REPRESENTING THE SUBALTERN THROUGH PROPERTY LAW: REFLECTIONS ON *STATE V. SHACK*

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Friends,

Please note that this draft is a little more than half of an Essay that is still at a very early stage. John's kindness in giving me time for a full presentation and discussion of this draft should not be read as a statement of the draft's completeness. It would belong in an early stage session if one were available at this conference. I look forward to your suggestions regarding this draft and where to take it from here.

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INTRODUCTION

> Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law.[1]

This statement introduced the New Jersey Supreme Court's quite noteworthy holding and rationale in the now-famous 1971 case of *State v. Shack*.[2] It is a statement that still surprises many legal readers for its unexpected explicitness in acknowledging that property cannot serve to overly limit the civil and political rights of others. For many, too, it represents a significant level of contextualization of rights: the Court recognized that this was not just a case about lawyers and social workers having the right to visit clients. For some scholars, including progressive property scholars, it 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.[3] *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. The problem within *Shack* is its opacity about the question of how much the migrant workers whom the Court sought to protect mattered – as individuals or as a class – at all to the case.[4] *Shack* claimed to be a case that upheld the rights of a particular group of unprivileged individuals,[5] and it is

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

[2] Specifically, the quotation consists of the first several sentences of Section II of the Court's opinion. *Id.*

[3] *See, e.g.*, A.J. Van Der Walt, *Property and Marginality*, *in* PROPERTY AND COMMUNITY 81 (Gregory S. Alexander & Eduardo M. Penalver eds., 2010); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 808-810 (2009); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 883-884 (2009); Madhavi Sunder, *IP*^{3}, 59 STAN. L. REV. 257, 291-297 (2006); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 343-350, 361 (1998); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 675-677 (1988); Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 663-667 (1991); Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1565-69 (2010).

[4] State v. Shack, 277 A.2d 369 (N.J. 1971).

[5] 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." *Id.* 372. "Here we are concerned with a highly disadvantaged segment of our society." *Id.* "The quest is for a fair adjustment of the

read by many as doing just that. But both as a technical matter, because no migrant workers were parties to the case,[6] and more importantly as an analytical matter, the opinion of the New Jersey Supreme Court prevented those individuals from speaking. In this respect, *Shack* also ought to be the subject of a powerful critique.

The purpose of this Essay 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 dilemma identified by postcolonialist scholar Gayatri Chakravorty Spivak.[7] In attempting to understand and indeed protect the postcolonial subject (or as Spivak says, the "subaltern"),[8] the Court "represented" the subject in a unified portrait that eliminated the fragmented space in which the subject could genuinely speak. 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 particularly indispensible, given the challenge it had accepted in achieving a legitimate means by which to curtail the venerable property right to exclude. But the very proficiency of the Court in achieving this result was the mechanism by which the Court so completely eliminated the voice of the migrant workers in the case. Simply put, their voices were not helpful to making the case.

This failure to achieve genuine representation in a progressive icon such as *Shack* highlights the expansiveness and depth of the problem of representation 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 means of 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 Essay shows, to assume that the basic rights addressed by property law are universally enough shared 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.[9] It is only by recognizing that property rights are rivalrous that we can understand the extent to which property rights have distributional

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competing needs of the parties, in the light of the relationship between the migrant worker and the operator of the housing facility. *Id.* at 374.

[6] The case is a criminal case, for violation of a criminal trespass statute. *Id.* at 370.

[7] Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg, eds., 1988).

[8] Id.

[9] *See* HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS (2011).

consequences.[10] But, as this Essay argues, property law cannot stop there. The inquiry must extend also to understanding what those pluralistic values are in any given case. As importantly, property law must develop the capacity to accept, protect, and respond to the inevitable conflicts and fragmentation that will result from carefully listening to subaltern voices.[11] Without doing so, we cannot accurately define and apply such basic analytical devices as welfare maximization or distributional justice.

This Essay begins, in Part I, by describing *Shack*'s contributions and limitations. In Part II, the Essay sets forth a critique of *Shack* as a problem of representation. In doing so, the Essay analyzes the main writings relied upon by the New Jersey Supreme Court in constructing a unified and powerful image of the workers it sought to protect. This Part also identifies *Shack*'s representational problem as a central problem for property law. In Part III, the Essay explores the question of how to address the problem of representation by considering devices for exposing and protecting subaltern voices within property law.

I. *STATE V. SHACK* AS PROGRESSIVE ICON

A.

It is no small wonder that *State v. Shack* has achieved iconic status in property law, and particularly among property scholars who identify (or are identified) as progressives. 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.[12] Shack and Tejeras had entered Tedesco's land to find two migrant workers who they claimed required legal and medical services.[13] As the two were making their way to the camp site where Tedesco provided housing for the migrant workers during the time that they worked on his farm, Tedesco confronted them, asked their intentions, and ultimately demanded that they leave his property.[14]

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 rejected both an argument grounded

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[10] *Id.*; Gregory Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009).

[11] Spivak, *supra* note 7.

[12] State v. Shack, 277 A.2d 369, 370-371 (N.J. 1971).

[13] *Id.* at 370.

[14] *Id.* at 370-371.

in state landlord-tenant law (that tenants have the right to receive visitors)[15] and federal Constitutional arguments (involving the First Amendment freedom of association[16] and the supremacy of certain federal statutes protecting migrant farm workers[17]) in favor of a broadly worded limitation on the right to exclude founded, as the Court stated, on "a maxim of the common law."[18] 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, a conclusion for which it laid the foundation[19] but on which it never really relied in its holding.[20] Alternatively, the Court could have held that by opening up his property for use as a home for others, Tedesco effectively consented to the entry onto his land of visitors of those whom he housed.[21]

Instead, the Court used the general doctrine that "one must use one's property so as not to harm others"[22] as an instrumental, *doctrinal* constraint on the right to exclude. Using its equitable powers[23] in a very full sense of that term and with a view towards standard setting,[24] 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.[25]

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."[26]

But *Shack*'s greater influence has been on property norms, rather than on property doctrine.[27] In generalized form, *Shack* is a doctrinal

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[15] *Id.* at 374.
[16] *Id.* at 371.
[17] *Id.*
[18] *Id.* at 373.
[19] *Id.* at 373.
[20] *Id.* at 374.
[21] 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, *supra* note 3, at 675-676.
[22] State v. Shack, 277 A.2d 369, 373 (N.J. 1971).
[23] *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).
[24] *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).
[25] State v. Shack, 277 A.2d 369, 374-375 (N.J. 1971).
[26] *Id.* at 374.

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 as broad as to reflect and preserve the "human values" of "health, welfare, and dignity."[28] In essence, *Shack* exemplifies what Professor Singer has described as the "public interest" exception to trespass.[29] *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.[30]

Instead, according to this view, the essential function of property law is to provide a framework for the pursuit of relationships and interconnection.[31] 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 deemed necessary to improve their lives.[32] The Court's concern over this connection was in promoting a greater integration of the migrant workers with the surrounding community so that they could take advantage of the opportunities that existed there.[33] A second set of relations that seemed important to the Court, but about which it made only general statements, was among the workers themselves. 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.[34] 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.[35] Ultimately, although the Court failed to capture these

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[27] Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107 (2013) (noting the limited doctrinal impact of the case.) *See also* Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 939-940 (2009); Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 984 (2009).

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

[29] Singer, *supra* note 3, at 676.

[30] Professor Singer has used the castle metaphor to describe this 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).

[31] *See* Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1638-39 (2010); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152 (1971).

[32] State v. Shack, 277 A.2d 369, 372-373 (N.J. 1971) (discussing the federal and state statutes and reports seeking to provide support and services to migrant workers).

[33] Id.

[34] *Id.* at 370-373.

[35] *Id.* at 372.

relationships in a doctrine of lasting precedential value, it did at least succeed in articulating powerfully the normative import of some of the interconnections (and more broadly, the context) underlying the case.[36]

To those scholars who argue that the relational view of property law imposes certain social obligations on owners, *Shack* also serves as a high point in property jurisprudence. 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 entire 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 community by providing the workers with equality and dignity otherwise denied them by their employer's treatment.[37]

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.[38] He demonstrated this point using both *Shack* and a number of public trust doctrine cases. Interestingly, in his descriptions of modern public trust doctrine cases he was able to identify the activities associated with affiliation (baseball games and beachcombing) with specificity,[39] 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.

Writing from a postcolonial perspective, Professor Sunder has used *Shack* to make much the same point. She argued that *Shack* represented a unique moment in property law when the law recognized the distributional impact of property rights on non-owners.[40] It was, as she described it, a moment of "social enlightenment" in property law.[41] 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.[42] For them,

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[36] Rosser, *supra* note 27, at 154-155.
[37] Alexander, *supra* note 3, at 809.
[38] *Id.*
[39] *Id.* at 809-810.
[40] Sunder, *supra* note 3, at 293.
[41] *Id.* at 291.
[42] *Id.*; Alexander, *supra* note 3, at 809-810.

Shack was a uniquely powerful reminder of the effect of property ownership on "Others."[43]

B.

The particular combination of doctrine and norms in *Shack* achieved a quite specific result in property law, although the specificity of *Shack*'s impact recedes into the shadows as the case grows in fame and symbolic value.[44] 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* could be said to protect the rights of non-owners, those rights can be defined only broadly, or if the rights are more narrowly defined, 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.[45] 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,"[46] "isolated,"[47] "highly disadvantaged,"[48] and "without economic or political power."[49] But these descriptions do not tell us what they felt, experienced and understood about their impoverished situation. They do not, in that sense, paint a picture.

Similarly, Professor Alexander picked out the value of affiliation to the non-owners in *Shack*. This 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.[50] 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, class-based claims that we (and, as Part II discusses, the Court[51]) 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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[43] Edward Said…

[44] *See* Rosser, *supra* note 27, at 153-155.

[45] Sunder, *supra* note 3, at 291-292.

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

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See, e.g.*, Freedman v. New Jersey State Police, 343 A.2d 148 (N.J.Super.L. 1975); State v. Schmid, 423 A.2d 615 (N.J. 1980); New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994).

[51] *See infra* Part II.B.2.b.

The workers were not parties to the case.[52] Their rights and needs were voiced by the defendants, who claimed to represent them for quite narrow purposes.[53] 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's decision. 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 voice 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*, really, was to re-cast the image of property ownership as requiring each of us – those who are entitled owners – to fulfill certain duties. These duties might variously include the duties to share and exercise self-restraint,[54] to act as a good host,[55] or to balance one's personal and property needs and rights against the personal and property rights of others.[56] Regardless of how these duties are described, they ultimately define limitations on the owner's ability to build insurmountable walls around herself.

Correlatively, then, *Shack* was about the limits of property rights rather than on their expansive potential. It was a case that took very seriously the notion that rights of ownership are not boundless. 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 exclude. 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 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 Professor Alexander have undertaken into the pragmatic potential of self-restraint in property ownership.[57] From a Legal Realist perspective, viewing the judges on the New Jersey Supreme Court as individuals with a certain status in society,[58] it

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[52] State v. Shack, 277 A.2d 369, 370 (N.J. 1971).

[53] *Id.* at 370-371.

[54] *See* Peñalver, *supra* note 3, at 880-884.

[55] *See* Singer, *supra* note 3, at 673-677; Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

[56] *See* Alexander, *supra* note 3, at 809-810; Peñalver, *supra* note 3, at 880-884.

[57] *See* Alexander, *supra* note 3, at 809-810.

[58] Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 710 (1931).

would be difficult to imagine a more honest adjudication on the basis of personal position and experience. The adjudicants were true to themselves.

II.

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 explore that problem. Part A identifies the problem in greater detail, defining it as perhaps the quintessential issue identified by postcolonial scholars. Part B demonstrates how the *Shack* opinion, both in rhetoric and doctrine, exemplified this challenge of "representation" as defined by postcolonialism. Through *Shack*, the particular migrant workers whom the Court sought to protect were rendered voiceless. Part C follows this demonstration by arguing that the challenge of representation that inheres in *Shack* is indeed a core challenge for property law.

A.

In particular, 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. The problem that I am claiming here might best be described as one identified by postcolonialist scholars.[59] It is a concern with representation and voice, 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.[60]

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?"[61] Spivak's central inquiry in the essay concerned the problem of "representing"[62] the "subaltern" "masses"[63] who have experienced the effects of colonialism.[64] For Spivak, the problem of representation occurs perhaps in large part because of the pressure Western intellectuals seeking to understand the postcolonial subject feel to "conflate"[65] two different understandings of the verb "to represent," understandings which are captured by Marx's use of the German verbs *vertreten* and *darstellen* in *The Eighteenth Brumaire of Louis Bonaparte*.[66] Spivak interpreted *vertreten* to mean political representation and *darstellen*

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[61] Spivak, *supra* note 7.

[62] *See id.* at 276-278.

[63] *Id.* at 274.

[64] *Id.* at 283.

[65] *Id.* at 277.

[66] *Id.* at 276-278 (citing and discussing Karl Marx, The Eighteenth Brumaire of Louis Bonaparte (1963).

to mean aesthetic representation.[67] The former, Spivak described as "proxy;" the latter as "portrait."[68] Spivak insisted that it is critical to the postcolonial subject, and in particular to the problem of giving her voice, to acknowledge that these two forms of representation expose a fragmented voice.[69] Indeed, Spivak argued, it is the possibility of remaining cognizant of and "expos[ing]" the different representations (*vertreten* and *darstellen*) of the subaltern that give the subaltern subject the most space to speak.[70] By contrast, the Western intellectual is driven to attempt to unify these distinct forms of representation as a means of creating 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.[71]

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 verb.[72] 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.[73] They are not, however, a class in the sense of sharing a feeling of community as a result of that condition.[74] 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.[75] But this particular form of representation creates the problem that the class is represented by an authority that both protects it and controls it. The consequence, as Spivak argued, is *darstellen*, portraiture, (rather than *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.[76]

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*, widow sacrifice, in India[77] and the second was a particular case of suicide by a woman in Calcutta in 1926.[78] In each of these examples, Spivak traced multiple interpretations about what motivated the

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[67] Spivak, *supra* note 7, at 275-277.
[68] *Id.* at 276.
[69] *Id.* at 275, 279.
[70] *Id.* at 277.
[71] *Id.* at 276, 279-280.
[72] *Id.* at 276-277.
[73] *Id.* at 277.
[74] Id.
[75] Id.
[76] *Id.* at 277-278.
[77] *Id.* at 297-307.
[78] *Id.* at 307-308.

women who died. In the case of *sati*, for example, was it a choice to free themselves of their bodies and join their husbands in eternal celestial pleasure,[79] or was it the pressure from their dead husbands' relatives in whose way the widows stood in inheriting the property?[80] The answer to this question of course drives the legal response.[81] Time and again in these examples, Spivak showed the unremitting challenge in finding the voice of the women who died. Even as concerns the basic capability of *life*, Spivak argued, it is a terrible mistake to assume complicity between *vertreten* and *darstellen*. One wonders whether this is partly 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.[82] Sen argues instead that such a list must be left to be divined by local and democratic processes attuned to particular places and times.[83]

Two additional features deserve attention in this description of Spivak's postcolonialist perspective on representation. The first is that it differs from, indeed disputes, the Foucaultian ideal that individual narrative is crucial.[84] 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 was less apparent in property law.[85] Examples of such practices include the protection and indeed exaltation of client "storytelling" as part of the process of *legal* representation.[86] 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.[87]

The second feature is that Spivak's view of representation defies the Hegelian notion of "property as personhood," 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,"[88] or that might be managed using more personalized principles such as "stewardship."[89] The problem with the Hegelian prescription at least

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[79] *Id.* at 303.

[80] *Id.* at 300.

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

[82] AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

[83] Amartya Sen, *Conceptualizing and Measuring Poverty*, *in* POVERTY AND INEQUALITY 30-46 (David Grusky & Ravi Kanbur, eds., 2006).

[84] Spivak, *supra* note 7, at 279.

[85] *See* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992).

[86] Lucie E. White, *Seeking "... the Faces of Otherness...": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499 (1992); Louise G. Trubek, *Lawyering for Poor People: Revisionist Scholarship and Practice*, 48 U. MIAMI L. REV. 983 (1994); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994).

[87] Spivak, *supra* note 7, at 274.

[88] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 960 (1982).

[89] Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L. J. 1022 (2009).

as it is currently deployed is partly that, from a pragmatic perspective, it requires a relatively cohesive sense of what is "personal" to a given class,[90] a cohesion which of course is 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.

B.

1.

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 begins by considering 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. 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.[91] It is widely viewed as a consolidating force that allocates great control over resources once the hurdle of ownership is cleared.[92] 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.[93] 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

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[90] Radin, *supra* note 88, 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.").

[91] For influential discussions of the importance of property ownership, see GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS (1989); Robert C. Ellickson, *Property in Land*, 102 YALE L. J. 1315 (1993); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1728 (2004) (discussing remedies enforcing exclusion as a means of protecting ownership).

[92] *See* Ellickson, *supra* note 91, at 1369; Richard A. Epstein, *Justice Across the Generations*, 67 TEX. L. REV. 1465 (1989); LIBECAP, *supra* note 91.

[93] The public's response to the 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* 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 (2008); Katrina M. Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239 (2007); David A. Dana, *The Law and Expressive Meaning of Condemning the Poor after Kelo*, 101 NW. U. L. REV. 365 (2006), 101 NW. U. L. REV. COLLOQUY 5 (2006); D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006).

ownership can exist. Hence the overarching principle of the numerus clausus in property law.[94] 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. Property would be under-utilized.[95] Information costs would be too high.[96] People could not function vis-à-vis property in an effective (or efficient) manner without such consolidation. Ownership, and more generally, rights to property signify a few really important things.

Given this consolidating impulse in property law, cases like *Shack* accentuate the necessary countermoves. What *Shack* makes clear is that to effectively overcome property ownership (or equivalent rights over resources), the opposition must be unequivocal and forceful. It will not do in a dispute with a property owner over her land 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. For this reason also, 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,[97] association,[98] racial equality,[99] and life (as in the cases of necessity).[100] 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,"[101] or they may be remedied just with damages rather than injunctive relief.[102]

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 effectively lies in the judge's (and 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 "springboards" for deciding the dispute, while also "cutting" away "unwelcome precedents" that unhelpfully appear to "bind" the judge.[103] The process of legal decision-making in which judges

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[94] Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000); Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1597-1603 (2008); Avihay Dorfman, *Property and Collective Undertaking: The Principle of Numerus Clausus*, 61 U. TORONTO L.J. 467 (2011).

[95] *See, e.g.*, Ellickson, *supra* note 91, at 1369.

[96] *See, e.g.*, Smith, *supra* note 91.

[97] *See, e.g.*, State v. Schmid, 423 A.2d 615 (N.J. 1980).

[98] *See, e.g.*, State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

[99] *See* Singer, *No Right to Exclude*, *supra* note 55.

[100] *See* United States v. Schoon, 955 F.2d 1238, 1239-40 (9th Cir. 1991).

[101] *See, e.g.*, Brown v. Gobble, 474 S.E.2d 489, 494-494 (W. Va. 1996).

[102] *See* Smith, *supra* note 91, 1724-30; Rashmi Dyal-Chand, *Sharing the Cathedral: The Extraordinary Potential of Outcomes in Property Law* CONN. L. REV. (forthcoming 2013).

[103] KARL LLEWELLLYN, THE BRAMBLE BUSH (1930).

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 prior such classes have received protection for similar rights.[104] 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.[105]

These two systems of "representation" seem so fundamentally irreconcilable that an attempt such as mine 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. With the following analysis, I hope to respond to this question by testing my belief that simply exposing the process of representation in property law as a consolidation of proxy and portraiture can teach progressive lawyers something about the strengths and weaknesses of property law-making from a postcolonial perspective.

2.

This brief reminder of the exigencies of property law, and more generally precedential decision-making, ought to suffice as an introduction to *State v. Shack* as a particular instance of representation. The inquiry that I undertake in this section is to understand how the migrant workers were "represented" in that case by analyzing the various texts that the Court considered as it defined their rights vis-à-vis the property owner who claimed trespass. Ultimately, the purpose of this analysis is two-fold. The first is to trace the integration of *vertreten* and *darstellen* within each of the texts and then their further consolidation 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 ask to what extent any of these representations evidences the political voice(s) of the migrant workers themselves.

While there are doubtless more texts that ought to be relevant to this inquiry, at least three sets of texts demand individualized attention given their relevance to the Court's decision. The first is the set of texts making up the federal Economic Opportunity Act of 1964,[106] the 1967 amendments to

[104] *Id.* Civil rights law, with its categories of protected classes, is a paradigmatic example.

[105] Karen Engle repeatedly confronts this conflict between law and representation in her recent book. KAREN ENGLE, THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY. (2010).

[106] The Economic Opportunity Act of 1964, 42 U.S.C. § 2701 et seq. ().

that Act,[107] and the legislative history of both bills. The second is the statements by (or on behalf of) the defendants to the case, Shack and Tejeras.[108] The third is the "Report of the Governor's Task Force on Migrant Farm Labor" that was quoted by the New Jersey Supreme Court in its opinion.[109] A fourth text is the opinion itself, which drew from the other texts to construct a cohesive vision of the migrant workers whom it sought to protect.

a. Differing Representations

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, the "policy considerations" underlying its decision were much the same as those animating that statute.[110] On its face, as concerned migrant workers, the purpose of the Economic Opportunity Act was to assist the states in developing programs to aid migrant workers and their families in the areas of "housing, sanitation, education, and day care of children."[111]

The legislative history for the 1964 statute painted a vivid picture of the conditions that motivated Congress to take such action. The Senate report described its programs as assisting an "almost forgotten group of the poverty stricken" who had been "trapped" on a "a treadmill of poverty."[112] The report depicted a class whose school-aged children were often kept home to work with their parents in the fields, whose children even if they went to school fell behind 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.[113] In general, the 1964 legislation was imbued with a sense of 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[114] were to be replaced with housing, ideally permanent in tenure.[115] Child labor was to give way to free public education.[116] Whatever the norms

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[107] Economic Opportunity Amendments of 1967, Pub. L. No. 90-222, 81 Stat. 672 (1967).
[108] State v. Shack, 277 A.2d 369, 370 (N.J. 1971).
[109] The Report of the Governor's Task Force on Migrant Farm Labor (1968).
[110] State v. Shack, 277 A.2d 369, 372 (N.J. 1971).
[111] The Economic Opportunity Act of 1964, Part B, § 311, 78 Stat. 508, 525 (1964).
[112] S. Rep. No. 88-1218, at 30 (1964).
[113] *Id.* at 30-31.
[114] S. Rep. No. 90-563, at 63 (1967).
[115] *Id.* at 64.
[116] *Id.* at 63-64.

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.

In 1967, the Act was amended both in furtherance of that original purpose and in pursuit of a somewhat more abstract cause:

> The purpose of this part is 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.[117]

The legislative history of the 1967 Amendments began with a quotation from a seasonal farmworker in New Mexico that expressed the more abstract purpose of the Amendments:

> 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.[118]

Thus while the Amendments expanded support for housing (redoubling efforts to provide temporary and emergency shelters in addition to longer term homeownership opportunities[119]) as well as education, they also added funds for "education and occupational training to respond to the changing demands in agricultural employment."[120] Moreover, the 1967 Amendments more explicitly supported such integrationist efforts as the provision of "legal advice and representation, and consumer training and counseling"[121] along with providing funds to promote "community acceptance of such persons."[122]

The two sets of texts, from 1964 and 1967, suggest a crystallizing sense of what it meant really to be a part of the First World. Such an existence seemingly involved not just sanitation and education, but also the meaningful prospect of long-term and sustainable employment, housing, and *consumption* in the new community. The 1967 Amendments conveyed a sense 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 her 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 middle class. There was no

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[117] Economic Opportunity Amendments of 1967, Pub. L. No. 90-222, 81 Stat. 672, 709 (1967).

[118] S. Rep. No. 90-563, at 63 (1967).

[119] *Id.* at 64.

[120] *Id.*

[121] *Id.*

[122] *Id.*

mention in the statutes or their legislative history of 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. There was no obvious evidence that they, as a class, desired training in the ways of Western-style consumerism. Indeed, there was no sense of these workers having a home other than the idealized pursuit of the homes of the people in the surrounding communities.

What began in the 1964 legislation as an emergency response to basic needs transformed by 1967 into a rather nuanced response to a presumably elaborate set of desires to join a new social and economic society. It is not clear even whether 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.

Compare this representation of the migrant workers with the set of texts prepared by and on behalf of the defendants in *State v. Shack*. There is a great deal that we do not know about their perceptions of the workers they claimed as clients. But we can at least glean two main assumptions from the opinion [and the briefs filed in the case]. First, the defendants appeared quite fervently to believe that the migrant workers needed their services, though it is not clear whether they perceived the workers' desires and interests in the same way as the federal legislation.[123]

Second, by arguing that the migrant workers were tenants with all the rights available to tenants in the State of New Jersey, the defendants appeared to assume that their clients had both the desire and the *capacity* to protect themselves using the landlord-tenant law of the state.[124] This assumption appears to have been connected with the further claims 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.[125] 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.[126] 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 the benefits of affiliation and social engagement – but for the blunt intervention of the landowner exercising his right to exclude (and thus to isolate).[127]

As represented by the federal legislation, the workers were isolated and helpless. As represented by the defendants in *State v. Shack*, the workers

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[123] State v. Shack, 277 A.2d 369, 370 (N.J. 1971).
[124] *Id.* at 374.
[125] *Id.*
[126]
[127] State v. Shack, 277 A.2d 369, 374 (N.J. 1971).

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.

The Court's references to the Report of the Governor's Task Force on Migrant Farm Labor presaged the choice the Court made.[128] While the report was lengthy [and no doubt provided much detail about the conditions experienced by migrant workers in that state], the Court used it to make a concise point. According to the report, the workers were in need of public services, and their isolation on the private property of others combined with their different language precluded them from accessing "informational material in a language and style that can readily be understood" by them.[129]

[I will say more about the Report once I review it in its entirety.]

b. The 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,[130] the New Jersey Supreme Court deployed these three 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."[131] 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."[132] 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."[133] First year students may wonder why landlord-tenant law was not a perfectly viable basis for decision in the case. But reliance on this strain of jurisprudence would have carried

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[128] *Id.* at 373.
[129] *Id.* at 373.
[130] LLEWELLLYN, *supra* note 103, at.
[131] Spivak, *supra* note 7, at 276.
[132] State v. Shack, 277 A.2d 369, 375 (N.J. 1971).
[133] *Id.* at 374-375. 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.

with it too many assumptions about the rights and responsibilities of the class. These needs, the Court noted, included the dignification that accompanies middle class life, rather than simply the necessities of subsistence.[134]

The consolidating imperative of creating a class thus left the Court with no option but to represent the migrant workers. In this respect, the Court re-enacted 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.[135]

The Court used a full range of rhetorical devices to justify this formidable role. It relied upon the Governor's Report to further reduce and consolidate the voices of the migrant workers. It defined its own role, to protect the "well-being" of the workers, as "the paramount concern of a system of law."[136] It described the workers, overridingly, as "rootless and isolated,"[137] "outside the mainstream,"[138] "unorganized and without economic or political power."[139]

The Court's view of its role, as well as that of the defendants, 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, these rights (of the workers) were better represented by individuals other than the workers themselves. The portrait of the workers was more clearly presented by others – Shack, Tejeras and ultimately, the Supreme Court of New Jersey.

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 reader's attention is redirected by the Court to the perception of the workers as unable to speak for themselves

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[134] *Id.*
[135] Spivak, *supra* note 7, at 277.
[136] State v. Shack, 277 A.2d 369, 372 (N.J. 1971).
[137] *Id.*
[138] *Id.* at 373.
[139] *Id.* at 372.

(rootless and voiceless).[140] If we look hard, we can find the voice of a single seasonal worker in the form of a quotation in the legislative history for the 1967 Amendments to the Economic Opportunity Act.[141] As a legal matter, what is so effective about the portrait presented 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.

[140] *Id.*
[141] S. Rep. No. 90-563, at 63 (1967).