2014

Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law

Rashmi Dyal-Chad
Northeastern University, r.dyal-chand@neu.edu

Follow this and additional works at: http://lsr.nellco.org/nusl_faculty

Part of the Law Commons

Recommended Citation
http://lsr.nellco.org/nusl_faculty/62

This Article is brought to you for free and open access by the Northeastern University School of Law at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in School of Law Faculty Publications by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.
PRAGMATISM AND POSTCOLONIALISM: PROTECTING NON-OWNERS IN PROPERTY LAW


Rashmi Dyal-Chand
Northeastern University – School of Law
PRAGMATISM AND POSTCOLONIALISM: PROTECTING NON-OWNERS IN PROPERTY LAW

Rashmi Dyal-Chand*

Property law has a particular problem with non-owners. Although property law has a very clear understanding of the rights of “owners,” it has only a vague understanding of the rights of “non-owners.” The problem is significant, because modern property law is so often called upon to balance the rights and needs of owners and non-owners. With so vague an understanding of one set of rights, property law cannot adequately perform this function. The New Jersey case of State v. Shack exemplifies this problem, because it purports to be a case about protecting non-owners. By examining both the case and the texts upon which the Court relied in deciding the case, this Article argues that the New Jersey Supreme Court could not understand, and therefore could not adequately protect, the non-owners in the case. 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, the Article proposes three devices within the common law tradition that are well suited to the task of representing and protecting non-owners. As Hilder demonstrates, by the pragmatic use of storytelling, the personalization of claims, and the precise matching of remedies to harm and need, legal decision-makers can more fully consider and protect the rights and needs of non-owners.

* Professor, Northeastern University School of Law. I am grateful to Libby Adler, Muneer Ahmad, Gregory Alexander, Benjamin Ericson, Daniel Medwed, Jeremy Paul, Mark Pointe, Joseph William Singer, and participants in the Progressive Property Conference at Loyola University New Orleans College of Law and the 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 indispensible research support.
TABLE OF CONTENTS

Introduction ......................................................................................................................... 1

I.  State v. Shack as Progressive Icon ................................................................. 4
   A.  A Rhetorical Tour de Force ................................................................. 4
   B.  A Case about Self-Restraint, But Not Self-Expression .......... 8

II. Postcolonialism: In Critical and Pragmatic Forms ................. 10
    A.  Critical Postcolonialism ................................................................. 10
    B.  The Existentialist Challenge to Law Posed by Critical Postcolonialism ........................................... 14
    C.  Theorizing Pragmatic Postcolonialism .................................. 18

III. A Postcolonialist Critique of State v. Shack ............... 21
    A.  Differing Representations ................................................................. 22
        1.  The Economic Opportunity Act .......................................... 22
        2.  New Jersey Landlord-Tenant Law ....................................... 26
        3.  Other Texts ............................................................................. 30
    B.  The Court’s Opinion ......................................................................... 33

IV. Pragmatic Postcolonialism in Rational Lawmaking .......... 38
    A.  Hilder v. St. Peter as an Example of Pragmatic Postcolonialism ..................................................... 39
        1.  Differing Representations ......................................................... 39
        2.  The Court’s Opinion ................................................................. 44
    B.  Three Devices for Protecting Subaltern Voices in Property Law ...................................................... 46
    C.  Reconsidering State v. Shack from a Pragmatic Postcolonialist Perspective ..................................... 51
INTRODUCTION

In 1971, the New Jersey Supreme Court enhanced its well-deserved reputation as a progressive and “activist” Court with its holding in the now famous property case of *State v. Shack*. 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. The defendants were charged with criminal trespass after having refused to leave the property of a landowner who employed and housed migrant workers on his large farm. 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.” With this statement, the Court reaffirmed its commitment to making important decisions on the basis of rights and needs in context, even when doing so meant leaving behind the comfort and stability of precedent. 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. 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. *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* this problem takes the form of opacity about the question of

---


3 *Id.* at 372.

4 *Id.* at 370.

5 *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971). Specifically, the quotation consists of the first several sentences of Section II of the Court’s opinion. *Id.*

how much the migrant workers whom the Court sought to protect mattered at all to the case – as individuals or as a class. *Shack* claimed to be a case that upheld the rights of a particular group of unprivileged individuals, and it is read by many as doing just that. But both as a technical matter, because no migrant workers were parties to the case, 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 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 dilemma identified by postcolonialist scholar Gayatri Chakravorty Spivak. In attempting to understand and indeed protect the postcolonial subject (or as Spivak says, the “subaltern”), the Court “represented” the subject in a unified portrait that eliminated the fragmented space in which the subject could in fact 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 indispensible, given its challenge of finding 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 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 voice 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

---

7 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 relationship between the migrant worker and the operator of the housing facility.” *Id.* at 374.

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


10 *Id.*

11 *Id.* at 277-278.

12 *Shack*, 277 A.2d at 374-375.
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 universally enough shared to be obvious to legal decision-makers without the need to listen to the voices of subaltern subjects.

The imperative of making space for subaltern voices 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.\textsuperscript{13} It is only by recognizing that property rights are rivalrous that we can understand the extent to which property rights have distributional consequences.\textsuperscript{14} 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. 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 the voices of non-owners.\textsuperscript{15} 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 critique 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 both actively investigates and creates space for subalternity and recognizes that, at the end of the dispute, the court must make a rational decision about the allocation of important resources. Taking the much less famous property case of \textit{Hilder v. St. Peter}\textsuperscript{16} as its example, the 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 while also recognize that this task is to be performed by lawyers and judges in the adjudicatory process.

I begin in Part I by describing Shack’s contributions to property law as well as its limitations. In Part II, I lay out the theoretical frameworks both for critiquing the case and for more fully incorporating subaltern perspectives into property lawmaking. The theoretical basis for critique is postcolonialism as developed by Spivak. The theoretical basis for prescription is pragmatic postcolonialism, my own adaptation of the postcolonialist inquiry to operate effectively within our system of precedential decision-making. In Parts III and IV, I apply both theoretical

\begin{itemize}
\item \textsuperscript{14} \textit{Id.}; Gregory Alexander et al., \textit{A Statement of Progressive Property}, 94 \textit{Cornell L. Rev.} 743 (2009).
\item \textsuperscript{15} Spivak, \textit{supra} note 9.
\item \textsuperscript{16} 478 A.2d 202 (Vt. 1984).
\end{itemize}
frameworks. In Part III, I critique *Shack* as a problem of representation. In doing so, I analyze 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 the case of *Hilder v. St. Peter*\(^7\) 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.

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, and particularly among property scholars who identify (or are identified) as progressives.\(^8\) 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.\(^9\) Shack and Tejeras had entered Tedesco’s land to find two migrant workers who they claimed required legal and medical services.\(^10\) 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.\(^11\)

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 in state landlord-tenant law (that tenants have the right to receive visitors)\(^12\) and federal Constitutional arguments (involving the First Amendment freedom of association\(^13\) and the supremacy of certain federal statutes

\(^7\) 478 A.2d 202 (Vt. 1984).
\(^9\) Shack, 277 A.2d at 370-371.
\(^10\) Id. at 370.
\(^11\) Id. at 370-371.
\(^12\) Id. at 374.
\(^13\) Id. at 371.
protecting migrant farm workers\textsuperscript{24}) in favor of a broadly worded limitation on the right to exclude founded, as the Court stated, on “a maxim of the common law.”\textsuperscript{25} 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\textsuperscript{26} but on which it never really relied in its holding.\textsuperscript{27} 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.\textsuperscript{28}

Instead, the Court used the general doctrine that “one must use one’s property so as not to harm others”\textsuperscript{29} as an instrumental, doctrinal constraint on the right to exclude. Using its equitable powers\textsuperscript{30} in a very full sense of that term and with a view towards standard setting,\textsuperscript{31} the Court held in its broadest statements:

\begin{quote}
[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.\textsuperscript{32}
\end{quote}

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.”\textsuperscript{33}

But \textit{Shack’s} greater influence has been on property norms, rather than on property doctrine.\textsuperscript{34} In generalized form, \textit{Shack} is a doctrinal symbol that the right to exclude in property law is anything but absolute. To the

\textsuperscript{24} Id.
\textsuperscript{25} Id. at 373.
\textsuperscript{26} Id. at 373.
\textsuperscript{27} Id. at 374.
\textsuperscript{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, \textit{The Reliance Interest, supra} note 6, at 675-676.
\textsuperscript{29} State v. Shack, 277 A.2d 369, 373 (N.J. 1971).
\textsuperscript{32} Shack, 277 A.2d at 374-375.
\textsuperscript{33} Id. at 374.
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.” In essence, *Shack* exemplifies what Professor Singer has described as the “public interest” exception to trespass. *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.

Instead, according to this view, the essential function of property law is to provide a framework for the pursuit of relationships and interconnection. 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. 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. 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. 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. Ultimately, although the Court failed to capture these 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.

---

35 *Shack*, 277 A.2d at 372.
36 Singer, *The Reliance Interest*, supra note 6, at 676.
39 *Shack*, 277 A.2d at 372-373 (discussing the federal and state statutes and reports seeking to provide support and services to migrant workers).
40 *Id.*
41 *Id.* at 370-373.
42 *Id.* at 372.
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 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 community by providing the workers with equality and dignity otherwise denied them by their employer’s treatment.  

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. 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, 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. It was, as she described it, a moment of “social enlightenment” in property law. 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. For them, *Shack* was a uniquely powerful reminder of the effect of property ownership on “Others.”

---

44 Alexander, *Social-Obligation Norm*, supra note 6, at 809.
45 Id.
46 Id. at 809-810.
47 Sunder, *supra* note 6, at 293.
48 Id. at 291.
49 Id.; Alexander, *Social-Obligation Norm*, supra note 6, at 809-810.
50 This term, too, was coined by Spivak. See BILL ASHCROFT ET AL., POSTCOLONIAL STUDIES: THE KEY CONCEPTS 141 (2000).
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 recedes into the shadows as the case grows in fame and symbolic value. 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. 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.” But these descriptions do not tell us what they felt, experienced and understood about their impoverished situation.

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. 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 III discusses, the Court) 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.

The workers were not parties to the case. Their rights and needs were voiced by the defendants, who claimed to represent them for quite narrow purposes. Neither the particular stories of the two workers with

---

52 Sunder, supra note 6, at 291-292.
54 Id.
55 Id.
56 Id.
58 See infra Part III.A.1.
59 Shack, 277 A.2d at 370.
60 Id. at 370-371.
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,\(^61\) to act as a good host,\(^62\) or to balance one’s personal and property needs and rights against the personal and property rights of others.\(^63\) 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 Professors Alexander and Singer have undertaken into the pragmatic potential of self-restraint in property ownership.\(^64\) From a Legal Realist perspective, viewing the judges on the New Jersey Supreme Court as individuals with a certain status in society,\(^65\) it would be difficult to imagine a more honest adjudication on the basis of personal position and experience. The adjudicants were true to themselves.

---

\(^61\) See Peñalver, *supra* note 6, at 880-884.


\(^63\) See Alexander, *Social-Obligation Norm*, *supra* note 6, at 809-810; Peñalver, *supra* note 6, at 880-884.


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 the 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 property lawmaking in particular. 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 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.66 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.

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?”67 Spivak’s central inquiry in the essay concerned the problem of “representing”68 the “subaltern” “masses”69 who have experienced the effects of colonialism.70 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”71 two different understandings of the verb “to represent,” understandings that are captured by Marx’s use of the German verbs *vertreten* and *darstellen* in *The Eighteenth Brumaire of Louis Bonaparte*.72 Spivak interpreted *vertreten* to mean political representation and *darstellen* to mean aesthetic representation.73 The former, Spivak described as

---

66 See generally, ASHCROFT ET AL., supra note 50.
67 Spivak, supra note 9.
68 See id. at 276-278.
69 Id. at 274.
70 Id. at 283.
71 Id. at 277.
72 Id. at 276-278 (citing and discussing Karl Marx, The Eighteenth Brumaire of Louis Bonaparte (1963)).
73 Spivak, supra note 6, at 275-277.
“proxy,” the latter as “portrait.” 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. 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. 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.

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. 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. They are not, however, a class in the sense of sharing a feeling of community as a result of that condition. 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. 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.

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 and the second was a particular case of suicide by a woman in Calcutta in 1926. 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

---

74 Id. at 276.
75 Id. at 275, 279. See also JANET HALLEY, SPLIT DECISIONS 91-105 (2006) (discussing Spivak’s essay).
76 Id. at 277.
77 Id. at 276, 279-280.
78 Id. at 276-277.
79 Id. at 277.
80 Id.
81 Id.
82 Id. at 277-278.
83 Id. at 297-307.
84 Id. at 307-308.
example, was it a choice to free themselves of their bodies and join their husbands in eternal celestial pleasure as claimed by Hindu religious texts?\(^{85}\) Or was it the pressure from their dead husbands’ relatives in whose way the widows stood in inheriting the property as suggested by “a great historian of the Dharmaśāstra”\(^{86}\). The answer to this question of course drives the legal response.\(^{87}\) 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.\(^{88}\) Sen argues instead that such a list must be left to be divined by local and democratic processes attuned to particular places and times.\(^{89}\)

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 ideal of the individual narrative as crucial.\(^{90}\) 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.\(^{91}\) Examples of such practices include the protection and indeed exaltation of client “storytelling” as part of the process of legal representation.\(^{92}\) 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.\(^{93}\)

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,”\(^{94}\) or that might be managed using more personalized principles such as “stewardship.”\(^{95}\) The problem with the Hegelian prescription at least

\(^{85}\) Id. at 303.
\(^{86}\) Id. at 300.
\(^{87}\) Indeed, the legal response, namely the colonial British law outlawing sati, is Spivak’s beginning point in her critical analysis. Id. at 298.
\(^{88}\) AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).
\(^{89}\) Amartya Sen, Conceptualizing and Measuring Poverty, in POVERTY AND INEQUALITY 30-46 (David Grusky & Ravi Kanbur, eds., 2006).
\(^{90}\) Spivak, supra note 9, at 279.
\(^{93}\) Spivak, supra note 9, at 274.
\(^{94}\) Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957, 960 (1982).
\(^{95}\) 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, 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.

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 extent such a critique is applicable to American property law. The more specific version of this question is to ask who the “subaltern” are 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 recognizable basis of action.” In her 1985 essay, she also quotes the definition propounded by the leading representative of the term as used by the “Subaltern Studies” group. Like Spivak, this group uses subaltern to define those who are left out of the “elite” achievements in their society that amount to participation. These may include the development of nationalist movements with the strength to overcome colonial rule. Using these definitions, the migrant workers in *Shack* seem rather 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, they lacked social mobility within American society. But it is reasonable to assume that they were also at the economic margins within 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. These individuals were essentially a product of an implicit economic agreement that required their

---

96 Radin, supra note 94, 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.”).


98 Spivak, supra note 9, at 283-286.

99 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.

100 Id.

101 See infra, notes 133-143 and accompanying text.

marginalization and cheap labor. While it is dangerous to make too many assumptions from their demographics, the facts (for example, that many were young, often teenaged males traveling alone but with active ties to their home countries) suggest a desire, but also an inability, to remain connected to the economic, social and cultural communities in those countries. As one of the very few quotations from migrant workers in the legislative history for the federal statutes expressed, “We go everywhere and we don’t belong nowhere.”

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, it 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,” the term “subaltern” is still grounded in a colonialist social and cultural history. Secondly, as Spivak has repeatedly emphasized, subalternity is fundamentally about heterogeneity, both as compared against individuals who are not “subaltern” and within the category itself. 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 it is important to my theoretical framework that I am working with subalternity in particular, 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 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

107 GAYATRI CHAKRAVORTY SPIVAK, A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT 283 (1999); GAYATRI CHAKRAVORTY SPIVAK, IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS 207 (1998); Spivak, supra note 9, at 280.
Section thus considers the ways in which property law, but also the process of legal decision-making, shapes the question of representation. In considering the broader process of legal decision-making, the Section focuses on the particular work performed by lawyers and judges in the adversarial process.

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. It is widely viewed as a consolidating force that allocates great control over resources once the hurdle of ownership is cleared. 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. Over the last decade, a number of legal scholars have leveled a powerful critique of ownership as a force of consolidation and rational decision-making. 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 a number of 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 numeros clausus in property law. It appears to be widely believed that less consolidation of property rights could lead to too much fragmenting of property use, access, marketability

---


111 See, e.g., Gregory Alexander et al., A Statement of Progressive Property, supra note 14; SINGER, ENTITLEMENT, supra note 38; Alexander, The Social-Obligation Norm, supra note 6.

and other important features of property ownership. Property would be under-utilized.113 Information costs would be too high.114 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.115

Given this consolidating impulse in property law, cases like Shack accentuate the necessary counter-moves. 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,116 association,117 racial equality,118 and life (as in the cases of necessity).119 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,”120 or they may be remedied just with damages rather than injunctive relief.121

This instrumentalist cohesion in property law is undergirded by a much more foundational cohesive drive in law more generally, and particularly in the adversarial system. As Karl Llewellyn so artfully expressed in The Bramble Bush, the art of using precedent 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.122 As discussed by William Simon and others, the adversarial system is a process in which lawyers develop a story about a client that coherently points toward a particular set of legal needs, right, claims and resulting remedies.123 Thus,

113 See, e.g., Ellickson, supra note 108, at 1369.
114 See, e.g., Smith, supra note 108.
115 As with ownership, this Article disputes this broader consolidating impulse in property law.
118 See Singer, No Right to Exclude, supra note 62.
119 See United States v. Schoon, 955 F.2d 1238, 1239-40 (9th Cir. 1991).
122 KARL LLEWELLYN, THE BRAMBLE BUSH (1930).
to argue that a client has acted both as a “reasonable person” and also at times unreasonably (or at least incomprehensibly – from the lawyer’s perspective) in a given circumstance is, in the adversarial process, to weaken the client’s case.\footnote{Simon, supra note 123, at 115.}

Moreover, in any given case, it is the plaintiff’s lawyer (presumably in consultation with her client) who first makes the decision about what needs, rights and claims to emphasize. Cases like \textit{Shack} not withstanding, the judge responds, rather than developing the theory of a case \textit{sua sponte}.\footnote{Id.}

The judge does not have the opportunity to make factual inquiries, nor to develop the facts in such a way as to understand or emphasize the highly individualized or unique needs or characteristics of the parties. Thus in \textit{Shack}, the Court did not have the institutional capacity to inquire into the particular needs of the migrant workers on Tedesco’s farm, whether financial, housing-related, wage-based or any of a multitude of possibilities.\footnote{See David Shapiro, \textit{Courts, Legislatures and Paternalism}, 74 VA. L. REV. 519 (1988); Cassandra Burke Robertson, \textit{Transnational Litigation and Institutional Choice}, 51 BOSTON COLLEGE L. REV. 1081 (2010); Brianne J. Gorod, \textit{The Adversarial Myth: Appellate Court Extra-Record Factfinding}, 61 DUKE L. J. 1 (2011); Helen Hirshkoff, \textit{State Courts and the “Passive Virtues”: Rethinking the Judicial Function}, 114 HARV. L. REV. 1833 (2001).}

As the vast literature on institutional capacities has discussed, in these respects, judges are far more constrained than legislatures in undertaking the factual inquiries that could lead them to develop more individualized and detailed pictures of the parties involved in any given dispute.\footnote{But as Part III discusses, it is also clear that legislatures regularly contribute to the conflation of \textit{vertreten} and \textit{darstellen}.} For judges, but also for the lawyers arguing before them, the imperatives of coherence, simplicity and decisional clarity are overwhelmingly important.\footnote{Id.}

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 prior such classes have received protection for similar rights.\footnote{Civil rights law, with its categories of protected classes, is a paradigmatic example.} 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.\footnote{Karen Engle repeatedly confronts this conflict between law and representation in her recent book \textit{Karen Engle, The Elusive Promise of Indigenous Development: Rights, Culture, Strategy}. (2010).} 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

\begin{footnotesize}
\end{footnotesize}
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.

C. Theorizing Pragmatic Postcolonialism

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 application at the core of property law – in the trenches of resolving everyday property disputes. Indeed, although it is likely true that it would be easier to incorporate postcolonialist perspectives into legislative lawmaking rather than judicial lawmaking, the approach I propose is directed specifically to judges and the lawyers arguing before them. Doing so requires my active divergence 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. I conclude this discussion by proposing three devices that lawyers and judges in the adversarial system could use to incorporate some of the enormous benefits of postcolonialist perspectives into judicial lawmaking.

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. At least in law, without class formation, it 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, then it is hard to envision a pragmatic way forward. In this respect, Spivak’s critique appears to prioritize deconstruction over instrumentalism. 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. Her priority appears to be the creation of an alternative intellectual history of subaltern peoples. 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

132 Spivak, supra note 9, at 277-278.
133 Id.
134 For numerous perspectives on this agenda, including Spivak’s, see Mapping Subaltern Studies and the Postcolonial (Vinayak Chaturvedi ed., 2012).
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 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 my application of this theory in Part IV, I propose the creation of some space for fragmented voices within a framework that remains grounded in the creation of a cohesive class for the purpose of achieving certain more commonly defined rights. Stated differently, I propose a dispute resolution process in which representation is 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 am working hard to protect the ability of judges to make the difficult choices between conflicting values even though that at times will narrow the space in which subaltern voices can be heard. 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 some of the scholars advocating the importance of individual narratives, that there is much independent value and achievement in allowing the subaltern to speak for herself. 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.

---

135 See infra Part IV.
136 See Alexander, Pluralism and Property, supra note 13 (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 those of the other “Western intellectuals” whom she critiques. Spivak, supra note 9, at 279.
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 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, and it is simply 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 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. It is possible, for example, to specify particular individual characteristics of tenants that would qualify them for legal relief. 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 can create space for subalternity. Punitive damages and injunctions, for example, can be matched to the particular effects of bad housing conditions on an individual who is socially or cultural marginalized in particular respects.

The purpose of Part IV is to demonstrate the viability of these three features of the common law in protecting subaltern voices. As that Part will discuss, these are devices that are particularly useful for judges, as distinguished from legislatures, to use in protecting and exposing subaltern voices of non-owners and similarly property-less parties. In this respect, I

---

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 the case of Hilder v. St. Peter).
140 Id.
141 Id.
am placing part of the burden of protecting subalternity on courts, not just on legislatures. It would not have sufficed for the Shack Court to conclude that the statutes protecting migrant workers were the right or only site for protecting and representing subalternity, and indeed the Court quite obviously did not shirk the task of protecting the migrant workers. Nor would it have sufficed for the Court to use the posture of the case, in which the migrant workers’ lawyer and social worker were parties to the case, rather than the workers themselves, as a basis for avoiding use of these devices for protecting subaltern voices. Instead, the purpose of these three devices is in part to clear away procedural arguments such as these as a means of encouraging judges to accept the important obligation of looking behind the procedural and adversarial posture at the parties’ deeper and more embedded interests. And my claim in presenting these three devices is that it is a responsibility of judges in adjudicating individual cases to inquire into these interests because that fundamentally is the court’s function in achieving justice in any given case. In cases where such an important issue as access to property is concerned, the imperative of achieving justice could not be more weighty.

III. A POSTCOLONIALIST CRITIQUE OF STATE V. SHACK

The inquiry that I undertake in this Part is to 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 do so by analyzing the various texts that the 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 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 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 1964,143 the 1967 amendments to that Act,144 and the legislative history of both bills, which the Court referenced extensively as supporting the policy underlying its decision. 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. The defendants claimed the protections of landlord-tenant law as an important basis for preserving their

own access to the workers. The third text is a policy paper prepared for the Governor of New Jersey, which the New Jersey Supreme Court quoted in its opinion. The fourth set of texts are the federal and state labor laws that created and supported the structure of migrant farm labor, but that the Court barely acknowledged as relevant to its decision. 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, the “policy considerations” underlying its decision were much the same as those animating that statute. 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.” This, then, was 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 its programs as assisting an “almost forgotten group of the poverty stricken” who had been “trapped” on a “treadmill of poverty.” 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. 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

147 Shack, 277 A.2d at 372.
150 Id. at 30-31.
seemed to translate into programs intended to transform – as immediately as possible – Third World conditions into First World conditions. Cars and tents in ditches\textsuperscript{151} were to be replaced with housing, ideally permanent in tenure.\textsuperscript{152} Child labor was to give way to free public education.\textsuperscript{153} 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, the picture, \textit{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.\textsuperscript{154} The basic, reactive and short-term nature of the Congressional response also suggests that such a response would have been welcomed by the workers themselves to a relatively uncontroversial extent. 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, there was a prioritization of the conditions of life of the workers during their periods away 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),\textsuperscript{155} Congress in 1964 was responding to the nearly scandalous sense that no one in the “land of plenty” should live in ditches.\textsuperscript{156} 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 \textit{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 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

\begin{itemize}
\item \textsuperscript{151} S. Rep. No. 90-563, at 63 (1967).
\item \textsuperscript{152} Id. at 64.
\item \textsuperscript{153} Id. at 63-64.
\item \textsuperscript{154} S. Rep. No. 88-1218, at 30 (1964) (“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.”).
\item \textsuperscript{155} See Spivak, supra note 9, at 297-307.
\item \textsuperscript{156} S. Rep. No. 88-1218, at 30-31 (1964).
\end{itemize}
self-sufficient life in an increasingly complex and technological society.\(^{157}\)

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.\(^{158}\)

Thus while the Amendments expanded support for housing (redoubling efforts to provide temporary and emergency shelters in addition to longer term homeownership opportunities\(^{159}\)) as well as education, they also added funds for "education and occupational training to respond to the changing demands in agricultural employment."\(^{160}\) Moreover, the 1967 Amendments more explicitly supported such integrationist efforts as the provision of "legal advice and representation, and consumer training and counseling"\(^{161}\) along with providing funds to promote "community acceptance of such persons."\(^{162}\)

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. 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 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. There was no obvious evidence that the workers, as a class, desired training in the ways of Western-style


\(^{159}\) Id. at 64.

\(^{160}\) Id.

\(^{161}\) Id.

\(^{162}\) Id.
consumerism, but such a desire was entrenched in the legislation. 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.

What was required to buttress this more significant and complex form of political representation was a far more elaborate and integrated portrait of the workers. Perhaps nothing in the hundreds of pages of legislative history for the 1967 Amendments could exemplify this move towards more detailed portrature than a psychological study of the migrant workers prepared by Dr. Robert Coles, a Harvard psychiatrist. While there are many claims worth pausing over in 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. Unfortunately, however, this portraiture was accomplished by a medical professional who existed worlds apart from the workers, and whose accounting of their psychological profile appeared to be based largely on his own observations of their reactions to their circumstances.

Moreover, unsurprisingly, his 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. 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.” 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. 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

---

163 I should acknowledge here that 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 Report of the Project Director, Camden Regional Legal Services, Inc., Farm Worker Division, No. 6 (April – Dec. 1970) (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).


165 Id.

166 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.”).


168 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.
better working and living conditions.” He painted a picture of the workers as fundamentally incompetent and pitiful, needful of the intervention of federal law because of their own inadequacies rather than the avarice or exploitation of the employers.

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. 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 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. 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 Tejeras 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 of 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. They told many stories of living conditions that resulted in dangerous health problems, especially for the young children of

---

169 Id.
170 I am grateful to Joseph William Singer for clarifying this distinctive basis for the federal legislation.
the workers. They provided many examples of employers taking advantage of the criminal law to pursue the arrest and criminal prosecution of workers who sought aid from third parties. 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. 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. This was in contrast to the federal legislation, which appeared to rely on the helplessness and weakness of the workers as a basis for federal intervention.

From these court filings, what one would expect from reading the famous 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. 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.” 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 such as 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.

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

---

172 Id. at 6-7 (“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.”)
173 Id. at 12-18.
174 Id. at 8-10.
175 Id.
would compel a court to grant access to a private owner’s property was the right of a tenant to receive visitors.\textsuperscript{178} 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.\textsuperscript{179} 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.\textsuperscript{180}

Thus, in their desperate search for access, 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.\textsuperscript{181} The federal statutes defined migrant workers as trapped in a system of poverty that isolated them from integration into middle-class America, an integration which the legislation assumed they desired. By contrast, the defendants defined the migrant workers as tenants – much like any other tenant in the State of New Jersey. The New Jersey Supreme Court recognized that the class of “tenant” did not fully overlap with the class of “migrant worker.” There was, as the Court observed, dissonance between the two.\textsuperscript{182} 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.\textsuperscript{183} 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.\textsuperscript{184} This is because both employment law and landlord-tenant law are

\footnotesize{
\textsuperscript{178} Hence the Court’s statement that “the 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.

\textsuperscript{179} Alexander, The Social-Obligation Norm, supra note 6, at 807; Singer, No Right to Exclude, supra note 62, at 1455-56.

\textsuperscript{180} The Court cited the New Jersey case of Williams v. Lubbering, 63 A. 90 (Sup.Ct. 1906) for this point.

\textsuperscript{181} To be clear, this was not the only argument in the defendants’ brief. They also presented a forceful argument that the migrant workers had the right to receive information of the sort that the defendants were trying to communicate to them. Brief and Appendix of Defendants-Appellants, State of New Jersey v. Peter K. Shack, Frank Tejeras, No. A-275-70 (NJ Nov. 30, 1970).

\textsuperscript{182} Shack, 277 A.2d at 374 (noting that the cases cited did not fit the employment relationship of the migrant workers and Tedesco).

\textsuperscript{183} Shack, 277 A.2d at 374.

\textsuperscript{184} Id.
}
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. 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).

In fact, Shack and Tejeras 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. Thus, as the New Jersey Supreme Court discussed, the cases cited by the defendants 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. In the case of *Schuman v. Zurawell*, 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. It was assumed that the rights had been defined in the contract. All that was required was a signaling from the court about the availability of notice or the remedy of summary eviction. 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.

---


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

187 *Id.*

188 47 A.2d 560 (NJ Cir. Ct. 1946).

189 *Id.* at 560-561.
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 concerning the lives and needs of migrant and seasonal workers in New Jersey. This text is important because of its contribution to the Court’s portrayal of the workers. The second set of texts is the set of federal and state laws governing the conditions and rights of the workers as workers. These texts 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 federal 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.* While this Report could have served the function of providing a more detailed and individualized portrait of the migrant workers in New Jersey, it failed in large measure 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 did provide relatively detailed statistics about migrant workers in New Jersey. In addition to providing details about the number of workers in New Jersey, the Report focused on demographics. For example, we learn 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. But these details comprised two of the 151 pages. The great bulk of information we receive about the migrant workers in New Jersey is more general, matching the abstraction in much of the Economic Opportunity Act’s legislative history. Indeed, the Report cites the same Harvard psychiatrist, Richard Coles, to paint (not surprisingly) much the same portrait that we find in the federal legislation.

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. The result was a detailed set of policy recommendations that was regularly quite integrationist in perspective.

---

190 Shack, 277 A.2d at 373.
191 Governor’s Report at 15-16.
192 Id.
193 Id. at 17-19.
194 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
The Report gave 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. 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. Thanks to the Report’s rhetorical force, the Court was able to target the “no trespass” signs that constrained legal aid.

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 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, laws establishing the minimum wage, and laws governing the rights of workers to organize. At the most basic level, both affirmatively, but even more 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 which many rightly view as trapping workers in a structure of poverty and exploitation.

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

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.  

195 Id. at 21-22.  


197 Id.  

198 In New Jersey, these regulations were managed by the New Jersey Division of Workmen’s Compensation, the Wage and Hour Bureau and the Department of Labor and Industry.  

199 These laws included the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.  


minimum wage. The defendants pointed out in their briefs that the right to organize under the National Labor Relations Act was unavailable to the workers. It appears that laws concerning child labor, worker safety and health and maximum hours were applicable to the migrant workers, but their coverage did not account for the particular details of the lives of migrant workers, and as a result, they did not prevent some of the worst abuses. Moreover, as the defendants’ briefs (and the copious appendices to those briefs) discuss, even these laws were often not enforced in New Jersey and across the United States. 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.

For this Article, they are worth mentioning as a relevant text for two reasons that are important, but will remain largely unexplored. First, there can be little doubt that these laws reinforced both the political and aesthetic presentations – and representations – that the 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.” Secondly, the images produced by these laws ought to have been much more relevant to the Court’s property analysis than they were. At a basic level, the rights and needs of the workers ought to have served as meaningful counterforces to Tedesco’s right to exclude just as they should have to the shareholders’ right to destroy the steel mills in the famous case of Local 1330, United Steel Workers v. United States Steel Corp. But it also seems likely that consideration of the workers’ rights as workers would have produced fragmentation in 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

---

204 S. Rep. No. 91-83, at 51-61; 76-92 (concerning child labor); 86-92 (concerning unemployment and workmen’s compensation).
206 These laws certainly were, however, quite relevant to Congress as it considered the various measures required in the Economic Opportunity Act and other legislation to improve the lives of migrant workers. See supra notes 198-204.
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 failure to consider labor considerations is a significant cost of failing to paint a more accurate picture of the migrant workers whom the Court sought to protect.

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, 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.” 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.” 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.” 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 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.

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:

---

209 LLEWELLYN, supra note 122, at 70-76.
210 Spivak, supra note 9, at 276.
212 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.
213 Id.
Their representative must appear simultaneously as their master, as an authority over them, as unrestricted governmental power that protects them from the other classes.\textsuperscript{214} 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.\textsuperscript{215} It defined its own role, to protect the “well-being” of the workers, as “the paramount concern of a system of law.”\textsuperscript{216} It described the workers, overridingly, as “rootless and isolated.”\textsuperscript{217} “outside the mainstream,”\textsuperscript{218} “unorganized and without economic or political power.”\textsuperscript{219}

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 (rootless and voiceless).\textsuperscript{220} 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.\textsuperscript{221} 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.

\textsuperscript{214} Spivak, \textit{supra} note 9, at 277.
\textsuperscript{215} \textit{Id.} at 373.
\textsuperscript{216} State v. Shack, 277 A.2d 369, 372 (N.J. 1971).
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Id.} at 373.
\textsuperscript{219} \textit{Id.} at 372.
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} S. Rep. No. 90-563, at 63 (1967).
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 bring those costs into plain view.

In an Article dedicated to unearthing subaltern voices in property law, it is well to begin by stressing that the most blunt 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. 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. This limitation may well be one reason why the case is cited so little 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. Once the workers left the property, their needs and rights were unaddressed by the case, except to the extent that the case relied on lawyers and other service providers to protect those rights as a result of the greater contact they established with the workers at their camps. This protection was an important one, but again, it assumed the continuing good will, interest, attention, and understanding on the part of the service providers in addressing the most pressing needs of the workers.

Moreover, even the protections the case provided for the workers on farms such as Tedesco’s were incomplete in important ways. 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. Given its emphasis on the right of access by others, Shack’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 limit an employer from requiring his workers to remain on his

---

222 Shack, 277 A.2d at 374-375.
223 The holding in the case signals this reality. Shack, 277 A.2d at 374-375.
225 Shack, 277 A.2d at 374-375.
226 Report of the Project Director, Camden Regional Legal Services, Inc., Farm Worker Division, No. 6, at 6-7 (April – Dec. 1970)
farm, so long as such requirements did not rise to the egregious level of false imprisonment or similarly tortious behavior.\textsuperscript{227} 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.\textsuperscript{228} 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 these values.\textsuperscript{229}

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, though the majority of them traveled with one or more family members.\textsuperscript{230} A quarter of them were boys, age fourteen to seventeen.\textsuperscript{231} Among those of Mexican origin, “many” were “permanent immigrants” but “retain[ed] their residence in Mexico.”\textsuperscript{232} And “some” returned to “permanent homes in Mexico.”\textsuperscript{233} One important message to take from these statistics is that a significant number of workers maintained very strong ties to other countries. Often these ties were 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.\textsuperscript{234} As a corollary, it would be reasonable to assume that these workers would treat the protection of their wages as paramount (perhaps even more important than their own living conditions on the farms).\textsuperscript{235} 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 the transmission of money by physical mail or electronic

\begin{itemize}
  \item \textsuperscript{227} Dobbs et al., 2 The Law of Torts §381 (2001); Restatement (First) of Torts § 13 cmt. f (1934).
  \item \textsuperscript{228} Shack, 277 A.2d at 372-373.
  \item \textsuperscript{229} See supra Part III.A.1.
  \item \textsuperscript{230} S. Rep. No. 91-83, at 5 (1969).
  \item \textsuperscript{231} Id. at 10.
  \item \textsuperscript{232} Id. at 11.
  \item \textsuperscript{233} Id.
  \item \textsuperscript{234} See generally Ezra Rosser, Immigrant Remittances, 41 CONN. L. REV. 1 (2008).
  \item \textsuperscript{235} Id. at 56-61 (discussing the motivations, centering on love, for sending remittances home).
\end{itemize}
means and banking laws protecting financial transactions,236 and of course labor and employment laws protecting access to wages earned.237 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.238

Rather than addressing these types of financial transactions, however, the federal statute, with its integrationist perspective, contributed tremendous resources and thought to the question of supporting homeownership among migrant workers. The statutes 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.239 They did so without any apparent attention to how many migrant workers could achieve sufficient wage levels and access to communities to be able to participate in the housing market even with the availability of financing.240 Equally importantly, they did so without apparent 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.241

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 the sending of remittances to other countries over homeownership opportunities in the United States. It was not until exactly forty years after the New Jersey Supreme Court opinion in 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 rules implementing portions of the Dodd-Frank Act.242

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, is it reasonable that such achievements were made at the expense of costs such as these? The answer surely must be yes if a meaningful amount of the overall resources was 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,

---

236 See, e.g., U.C.C. §§ 3 and 4.
237 See supra Part III.A.3.b.
238 See Rosser, Remittances, supra note 234, at 28-37.
240 Id.
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 that left out a subset of migrant workers and continues to leave out a subset of immigrants. In this respect, the 1967 Amendments in particular contributed to a significant gap in federal law that exists still 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 Shack’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 painted by this case 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. And on this point, it is also important to recognize the limitations of my analysis. Because my attempt to excavate a more complete “voice” for the migrant workers on Tedesco’s farm relies more on statistics and broad guesses than anything close to their own words, it is essentially impossible to know just how well or badly the Shack Court represented the political, social and legal needs and desires of those workers. In this respect, my analysis cannot express an alternative story or basis for knowledge, but at best an ethical striving. As Part IV discusses, there are pieces of the migrant workers’ legal stories that are irretrievably lost.

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, the case of Hilder v. St. Peter presents a very different approach to representing the voice of the individual seeking relief. In doing so, 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.*, 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.

One observation that will become apparent in the following discussion of the case is that 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. 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 suggested by the *Hilder* Court did in fact protect 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 different representations of the plaintiff in *Hilder*. Most palpably, one of the parties in the case, the plaintiff Ella Hilder, was also one of the ultimate targets of the Court’s protection. In contrast to *Shack*, therefore, it was much more natural for one of the relevant “texts” in this case to be the

---

245. *Hilder*, 478 A.2d at 202. 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 implied warranty of habitability in the State of Vermont).
246. *See supra* Part II.A.
testimony of the plaintiff herself. 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 facts that drew extensively from the plaintiff’s testimony.248 As described by the Court, 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.249

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

248 Id. at 205.
249 Id.
littered the floor of the basement, but defendant failed to clean it up. Plaintiff also 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.  

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, or even with the claims made by the defendants about the migrant workers in State v. Shack. 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. 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 discuss below, it was accomplished by the choice of remedies which 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.

---

250 Id. at 206.  
253 Hilder, 478 A.2d at 206.
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.254

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 Shack Court did, the Hilder Court embraced them, ultimately using them as a vehicle for preserving the plaintiff’s voice in that case.

In Vermont, the legal recognition of leases as contracts followed the path laid by the iconic case of Javins v. First National Realty Corp.255 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.”256 Rather it was the landlord who was “more familiar with the dwelling unit and mechanical equipment attached to that unit, and is more financially able to ‘discover and cure’ any faults and break-downs.”257 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 rent258 or to remain and continue to pay rent259

Instead, under Vermont law, parties to leases had the right to avail themselves of both the covenants, implied terms and prevailing norms undergirding contract law, as well as contract remedies.260 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.261 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

---

254 Or in the case of Shack, for whom that status was claimed.


256 Hilder, 478 A.2d at 207.

257 Id.

258 Id.

259 Id. at 208.

260 Id.

261 Javins v. First National Realty Corp., 428 F.2d 1071, 1075-1078, 1080 (D.C. Cir.), cert. denied, 400 U.S. 925, 91 S.Ct. 186, 27 L.Ed.2d 185 (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.”).
available to the tenant when suing for breach of the implied warranty of habitability.\textsuperscript{262}  

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 \textit{Hilder} Court followed \textit{Javins} and other warranty of habitability cases in recognizing that tenants in residential leases were “virtually powerless to compel the performance of essential services.”\textsuperscript{263} 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.\textsuperscript{264} In Vermont, this recognition came in the form of a statutory pronouncement:

\begin{quote}
[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....\textsuperscript{265}
\end{quote}

The \textit{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.\textsuperscript{266} By connecting this remedy to a breach of warranty claim, the Court firmly eliminated the property law requirement that a tenant abandon an apartment in order to avoid paying rent.\textsuperscript{267}

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. The purpose of the representation was merely to afford enough protections to tenants to allow them access to safe, decent and sanitary housing, though 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

\begin{footnotesize}
\textsuperscript{262} Hilder, 478 A.2d at 209.
\hfill \textsuperscript{263} Id. at 207 (quoting Park West Management Corp. v. Mitchell, 391 N.E.2d 1288, 1292, cert. denied, 444 U.S. 992 (1979)). See also Javins, 428 F.2d at 1079-1080.
\hfill \textsuperscript{264} Hilder, 478 A.2d at 209; Javins, 428 F.2d at 1079-1080.
\hfill \textsuperscript{265} Hilder, 478 A.2d at 208 (quoting 24 V.S.A. § 4001(4)).
\hfill \textsuperscript{266} Id. at 209-210.
\hfill \textsuperscript{267} Id. at 210, n.3.
\end{footnotesize}
of city dwellers, not farmers,\textsuperscript{268} it was also acknowledged that some were elderly, some were of low income, some had relatively more bargaining power and sophistication and some had less.\textsuperscript{269} 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.\textsuperscript{270} 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 Court’s Opinion

In working with these two texts – these two different portraits of tenants in Vermont – the \textit{Hilder} Court made some markedly different choices from those made by the \textit{Shack} Court. One explanation for the difference in adjudicatory choices may be that the \textit{Hilder} Court was not obliged to deploy nearly so much rhetorical force as the \textit{Shack} Court. In \textit{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.\textsuperscript{271} 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 \textit{Hilder} that the landlord had voluntarily relinquished her right of possession and use to the tenant in return for rent. In \textit{Shack}, by contrast, all 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.\textsuperscript{272}

Another important explanation is the difference in adversarial posture between the two cases. In \textit{Shack}, the lawyers chose to litigate in an effort to expand protections for migrant workers by defending a trespass case brought against individuals interacting with those workers.\textsuperscript{273} In \textit{Hilder}, the lawyers brought a case on behalf of the tenant whose rights they sought to expand and protect. Thus, the \textit{Shack} Court’s ability to protect subaltern voices could only be accomplished through a more attenuated process.

The markers of these differences are evident throughout \textit{Hilder}. The \textit{beginning} point for the Court’s discussion was with the plaintiff’s own testimony.\textsuperscript{274} 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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{268} Id. at 207.
\item \textsuperscript{269} Id. at 208.
\item \textsuperscript{270} Id. at 207.
\item \textsuperscript{271} Id. at 207-211.
\item \textsuperscript{272} \textit{Llewellyn}, supra note 122, at 70-76.
\item \textsuperscript{273} State v. Shack, 277 A.2d 369 (N.J. 1971).
\item \textsuperscript{274} Hilder, 478 A.2d at 206.
\end{itemize}
\end{footnotesize}
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 simply have concluded that the plaintiff was entitled to the protections clearly evident in Vermont law. Doing so would only have required the Court 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.275

Any such violations would then be remedied by rent abatement and standard damages available for breach of contract.276 It is critical to recognize that the Court could have stopped there. The narrower scope of Hilder’s claims did not require the Court to individualize her needs. Standard legal categories existed to protect her, just as they did for the migrant workers in Shack. That is, the particular adversarial posture of Hilder made the process of individualized inquiry less attenuated than it may feel in Shack, but it was not required to decide the case. Rather, there was something quite special about Hilder in the Court’s turn to differentiation and specificity.

In other words, 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 the Court expanded the range of remedies available for such a breach. Regarding the claim itself, the Court held that it was “merely a starting point” to look at the housing codes in determining whether a breach of the warranty had occurred.277 The Court also added an inquiry into “whether the claimed defect has an impact on the safety or health of the tenant.”278 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.279

---

275 Hilder, 478 A.2d at 208.
276 Id. at 209.
277 Id.
278 Id.
279 Id. at 206. Of course, this would need to be determined by a trial court on remand. Id. at 211.
Rather, it was a safety and health issue for the newborn child into whose crib the plaster was falling.\textsuperscript{280}

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” that she and her family experienced at the hands of the defendants.\textsuperscript{281} Similarly, the Court concluded that, although punitive damages are not the norm in contract cases, the particular (“willful and wanton or fraudulent”\textsuperscript{282}) behavior of a landlord could justify such damages in cases adjudicating breaches of lease agreements.\textsuperscript{283}

In these details, the “skilful judg[ing]” in \textit{Hilder} was of an entirely different sort than in \textit{Shack}.\textsuperscript{284} In \textit{Shack}, the Court filtered out differences in order to create a class that appeared as a paragon of cohesion and compelling need. In \textit{Hilder}, the Court identified differences that required different legal responses at different times. The need for housing required a property response. The basic reality of bargaining required contract protections. The inequality of bargaining required consumer law protections in the form of an implied warranty. The public health and sanitation issues required reference to housing and health codes. The protection of a newborn, of the plaintiff’s desire to act as a host in her own home, of her individualized sense of dignity,\textsuperscript{285} required an inquiry into her particular health and safety. It also raised the possibility of reparation by means of punitive damages. 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 skilful judging to pay more attention to voice while remaining very skilful. At bottom, \textit{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.\textsuperscript{286}

\section*{B. Three Devices for Protecting Subaltern Voices in Property Law}

\textit{Hilder} thus provides a rich basis for developing my pragmatic postcolonialist framework into a workable instrument for legal decision-

\begin{itemize}
\item \textsuperscript{280} \textit{Id.} at 209 (citing Vermont Electric Supply Co. v. Andrus, 315 A.2d 456, 459 (1974)).
\item \textsuperscript{281} \textit{Id.} at 209.
\item \textsuperscript{282} \textit{Id.} at 210.
\item \textsuperscript{283} \textit{Id.} at 205-206.
\item \textsuperscript{284} LLEWELLLYN, supra note 122, at 70-76.
\item \textsuperscript{285} Hilder, 478 A.2d at 205-206.
\item \textsuperscript{286} Alexander, \textit{Pluralism and Property}, supra note 13, at 1045-51 (discussing the imperative to make rational choices).
\end{itemize}
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 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. 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. 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 it makes 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.” The particular facts of a case are what give it meaning. But as *Hilder* shows, from a postcolonialist perspective, the sharing of facts can be a powerful means of creating space for the unique voices 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 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

---

289 LLEWELLYN, supra note 122, at 70-76 (emphasis in original).
occurred in *Hilder* did more than “empower” the client. 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. In these respects, the use of the plaintiff’s testimony as text made the most beneficial advantage of the story-telling 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* again, 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. 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. 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. Some tenants would be able to find better, more expensive housing; this one presumably could not. Even though plaintiff may not have been at risk of catching communicable diseases from her living situation, elderly tenants likely would encounter such risks.

The counterpart to recognizing the fragmented nature of tenants’ claims is recognizing that the landlord’s rights are also fragmented in nature. Obviously, this is so, given the landlord’s transfer of the rights of possession and use to the tenant. But the *Hilder* Court also *de facto* determined that sometimes a landlord breaches a warranty by failing to replace plaster, and sometimes not. 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, 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

---


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

292 *Id.* at 209-210.

293 Spivak, supra note 9, at 275-279.

294 *Hilder*, 478 A.2d at 206.

295 *Id.* at 208.

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.297 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.298 For example, in Rase v. Castle Mountain Ranch, Inc., 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.299 Demonstrating the extraordinary potential of remedies, in Southern Burlington County, NAACP v. Township of Mt. Laurel, 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.300 This was a remarkable example of recognizing the structural inability of some residents to speak. The remedy chosen by the Court 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.301 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.

298 In so much of his work, Professor Singer has emphasized the importance of relationships in property lawmaking. See, e.g., Singer, The Reliance Interest, supra note 6; Singer, Entitlement, supra note 38.
From the perspective of pragmatic postcolonialism, remedies are such a valuable device 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 feel 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.\footnote{Hilder, 478 A.2d at 209-210.} The legal imperative of pursuing claims may require the formation of a class that must, to some extent, be unified and represented by someone outside of that class.\footnote{Spivak, supra note 9, at 277-278.} As we saw in \textit{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.\footnote{See supra Part III.A.1.} 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.

Indeed, as scholars who have contemplated the utility of inalienability rules have explored, it is also at this stage that a court should consider just how much paternalism is warranted in crafting a remedy.\footnote{See Guido Calabresi & A. Douglas Melamed, \textit{Property Rules, Liability Rules, and Inalienability: One View of the Cathedral}, 85 Harv. L. Rev. 1089, 1092-93 (1972); Margaret Jane Radin, \textit{Market-Inalienability}, 100 Harv. L. Rev. 1849 (1987); Lee Anne Fennell, \textit{Adjusting Alienability}, 122 Harv. L. Rev. 1403 (2009).} It may well be that inalienability rules are required in certain circumstances in order to protect the parties to the extent warranted by their unique circumstances.\footnote{See Radin, supra note 305.} But a postcolonialist inquiry that preceded such a conclusion with a detailed consideration of the unique circumstances of the parties – and indeed by listening to the voices of such parties – would surely err on the side of imposing paternalism in more limited circumstances.\footnote{On this point, one of Spivak’s examples, that of the British law banning \textit{sati}, is very much on point. Spivak ruminates on the question of how paternalism in enacting such a law could have been reduced. Spivak, supra note 9, at 298.} In this respect, the postcolonialist approach ought to contribute to the goal of
making “good law” without sacrificing the particular preferences or concerns of the parties involved.\textsuperscript{308}

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 \textit{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.\textsuperscript{309} But it is a 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 \textit{Hilder} achieve a meaningful protection of subaltern voices while also preserving (indeed enhancing) the judge’s ability to make rational choices in the fact of conflicting values. There is sufficient space in the precedential process for instilling the localism that Sen seeks in his insistence against universal values.\textsuperscript{310} 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.

Moreover, these three devices are uniquely appropriate for lawyers and judges in the adversarial process to use. Stories are the province of judges, as much as or more than they are the province of legislatures. While legislatures can rely on individualized examples to create protections, those protections are almost by necessity fashioned for categories of individuals. Judges have the job of responding to the legal needs of the individuals before them in any given case. And thus the purpose of the stories told by those individuals is to connect the categories to the unique people using those categories. This ought to be even more the case with remedies.

C. \textit{Reconsidering State v. Shack from a Pragmatic Postcolonialist Perspective}

Reconsidering \textit{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 Tejeras (the service providers) rather than on the migrant workers.\textsuperscript{311} In the case of the Supremacy Clause claim, the remedy would have been to allow people like Shack and Tejeras access to the camp. The result would have been the provision on-site of the types of services provided by those two

\textsuperscript{308} Cf. Simon, \textit{supra} note 123.
\textsuperscript{309} For an example of such a critique, see Smith, \textit{supra} note 108.
\textsuperscript{310} Sen, \textit{supra} note 89.
\textsuperscript{311} Shack, 277 A.2d at 371.
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 federal Economic Opportunity Act or one of the other federal statutes that funded the defendants’ work. If a court was to conclude that Tedesco’s camp qualified as a “company-owned 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. 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.

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 federal 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 personalization. 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. 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. 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

312 Id.
313 Id.
314 See supra Part III.A.1.
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.\textsuperscript{316} 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 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.\textsuperscript{317}

Hilder also instructs us on the possibilities of individualizing the claims of the migrant workers as tenants and tailoring remedies to those individualized claims. 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 and remedied.

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.\textsuperscript{318} We can hypothesize from the statistics, but we cannot know in the way we knew of Ella Hilder’s legal desires.

But could the Shack Court have asked these questions, given the particular posture of that case as contrasted with Hilder? Cases such as Hilder reveal that that the Shack Court very possibly could have engaged

\textsuperscript{316} See supra Part II.B.

\textsuperscript{317} See Report of the Project Director, Camden Regional Legal Services, Inc., Farm Worker Division, No. 6 (April – Dec. 1970) (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).

\textsuperscript{318} Sen, supra note 89.
quite productively in such an inquiry, precisely because the defendants’ lawyers made an argument grounded in landlord tenant law.\textsuperscript{319} Thus the very same kinds of inquiries into the living conditions, daily lives, housing imperatives, and basic needs of the migrant workers could have been undertaken through the filter of landlord-tenant law, just as they were in \textit{Hilder}. Indeed, defendant Shack’s employer filed an amicus brief that detailed many, many stories about the experiences of migrant workers that could have served as a basis for considering more individual needs, claims and remedies.\textsuperscript{320} Undeniably, the fact that the workers were not parties to the case would still have limited their formal remedies. The focus in a landlord-tenant claim would have been on the rights of Shack and Tejeras to enter because of the foundational right of tenants to receive visitors.\textsuperscript{321} But just as the \textit{Hilder} Court did, the \textit{Shack} Court could have used the landlord-tenant claim to consider \textit{why} the right to receive visitors was important to various workers on Tedesco’s farm. Perhaps there were workers who were suffering intolerable living conditions. Perhaps others had significant wage-related claims they wished to pursue. These individualized needs to connect with outsiders could then have been connected to individualized remedies, as in \textit{Hilder}. Moreover, by recognizing a right to receive visitors grounded in landlord-tenant law, the Court could have laid a foundation for the recognition of other tenants’ rights for the migrant workers to be developed in later cases. Viewed in this light, the difference in posture between these two cases seems more illusory than determinative of any particular limitations on the judges involved.

In its failure to answer this question, for all its important contributions about ownership, \textit{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.

\begin{itemize}
  \item \textsuperscript{319} State v. Shack, 277 A.2d 369, 374 (N.J. 1971).
  \item \textsuperscript{320} Report of the Project Director, \textit{supra} note 171.
  \item \textsuperscript{321} Shack, 277 A.2d at 374.
\end{itemize}