe and protect in property law because it changes the nature of the claims and remedies that would best serve those individuals. Postcolonialist history and the particular forms of

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135. See *infra* Part IV.A.

136. See Alexander, *Pluralism and Property*, *supra* note 16, at 1019 (discussing the imperative of rational decision-making).

137. In this respect, my version of pragmatic postcolonialism hues more closely to Spivak's priorities, as distinguished from Foucault's and those of the other "Western intellectuals" whom she critiques. Spivak, *Can the Subaltern Speak?*, *supra* note 12, at 271, 279.

subordination, silencing, social and cultural immobility, lack of participation, or even of recognition of the possibilities of participation are utterly relevant to the claims that subaltern individuals ought to be able to make in property law. Previewing my analysis of *State v. Shack*, many migrant workers straddle two sets of countries, cultures, communities, and economic systems,<sup>138</sup> and it is simply an injustice only to recognize one set because that is the only understanding of “non-owner” or even of “subordinate individual” that property law currently accommodates.

Finally, legal mechanisms exist in our system of precedential decision-making for detecting and protecting subaltern voices. Far from being quixotic or illogical, it is quite possible to take advantage of some of the most respected features of the common law as a means of more robustly attending to subaltern voices. Three features are particularly useful for pragmatic postcolonialism. The first is the art of instrumental storytelling. The detailing of the facts of an individual case not only allows lawyers and judges to determine how the case compares to precedent, but it also provides a powerful and pragmatic opportunity to expose and protect subalternity. The second feature is that of individualizing a claim once a basic level of class conformity has been established. While it appears critical to precedential decision-making to define a group deserving of a remedy (for example, tenants) into which a party fits, our common law system also shows that this process of class categorization need not be the *last* step in the process of defining a legal claim.<sup>139</sup> It is possible, for example, to specify particular individual characteristics of tenants that would qualify them for legal relief.<sup>140</sup> The third feature is the enormous capacity of remedies to individualize the needs of parties at the point when judges must decide what to do about the legal violations they have established. Thus, even where it is only possible or sensible to build a claim just on the basis of class membership and harm, the remedial phase of a case can be the point at which judges create space for subalternity. Punitive damages and injunctions, for example, can remedy the particular effects of bad housing conditions on an individual who is socially or culturally

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138. See *infra* Part III.A.

139. See *infra* Part IV.A (discussing the personalization of the warranty of habitability claim by the court in *Hilder v. St. Peter*).

140. See *infra* notes 305–08 and accompanying text (explaining that *Hilder* teaches the importance of individualizing claims).

marginalized in particular respects.<sup>141</sup> The purpose of Part IV is to demonstrate the viability of these three features of the common law in protecting subaltern voices.

### III. A POSTCOLONIALIST CRITIQUE OF *STATE V. SHACK*

In this Part, I deploy Spivak's theory of subaltern representation to critique how the migrant workers were "represented" in *State v. Shack*. Following Spivak's methodology, I will analyze the various texts that the New Jersey Supreme Court considered as it defined the workers' rights vis-à-vis the property owner who claimed trespass. Ultimately, the purposes of this analysis are three-fold. The first is to trace the integration of *vertreten* and *darstellen* within each of the major sources that the court used to define the class it sought to protect, and then the further consolidation of representation by the New Jersey Supreme Court into a set of rights powerful enough to overpower the landowner's right to exclude. The second is to demonstrate how the fragmented voices of the migrant workers themselves were lost in the process. The third is to explicate the costs of ignoring those voices.

While there are doubtless more texts that ought to be relevant to this inquiry, at least four sets of texts demand the individualized attention I give them in Section A. The first is the set of texts making up the federal Economic Opportunity Act of 1964,<sup>142</sup> the 1967 amendments to that Act,<sup>143</sup> and the legislative history of both bills,<sup>144</sup> which the court referenced extensively as supporting the policy underlying its decision.<sup>145</sup> The second set of texts comprise the landlord-tenant law of the State of New Jersey, especially as presented by the briefs filed on behalf of the defendants in their appeal to the New Jersey Supreme Court.<sup>146</sup> The defendants claimed the protections of landlord-tenant law as an important basis for preserving their own access to the workers.<sup>147</sup> The third text is a policy paper prepared for the Governor of New Jersey, which the New

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141. See *infra* notes 291, 317 and accompanying text (noting that punitive damages, although not the norm, are available in certain property law cases and providing examples where injunctions were issued in property law cases).

142. Pub. L. No. 88-452, 78 Stat. 508 (1964) (codified as amended at 42 U.S.C. §§ 2701-3000 (2012)).

143. Amendments to the Economic Opportunity Act, Pub. L. No. 90-222, 81 Stat. 672 (1967) (codified as amended at scattered sections of 42 U.S.C.).

144. See *infra* Part III.A.1 (discussing the legislative history of the original statute and the amendments).

145. *State v. Shack*, 277 A.2d 369, 372-73 (N.J. 1971) (explicating that Congress recognized the migrant workers' plight in enacting the Economic Opportunity Act).

146. Brief and Appendix of the Defendants-Appellants, *Shack*, 277 A.2d 369 (No. A-275-70) [hereinafter Brief of the Defendants-Appellants].

147. *Shack*, 277 A.2d at 370-71.

Jersey Supreme Court quoted in its opinion.<sup>148</sup> The fourth set of texts comprise the federal and state labor laws that created and supported the structure of migrant farm labor,<sup>149</sup> but that the court barely acknowledged as relevant to its decision.<sup>150</sup> A final text, which I discuss in Section B, is the opinion itself, which drew from the other texts to construct a cohesive vision of the migrant workers whom it sought to protect. After tracing the court's construction of the image of migrant workers in its opinion, I discuss in Section C the costs associated with the court's representation of the workers.

### A. *Differing Representations*

#### 1. *The Economic Opportunity Act*

Quite possibly, the textual representations about migrant workers that most influenced the court in constructing its own image of the workers were those contained in the federal Economic Opportunity Act and its legislative history. As the court stated, although it decided the case on the basis of its own state's common law,<sup>151</sup> the "policy considerations" underlying its decision were much the same as those animating that statute.<sup>152</sup> On its face, the purpose of the Economic Opportunity Act was to assist the states in developing programs to aid migrant workers and their families with "housing, sanitation, education, and day care of children."<sup>153</sup> This, then, was *vertreten*, the particular political representation that Congress undertook in the 1964 Act.

To accomplish this basic form of political and legal representation in response to crisis-level conditions of poverty, the legislative history for the 1964 statute painted a vivid picture of the conditions that motivated Congress to act. The Senate report described the programs authorized by the Act as assisting "an almost forgotten group of the poverty stricken" who had been "trapped" on "a

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148. See generally GOVERNOR'S TASK FORCE ON MIGRANT FARM LABOR, POVERTY IN A LAND OF PLENTY: THE SEASONAL FARM WORKER IN NEW JERSEY (1968) (reporting on a study of seasonal farm labor and laborers in New Jersey and proposing policy recommendations).

149. See *infra* Part III.A.3.b (discussing relevant federal and state statutes).

150. See *infra* text accompanying notes 215–18 (identifying relevant statutes but noting the court did not rely on them to decide *Shack*).

151. *Shack*, 277 A.2d at 371.

152. *Id.* at 372 ("The policy considerations which underlie [a decision based on the Supremacy Clause] may be much the same as those which would be weighed with respect to one or more of the constitutional challenges, but a decision in nonconstitutional terms is more satisfactory . . .").

153. Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 311, 78 Stat. 508, 525 (1964).

treadmill of poverty.”<sup>154</sup> Further, the report depicted a class of people whose school-aged children were often kept home to work with their parents in the fields, whose children fell behind even if they went to school because of the frequent moves their families made, who lived in unhealthy, unsanitary and overcrowded housing, and who (along with their children) were over time being rendered superfluous because of the onslaught of new agricultural technology.<sup>155</sup> In general, the 1964 legislation was imbued with near panic about the living conditions of migrant workers—a sense that they lived truly in different circumstances from the surrounding community. This sense seemed to translate into programs intended to transform—as immediately as possible—Third World conditions into First World conditions. Cars and tents in ditches<sup>156</sup> were to be replaced with housing, ideally permanent in tenure.<sup>157</sup> Child labor was to give way to free public education.<sup>158</sup> Whatever the norms were of the Third World society in which the migrant families originated, the urgency was to transition them as quickly as possible to at least the subsistence norms of the First World.

Thus, in 1964, the problem of representation was arguably quite simple. Because Congress sought primarily to address the most extreme circumstances of poverty,<sup>159</sup> the picture, *darstellen*, that was called up to support this legislative effort was both unadorned and compelling. It was at least plausible to assume that many migrant workers did in fact live under the conditions broadly described in the portrait of poverty presented in the legislative history for the original Act.<sup>160</sup> The basic, reactive, and short-term nature of the congressional response also suggests that the workers likely would have welcomed such a response. It is hard to imagine, for example, that most workers would not have welcomed clean, sanitary and accessible housing during the time they worked on farms far away from home.

Even in this first iteration of the statute, however, Congress prioritized the workers’ conditions of life during their periods away

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154. S. REP. NO. 88-1218, at 30 (1964).

155. *Id.* at 30–31.

156. S. REP. NO. 90-563, at 63 (1967).

157. *See id.* at 64.

158. *Id.* at 63–64.

159. *See* 88 CONG. REC. 5179 (1964) (statement of Sen. McNamara) (introducing the Economic Opportunity Act, “a bill to mobilize the human and financial resources of the Nation to combat poverty in the United States”).

160. S. REP. NO. 88-1218, at 30 (“In 1962, the migrants’ average earnings were \$1,123, of which \$874 was earned from farmwork. The median years of school completed by migrants over the age of 25 is 6.5, compared to a median of 11 years of school for the general population. Farmworkers are the only group, in fact, whose educational achievement has not advanced in the past 20 years.”).

from home over their *reasons* for having chosen the work they chose. Just as the colonial British government in India banned the practice of widow sacrifice without any real attention to the underlying cause of such a practice (whether it was the laws of succession or the customs associated with deeply held religious beliefs),<sup>161</sup> Congress in 1964 was responding to the nearly scandalous sense that no one in the “land of plenty” should live in ditches.<sup>162</sup> The more difficult questions of why the workers were forced to leave their homes for work far away, how labor and immigration laws contributed to such a framework, and what might be done to facilitate their and their families’ lives back home, were not as pressing when the portrait was one of such embarrassing levels of poverty in the United States.

In 1967, the Act was amended both in furtherance of that original purpose of political representation and in pursuit of a somewhat more abstract political cause. “The purpose[...] [was] to assist migrant and seasonal farmworkers and their families to improve their living conditions and develop skills necessary for a productive and self-sufficient life in an increasingly complex and technological society.”<sup>163</sup> Thus, while the Amendments expanded support for housing (redoubling efforts to provide temporary and emergency shelters in addition to long-term homeownership opportunities) as well as education, they also added funds for “occupational training to respond to the changing demands in agricultural employment.”<sup>164</sup> Moreover, the 1967 Amendments more explicitly supported such integrationist efforts by providing for “legal advice and representation, and consumer training and counseling” and by promoting “community acceptance of such persons.”<sup>165</sup>

The two sets of texts, from 1964 and 1967, suggest a crystallizing sense of what it really meant to be a part of the First World. Such an existence seemingly involved not just sanitation and education, but

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161. See Spivak, *Can the Subaltern Speak?*, *supra* note 12, at 297–99 (suggesting that the British abolishment of widow sacrifice was not a result of the problems with the practice itself, but rather a result of British imperialism and imposition of British customs on Indian culture).

162. S. REP. NO. 88-1218, at 117.

163. Economic Opportunity Amendments of 1967, Pub. L. No. 90-222, § 311, 81 Stat. 672, 709 (1967) (codified as amended at 42 U.S.C. § 2946 (2012)). The legislative history of the 1967 Amendments began with a quotation from a seasonal farmworker in New Mexico that expressed this more abstract representational undertaking: “The aim is to provide skills so they can do other work and provide them with a wider variety of skills to make them better workers off and on the farm, hopefully to be able to command a higher wage.” S. REP. NO. 90-563, at 63 (internal quotation marks omitted).

164. S. REP. NO. 90-563, at 64.

165. *Id.*

also the meaningful prospect of long-term and sustainable employment, housing, and *consumption* in the new community. Correlatively, the 1967 Amendments conveyed a portrait, *darstellen*, of the migrant workers as a class excluded from access to a stable society in which economic and political opportunities were accessible to everyone, no matter how poor one's origin. This sense of isolation and separation pervaded both sets of texts, but the question of what the workers were separated from was much more explicitly about long-term participation in the 1967 Amendments.

From this pair of legislative pronouncements, then, it is possible to perceive a set of claims about the political desires and needs of the migrant workers as a class. In short, they were depicted as a group that was deeply isolated but that yearned for integration into the American middle class. The statutes did not include protections directed toward migrant workers who intended to stay in the United States for only a short while, who sought work in this country for the purpose of sending money back home, or who preferred to keep their children by their sides rather than sending them for education in a land which they might not view as home.<sup>166</sup> There was no obvious evidence that the workers, as a class, desired training in the ways of Western-style consumerism, but such a desire was entrenched in the legislation.<sup>167</sup> Indeed, there was no political recognition of these workers having a home other than the idealized pursuit of the homes of the people in the surrounding communities.

A far more elaborate and integrated portrait of the workers was required to buttress this more significant and complex form of political representation. Perhaps nothing in the hundreds of pages of legislative history for the 1967 Amendments could exemplify this move towards more detailed portraiture better than a psychological study of the migrant workers prepared by Dr. Robert Coles, a Harvard psychiatrist.<sup>168</sup> While there are many claims worth pausing over in

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166. See Economic Opportunity Amendments of 1967 § 311 (providing assistance to migrant farm workers "for a productive and self-sufficient life"); Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 2, 78 Stat. 508, 508 (1964) (declaring that the Act was intended to ensure every person has a chance to participate fully in U.S. society).

167. The primary motivation for such consumer education may well have been to respond to the trickery and fraud many workers experienced even when buying basic provisions such as food. See generally FARM WORKER DIV., CAMDEN REG'L LEGAL SERVS., INC., REPORT OF THE PROJECT DIRECTOR (1970) (constituting an unpublished report filed as an appendix with the brief of the defendants on appeal to the Supreme Court of New Jersey in *State v. Shack*).

168. See S. REP. NO. 91-83, at 13-18 (1969) (quoting an excerpt from Dr. Robert Coles' study suggesting that migrant workers are part of a U.S. "sub-culture" because they are physically, culturally, and emotionally isolated from "the rest of us").

this extraordinary report, the overarching point to make about it is that the proponents of the 1967 Amendments apparently believed that support for their broader integrationist efforts required them to present a picture of the workers as deeply psychologically (as well as physically) harmed by the conditions of their work on the farms.<sup>169</sup> Unfortunately, however, this portraiture was accomplished by a medical professional who existed worlds apart from the workers and whose account of their psychological profile appeared to be based largely on his observations of their reactions to their circumstances.<sup>170</sup>

Moreover, unsurprisingly, Dr. Coles's observations were filtered through the lens in which "normal" was middle class American—a norm in which property rights were paramount and hard work led to an existence defined by a nuclear family who lived and played together.<sup>171</sup> Thus, for example, Dr. Coles stated, "there is no comparing the unstable, disorganized social life of migrants with that of the large majority of Americans."<sup>172</sup> He reduced the workers to a group of "unreliable, unkempt," untidy people who were "willfully destructive of property" as an expression of their "hostility" and "resentment" towards their employers.<sup>173</sup> It was no wonder that he could hardly blame the "many intelligent growers" who employed them for concluding that they were "generally a discouraging and depressing lot, unresponsive to aid, sullen before advice, ill-suited even for more money or better working and living conditions."<sup>174</sup> He painted a picture of the workers as fundamentally incompetent, pitiful, and needful of federal intervention because of their own inadequacies *rather* than the avarice or exploitation of the employers.<sup>175</sup>

What began in the 1964 legislation as an emergency response to basic needs transformed by 1967 into a rather nuanced response to a

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169. *Id.* at 13–14.

170. *Id.* at 18 (noting that Dr. Robert Coles had observed and studied farm workers for six years).

171. *Cf.* GEORGE MASNICK & MARY JO BANE, *THE NATION'S FAMILIES: 1960–1990* 25 (1980) ("By 1970 very few people who did not live alone lived with someone other than their spouse or their children. The households in which the younger generation grew up had become standardized to include one to three siblings (two to four years different in age), two parents (approximately 25 years older), and no one else.").

172. S. REP. NO. 91-83, at 14.

173. *Id.* at 16. Dr. Coles's interest in the workers' attitude toward property is anything but marginal to his psychological profiling. Elsewhere in his report, for example, he describes the workers as not caring about "permanent possessions." *Id.* (internal quotation marks omitted).

174. *Id.*

175. *See id.* at 16–18 (grounding his arguments in favor of aid in the incompetence and neediness of the migrant workers). I am grateful to Joseph William Singer for clarifying this distinctive basis for the federal legislation.

presumably elaborate set of desires to join a new social and economic society. This more expansive response was supported by a mounting sense of the workers as basically inadequate and as requiring a much more extensive set of interventions to fix them. It is not even clear if the half million migrant workers would, as a class, have chosen the forms of housing and education that were offered to them on an emergency basis in the original legislation. But it is a far more extreme assumption to believe that, as a class, they would have chosen integration in the form in which it was offered to them in 1967. It is not exaggeration to say that while the federal statute worked hard to provide expansive remedies to migrant and seasonal workers, it may well have been providing the wrong remedies.

## 2. *New Jersey landlord-tenant law*

Compare this representation of the migrant workers with one set of claims made about them in the briefs filed on behalf of the defendants in *State v. Shack*. There is a great deal that we do not know about the defendants' perceptions of the workers they claimed as clients. But we can at least glean a few salient assumptions and interests from the opinion and the briefs filed in the case. Beginning with the question of what the defendants' own interests were, the defendants appeared quite fervently to believe that the migrant workers needed their services. The briefs filed on appeal to the New Jersey Supreme Court, as well as the reports filed in the appendices to those briefs, suggest some important differences in the perceptions of service providers, such as Shack and Tejas, as contrasted with the picture of the migrant workers presented in the federal legislation.

Specifically, these and other service providers presented innumerable and detailed examples of the exploitation by the employers and the corresponding helplessness of the migrant workers in responding to this exploitation. They described the frequent use of extreme and, at times, near fatal beatings as a means of disciplining workers and discouraging them from seeking protections.<sup>176</sup> They told many stories of living conditions that resulted in dangerous health problems, especially for the young children of the workers.<sup>177</sup> They provided many examples of employers taking advantage of the criminal law to pursue the arrest

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176. FARM WORKER DIV., *supra* note 167, at 10–11.

177. *Id.* at 6 (“In one case, a Puerto Rican man, his wife and five children lived in a three-room affair above a chicken coop. One of the children, a small girl, twice had been seriously ill, suffering from respiratory problems caused by the fowl smell pervading the living quarters.”).

and criminal prosecution of workers who sought aid from third parties.<sup>178</sup> And perhaps the most frequent examples of exploitation were tricks and outright refusals of employers to pay the (already depressed) wages that had been earned by the workers.<sup>179</sup> These examples focused primarily on the flagrantly manipulative and abusive behavior of the employers without dwelling nearly as much on the inadequacies of the workers. By contrast, the federal legislation appeared to rely on the workers' helplessness and weakness as a basis for federal intervention.<sup>180</sup>

From these court filings, what one would expect from reading the famous New Jersey Supreme Court opinion becomes obvious: the defendants' primary interest was in preserving their own access to the migrant workers so that they could continue to document and address at least the worst abuses that they were just beginning to discover at the time the case was filed.<sup>181</sup> This is an utterly understandable interest, one with which most lawyers would empathize deeply. The defendants and similarly situated service providers could not help the workers if they could not access them. And in this respect, the New Jersey Supreme Court's quotation from the Governor's Report on migrant labor was perhaps the most important rhetorical statement in the opinion: "no trespass' signs represent the last dying remnants of paternalistic behavior."<sup>182</sup> But it is equally obvious that this interest could only overlap or be shared with the workers' own interests and perspectives up to a point. Specifically, the interests of the migrant workers that service providers like the defendants were in the best position to address were their interests in decent living conditions, safe work conditions, and fair wages while they worked on the farms. These were critical interests, of course. But they were not the workers' only needs or interests. In short, as the legislative history suggests, they did not encompass the needs and interests of the workers off the farms and in other parts of their lives and relationships.<sup>183</sup>

The defendants' particular interest in access to farms such as Tedesco's, which allowed them to address a particular subset of the

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178. *Id.* at 12–18.

179. *Id.* at 8–10.

180. *See supra* Part III.A.1 (detailing the history and purpose of the Economic Opportunity Act and its amendments).

181. *See generally* FARM WORKER DIV., *supra* note 167.

182. *State v. Shack*, 277 A.2d 369, 373 (N.J. 1971).

183. *See* S. REP. NO. 91-83, at 2 (1969) (focusing on migrant workers' ability to fill "the crucial needs at harvest time"); S. REP. NO. 90-563, at 63 (1967) (explaining that programs were authorized for "housing, sanitation, education, and day care for children" with no mention of any other area).

workers' interests, in turn dictated the legal claims and rights that the defendants and their attorneys used as vehicles for protecting those interests. Turning then to the interests of the workers, those interests had to be defined as rights that the defendants could convince the court existed at the time of the litigation. In 1970, and today, one of the most obvious legal rights that would compel a court to grant access to a private owner's property was the right of a tenant to receive visitors.<sup>184</sup> Such a right was powerful enough to be recognized as a consistent basis for limiting a property owner's right to exclude because it was well established that once a landlord opened her property to tenants, those tenants shared a property interest in that property.<sup>185</sup> But it was also a right that explicitly acknowledged the right of third parties who were guests of those tenants to access the property as well.<sup>186</sup>

In short, because of their intense desire to connect with the migrant workers, the defendants painted a picture of the migrant workers as most desperately needing those things that the defendants were able to provide. It was not even the full set of needs of the migrant workers on the farms that the defendants themselves had identified that they sought to protect, but rather the workers' needs as *tenants*.<sup>187</sup> The federal statutes defined migrant workers as trapped in a system of poverty that isolated them from integration into middle class America, an integration that the legislation assumed they desired.<sup>188</sup> By contrast, the defendants defined the migrant workers as tenants—much like any other tenant in the State of New Jersey.<sup>189</sup> The New Jersey Supreme Court recognized that the class of “tenant”

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184. See, e.g., *State v. DeCoster*, 653 A.2d 891, 895 (Me. 1995) (finding an employer violated the Civil Rights Act by erecting signs prohibiting entry by non-employees into a mobile home park and threatening employee tenants with violence if they brought visitors to the park). Hence the Court's statement that “this case understandably included the question whether the migrant worker should be deemed to be a tenant and thus entitled to the tenant's right to receive visitors.” *Shack*, 277 A.2d at 374.

185. Alexander, *The Social-Obligation Norm*, *supra* note 6, at 807; see also Singer, *No Right to Exclude*, *supra* note 61, at 1456 (listing several examples of relationships that raise issues over conflicting property rights, including relationships between landlords and their tenants).

186. *Shack*, 277 A.2d at 374 (citing *Williams v. Lubbering*, 63 A. 90, 91 (N.J. Sup. Ct. 1906)).

187. To be clear, this was not the only argument in the defendants' brief. They also presented a forceful argument on First Amendment grounds that the migrant workers had the right to receive information of the sort that the defendants were trying to communicate to them. Brief of the Defendants-Appellants, *supra* note 146, at 17–18.

188. See *supra* Part III.A.1 (detailing the history and purpose of the federal legislation).

189. Brief of the Defendants-Appellants, *supra* note 146, at 36.

did not fully overlap with the class of “migrant worker.”<sup>190</sup> There was, as the court observed, dissonance between the two.<sup>191</sup> What the court failed to recognize was that the dissonance was partly attributable to the fact that each of these classes was not homogenous. Each contained shards of desire, need, and perspective that could not be represented or remedied fully by treatment of the individuals in these classes as homogenous. In that respect, the court did not recognize one critical feature of their subalternity.

Moreover, the defendants’ choice to seek protection for accessing the workers by means of landlord-tenant law came with its own accouterments. By arguing that the migrant workers were tenants with all the rights available to tenants in the State of New Jersey, the defendants effectively argued that their clients had both the desire and the *capacity* to protect themselves using the landlord-tenant law of the state.<sup>192</sup> This argument implied also that the workers could engage with the landowner who employed and housed them as any other employee or tenant would be able to do in the State of New Jersey.<sup>193</sup> This is because both employment law and landlord-tenant law are grounded in the generalized belief that participants in a contract have the independence of will, action, and judgment to protect themselves by achieving the benefits of a given bargain.<sup>194</sup> In these respects, the defendants represented the workers as having made much progress in achieving integration. Rather than being isolated, the defendants implied that the workers were ready to enjoy

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190. *Shack*, 277 A.2d at 374 (exploring the question of whether a migrant worker should be considered a tenant).

191. *See id.* (noting that the cases cited did not involve employment relationships like those of the migrant workers and Tedesco).

192. *Id.*

193. *See id.* (considering whether migrant workers have a possessory or “merely incidental” relationship with their employers’ property).

194. For discussions and critiques of these assumptions in both areas of contracting, *see* Joseph W. Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL’Y REV. 139, 143 (2008) (discussing the law’s anti-paternalistic approach of not requiring mandatory terms in contracts allows people the liberty to “determine the course of their own lives”); Franklin G. Snyder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33, 34 (2003) (arguing that classic contract theory is an inappropriate method to interpret important social relationships such as employment law); Clyde W. Summers, *The Rights of Individual Workers: The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1082 (1984) (explaining the “reemergence” of the individual employment contract as a form of extralegal protection against arbitrary employer action). *See generally* Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J.L. & PUB. POL’Y 107, 107 (1986) (contending that the justice of contract law is allowing people to make unrestrained choice which requires the state to ensure an environment in which people can make choices to “maximize[] their own utility”).

the benefits of affiliation and social engagement but for the blunt intervention of the landowner exercising his right to exclude (and thus to isolate).<sup>195</sup>

In fact, Shack and Tejerias may have thought nothing of the kind, but the only precedent that they had available to them in support of their legal claim of access grounded in the rights of a tenant were cases that contained that fully constructed set of assumptions about tenants, their rights, and their relationships to landlords.<sup>196</sup> Thus, as the New Jersey Supreme Court discussed, the cases the defendants cited in their briefs analyzed the question of what process ought to be available to the parties when litigating a breach of this particular form of contract, with the assumption that process was all that was required to support the migrant workers in the pursuit of their rights.<sup>197</sup> In *Schuman v. Zurawell*,<sup>198</sup> for example, the court appeared to assume that the parties had reached a rational and mutually advantageous bargain about their respective rights to the property on which the employee was housed.<sup>199</sup> It was assumed that the rights had been defined in the contract.<sup>200</sup> All that was required was a signaling from the court about the sufficiency of notice under the contract.<sup>201</sup> Reliance on such cases suggested that the workers had chosen from among a range of options in deciding to accept part of their remuneration in the form of housing on their employers' property, rather than that this condition had been imposed on them without any appearance of options.

As represented by the federal legislation, the workers were isolated and helpless. As represented by the defendants, the workers were capable of class affiliation and of protecting themselves using the mainstream approach of contracting for rights. As a matter of property law, the court had a choice to make.

### 3. *Other texts*

Two other sets of texts are worthy of brief mention in this analysis. The first is a policy report prepared for the Governor of New Jersey

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195. *Shack*, 277 A.2d at 374.

196. *Id.* (stating that the cases cited by the defendants focused on the rights of employer-landlords to remove discharged employees and the judicial processes that employer-landlords needed to follow).

197. *Id.*

198. 47 A.2d 560 (Essex Cnty. Ct. 1946).

199. *Id.* at 560 (stating the parties had agreed that the defendants would act as a building superintendent and janitor in exchange for payment and the use of an apartment).

200. *Id.*

201. *Id.* at 560–61.

concerning the lives and needs of migrant and seasonal workers in New Jersey; this report contributed to the court's portrayal of the workers. The second set of texts is a set of federal and state laws governing the conditions and rights of the workers as workers. These laws are important both because of their largely invisible contributions to the structure of migrant labor in the United States and because they should have been so much more relevant to the court's property analysis.

*a. Report of the Governor's Task Force on migrant farm labor*

In addition to using the Economic Opportunity Act as a text through which to understand and ultimately to represent the migrant workers, the New Jersey Supreme Court also referenced a 150-page policy paper titled *Poverty in a Land of Plenty: The Seasonal Farm Worker in New Jersey, Report of the Governor's Task Force on Migrant Farm Labor*.<sup>202</sup> While this report could have provided a more detailed and individualized portrait of migrant workers in New Jersey, it largely failed to do so. Instead, the report reinforced the portrait already constructed by the court on the basis of the federal legislation.

In its introduction, the report provided relatively detailed statistics about migrant workers in New Jersey.<sup>203</sup> In addition to detailing the number of workers in New Jersey, the report focused on demographics. For example, the report provided information about the national origin and race (Puerto Rican and African American workers appeared to predominate), approximate ages, earnings, and family connections of the workers in that state.<sup>204</sup> But these details comprised two of the report's 151 pages. The great bulk of information the report provided about the migrant workers in New Jersey was more general, matching the abstraction in much of the Economic Opportunity Act's legislative history. Indeed, the report cited the same Harvard psychiatrist, Richard Coles, to paint (not surprisingly) much the same portrait found in the history of the federal legislation.<sup>205</sup>

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202. *Shack*, 277 A.2d at 373.

203. GOVERNOR'S TASK FORCE ON MIGRANT FARM LABOR, *POVERTY IN A LAND OF PLENTY: THE SEASONAL FARM WORKER IN NEW JERSEY* 15–16 (1968) [hereinafter *POVERTY IN A LAND OF PLENTY*] (providing a few details concerning Puerto Rican contract and non-contract workers, local workers, and interstate workers).

204. *Id.*

205. *Id.* at 17–19 (suggesting the “myth” that migrant workers are “lazy and good-for-nothing . . . has been largely destroyed by recent psychological findings” (internal quotation marks omitted)); see *supra* notes 168–75 and accompanying text (providing details of Dr. Coles' portrait of migrant workers in the legislative history of the Economic Opportunity Amendments).

This was a lost opportunity. Rather than giving a more nuanced picture of the workers that was sensitive to place, history, and local conditions, the report reinforced the same abstract themes and claims developed by the federal statute.<sup>206</sup> The result was a specific set of policy recommendations that was regularly quite integrationist in perspective.<sup>207</sup> The report detailed only a few of the most egregious incidents of mistreatment—far fewer than, for example, the reports filed by Camden Legal Services as appendices to the defendants’ briefs.<sup>208</sup> What it provided instead was thematically compelling language that the New Jersey Supreme Court could use to further consolidate its image of the workers as desperately isolated and in need of significant intervention and support. In particular, by detailing the egregiously isolating behavior of some of the farm owners as well as the workers’ inability to respond (because of language differences, lack of information about legal protections, and other factors), the report added ballast to the court’s conclusion that property law was part of the problem.<sup>209</sup> Thanks to the report’s rhetorical force, the court was able to target the “no trespass” signs that constrained legal aid.<sup>210</sup>

*b. State and federal labor and employment laws*

At least one more set of texts fundamentally shaped the rights of the migrant workers on Tedesco’s farm. However, the New Jersey Supreme Court only obliquely and fleetingly touched on these in defining the workers’ rights. These texts were the state and federal laws that governed the work lives of the migrant workers, including laws governing the hours worked and safety requirements of the work,<sup>211</sup> laws establishing the minimum wage,<sup>212</sup> and laws governing

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206. See generally POVERTY IN A LAND OF PLENTY, *supra* note 203, at 17–19 (detailing the physical and linguistic separateness of migrant workers and local residents).

207. It should be acknowledged that the policy recommendations in this report were more sensitive to the state of “emergency” in which the workers lived, often recommending health care and other services on-site at labor camps. But the recommendations also included, for example, detailed educational recommendations that seemed designed to integrate migrant children more fully into long-term educational participation. See *id.* at 89–91.

208. *Id.* at 21–22 (providing examples of the migrant workers’ “substandard and at times inhumane living conditions” and of discrimination against migrant workers).

209. State v. Shack, 277 A.2d 369, 373 (N.J. 1971).

210. *Id.*

211. See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, §§ 7, 12, 52 Stat. 1060, 1063, 1067 (codified as amended at 28 U.S.C. §§ 207(a)(1), 212(a) (2012)) (introducing, among other things, a maximum hour work week and prohibiting forms of oppressive child labor). In New Jersey, the New Jersey Division of Workers’ Compensation and the Wage and Hour Compliance Division, both within the Department of Labor and Workforce Development, oversaw state-level regulations.

the rights of workers to organize.<sup>213</sup> At the most basic level, as this brief section discusses, both affirmatively and by lack of prohibition, these laws allowed the system of seasonal and migrant farm labor to develop and flourish. It is well beyond the scope of this Article to trace how, but the support of interstate labor combined with the resistance to international standards for workers appears to have contributed to the system of migrant and seasonal labor that many rightly view as trapping workers in a structure of poverty and exploitation.<sup>214</sup>

By means of selective application, federal and state laws contributed to this system. For example, the 1966 Amendments to the Fair Labor Standards Act gave some, but not all, agricultural workers the right to the minimum wage.<sup>215</sup> The defendants pointed out in their briefs that the right to organize under the National Labor Relations Act was unavailable to the workers.<sup>216</sup> It appears that laws concerning child labor, worker safety and health, and maximum hours applied to the migrant workers, but they did not account for the particular details of migrant workers' lives; as a result, they did not prevent some of the worst abuses.<sup>217</sup> Moreover, as the defendants' briefs (and the copious appendices to those briefs) discuss, even these laws were often not enforced in New Jersey and

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*Laws and Regulations*, DEP'T LAB. & WORKFORCE DEV., [http://lwd.dol.state.nj.us/labor/wagehour/lawregs/wage\\_and\\_hour\\_laws.html](http://lwd.dol.state.nj.us/labor/wagehour/lawregs/wage_and_hour_laws.html) (last visited Aug. 7, 2014) (explaining that the Wage and Hour Compliance Division enforces state minimum wage and child labor requirements and providing legal resources); *Legal Information*, DEP'T LAB. & WORKFORCE DEV., [http://lwd.dol.state.nj.us/labor/wc/legal/legal\\_index.html](http://lwd.dol.state.nj.us/labor/wc/legal/legal_index.html) (last visited Aug. 7, 2014) (providing legal resources for workers' compensation).

212. 52 Stat. at 1062–63.

213. These laws included the Labor Management Relations Act, 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C.), and the National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

214. See, e.g., Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 505 (2007) (advocating for cross-border worker organizations as a measure to improve working conditions for migratory workers); Juan Carlos Linares *Hired Hands Needed: The Impact of Globalization and Human Rights Law on Migrant Workers in the United States*, 34 DENV. J. INT'L L. & POL'Y 321, 329–37 (2006) (discussing examples of formal U.S.-funded programs which demonstrate that “[m]igrant workers represent an easily discardable labor pool, bestowed with few rights” (internal quotation marks omitted)); Sarah H. Paoletti, *Transnational Responses to Transnational Exploitation: A Proposal For Bi-National Migrant Rights Clinics*, 30 U. PA. J. INT'L L. 1171, 1171–72 (2009) (highlighting several prominent examples of abuses and legal violations that migrant workers face).

215. See Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 302, 80 Stat. 830, 838 (1966) (setting minimum wage at “not less than \$1 an hour” for first year of work, escalating to “not less than \$1.30 an hour” after two years of work).

216. Brief of the Defendants-Appellants, *supra* note 146, at 30.

217. See S. REP. NO. 91-83, at 51–61, 76–81 (1969) (recommending changes to federal and state minimum wage provisions, childcare, and unemployment compensation provisions to account for agricultural workers' particular needs).

across the United States.<sup>218</sup> These were in effect background texts that deeply affected the workers' lives when they were on the job, but that the court did not acknowledge as relevant to its decision. It is particularly remarkable that these laws seemed so invisible given the overriding perception of these workers as defined (indeed, labeled) by their work.

Although the federal labor laws will remain largely unexplored here, they are worth mentioning for two reasons. First, there can be little doubt that these laws reinforced both the political and aesthetic presentations—and representations—that the New Jersey Supreme Court felt were required in the course of protecting the workers. The recognition that the workers could not rely on laws protecting their right to organize or their human rights surely contributed to the court's sense that they had few options and thus required the court's intervention. The paucity of rights in this arena also contributed to the sense of the workers as "trapped."<sup>219</sup>

Second, the images these laws produced ought to have been much more relevant to the court's property analysis than they were. At a basic level, the workers' rights and needs ought to have served as meaningful counterforces to Tedesco's right to exclude.<sup>220</sup> But it also seems likely that consideration of the workers' rights *as workers* would have fragmented the court's portrayal of them. Some may have had strong claims of labor exploitation against Tedesco; others might not have had them. Some may have been entitled to minimum wage; others might not have been. But pressure to present the strongest and most cohesive claim against Tedesco's right to exclude required the court to avoid these compelling questions. Doing any more in this Article other than to make this basic point would be to engage in a highly hypothetical exercise. But it should be clear at least from this brief discussion that the court's failure to consider labor considerations is a significant cost of failing to paint a more accurate picture of the migrant workers the court sought to protect.

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218. See, e.g., FARM WORKER DIV., *supra* note 167, at 4 (stating that farm workers were often abused and victimized by the governmental agencies assigned to assist them); *id.* at 11–19 (describing the inattention by law enforcement agencies to physical abuse by crew leaders and other agents of the employers).

219. *Id.* at 20–21.

220. Indeed, this case is analogous to the famous case of *Local 1330, United Steel Workers of America v. U.S. Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980), in this respect: in both cases, the workers' rights should have limited the property owners' rights. In *United Steel Workers*, the steelworkers' rights should have served as meaningful counterforces to the steel company's right to close the steel mills. 631 F.2d at 1265. Professor Singer discusses this point with respect to *State v. Shack* in Singer, *Reliance Interest*, *supra* note 8, at 676–77.

B. *The New Jersey Supreme Court's Opinion*

Modeling Llewellyn's "skilful judge," who with the astute management of "welcome" and "unwelcome" precedents, can build a forceful rationale for her decision,<sup>221</sup> the New Jersey Supreme Court deployed these texts to develop a highly unified and convincing picture of the migrant workers who lived on Tedesco's farm.

The first step was to build a class that had meaningful instrumental value. For this purpose, the federal statutes and their legislative history were enormously helpful because these texts defined the "economic conditions of existence that cut off their mode of life, their interest, and their formation from those of the other classes."<sup>222</sup> These economic conditions not only involved the most basic, even reductionist, sense of what constitutes adequate shelter and education, but also a more refined sense of what it means to participate in a new economic and social community so that what the court ultimately expounded upon was the right of the workers "to live with dignity."<sup>223</sup> What the court omitted, except in the most confined sense, was any analysis of whether the workers classified *themselves* in this fashion or whether they identified with this classification.

This representation of the migrant workers also left little or no room for the possibility that they were a liberated class of individuals capable of protecting themselves by means of contract law and norms. Thus, the court pointedly concluded that the rights of the workers were "too fragile to be left to the unequal bargaining strength of the parties."<sup>224</sup> First-year students may wonder why landlord-tenant law was not a perfectly viable basis for the court's decision, but reliance on this strain of jurisprudence would have carried with it too many assumptions about the rights and responsibilities of the class. It would have prevented the court from pursuing the workers' need for the dignification that accompanies middle class life rather than simply the necessities of subsistence.<sup>225</sup>

The consolidating imperative of creating a class thus left the court with no option but to represent the migrant workers. In this respect,

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221. Llewellyn, *supra* note 127, at 73 ("He *can* throw the decision this way or that. *But not freely.*").

222. Spivak, *Can the Subaltern Speak?*, *supra* note 12, at 276 (internal quotation marks omitted); *see also supra* notes 211–13 and accompanying text (describing, in brief, the purpose of several federal statutes that benefited migrant workers specifically).

223. *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971).

224. *Id.* at 374–75. Similarly, the court concluded that "the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity." *Id.* at 372.

225. *Id.* at 373.

the court reenacted exactly what Spivak has argued occurs when a class is and is not a class: “Their representative must appear simultaneously as their master, as an authority over them, as unrestricted governmental power that protects them from the other classes[.]”<sup>226</sup>

The court used a full range of rhetorical devices to justify this formidable role. It relied on the report of the Governor’s task force to further reduce and consolidate the voices of the migrant workers.<sup>227</sup> It defined its own role to protect the “well-being” of the workers as “the paramount concern of a system of law.”<sup>228</sup> It described the workers, overridingly, as “rootless and isolated,” “outside the mainstream,” “unorganized[,] and without economic or political power.”<sup>229</sup>

The court’s view of its role and of the defendants’ role was apparent well before it began to describe its holding. The migrant workers were a voiceless class for whom the court and the defendants had to speak. There was nothing evidently gained or lost from considering what it would have meant to designate the workers as parties to the case. I refer here not to the technical irrelevance of the workers as parties to a criminal case. Rather, reimagining the case a bit more broadly as a civil trespass dispute, I refer to the substantive, *legal* irrelevance of the workers as parties to a case in which the owner’s right to exclude clashed with the civil right of association and the more amorphous human right to live with dignity. As a legal matter, individuals other than the workers were better able to represent the workers’ rights. The portrait of the workers was more clearly presented by others—Shack, Tejeras, and ultimately, the New Jersey Supreme Court.

As a consequence, there is really no evidence of one or more “subaltern” voices in *State v. Shack*. There are no quotations from trial testimony or affidavits given by the two workers with whom the defendants tried to meet. We have no information about whether the workers preferred to meet in their camp or off-site. We have no information about how important it was to them to meet with the defendants at all. To the extent this absence is arresting for the reader, the court directs the reader’s attention to the perception of the workers as unable to speak for themselves: “[t]hey are rootless and voiceless.”<sup>230</sup> If we look hard, we can find the voice of a single

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226. Spivak, *Can the Subaltern Speak?*, *supra* note 12, at 277.

227. *Shack*, 277 A.2d at 373.

228. *Id.* at 372.

229. *Id.* at 372–73.

230. *Id.* at 372.

seasonal worker in the form of a quotation in the legislative history for the 1967 amendments to the Economic Opportunity Act.<sup>231</sup> As a legal matter, what is so effective about the portrait of the workers is the unified image that it presents. It is clear from this image what the law can do to protect the workers.

C. *Subaltern Voices: Why Did They Matter in State v. Shack?*

The pragmatic posture of this Article requires me to do more than simply argue that the *Shack* court ignored the perspectives of those whom it sought to protect. It requires me to say why that mattered. If the court was able to achieve a significant inroad into rights of exclusion for the benefit of many subordinate non-owners with little or no costs for those among them who fit the category of “subaltern,” then (despite Spivak’s objections) lawyers might conclude that the court made the right choices. But there were costs—indeed potentially significant costs—and one of the concerning features of the case is that the costs have been so hidden from our view. The purpose of this Section is to illuminate those costs.

In an Article dedicated to unearthing the subaltern voice in property law, it is well to begin by stressing that the bluntest cost of consolidating the voices and interests of the migrant workers—at least in this case—was to produce a holding that explicitly protected only the right of other people to access the workers.<sup>232</sup> The case did not protect the workers’ rights outside Tedesco’s farm, and it only protected their rights on or to the farm in limited respects. As a doctrinal matter, the case was narrowly engaged with the question of increasing the standard of living of workers in a uniquely private and confined context, namely in a camp on a private owner’s property.<sup>233</sup> This limitation may well be one reason why the case is cited so infrequently outside of New Jersey, which seems to be one of the few jurisdictions in which migrant workers consistently were housed on the farms where they worked.<sup>234</sup> The case did not address the needs and rights of workers who left the property except to the extent that it relied on lawyers and other service providers to protect those rights through greater contact at the migrant workers’ camps.<sup>235</sup> This

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231. *Supra* note 163.

232. *Shack*, 277 A.2d at 374 (holding that the defendants did not trespass).

233. The holding in the case signals this reality. *Id.* (justifying aid workers’ ability to enter on private land to provide services to migrant workers).

234. S. REP. NO. 91-83, at 35 (1969) (stating eighty-six percent of migrant workers do not live on farms).

235. *Shack*, 277 A.2d at 374–75 (detailing only what the employers must do when visitors attempt to aid workers on their property).

protection was an important one, but again, it assumed continuing good will, interest, attention, and *understanding* on the part of the service providers in addressing the workers' most pressing needs.

Moreover, even the protections the case established for the workers on farm camps were incomplete. For example, the defendants' briefs described numerous and egregious examples of summary evictions, where employers required workers and their families to leave their homes with no notice.<sup>236</sup> Given its emphasis on the right of access by others, the court's holding would do nothing to address such deeds by employers. Indeed, it is possible to imagine that a court construing *Shack's* holding narrowly (but not unreasonably so) could conclude that the case would not prevent an employer from requiring his workers to remain on his farm, so long as such requirements did not rise to the egregious level of false imprisonment or similarly tortious behavior.<sup>237</sup>

In addition to the costs imposed by the particularities of the New Jersey Supreme Court's holding, there is the broader question of what was lost as a result of the court's endorsement of the values and interests expressed in the federal Economic Opportunity Act and the 1967 amendments thereto.<sup>238</sup> One way to pose this question might be to ask what was lost by affiliating important values such as dignity, equality, and freedom with the qualitatively different value of integration. The former set of values could be achieved outside of an integrative framework, although there is certainly a powerful argument that integration is a potent means of protecting such values. But the federal statute consistently presumed that integration was the vehicle for protecting those values.<sup>239</sup>

The answer to this question requires us to contemplate in greater detail the lives of the migrant workers off the farms and indeed beyond their work lives. Given the paucity of qualitative information about the workers, this is not easy to do. But even the statistics can be telling. Although the 1964 and 1967 legislation make nothing of it, the legislative history, especially for the 1964 Act, provides relatively detailed demographics of the migrant workers who worked in the United States during the decade preceding the case. They were predominantly male, although the majority of them traveled with one

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236. FARM WORKER DIV., *supra* note 167, at 6.

237. See RESTATEMENT (SECOND) OF TORTS § 35 (1977) (defining false imprisonment); DAN B. DOBBS ET AL., THE LAW OF TORTS § 381 (2d ed. 2011) (discussing the elements of the tort of false imprisonment).

238. *Shack*, 277 A.2d at 372–73.

239. See *supra* Part III.A.1 (describing the legislative history of the Economic Opportunity Act).

or more family members.<sup>240</sup> A quarter of them were boys, age fourteen to seventeen.<sup>241</sup> Among those of Mexican origin, “many” were “permanent immigrants” but “retain[ed] their residence in Mexico.”<sup>242</sup> And “some” returned to “permanent homes in Mexico.”<sup>243</sup> One important message to take from these statistics is that a significant number of workers maintained very strong ties to other countries, and that these ties were often physical, involving both ownership of property and connections with family members in those countries.

It would be reasonable to assume that this subset of workers would have interests both in sending money safely home to other countries and in regularly visiting those countries.<sup>244</sup> As a corollary, it would be reasonable to assume that these workers would treat the protection of their wages as paramount and perhaps even more important than their own living conditions on the farms.<sup>245</sup> For residents of the United States, these kinds of protections have long existed in a suite of federal and state laws, including consumer protections for transmitting money by physical mail or electronic means and banking laws for protecting financial transactions,<sup>246</sup> and of course labor and employment laws protecting access to wages earned.<sup>247</sup> But these protections by and large did not exist for the migrant workers because they were typically trying to engage in transactions beyond the borders of the United States.<sup>248</sup>

Rather than addressing these types of financial transactions, however, the federal statute, with its integrationist perspective, contributed tremendous resources to supporting homeownership among migrant workers. The statute developed new sources and kinds of financing opportunities uniquely targeted to the workers, allocating a total of two million dollars for such long-term housing opportunities.<sup>249</sup> It did so without any apparent attention to how many migrant workers could achieve sufficient wage levels and access

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240. S. REP. NO. 91-83, at 5, 8 (1969).

241. *Id.* at 4.

242. *Id.* at 11.

243. *Id.*

244. See generally Ezra Rosser, *Immigrant Remittances*, 41 CONN. L. REV. 1, 1 (2008) (proposing that remittance transactions “should be understood as an anti-poverty tool”).

245. See *id.* at 56–61 (discussing the motivations, centering on love, for sending remittances home).

246. See generally U.C.C. arts. 3–4 (2013) (creating uniform systems for negotiable instruments and bank deposits and collections).

247. See *supra* Part III.A.3.b (briefly discussing relevant federal laws).

248. See Rosser, *supra* note 244, at 28–37 (noting, for example, that in 2004 over thirty billion dollars in remittances were sent from the United States to Latin America).

249. S. REP. NO. 90-563, at 63 (1967).

to communities to be able to participate in the housing market even with the availability of financing.<sup>250</sup> Equally importantly, it did so without paying attention to how many workers would *want* such opportunities and whether those numbers were commensurate with the resources allocated for such purposes. The same could be said of English-integrative education for the children of the workers, though on this point it is important to acknowledge that a stay of any length in the United States may well have justified teaching the children English as a second language.<sup>251</sup>

Meanwhile, these statutes, and federal law more generally, ignored the possibility that a greater number of migrant workers may well have prioritized legal protections for sending remittances to other countries over homeownership opportunities in the United States. It was not until exactly forty years after the New Jersey Supreme Court decided *State v. Shack* that federal law provided limited protections for such transactions. These protections, which required disclosure of all terms in both English and the language of the remittance sender and an error resolution procedure, can be found in the Dodd-Frank Act.<sup>252</sup>

But does that matter? If the federal statute supported by cases such as *State v. Shack* significantly improved housing and work conditions for migrant workers on the farms, does it matter that such achievements were made at the expense of costs such as these? The answer surely must be “yes” if meaningful resources were allocated for purposes of limited value to the workers. It is clear that the emergency response embodied in the 1964 Act was likely helpful to a broad range of workers. In this respect, the original statute had important value. But it is also quite possible that the 1967 Amendments went too far in the wrong direction, redirecting resources for emergency response instead to a subset of workers who sought—and had a good shot at achieving—longer-term integration. As importantly, the 1967 Amendments set the tone for federal law to establish a framework of support for migrant workers and much more broadly for immigrants to the U.S. that was and is blatantly focused on integration into middle class life. This is a cause that many immigrants clearly endorse and share but also one that left out a subset of migrant workers and that continues to leave out a subset of

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250. *Id.* at 62.

251. S. REP. NO. 88-1218, at 30 (1964).

252. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1073, 124 Stat. 1376, 2060, 2063 (2010) (codified in scattered sections of 15 U.S.C.).

immigrants. In this respect, the 1967 Amendments particularly contributed to a significant gap in federal law that still exists today.

As for the case as distinguished from the federal statutes, the New Jersey Supreme Court's use of the federal statutes as a means of bolstering its analysis of Tedesco's rights makes plain that the case was about property law. It was not a case responding to the full range of actual needs and interests of the workers. And this focus on property law relates to a more abstract cost that this Article proposes merely to name rather than explicate. The consolidating effect of the court's analysis, which focuses attention on owner versus non-owner, extends beyond just the law of ownership. While statutes such as the Economic Opportunity Act may have had far greater force in immigration reform than individual cases such as *State v. Shack*, it was no doubt affirming that the portrait the case painted was so similar to that painted by the federal statutes. The case and the statutes supported each other in assuming a cohesive and comprehensive understanding of the workers. The query, of course, is whether that understanding was, in important respects, false.

#### IV. PRAGMATIC POSTCOLONIALISM IN RATIONAL LAWMAKING

This Part is the prescriptive complement to the postcolonialist critique in Part III. My purpose here is to further develop and then apply the pragmatic postcolonialist framework. For this purpose, I turn in Section A to another important property law case. Though it is not as iconic as *State v. Shack*, *Hilder v. St. Peter* presents a very different approach to representing the voice of the individual seeking relief. In so doing, the case provides a basis for developing my proposed theoretical framework into an instrument that is convenient to use in actual decision-making. In Section B, I evaluate the three devices that I argue are central to applying a pragmatic postcolonialist approach in property law. Finally, in Section C, I apply these three devices to *State v. Shack*.

##### A. *Hilder v. St. Peter as an Example of Pragmatic Postcolonialism*

Perhaps the best vehicle for exploring whether it is possible for property law to create more space for subaltern voices is to look for a case that evinces more of a connection to one or more voices that may have been subaltern. This section embodies such an effort by subjecting the case of *Hilder v. St. Peter* to the same analytical test imposed on *State v. Shack* in Part III of this Article. *Hilder* was an

important contribution in the group of cases, beginning with *Javins v. First National Realty Corp.*,<sup>253</sup> that established the implied warranty of habitability as a powerful protection for residential tenants. It is a case brought by a woman against her landlords for their failure to provide her and her family with a habitable apartment.<sup>254</sup>

It is not clear whether the plaintiff, Ella Hilder, was in fact “subaltern,” even as defined using the broader and more modern definitions of that term.<sup>255</sup> We know a great deal more about Hilder than we do about the migrant workers with whom Shack and Tejeras tried to meet. But we still do not know most of the central facts that would allow us to divine her membership in such a class. This is both a strength and a weakness of my theoretical model. It is a strength because my use of *Hilder* ought to demonstrate the accessibility of subaltern perspectives by means of the legal devices I discuss. Even a case that failed to answer the basic question of subaltern status can point us in the direction of protecting subaltern voices. But *Hilder* is also a weakness in my analysis because it does not provide a wholly successful demonstration of pragmatic postcolonialism. We cannot know, for example, whether the remedies that the *Hilder* court suggested actually protected subalternity. Such a demonstration must be left to other analyses.

### 1. Differing representations

#### a. The plaintiff's testimony

The difference between *Shack* and *Hilder* in their preservation of “voice” becomes immediately apparent when one begins to consider the very different representation of the plaintiff by the Vermont Supreme Court in *Hilder*. Most palpably, one of the parties in the case, the plaintiff Ella Hilder, was also one of the ultimate targets of the Supreme Court of Vermont's protection.<sup>256</sup> In contrast to *Shack*, therefore, it was much more natural for one of the relevant “texts” in this case to be the plaintiff's own testimony. This text, indeed, was where the court's opinion began.

After introducing the basis for appeal by the defendants-landlords, the court immediately provided an “uncontested” description of the

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253. 428 F.2d 1071 (D.C. Cir.).

254. *Hilder v. St. Peter*, 478 A.2d 202, 205–06 (Vt. 1984). The court quite clearly was also targeting Hilder's children, as well as other tenants in the State of Vermont. *Id.* at 208 (explicitly adopting the implied warranty of habitability in Vermont).

255. See *supra* Part II.A (analyzing the problem of representing subaltern voices).

256. *Hilder*, 478 A.2d at 206 (using the implied warranty of habitability as a basis for protecting the plaintiff).

facts that drew extensively from the plaintiff's testimony.<sup>257</sup> As the court described, the plaintiff, her three children, and a newborn grandson lived in two different apartments in a building owned by the defendants (who were a married couple) for a period of twenty-five months.<sup>258</sup> The court described:

Upon moving into the apartment, plaintiff discovered a broken kitchen window. Defendant promised to repair it, but after waiting a week and fearing that her two year old child might cut herself on the shards of glass, plaintiff repaired the window at her own expense. Although defendant promised to provide a front door key, he never did. For a period of time, whenever plaintiff left the apartment, a member of her family would remain behind for security reasons. Eventually, plaintiff purchased and installed a padlock, again at her own expense. After moving in, plaintiff discovered that the bathroom toilet was clogged with paper and feces and would flush only by dumping pails of water into it. Although plaintiff repeatedly complained about the toilet, and defendant promised to have it repaired, the toilet remained clogged and mechanically inoperable throughout the period of plaintiff's tenancy. In addition, the bathroom light and wall outlet were inoperable. Again, the defendant agreed to repair the fixtures, but never did. In order to have light in the bathroom, plaintiff attached a fixture to the wall and connected it to an extension cord that was plugged into an adjoining room. Plaintiff also discovered that water leaked from the water pipes of the upstairs apartment down the ceilings and walls of both her kitchen and back bedroom. Again, defendant promised to fix the leakage, but never did. As a result of this leakage, a large section of plaster fell from the back bedroom ceiling onto her bed and her grandson's crib. Other sections of plaster remained dangling from the ceiling. This condition was brought to the attention of the defendant, but he never corrected it. Fearing that the remaining plaster might fall when the room was occupied, plaintiff moved her and her grandson's bedroom furniture into the living room and ceased using the back bedroom. During the summer months an odor of raw sewage permeated plaintiff's apartment. The odor was so strong that the plaintiff was ashamed to have company in her apartment. Responding to plaintiff's complaints, Rutland City workers unearthed a broken sewage pipe in the basement of defendants' building. Raw sewage littered the floor of the basement, but defendant failed to clean it up. Plaintiff also

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257. *Id.* at 205–06. See also Transcript of Record at 6–22, *Hilder*, 478 A.2d 202 (No. 82-440).

258. *Hilder*, 478 A.2d at 205.

discovered that the electric service for her furnace was attached to her breaker box, although defendant had agreed, at the commencement of plaintiff's tenancy, to furnish heat.<sup>259</sup>

Several features about the plaintiff's testimony as "text" are relevant, especially when contrasted with the texts used to represent the migrant workers in *State v. Shack*. First, the portrait that was presented of the plaintiff and her family was quite detailed. There was very little question who the plaintiff was, what had happened, and why she was pursuing legal relief. The kinds of basic questions one might ask about the migrant workers in *Shack*—How long had they lived on the property? Did they have children? How did their legal problems arise?—were easily answered by the statement of the facts in *Hilder*. Second, this description of the plaintiff was not translated into a more abstract portrait of people "like her." Obviously, the fact that the picture of the plaintiff was taken largely from the plaintiff's own testimony rendered superfluous the question of whether that picture actually "represented" the lived experience of the plaintiff and her children. Contrast this with the picture of migrant workers presented by Dr. Coles in the legislative history for the 1967 Amendments to the federal Economic Opportunity Act<sup>260</sup> or even with the claims made by the defendants about the migrant workers in *State v. Shack*.<sup>261</sup> The lens of interpretation was not required in *Hilder*. There was no need for such an abstraction.

Third, it was very clear from the plaintiff's testimony that she herself had articulated the legal and political representation, *vertreten*, that she desired. It was plain that the plaintiff desired a more decent form of housing than the defendants had afforded her over the prior two years.<sup>262</sup>

Fourth, therefore, the portrait, *darstellen*, that was presented was narrowly tailored to the legal question before the court. While the court did not have occasion to examine the broader set of reasons that resulted in the plaintiff having no option but to live in defendants' apartments, the court did work hard to connect the plaintiff's lived experience to her legal experience. In part, that effort was accomplished by choice of legal question. In part, as I will

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259. *Id.* at 206.

260. See *supra* note 168 and accompanying text (describing Dr. Coles's psychological portrait of migrant workers as distinct from American citizens in a variety of ways).

261. See generally Brief of the Defendants-Appellants, *supra* note 146, at 29 (citing the difficulty of working with migrant workers due to their "cultural alienation").

262. *Hilder*, 478 A.2d at 206 (listing examples of ways the plaintiff attempted to rectify her deplorable living conditions when the defendant repeatedly failed to correct problems).

discuss below, it was accomplished by the choice of remedies that the court preserved for the plaintiff.

Fifth, and again in contrast to the portrait presented of migrant workers by the 1967 Amendments to the Economic Opportunity Act, the portrait that emerged of the plaintiff was as someone who was neither incompetent nor in need of being “fixed.” Rather, it was of someone who required the aid of a court to prevent the defendants from acting on their avarice.

*b. Vermont landlord-tenant law*

As in *State v. Shack*, a second “text” that the court had before it in *Hilder* was state landlord-tenant law—this time, the law of the State of Vermont. Also as in *Shack*, the use of this text raised the question of whether the representation of tenants within this area of law captured the voice(s) of the particular parties who claimed that status.<sup>263</sup>

Just as in New Jersey, Vermont law in 1984 was bending in the direction of recognizing leases as a form of contract, thereby importing all of the norms of contract law into this form of property conveyance. But rather than rejecting these norms as the Supreme Court of Jersey did in *Shack*, the *Hilder* court embraced and ultimately used them as a vehicle for preserving the plaintiff’s voice in that case.<sup>264</sup>

In Vermont, the legal recognition of leases as contracts followed the path laid by the iconic case of *Javins v. First National Realty Corp.* and its progeny. Such a trajectory began with the important recognition that it no longer reflected reality to enforce the principle of *caveat lessee* where the tenant was typically not a farmer “capable of making whatever repairs were necessary to his primitive dwelling.”<sup>265</sup> Rather it was the landlord who was “more familiar with the dwelling unit and mechanical equipment attached to that unit, and [was] more financially able to ‘discover and cure’ any faults and breakdowns.”<sup>266</sup> The designation of leases as a form of contract therefore justified eliminating the requirement that a tenant’s choices when faced with inferior living conditions were to abandon the premises and stop paying rent or to remain and continue to pay rent.<sup>267</sup>

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263. *Id.* at 208, 211 (noting that the legislature has officially recognized the need for adequate housing to protect public health and safety).

264. *Id.* at 208–09, 211 (holding that a lease of a residential dwelling “creates a contractual relationship between the landlord and tenant” and that contract remedies are available for breach of these agreements).

265. *Id.* at 207.

266. *Id.*

267. *Id.*

Instead, under Vermont law, parties to leases had the right to avail themselves of the covenants, implied terms, and prevailing norms undergirding contract law, as well as contract remedies.<sup>268</sup> For consumer products and services, such implied terms and covenants included the important warranties of quality (such as fitness and merchantability), which the *Javins* court identified in the lease context to amount to an implied warranty of habitability.<sup>269</sup> As for remedies, the court claimed to follow Vermont law in holding that, because “the lease of a residential dwelling creates a contractual relationship between the landlord and tenant, the standard contract remedies of rescission, reformation and damages are available to the tenant when suing for breach of the implied warranty of habitability.”<sup>270</sup>

At the same time, in recognizing the contractual nature of residential leases, Vermont law was quite specific in its understanding of the type of contract at issue in this context. These were consumer contracts, practically in the nature of contracts of adhesion. The *Hilder* court followed *Javins* and other warranty of habitability cases in recognizing that tenants in residential leases were “virtually powerless to compel the performance of essential services.”<sup>271</sup> Residential leases under the landlord-tenant law of Vermont thus fell within a special category of contract law in which one party received additional statutory and common law protections as a result of her inferior bargaining status.<sup>272</sup> In Vermont, this recognition came in the form of a statutory pronouncement:

[S]ubstandard and decadent areas exist in certain portions of the state of Vermont and . . . there is not . . . an adequate supply of decent, safe and sanitary housing for persons of low income and/or elderly persons of low income, available for rents which such persons can afford to pay . . . this situation tends to cause an increase and spread of communicable and chronic disease . . . [and] constitutes a menace to the health, safety, welfare and comfort of the inhabitants of the state and is detrimental to property values in the localities in which it exists[.]<sup>273</sup>

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268. *Supra* note 264.

269. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075–78, 1080 (D.C. Cir. 1970) (“Contract principles established in other areas of the law provide a more rational framework for the apportionment of landlord-tenant responsibilities; they strongly suggest that a warranty of habitability be implied into all contracts for urban dwellings.” (footnote omitted)).

270. *Hilder*, 478 A.2d at 209.

271. *Id.* at 207 (internal quotation marks omitted); *see also Javins*, 428 F.2d at 1079 (describing a lease as a contract).

272. *Javins*, 428 F.2d at 1079–80; *Hilder*, 478 A.2d at 209.

273. *Hilder*, 478 A.2d at 208 (first, second, third, fourth, and fifth alterations in original) (citation omitted).

The *Hilder* court identified this special species of contract with particular remedies that were not necessarily available in other contractual settings. One clear example that existed in Vermont law was the important remedy of rent abatement.<sup>274</sup> By connecting this remedy to a breach of warranty claim, the court firmly eliminated the property law requirement that a tenant must abandon an apartment to avoid paying rent.<sup>275</sup>

Through what may have been a happy accident, the portrait of tenants that emerges from the court's presentation of Vermont landlord-tenant law is noteworthy from a postcolonialist perspective. Even though the law effectively defined a class of tenants in need of legal protections, that definition was relatively narrow in its scope and imagery.<sup>276</sup> The purpose of the representation was merely to afford enough protections to tenants to allow them access to safe, decent, and sanitary housing, although that may well have meant different things in different contexts. There was no obvious broader agenda, such as economic or political integration or even poverty alleviation. This allowed for a class definition narrowly tailored to the political purpose. At the same time, the vision of tenants under Vermont law was also pluralist. At a basic level, while it was clear that the class of tenants at issue consisted of city dwellers, not farmers,<sup>277</sup> the court acknowledged that some were elderly, some were of low income, some had relatively more bargaining power and sophistication, and some had less.<sup>278</sup> This recognition matched the law: while confirming that a lease was a form of contract, the court also found it to be a contract regularly used by parties with unequal bargaining power.<sup>279</sup> Thus, what we see in Vermont law is a baseline definition of a basic class deserving of protection by means of consumer warranties. But beyond that baseline, there is a recognition that tenants within the class are different. There is a basic pluralism of needs discernable in the Vermont jurisprudence.

## 2. *The Supreme Court of Vermont's opinion*

In working with these two texts—these two different portraits of tenants in Vermont—the *Hilder* court made some markedly different choices from those made by the *Shack* court. One explanation for the

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274. *Id.* at 209–10.

275. *Id.* at 210 n.3.

276. *See id.* at 208 (tying the class definition very specifically to the questions of harm and remedy).

277. *Id.* at 207.

278. *Id.* at 208.

279. *Id.* at 207.

difference in adjudicatory choices may be that the *Hilder* court was not obliged to deploy nearly so much rhetorical force as the *Shack* court. In *Hilder*, the court was able to follow the lead of famous cases in nearby jurisdictions to complete a progression already begun by the Vermont legislature and courts.<sup>280</sup> As importantly, the progression did not involve the marshaling of rights powerful enough to overwhelm the countervailing right of property ownership. In the landlord-tenant context, it was settled long before *Hilder* that the landlord had voluntarily relinquished her right of possession and use to the tenant in return for rent. In *Shack*, by contrast, all of the skills of Llewellyn's "skilful judge" were required to overcome the owner's right to exclude for the purpose of giving a broadly defined class access to the norms of middle class American life.<sup>281</sup>

The markers of this difference are evident throughout *Hilder*. The *beginning* point for the court's discussion was with the plaintiff's own testimony.<sup>282</sup> Thus, in effect, it was the plaintiff's voice that defined the class (tenants) of which she was a member for purposes of legal representation. Both the specificity of the legal representation required and the obvious match between the individual plaintiff and the class obviated the need for the court to generalize the details of the plaintiff's circumstances or to consolidate her experience with those of other tenants. The plaintiff clearly qualified as a member of the class entitled to protection from breaches of the warranty of habitability.

But what makes *Hilder* an extraordinary case is the court's reaction to this easy task of class definition. The court could have simply concluded that the plaintiff was entitled to the protections clearly evident in Vermont law. Doing so would have required the court simply to match the facts to the current state of the law on breaches of the warranty, and that in turn would have meant looking for violations of the housing code. As the court stated:

In determining whether there has been a breach of the implied warranty of habitability, the courts may first look to any relevant local or municipal housing code; they may also make reference to the minimum housing code standards . . . . A substantial violation of an applicable housing code shall constitute prima facie evidence that there has been a breach of the warranty of habitability.<sup>283</sup>

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280. See *id.* at 207–11 (listing and describing cases).

281. Llewellyn, *supra* note 127, at 70–76 (describing a skillful judge as one who uses logic and wisdom to overcome the barriers of precedent).

282. *Hilder*, 478 A.2d at 205–06.

283. *Id.* at 208.

Any such violations would then be remedied by rent abatement and standard damages available for breach of contract.<sup>284</sup>

But the court did not stop there. Instead, the court deployed the two texts, not to filter out the pluralism within the portrait of tenants presented by Vermont law, but rather to accentuate and *protect* those individualisms. In doing so, the court both extended the warranty of habitability claim at the same time that it adopted it in Vermont and expanded the range of remedies available for such a breach.<sup>285</sup> Regarding the claim itself, the court held that it was “merely . . . a starting point” to look at the housing codes to determine whether a breach of the warranty had occurred.<sup>286</sup> The court also inquired into “whether the claimed defect has an impact on the safety or health of the tenant.”<sup>287</sup> In so doing, the court combined an objective standard relating to “safety” and “health” with a highly individualized look at the particular tenant bringing the claim. In *Hilder*, for example, that likely meant that the plaster falling from the ceiling in one of the bedrooms was not merely an inconvenience.<sup>288</sup> Rather, it was a safety and health issue for the newborn child into whose crib the plaster was falling.<sup>289</sup>

The court also required this type of individualized inquiry in determining remedies for the breach. For example, in addition to affirming the important remedy of rent abatement, the court cited a Vermont employment case in concluding that damages ought to be available to the plaintiff for the “discomfort and annoyance” she and her family experienced at the hands of the defendants.<sup>290</sup> Similarly, the court concluded that, although punitive damages are not the norm in contract cases, a landlord’s “willful and wanton or fraudulent” behavior could justify such damages in cases adjudicating breaches of lease agreements.<sup>291</sup>

In these details, the “skilful judg[ing]” in *Hilder* was of an entirely different sort than in *Shack*.<sup>292</sup> In *Shack*, the court filtered out

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284. *Id.* at 209.

285. *See id.* at 208–09 (asserting that a breach of the warranty of habitability can be remedied through standard contractual remedies, and that a court, when determining if a breach has occurred, should look to relevant municipal housing codes, statutory standards, and the claimed defect’s impact on the health and safety of the tenant).

286. *Id.* at 209.

287. *Id.*

288. *See id.* at 206 (noting the plaster fell into the plaintiff’s grandchild’s crib). Of course, this would need to be determined by a trial court on remand. *Id.* at 211.

289. *Id.* at 206.

290. *Id.* at 209.

291. *Id.* at 210.

292. Llewellyn, *supra* note 127, at 73.

differences in order to create a class that appeared as a paragon of cohesion and compelling need. In *Hilder*, the court identified differences that required different legal responses at different times. The need for housing required a property response.<sup>293</sup> The basic reality of bargaining required contract protections.<sup>294</sup> The inequality of bargaining required consumer law protections in the form of an implied warranty.<sup>295</sup> The public health and sanitation issues required reference to housing and health codes.<sup>296</sup> The court inquired into the plaintiff's particular health and safety to protect a newborn, the plaintiff's desire to be a host in her own home, and her individualized sense of dignity.<sup>297</sup> It also raised the possibility of reparation by means of punitive damages.<sup>298</sup> The court matched the pluralism in legal values to the pluralism in values of the individuals in the class of tenants.

It should be clear, then, that there is room for skillful judging to pay more attention to voice while remaining very skillful. At bottom, *Hilder* demonstrates that postcolonialism can have an instrumentalist edge. While Spivak may not have advocated, approved of, or even thought of the instrumentalist manifestations of her critique, the pieces of postcolonialist analysis that I adopt here are intended for use by a court required to make a rational decision.<sup>299</sup>

### B. *Three Devices for Protecting Subaltern Voices in Property Law*

*Hilder* thus provides a rich basis for developing my pragmatic postcolonialist framework into a workable instrument for legal decision-making. Built on a foundation of pluralism, the case provides three specific devices that can be enormously useful in unearthing and protecting subaltern voices. This Section explicates both the foundation and the features of each device.

The foundation for incorporating the subaltern perspective into property law is to acknowledge the importance of pluralism. As

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293. *Hilder*, 478 A.2d at 208 (emphasizing the Vermont legislature's interest in strengthening property values through local housing authorities).

294. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079–80 (D.C. Cir. 1970) (noting that tenants and landlords generally have unequal bargaining power and that contractual protections help ensure tenants' legitimate expectations of quality).

295. *Id.* at 1079.

296. *Hilder*, 478 A.2d at 208.

297. See *id.* at 205–06 (detailing the plaintiff's various health and safety concerns and the landlord's failure to respond to each one).

298. See *id.* at 210 (holding punitive damages are appropriate when a landlord fails to repair a facility that is "essential to the health and safety of his or her tenant" after he receives notice of a defect).

299. See Alexander, *Pluralism and Property*, *supra* note 16, at 1045–51 (discussing the imperative for judges to make rational choices between values).

recent scholarship has compellingly demonstrated, a monist perspective in property law relentlessly reduces individual values into a more cohesive and unitary understanding of needs, welfare, and desires about and through property.<sup>300</sup> Such a reductive influence emphasizes the economic importance of ownership over other values, and as we have seen in *Shack*, dictates a framework in which something really extraordinary is required to overcome rights of ownership.<sup>301</sup> When courts recognize multiple values that may at times conflict, we can expect them to use legal mechanisms to protect those values as coequal with the economic rights of owners. This not only has the benefit of more widely distributed legal protection, but as we have seen in *Hilder*, it creates and protects opportunities for subaltern voices to be heard.

But adopting a more instrumentalist version of postcolonialism in property law requires more. In particular, what is required are mechanisms that expose pluralist, even fragmented, perspectives in the process of constructing a class for the purpose of legal representation. Stated differently, the pragmatic postcolonialist challenge is to preserve the fragmentation in *darstellen* even as instrumentalist cohesion is achieved at some beneficial level for the purpose of *vertreten*. *Hilder* is particularly instructive here because the *Hilder* court made such accomplished use of three reliable legal devices that serve that purpose.

The first device is the case attorney's love of stories. As Llewellyn so eloquently described, those of us steeped in the common law "have learned that the concrete instance, the heaping up of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, *mean* anything at all."<sup>302</sup> The particular facts of a case are what give it meaning. But as *Hilder* shows, from a postcolonialist perspective, sharing facts can be a powerful way to create space for the unique voice of subaltern individuals. The statement of facts, including facts that appear irrelevant to the legal conclusion, can serve to separate the aesthetic representation of the parties from the legal and political representation. But *Hilder* also shows us that the device of fact stating in common law jurisprudence

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300. *Id.* at 1045; Hanoch Dagan, Pluralism and Perfectionism in Private Law 2–3, 10, 12–13 (June 20, 2011) (unpublished manuscript), *available at* <http://ssrn.com/abstract=1868198> (promoting instead a pluralistic approach to "account for the vast heterogeneity of . . . private law doctrines").

301. *See* State v. Shack, 277 A.2d 369, 370–71 (N.J. 1971) (detailing Tedesco's refusal to allow the defendants on to the property to aid the workers).

302. Llewellyn, *supra* note 127, at 12.

is not merely aesthetic or rhetorical. Unlike the technique of creating space for personal narratives in the process of client interviewing, fact stating of the kind that occurred in *Hilder* did more than “empower” the client.<sup>303</sup> In *Hilder*, the plaintiff’s story also had the power to serve as a basis for an individualized claim of breach of warranty—grounded in the unique health and safety concerns of the plaintiff and her family—as well as a basis for uniquely tailored remedies.<sup>304</sup> In these respects, the use of the plaintiff’s testimony as text made the most beneficial advantage of the storytelling process in litigation.

The second device that *Hilder* teaches is the importance of tying the legal claims to the individualized portrait of the parties pursuing those claims. In *Hilder*, the court accomplished this task by requiring future courts investigating breach of warranty claims to consider the individualized health and safety of the tenant in the case.<sup>305</sup> Spivak may well not have approved of such a move because of the risk that it would further intertwine the aesthetic with the political forms of representation.<sup>306</sup> But from a pragmatic postcolonialist perspective, the infusion of the plaintiff’s voice into the *legal* claim forced recognition of the fragmented nature of that claim. For some tenants, falling plaster would be un-concerning; for this one, it was an important safety concern.<sup>307</sup> Some tenants would be able to find better, more expensive housing; this one presumably could not. Even though the plaintiff may not have been at risk of catching communicable diseases from her living situation, elderly tenants likely would encounter such risks.<sup>308</sup>

The counterpart to recognizing the fragmented nature of tenants’ claims is recognizing that the landlord’s rights are also fragmented in nature because the landlord transfers rights of possession and use to the tenant. But the *Hilder* court also *de facto* determined that

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303. For leading discussions of the value of client narratives, see Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2109–11 (1991) (starting an essay with a client’s personal narrative of living without gas and electricity while on public assistance); López, *supra* note 104, at 618, 623–25 (discussing undocumented Mexican workers); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 21–28 (1990) (providing the story of a client to “trace how the complex realities of social inequality undermine the law’s formal promise of procedural justice”).

304. See *Hilder v. St. Peter*, 478 A.2d 202, 208–09 (Vt. 1984).

305. *Id.*

306. Spivak, *Can the Subaltern Speak?*, *supra* note 12, at 275–79 (expounding on the importance of fragmented voice).

307. See *Hilder*, 478 A.2d at 206 (explaining the plaster fell from the ceiling onto the plaintiff’s bed and her grandson’s crib).

308. *Id.* at 208 (noting the Vermont legislature’s concern for low income and elderly people).

sometimes a landlord breaches a warranty by failing to replace plaster, and sometimes not.<sup>309</sup> More broadly, as against different tenants in different circumstances, the same landlord may be constrained by different contract limitations. The pluralism in legal values, as between property law and contract law for instance,<sup>310</sup> can serve as the basis for recognizing the pluralism in values and rights. Indeed, a court could extend the device of preserving individual (and fragmented) voice *through* the legal claims even beyond its use in *Hilder* by reading precedent with an eye toward identifying the fragmented nature of the rights protected by the legal decisions in those cases. By reading cases for fragmentation rather than cohesion, courts can reinforce and extend *Hilder's* methodology for protecting voice in the course of legal representation.

The third, and perhaps most potent, device from *Hilder* is the deconsolidation of voice and identity by means of choice of remedy. In *Hilder*, this device allowed the court to recognize the unique impact of the defendants' actions on the plaintiff at the point when the breach of warranty claim had already been proven.<sup>311</sup> The individualized recognition of needs through remedies is by no means new. All that the postcolonialist perspective adds is a special inquiry into whether particular remedies might better reflect the subaltern voice.

Examples abound in property law of courts acknowledging the unique details of a dispute through remedies. Very often, in doing so courts recognize the unique relationships among the different parties.<sup>312</sup> For example, in *Rase v. Castle Mountain Ranch, Inc.*,<sup>313</sup> after balancing the parties' rights to real property surrounding a lake owned by the plaintiff but on which the defendants had built their homes with the encouragement of the plaintiff's predecessor in ownership, the court included in its remedy a period of time in which defendants could disassemble their homes with dignity and find other places to live.<sup>314</sup> Demonstrating the extraordinary potential of remedies, in *Southern Burlington County N.A.A.C.P. v. Township of*

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309. *See id.* at 206, 208–09 (noting the claimed defect must “affect the health or safety of a tenant,” and implying, in this case, the plaster could affect the health and safety of the tenant if it fell from the ceiling when the tenant’s room was occupied).

310. *Cf.* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 774–77 (2001) (discussing contract law as a set of default rules and property law as a set of mandatory rules that cannot be changed by mutual agreement).

311. *Hilder*, 478 A.2d at 209–10.

312. In so much of his work, Professor Singer has emphasized the importance of relationships in property lawmaking. *See, e.g.*, Singer, *Reliance Interest*, *supra* note 8, at 690–91 (explaining the common law rule that “impose[s] a duty to act to help others when a special relationship exists between the parties”).

313. 631 P.2d 680 (Mont. 1981).

314. *Id.* at 686.

*Mount Laurel*,<sup>315</sup> the court created a state-wide administrative structure designed to inquire extensively into whether municipalities in the State of New Jersey were providing meaningful housing opportunities for all their residents.<sup>316</sup> This was a remarkable example of recognizing the structural inability of some residents to speak. The court chose a remedy that addressed the structural problem with care and precision.

More broadly, property law is teeming with examples of injunctions awarded in recognition of the uniqueness of land.<sup>317</sup> Pragmatic postcolonialism would only slightly expand the inquiry in such cases to recognize the uniqueness of the parties and their relationships to the land and each other as well. In other cases, however, where courts seeking cohesion might be tempted to view a property dispute involving written contracts through the lens of contract law to the exclusion of property law, pragmatic postcolonialism could have a distinctive impact. In such cases, a focus on the voices of the parties could well dictate injunctive relief, thereby importing a property value into a contract context. Doing so would result in greater pluralism of legal values as a reflection of the pluralistic values of the parties themselves.

From the perspective of pragmatic postcolonialism, remedies are valuable devices partly because of timing. They have the potential to undo—at an appropriate point in the litigation—that which courts (and counsel for the parties) may feel utterly compelled to do at an earlier stage in the case. As I have discussed, it may often appear impossible to pursue a claim on behalf of a party without matching her facts to the facts of precedential cases. Doing so is a consolidating process. Ella Hilder may not have cared about the housing code violations. She may have felt much more harmed by her inability to host dinner guests and by the plaster falling on her newborn. But even in Vermont, the code violations were the starting point for determining whether the defendants had breached the warranty of habitability.<sup>318</sup> The legal imperative of pursuing claims may require the formation of a class that must, to some extent, be

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315. 336 A.2d 713 (N.J. 1975).

316. See *id.* at 731–33 (discussing the role of a state planning agency in determining a municipality's fair share of the present and prospective regional need).

317. See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 704–05 (1990) (listing a number of types of property cases involving “wrongs” and indicating that courts “almost never withhold injunctive relief in these cases on the ground that damages are an adequate remedy”).

318. *Hilder v. St. Peter*, 478 A.2d 202, 208–09 (Vt. 1984).

unified and represented by someone outside of that class.<sup>319</sup> As we saw in *Shack*, this process of class formation also has the tendency to superimpose a more general set of “moral” claims to strengthen the legal claims, a process of abstraction that makes the portrait less representative of reality.<sup>320</sup> But at the stage of determining remedies, the members of that class can be given the opportunity to reassert control by voicing those particular harms that most injured them. The portrait can be used at this stage to enunciate the injury, even if that injury conflicts with aspects of the legal claim. At the remedial stage, conflicting interests and rights do not destroy the case. The more general moral claims are no longer relevant. By means of remedies, then, the individual features of the portrait can serve the instrumentalist purpose of giving the parties that which they sought through litigation.

Finally, one of the really special advantages of using remedies as a means of protecting voice is that it provides a structural framework that fits relatively seamlessly within the current structure of dispute resolution. It may be relatively more unusual in claim construction to individualize the inquiry to the extent the *Hilder* court did. Such a level of individualized inquiry might be subject to critiques that any benefits would be outweighed by the administrative costs required to adjudicate such claims.<sup>321</sup> But it is commonplace that individualized inquiry occurs at the level of allocating remedies. Thus the current framework supports the protection of voice through the remedial inquiry.

Together, these three devices from *Hilder* achieve a meaningful protection of subaltern voices while also preserving (indeed enhancing) the judge’s ability to make rational choices in the face of conflicting values. There is sufficient space in the precedential process for instilling the localism that Sen seeks in his insistence against universal values.<sup>322</sup> A rational legal decision-maker may often conclude that universal values have a place. But both in the construction of claims, and much more often in the awarding of remedies, such universalism can be replaced with the unique voices of the parties in the case.

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319. Spivak, *Can the Subaltern Speak?*, *supra* note 12, at 276–78 (suggesting that such a representative “must appear simultaneously as their master, as an authority over them, as unrestricted government power”).

320. *See supra* Part III.A.1 (explaining that migrant workers as a class did not clearly evidence a desire to live as middle class Americans, but that desire was reflected in legislation aimed to remedy extreme circumstances of poverty).

321. For an example of such a critique, *see* Smith, *Property and Property Rules supra* note 111, at 1741 (arguing “liability rule is not warranted” if administrative costs outweigh the benefits).

322. Sen, *supra* note 89, at 244.

C. *Reconsidering State v. Shack from a Pragmatic Postcolonialist Perspective*

Reconsidering *Shack* from the perspective of pragmatic postcolonialism, it is immediately striking that as a remedial matter, the most promising claim for the migrant workers may well have been the landlord-tenant argument. The problem with both the Supremacy Clause and First Amendment claims was that they focused remedial attention on Shack and Tejas (the service providers) rather than on the migrant workers.<sup>323</sup> In the case of the Supremacy Clause claim, the remedy would have been to allow people like Shack and Tejas access to the camp. The result would have been the provision on-site of the types of services provided by those two defendants, but it would not have allowed much space for the migrant workers to articulate whether they needed those services more than other types of services. Nor of course would such a remedy have created any room for articulating the need for services that could not be provided by workers who were performing work funded by either the Economic Opportunity Act or one of the other federal statutes that funded the defendants' work.<sup>324</sup> If a court was to conclude that Tedesco's camp qualified as a "company town" or similarly public space, the migrant workers might have had a slightly larger opportunity to articulate their particular needs relating to free association and speech.<sup>325</sup> But in the First Amendment context, the remedy is bluntly negative: Tedesco might have been required to allow assembly and affiliation with guests of the workers, but not much more.<sup>326</sup>

The two federal claims were also problematic foundations for applying the first and second devices from *Hilder*. Both as a launching point for storytelling and as a basis for individualizing a claim, these two claims are troublesome because they impose such rigid requirements for creating a class and establishing rights. As we have seen, the Economic Opportunity Act, which served as the basis for the Supremacy Clause claim, propagated an integrationist view of migrant workers that was so well developed that it left little room for

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323. See *State v. Shack*, 277 A.2d 369, 371 (N.J. 1971).

324. *Id.* at 371-72.

325. See *id.* at 371 (discussing *Marsh v. Alabama*, 326 U.S. 501 (1946), where the U.S. Supreme Court held a Jehovah's Witness who gave out materials on a sidewalk was not a trespasser because the person was in a company-owned town that was open to the public).

326. *Id.*

personalization.<sup>327</sup> To qualify migrant workers for aid, it would be necessary to portray them as desperately needy, lacking basic civil and political rights, and singularly focused on achieving a long-term existence in middle class America.<sup>328</sup> Thus, those who were seen as not caring about property would have a difficult time meeting the requirements for joining the class of those qualifying for aid under the statute.<sup>329</sup> Similarly with the First Amendment claims, the inquiry would focus on whether the migrant workers were interested in affiliation, free speech, and association. Facts that did not lend themselves to these claims and rights would be irrelevant to the story.

Meanwhile, from a remedial perspective, the trouble with the trespass claim is that the explicit focus is on the owner's right to exclude. Definition of the workers' rights is tangential to that issue, though it is certainly possible that such definition could produce tangible results akin to remedies for the migrant workers. For example, without changing the legal positioning in the case much at all, the court could have remanded for the lower court to conduct a remedial inquiry into what exactly the migrant workers *and* the service providers needed by way of access to and use of Tedesco's property. Those particular needs and the injuries with which they were connected could have been the basis for creating exceptions within the law of trespass. In this respect, the remedial inquiry also could have been linked to the second device from *Hilder*: the court could have created exceptions to trespass that would require more specific inquiries into the non-owner's uses of the owner's property. But as we have seen, up against the formidable right of ownership, these exceptions would have to be grounded in well-articulated, powerful, and cohesive countervailing rights.<sup>330</sup> There would not be much room for storytelling that did not lead to the central moral of the story.

This leaves the landlord-tenant claim. As *Hilder* suggests, a focus on whether Tedesco violated the rights of the migrant workers as his

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327. *See id.* (explaining that the purpose of the Economic Opportunity Act was to improve the migrant workers' living conditions, to develop important skills for employment, and to provide funding for programs to meet the immediate needs of workers and their families).

328. *See supra* Part III.A.1 (noting the Economic Opportunity Act was intended to benefit those migrant workers who were living in extreme poverty but was not intended to benefit those who planned to stay in America for a short time or who sought work in America solely for the purpose of sending money back home).

329. S. REP. NO. 91-83, at 16 (1969) (noting it is "hard to dispute" complaints about migrants who do not want to take advantage of benefits of integrating in American society).

330. *See supra* Part II.B (discussing ownership as a powerful consolidating impulse in property law that requires unequivocal and forceful opposition to overcome).

tenants immediately directs the inquiry to how the workers lived while at the labor camp on Tedesco's farm. This creates space for stories. As the briefs filed by the defendants in the case demonstrate, we can see the potential for examining the conditions experienced by both the workers and their families.<sup>331</sup> *Hilder* also instructs us on the possibilities of individualizing the claims of the migrant workers as tenants. Perhaps some wanted access for guests such as Shack and Tejeras, while others would have prioritized negotiations over rent and rent abatement so that they could maximize their resources for a return to their countries of origin. The point here is that the landlord-tenant claims seemed to provide the most direct legal route into listening to the voices of the workers themselves. These claims contain no complicated and excessive build-up around the creation of rights. They require inquiries into the lived experiences of the workers. They create a foundational class (of tenants) onto which additional interests can be layered.

But the radically hypothetical nature of this exercise should be both a warning signal and should point us to the most basic lesson from reconsidering *Shack*. While we may develop some instincts about what kinds of claims are better as a vehicle for protecting subalternity, *Shack* cannot take us very far in a postcolonialist inquiry. What is most striking about *Shack* from a postcolonialist perspective is that we simply do not have enough information to know what the workers in that case wanted, whether the right to associate, the protection of wages and remittances, more habitable living conditions, or something else. In this respect, *Shack* adds a fourth device, more basic than the three outlined here: the first question should be to ask what those whom the court seeks to protect *want* by way of legal intervention. This is one legal moment in which there is no substitute for Sen's insistence on "local" control.<sup>332</sup> We can hypothesize from the statistics, but we cannot know in the way we knew of Ella Hilder's legal desires. In its failure to answer this question, for all its important contributions about ownership, *Shack* was a postcolonialist non-starter for the particular non-owners at the heart of the case. It was a case about ownership, but not a case that protected the voices of the particular non-owners who so claimed the court's attention and sympathy.

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331. See generally *supra* note 167 (citing an unpublished report that the defendants filed as an appendix to their brief on appeal to the Supreme Court of New Jersey in *State v. Shack*).

332. Sen, *supra* note 89, at 157–59.