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First Amendment and the Problem of Access to Migrant Labor Camps After Lloyd Corporation v. Tanner

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NOTES

FIRST AMENDMENT AND THE PROBLEM OF ACCESS TO MIGRANT LABOR CAMPS AFTER *LLOYD CORPORATION v. TANNER*

The plight of the migrant farm worker has recently been brought to public attention. Migrants are among the most ill-nourished,[1] ill-housed,[2] and poorly educated[3] workers in America. Migrants are isolated from their countrymen in labor camps.[4] They work long hours[5] at back-breaking labor[6] for very low wages.[7]

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[1] One observer of migrant conditions has described the standard meals at a migrant camp in Florida:

> For dinner we had rice, baked beans, corn bread and some kind of fatty cut from a pig, all soaked in gravy. For lunch, as usual, we had a peanut-butter sandwich, a lunch-meat sandwich, and two cookies. Sometimes, when there is not a full day's work, we get only two meals a day.

W. FRIEDLAND & D. NELKIN, MIGRANT: AGRICULTURAL WORKERS IN AMERICA'S NORTHEAST 45 (1971) [hereinafter cited as FRIEDLAND & NELKIN].

[2] See *Hearings of Subcomm. on Migratory Labor of the Comm. on Labor and Public Welfare of the United States Senate on Farm Worker Powerlessness*, 91st Cong., 1st & 2d Sess. 5653-5824 (1970), for a summary of the farm-labor housing problem. In Michigan, for instance, investigators found that 45% of the camps surveyed had defective drainage; 35% had either insufficient or unsafe water supplies; 46% of the houses in the camps had no place to hang clothing. Thirty-two percent of the homes had no bathing facilities; 62% of the camps had unsanitary toilets; 70% of the units in the camp were overcrowded. In 39% of the camp units children slept in the same room with their parents. This latter figure was a bright spot—in four states, Wisconsin, Iowa, Minnesota, and Washington, 74% of the homes had children and parents sleeping in the same room. *Id.* at 5690-91.

[3] A conversation with a migrant worker reported by one observer shows both the migrants' aspiration for education and their realistic chances to obtain it.

> I asked Ann what she wanted her three youngest children to be, and she said that she hoped the boy would be a doctor. . . . A little later in the conversation I phrased my question a little differently: "What do you think they will be?" Her answer . . . "Cherry pickers."

FRIEDLAND & NELKIN 253. One writer has estimated that as few as one migrant child in 50 enters high school and that fewer graduate. *See* M. REUL, TERRITORIAL BOUNDARIES OF RURAL POVERTY 477-78 (1974).

[4] *See* note 2 *supra.*

[5] Picking and harvesting require very long hours of work, but the migrants' remuneration for the work they do is very low. *See* note 7 *infra*; see FRIEDLAND & NELKIN 70-96 for a description of migrant work patterns.

[6] Union organizers complain that conditions in the field destroy the health of the workers. One complaint, for instance, centers on the use of pesticides on the crops that are harvested. César Chavez, leader of the United Farm Workers union, estimates that 80% of all migrants in California suffer ill-effects from pesticides. The U.F.W. has sought to incorporate limitations on pesticide use into union contracts with growers. *See* J. LONDON & H. ANDERSON, SO SHALL YE REAP: THE STORY OF CÉSAR CHAVEZ & THE FARM WORKERS' MOVEMENT 162-63 (1971).

[7] A strawberry picker, for instance, in 1969-70, working at top speed, made no more than $9 a day in Florida. For hoeing and weeding crops, the hardest type of agricultural labor, Florida migrants were paid between $1 and $1.25 an hour. *See* FRIEDLAND & NELKIN 90-91.

Housing in migrant camps often barely meets minimum health standards.[8] The harvest which the migrants bring in is a "[h]arvest of shame."[9]

Those who seek to provide social services to the migrants, or to organize them into unions,[10] have met fierce resistance from the farmers who employ the migrants.[11] This clash of interests has occurred in many contexts.[12] Outsiders who have sought to reach the migrants in their labor-camp homes have been arrested for violating state trespass laws.[13] These arrests and threats of arrest have occasioned much litigation.[14] Social workers and union organizers have argued that their right to see the migrants is protected by the first amendment.[15] In turn, camp owners have asserted that their rights as owners of the migrant camps allows them to eject trespassers.[16]

In weighing these conflicting interests, courts have almost unanimously held in favor of a right of entry.[17] Different rationales have been used to reach the same result. At least three distinct lines of reasoning can be discerned in the cases upholding a right of

[8] *See* note 2 *supra.*

[9] The phrase was first used in a 1960 CBS television documentary narrated by Edward R. Murrow. *See Hearings on Farm Worker Powerlessness Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare,* 91st Cong., 1st & 2d Sess. 4 (1970).

[10] For an account of the efforts of the United Farm Workers to organize migrants into unions, see P. MATTHIESSEN, SAL SI PUEDES: CÉSAR CHAVEZ AND THE NEW AMERICAN REVOLUTION (rev. ed. 1971).

[11] *See id.;* J. LONDON & H. ANDERSON, *supra* note 6. Both books contain detailed accounts of the jockeying between camp owners on the one hand, and priests, union organizers, and social workers on the other, over wages, working conditions, and access to the camps.

[12] *See* note 11 and accompanying text *supra.*

[13] *See, e.g.,* Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973); Franceschina v. Morgan, 346 F. Supp. 833 (S.D. Ind. 1972). All of the cases discussed in the text of this Note involved situations where arrests for trespass had been made or threatened. See also N.Y. Times, Sept. 4, 1975, at 36, col. 2, for a report on the threats of arrest made by farmers in California's current controversy over access to migrant camps.

[14] *See, e.g.,* Velez v. Amenta, 370 F. Supp. 1250 (D. Conn. 1974); N.Y. Times, Aug. 31, 1975, at 24, col. 1.

[15] *See* Asociacion de Trabajadores v. Green Giant Co., 518 F.2d 130 (3d Cir. 1975), where the plaintiffs chose to argue their case solely on first amendment grounds. *Id.* at 2. This first amendment approach, as this Note will show, is not the only route available to those seeking access.

[16] The use of the property-rights argument continually arises in outsider-versus-camp owner legal confrontations. For one example of how the argument has been used in recent California litigation, see the report in the N.Y. Times, Sept. 4, 1975, at 36, col. 2.

[17] *See* Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391 (7th Cir. 1975); Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973); Velez v. Amento, 370 F. Supp. 1250 (D. Conn. 1974); Franceschina v. Morgan, 346 F. Supp. 833 (S.D. Ind. 1972); Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971); State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971); People v. Rewald, 65 Misc. 2d 453, 318 N.Y.S.2d 40 (Cayuga Co. Ct. 1971); *contra* Asociacion de Trabajadores Agricolas v. Green Giant Co., 518 F.2d 130 (3d Cir. 1975).

access. One rationale proceeds from the premise that migrants are de facto tenants with all the rights of tenancy.[18] A second rationale proposed by the courts argues that only certain interests in land are worthy of protection from trespass.[19] A third line of judicial reasoning labels the migrant camps "company towns" with the result that parties seeking entry are protected by the first amendment. These courts rely on the line of first amendment cases beginning with *Marsh v. Alabama.*[20] All three rationales avoid dealing with the standards for balancing first amendment rights and property rights developed in *Lloyd Corporation v. Tanner.*[21]

In *Lloyd,* the Supreme Court articulated a three-part test for determining when first amendment rights would outweigh property rights so as to justify trespass on private land. First amendment rights would take precedence over property rights, the *Lloyd* Court stated, only when: (*1*) the property in question served a public or quasi-public function;[22] (*2*) the message of those seeking first amendment protection was reasonably related to the public use to which the property had been put;[23] and (*3*) no adequate

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[18] *See, e.g.,* Franceschina v. Morgan, 356 F. Supp. 833 (S.D. Ind. 1972); Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971).

[19] State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971).

[20] *See* Marsh v. Alabama, 326 U.S. 501 (1946); Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391 (7th Cir. 1975); Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973); People v. Rewald, 65 Misc. 2d 453, 318 N.Y.S.2d 40 (Cayuga Co. Ct. 1971).

[21] 407 U.S. 551 (1972). *Lloyd* has been the subject of some scathing commentary in the law reviews. *See, e.g.,* Recent Development, *Expression of First Amendment Rights in the Privately-Owned Shopping Center,* 22 CATH. U.L. REV. 807 (1971); Note, *The Demise of Logan Valley and the Disguise of Marsh,* 61 GEO. L.J. 1187 (1973); 57 MINN. L. REV. 603 (1972).

[22] 407 U.S. at 562-63, 569-70. Whether private property has assumed a public function seems, under one reading of *Lloyd,* to be a threshold question on the issue of state action. Thus, a parcel of private property must be dedicated to a public function before any balancing of free-speech rights with property rights can occur. *Id.* at 567. Exactly when private land assumes a public function is never clearly answered in *Lloyd*; rather, Justice Powell, writing for the Court, provides only sketchy guidelines:

> Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. . . . Nor is size alone the controlling factor. . . . This is not to say that no differences may exist with respect to governmental regulation or rights of citizens arising by virtue of the size and diversity of activities carried on within a privately owned facility serving the public. . . . We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected.

Id. at 569-70.

[23] *Id.* at 563. In his dissenting opinion, Justice Marshall argued that the relatedness of an activity to the use to which land had been put should be judged in light of past uses of the land and not in light of the "normal" uses of the land. He argued that the Lloyd Corporation had permitted political organizations to use their shopping center for political purposes in the past; thus, he maintained, the corporation could not argue that the activity of Viet Nam war protesters was unrelated to the use to which the land had been put, even though the land was normally used for nonpolitical, commercial purposes. *Id.* at 579 (dissenting opinion, Marshall,

alternative means of communication that did not require trespass existed.[24]

The *Lloyd* tests pose many potential difficulties for those asserting a "right" to enter migrant camps. For instance, camp owners can argue that alternative means of communication are easily available to reach migrants.[25] They may claim that the message sought to be conveyed by some outsiders is in no way related to the public function of the camp.[26] Camp owners can also argue that their camps serve no quasi-public functions.[27] Were the camp owners to prevail on any one of these arguments, under *Lloyd,* the claim of those seeking entry would be defeated.[28]

Can the *Lloyd* test be avoided in the migrant camp situation? Does a rationale that avoids *Lloyd* satisfactorily protect the interests of the migrants? If it does not, can other rationales be offered that would provide more protection? Finally, if *Lloyd* cannot be avoided, can the migrant camp situation be analyzed in such a way so as to protect the first amendment rights of those seeking entry? This Note responds to these questions.

I

THE LANDLORD-TENANT RATIONALE

In *Franceschina v. Morgan*[29] and *Folgueras v. Hassle*[30] the courts

J.). The majority opinion, in contrast, judged the relatedness of the speech in light of the normal, quotidian uses of the land. The majority also indicated that "relatedness" would be judged in part by the audience the protesters wished to reach; if the audience were merely the public in general, the court noted, there could be no relatedness between message and use. *Id.* at 564.

[24] *Id.* at 566-67.

[25] Camp owners might suggest, for instance, that local newspapers be utilized to convey messages to the migrants without any trespassory infringement on camp land. *See* notes 152-53 *infra.*

[26] This argument would be especially effective where those seeking access were attempting to disseminate a message about the plight of Mexican-Americans. In that instance, camp owners could argue that even if many migrants were Chicanos the message was still directed to a larger group and lacked the particularity of relationship to the land use required by *Lloyd. See* note 23 *supra.*

[27] The lack of a clear definition of "public function" makes this argument attractive. *See* note 22 and accompanying text *supra.*

[28] The *Lloyd* Court made it clear that all three factors would have to be present before the first amendment would protect the free-speech rights of those seeking access. 407 U.S. at 563.

[29] 346 F. Supp. 833 (S.D. Ind. 1972). The defendants in *Franceschina* were a packing company, that had interests in farming operations in Indiana, and the company's president. The company ran camps in seven Indiana counties to house migrants who worked in the company's farming operations and worked for other farmers in the area. *Id.* at 834-35. The plaintiffs were employees of organizations funded by the Office of Economic Opportunity and union organizers working for the United Farm Workers. The plaintiffs were forbidden to

held that migrants were tenants within the meaning of state law.[31] As tenants, the migrants were entitled to invite whatever guests they chose into their homes free from landlord interference.[32] The courts reasoned that the labor the migrants performed for the camp owners was in part consideration for the "lease" of camp housing.[33] The *Folgueras* court, in determining that the relationship between camp owner and migrant was one of landlord and tenant, specifically noted that the migrants occupied their homes exclusively for a fixed term[34] and that the landlord was bound by a federal government regulation to provide housing satisfying a minimum standard.[35] Thus, the migrants had entered into a "lease" with definite terms.

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enter the defendant's property, and plaintiff Franceschina was excluded from the camps on the grounds that he was "long haired, liberal, [and] a socialist." *Id.* at 836. When the plaintiffs entered on the land of the company, they were arrested. They then brought an action for injunctive relief to protect their alleged right of access to the camps. *Id.* at 834.

[30] 331 F. Supp. 615 (W.D. Mich. 1971). The plaintiffs in *Folgueras* were student employees of the United Migrants for Opportunity, Inc., and a family of migrant workers. The student employees had received invitations from a migrant named Gutierrez to visit the defendant's camp to help care for the Gutierrez's sick children. *Id.* at 617. When the plaintiffs arrived at the camp, they were attacked by the defendant, who kept plaintiff Folgueras pinned to the ground for two hours with a shotgun pointed at his head. The plaintiffs were then arrested for trespass. *Id.* They brought an action for a declaratory judgment and for damages both for the physical attack and for the denial of access.

[31] 346 F. Supp. at 838; 331 F. Supp. at 624. The *Franceschina* and *Folgueras* courts did not base their decisions to grant access solely on the tenancy rationale. The *Folgueras* court also held that the activities of the plaintiffs were protected by the first and fourteenth amendments (331 F. Supp. at 623), and that the defendant did not have a possessory interest in land protected by the state's trespass laws (331 F. Supp. at 624). The *Franceschina* court also found that the first and fourteenth amendments protected the plaintiffs. 346 F. Supp. at 837-39.

[32] 346 F. Supp. at 839; 331 F. Supp. at 625. The *Franceschina* court spoke of a "constitutional" right to invite guests into the home and a corresponding right of access for the visitor. 346 F. Supp. at 839. The *Franceschina* opinion is extraordinarily confused, and the reader has to search hard for the rationale supporting the court's result. The court writes:

> This is consideration enough . . . to denote the migrant a tenant for the term of the crop season. A tenant *sui generis*, perhaps, but yet a tenant.
>
> In short, the controlling status here is that the migrants are citizens of the United States, residing in their own homes, and are entitled to be treated as such. By the same token, their would-be visitors have the constitutional right to visit with them, subject to the discretion of the migrants . . . .

Id. at 838-39. Thus, in two paragraphs the court suggests that (*1*) migrants have the rights of tenants, (*2*) migrants have the rights of citizens, and (*3*) visitors have the constitutional right to visit with the migrants if the migrants invite them. None of these propositions logically follows each other.

[33] 346 F. Supp. at 838; 331 F. Supp. at 625. For a case where migrants did pay rent, and thus were clearly tenants, see State v. Fox, 82 Wash. 2d 289, 510 P.2d 230 (1973), *cert. denied*, 414 U.S. 1130 (1974). The *Fox* case is unusual in that a separate rental agreement was signed by the migrants.

[34] 346 F. Supp. at 838.

[35] 20 C.F.R. §§ 620.1-.17 (1975). An employer of migrant workers must satisfy minimum standards for housing if he makes use of the interstate agricultural recruitment services of the

The *Franceschina-Folgueras* analysis seems, at first glance, to provide an attractive way to avoid any constitutional questions posed by the access problem. Landlord-tenant law is familiar ground for both courts and poverty lawyers.[36] The right of tenants to invite guests onto their leased premises is well established by law,[37] as both the *Folgueras* and *Franceschina* courts observed.[38] Finally, the migrant-camp owner relationship seems to fit the classic model of a landlord-tenant situation. In both circumstances, an owner relinquishes the right of possession of his premises for a fixed term to a party who provides a consideration in return.[39]

Unfortunately, several problems are raised by the use of the landlord-tenant model for resolving conflicts concerning access. First, courts in a vast majority of jurisdictions have held that no tenancy is created when rent-free housing is furnished to an employee by an employer to enable the employee to better perform his duties.[40] Courts have characterized the relationship created in this situation as one of master and servant rather than one of landlord and tenant.[41] Under the majority rule, the migrant-camp owner relationship would not establish a recognized tenancy.[42] The *Franceschina* court was not confronted with any precedent to this effect,[43]

United States Employment Service, as did the employers in both *Franceschina* and *Folgueras*. 346 F. Supp. at 835; 331 F. Supp. at 624.

[36] For a persuasive argument that poverty lawyers know *too* much about landlord-tenant law, see Comment, *Legal Services and Landlord-Tenant Litigation: A Critical Analysis*, 82 YALE L.J. 1495 (1973). The author of that piece suggests that poverty lawyers too often litigate hopeless tenant claims, thus overburdening the courts while providing few benefits to their clients.

[37] *See* Brown v. Kisner, 192 Miss. 746, 763, 6 So. 2d 611, 617 (1942); Lott v. State, 159 Miss. 484, 490, 132 So. 336, 338 (1931); Denver v. Sharpless, 191 Pa. Super. 554, 557, 159 A.2d 7, 9 (1960).

[38] 346 F. Supp. at 839; 331 F. Supp. at 625.

[39] In speaking of the migrant-camp owner relationship, the *Folgueras* court noted:

> Thus, all the elements of the typical landlord-tenant relationship are present. The migrant pays for the dwelling he occupies; the landlord binds himself to provide a dwelling of a fixed quality; the migrant occupies the dwelling exclusive of the landlord for an agreed upon term—the length of his employment.

331 F. Supp. at 624.

[40] *See, e.g.*, Davis v. Williams, 130 Ala. 530, 30 So. 488 (1901); Wukaloff v. Malibu Lake Mountain, 96 Cal. App. 2d 147, 214 P.2d 832 (1950); Mead v. Pollock, 99 Ill. App. 151 (1900); Mayer v. Norton, 62 Misc. 2d 887, 310 N.Y.S.2d 576 (N.Y.C. Civ. Ct. 1970).

[41] *See, e.g.*, Guiel v. Barnes, 100 Conn. 737, 125 A. 91 (1924).

[42] For instance, in both *Folgueras* and *Franceschina* the migrants received their housing as part of their employment agreement. In *Franceschina* the situation was somewhat more complicated than in *Folgueras*. The camp owner in the former case had migrants living on his property who were not in his employ. It is conceivable, therefore, that in a jurisdiction following the majority rule a landlord-tenant relationship would arise between the camp owner and the nonemployee residents of his camp but that no tenancy would be created between the camp owner and his own employees.

[43] The defendants in *Franceschina* argued that the migrants should be classed as servants

but the *Folgueras* court ignored a line of Michigan cases following the majority rule.[44]

The majority rule is supported by sound public policy considerations. Rent-free housing furnished by an employer to an employee is in most cases part of the compensation furnished by the employer under an employment contract.[45] In delineating the legal duties of the parties in such a situation it makes sense to focus on the primary relationship between them.[46] Moreover, characterizing their duties in a conflict over housing as arising from a master and servant relationship normally affords more protection to the employee than would a landlord-tenant analysis.[47] Although, as one eminent treatise writer has pointed out, the rule is riddled with judicially created exceptions,[48] it has been adopted in the *Restatement (Second) of Property*.[49] To gain acceptance of a landlord-tenant analysis in the migrant camp situation, proponents of this solution would be forced to convince courts to overrule adverse precedent supporting the majority rule.

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and not as tenants. The court said the differences in characterization "matter[ed] not" and then proceeded to explain at length why the migrants were tenants. 346 F. Supp. at 838. In any event, a diligent search of Indiana case law indicates that this issue had not been decided in Indiana when *Franceschina* arose.

[44] In School District No. 11 v. Batsche, 106 Mich. 330, 64 N.W. 196 (1895), the Michigan Supreme Court had held that a teacher occupying a residence furnished him by his employer was in a master-servant, and not a landlord-tenant, relationship. In Tucker v. Burt, 152 Mich. 68, 115 N.W. 722 (1908), a similar result was reached in the case of a janitor occupying rent-free premises furnished him by his employer.

[45] Some courts have noted that a tenancy might arise if the employer received rent in exchange for the let premises; in such a case, the rental contract would be independent of the employment contract. Womack v. Jenkins, 128 Mo. App. 408, 107 S.W. 423 (1908). One court has suggested that if the employer allows his servant-employee to exercise the right of a tenant to sublet the premises, a tenancy will then be implied. Snedaker v. Powell, 32 Kan. 396, 4 P. 869 (1884).

[46] This is especially true in situations where legal duties may change depending on the characterization of the relationship between the parties. In such circumstances it seems logical to look at the primary relationship of the parties to determine legal duties, since the parties themselves are likely to have their expectations determined by the primary relationship.

[47] Tort law is one area where the master-servant characterization would work to the employee-"tenant's" advantage. For instance, in Guiel v. Barnes, 100 Conn. 737, 125 A. 91 (1924), the Connecticut Supreme Court reversed a lower court decision holding that a "landlord" had not been negligent in causing his "tenant's" death. The court held that the "landlord" was a "master" and the "tenant" a "servant"; hence, a higher standard of duty was owed the servant-employee than would have been the case had the deceased party been a mere tenant. An employee-servant can also claim that his right to the premises furnished him by his employer continues for the life of his employment contract, and can thus defeat an attempt by his employer to evict him. *Cf.* School District No. 11 v. Batsche, 106 Mich. 330, 64 N.W. 196 (1895).

[48] See A. CASNER, 1 AMERICAN LAW OF PROPERTY § 3.8 (1952), for an argument that the rule is not applied absolutely whenever rent-free housing is furnished by an employer to his employee, and that exceptions to the rule are numerous.

[49] RESTATEMENT (SECOND) OF PROPERTY § 1.2 (Tent. Draft No. 1, 1973).

Other problems arise if migrants are characterized as tenants by the courts. Conceivably, migrants could bargain away their right to invite guests onto their leased premises by a specific contractual provision. Such a lease clause could possibly be voided on public policy grounds.[50] Courts have refused, on public policy grounds, to enforce lease clauses that relieve the landlord of liability for personal injury[51] or that force indigent tenants to pay landlord attorney's fees.[52] A landlord could counter such arguments by contending that a "no-guest" lease clause is no more obnoxious than clauses prohibiting wild parties or excessive noise, which are routinely enforced by courts.[53] In any event, if the landlord-camp owner were to force the migrant to agree to such a lease clause, the migrant tenant, rather than an outsider, would then be the only party with standing to challenge the validity of the clause.[54]

[50] The tenant could argue that the right to invite guests onto his property is an integral part of the bargained-for leasehold. This argument is premised on the assumption that the tenant should have an implied right to use the leased property as he sees fit so long as no waste is committed. The landlord's right to restrict the use the tenant makes of the leased property, the tenant argues, should be limited to lease clauses reasonably related to the landlord's legitimate concern with preventing waste. The tenant would thus contend that this right to invite guests is analogous to his right to be free from legal and physical obstacles erected by the landlord that hinder the tenant's occupancy of the leased property. *See* Richard Paul, Inc. v. Union Improvement Co., 33 Del. Ch. 113, 91 A.2d 49 (1952) (court forced landlord to remove physical barriers impeding tenant's access to leased premises); Plaza Amusement Co. v. Rothenberg, 159 Miss. 800, 834-36, 131 So. 350, 356 (1930) (court cited with approval rule that where property is leased for particular use, landlord may not interpose legal obstacles to such use).

[51] *See* Crowell v. Housing Authority, 495 S.W.2d 887 (Tex. 1973); McCutcheon v. United Homes Corp., 79 Wash. 2d 443, 486 P.2d 1093 (1971). Exculpatory clauses in leases have been declared invalid by statute in some states. *See, e.g.*, DEL. CODE ANN. tit. 25, § 5515 (1974); MD. REAL PROP. CODE ANN. § 8-105 (1974); N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 1964). For a general discussion of the validity of exculpatory clauses in leases, see C. DONAHUE, T. KAUPER & P. MARTIN, PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 839-42 (1974).

[52] *See, e.g.*, Edot Realty Co. v. Levinson, 54 Misc. 2d 673, 283 N.Y.S.2d 232 (N.Y.C. Civ. Ct. 1967).

[53] The landlord's argument would rest on the general principle that parties to a leasehold contract can consent to almost any terms they wish in a leasehold agreement. The landlord can argue that the right to invite guests onto leased property has never given the tenant the right to create a nuisance or to use the premises for disreputable purposes. *See* Miles v. Lauraine, 99 Ga. 402, 27 S.E. 739 (1896); Sullivan v. Waterman, 20 R.I. 372, 39 A. 243 (1898). Thus, the landlord could argue that the parties should have the right to agree in their lease as to what constitutes a nuisance or a disreputable use. If the parties agree that the presence of union organizers would create a nuisance, the landlord would argue, then the parties should be free to write into the lease a prohibition on visits by such organizers. Moreover, the landlord could argue that the right of a lessor to restrict the uses to which his premises are put is well recognized in law. *See, e.g.*, Alabama Fuel & Iron Co. v. Courson, 212 Ala. 573, 103 So. 667 (1925); Denecke v. Henry F. Miller & Son, 142 Iowa 486, 119 N.W. 380 (1909); Lamont Bldg. Co. v. Court, 147 Ohio St. 183, 70 N.E.2d 447 (1946).

[54] Thus, outsiders would not have standing to bring an action to void a lease clause since they were not parties to the contract. The court test could only arise if the migrant brought an

Rather than risk a court test of a no-guest clause, a camp owner might decide not to execute a lease with his migrant-tenant, thus leaving the migrant a tenant at will.[55] The landlord could then evict any migrant who invited undesirable guests into his home.[56] Courts have held that a landlord may not evict a tenant at will in retaliation for complaints made to a local housing authority.[57] These cases, however, can be distinguished from an eviction in retaliation for inviting an undesirable guest onto leased premises. First, the courts that forbid retaliatory evictions for complaints to housing authorities have reasoned that the smooth operation of state and municipal housing laws would be interfered with if tenants did not feel free to complain to state and municipal agencies about housing conditions.[58] But state policy in support of the right of the migrants to unionize or to join a political movement seems lacking. Moreover, complaints to housing authorities strike at the very heart of the landlord-tenant relationship: the condition of the leased premises.

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action for declaratory relief or if the migrant were evicted for violating a no-guest rule and sought to defend by pleading that the clause was unconscionable. For a discussion of standing to contest the terms of a lease, see Flesher v. St. Paul Apartment House Co., 151 Minn. 146, 186 N.W. 232 (1922) (member of tenant's family had no standing to bring an action to enforce covenant between tenant and landlord).

[55] The migrant would be a tenant at will since his tenancy would be at the mutual pleasure of the parties and there would be no express contract setting forth the terms of the leasehold, thus creating an implied tenancy at will.

[56] The right of a landlord to terminate a tenancy at will has until recently been thought to be absolute. *See, e.g.*, O'Reilly v. Frye, 263 Mass. 318, 160 N.E. 829 (1928); Freedline v. Cielensky, 115 Ohio App. 138, 184 N.E.2d 433 (1961); Lyons v. Philadelphia & Reading Ry., 209 Pa. 550, 58 A. 924 (1904).

[57] Recently, courts have carved out an exception to the general rule that a tenancy at will is terminable at the will of the landlord. The exception has been limited to cases where the landlord's termination of the tenancy was in retaliation for the tenant's complaint to local housing authorities. The leading case in this area is Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). A similar result has been reached in other jurisdictions. *See* Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970); Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970). Some states have sought to provide a retaliatory-eviction defense by statute. *See, e.g.*, MICH. STAT. ANN. § 27A.5720 (Cum. Supp. 1975); MINN. STAT. ANN. § 566.03(2) (Cum. Supp. 1975); R.I. GEN. LAWS ANN. §§ 34-20-10 to -11 (1970).

[58] For instance, the court in Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969), reasoned that the District of Columbia's housing code's

> [e]ffective implementation and enforcement . . . depend in part on private initiative in the reporting of violations. . . .
>
> . . . .
>
> The notion that the effectiveness of remedial legislation will be inhibited if those reporting violations of it can legally be intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred . . . .

Id. at 700-02. The other cases finding that a retaliatory-eviction defense exists also have based their holding on state housing law. *See, e.g.*, Dickhut v. Norton, 45 Wis. 2d 389, 397, 173 N.W.2d 297, 301 (1970).

Courts, in protecting tenants from retaliatory eviction for complaints to housing authorities, have been at least partially motivated by a desire to see that a tenant has at least some protection, and thus some bargaining power, in his disputes with a landlord over housing conditions.[59] Courts in retaliatory eviction cases have, however, been very careful to limit the availability of the defense.[60]

It is unlikely that courts would be willing to restrict the traditional power of the landlord to evict a tenant at will where the dispute prompting the eviction is unrelated to housing; otherwise, every tenant at will might attempt to invoke "public policy" to prevent his eviction.[61] Moreover, it is difficult to find the requisite state action when a landlord uses eviction to stifle his tenant's exercise of free speech.[62] State action is a prerequisite to a free-speech de-

[59] *See* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

[60] The complaint of the migrant could conceivably be stretched to fit the *Habib* retaliatory-eviction defense. Thus, if a migrant invited visitors into his house to complain about the conditions of his housing, he could claim a retaliatory purpose existed if the landlord then sought to evict him. However, the *Habib* court and other courts that have considered the issue have left open the question of whether complaints about housing made to someone other than a state-authorized housing agency would allow the tenant to plead a retaliatory-eviction defense. Logic suggests, however, that if the retaliatory-eviction defense is based on state statutes establishing housing agencies to handle tenant complaints, then the defense should be limited to cases where tenants complain to the statutorily created housing authorities.

[61] Some public policy argument could be found to protect the tenant in almost any eviction of a tenant at will. A tenant evicted because the landlord found a party willing to pay more rent could claim that public policy favors providing housing for the poor; therefore, as the poorer of the possible tenants he should be allowed to stay in his apartment. Such an argument is specious, but does indicate the wisdom of limiting *Habib* and the other retaliatory eviction cases to situations where the retaliatory purpose is clear and the eviction is in retaliation for complaints made to the proper authorities.

[62] In *Habib*, Judge Wright considered whether the ordering of an eviction by a court constituted sufficient state action so as to prevent the court from ordering the eviction on first amendment grounds. 397 F.2d at 690-98. Judge Wright concluded that some support for the proposition that state action was involved in the mere enforcement by the courts of an eviction could be found in Shelley v. Kraemer, 334 U.S. 1 (1948). Judge Wright, however, refused to decide the first amendment issue because narrower statutory grounds existed for granting the tenant the relief sought. 397 F.2d at 699.

The district court in Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969), squarely held that the enforcement by a court of an eviction constituted sufficient state action so as to give the tenant involved the protection of the first and fourteenth amendments. The court noted that "[t]here is no doubt today that judicial action in private disputes is a form of state action . . . ." *Id.* at 505. If the *Hosey* court is correct, migrants would certainly be protected by the first amendment from eviction in retaliation for their exercise of first amendment rights. The *Hosey* court, however, seems clearly wrong. The actions of courts in enforcing eviction laws that do not themselves infringe on first or fourteenth amendment rights would seem to involve no impermissible state infringement of freedom of speech or of equal protection. The court in such a case is merely neutrally enforcing laws that are themselves constitutionally valid. *Cf.* Lindsey v. Normet, 405 U.S. 56 (1972). In *Lindsey* the Court pointed out that "[t]he Constitution has not federalized the substantive law of landlord-tenant

fense.[63] Judicial enforcement of the eviction would not seem to be a sufficient basis for finding state action.[64] Thus, camp owners could freely evict their migrant-tenants at will.

Even if migrant-tenants could plead a free-speech defense to thwart attempted evictions, difficulties would still remain for outsiders seeking to visit the migrants. Organizing migrants involves contacting workers quickly[65] and often.[66] Under a tenancy model, this type of contact would be difficult. Mass meetings on camp property that is not used for residential purposes could be forbidden by camp owners.[67] Organizers would be required to receive invitations from individual migrants before they could enter camp property.[68] Migrants who extended such invitations would be subject to retaliatory action by the camp owner.[69] The tenancy rationale seems to provide

relations . . . ." *Id.* at 68. The Court implied that the Constitution did not require that the states make a retaliatory-eviction defense available. The Court expressly noted, in discussing the permissible variety of state landlord-tenant law, that many states did not provide for a retaliatory-eviction defense, and implied that this was constitutionally permissible. *Id.* at 69.

Moreover, good sense argues that not every issue that reaches a court immediately cloaks the parties with a robe of constitutional protection since state action is then involved simply because a court is acting as a mediator between the parties. As the Supreme Court pointed out in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), state involvement must be "significant" before the Constitution will dictate the parameters of the relationships engaged in by private parties. *Id.* at 173, *quoting* Reitman v. Mulkey, 387 U.S. 369, 380 (1967). It is hard to find significant state action in a routine processing of evictions. The eviction cases can be easily distinguished from Shelley v. Kraemer, 334 U.S. 1 (1948). In *Shelley,* the Court, by positively enforcing a restrictive covenant, thwarted the will of the parties who wished to buy and sell land in violation of the discriminatory covenant. The court, by enforcing the covenant, positively fostered racial discrimination. A court in an eviction case, however, merely acts as a neutral referee between the parties. *See* Evans v. Abney, 396 U.S. 435, 445 (1970) (distinguishing *Shelley* from court enforcement of cy pres doctrine).

[63] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 173 (1972).

[64] *See* note 62 *supra.*

[65] See J. DUNNE, DELANO: THE STORY OF THE CALIFORNIA GRAPE STRIKE 55 (1967), for Saul Alinsky's description of the tactics that would produce the best result in a farm workers' organizing campaign.

[66] For a description of the repeated marches, speeches, and picketing necessary for the successful conduct of an organizing campaign among the migrants, see E. NELSON, HUELGA (1966).

[67] As tenants, migrants could control only their abodes; their right to invite guests would extend only to their own homes and not to land beyond their control. On land not used for housing, the landlord could still exercise full rights of ownership, including the right to evict trespassers.

[68] Thus, as "guests," outside organizers would be forced to receive invitations before they could enter migrant homes. Since migrant workers are not covered by the National Labor Relations Act, organizers would not have the right to receive lists of migrants from employers in order to contact the workers to solicit such an invitation. For a discussion of how this problem is handled under the National Labor Relations Act, see NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).

[69] Thus, camp owners could increase the work the disfavored migrant was forced to perform, shift the migrant to less desirable premises, or fire a migrant who had the courage to invite an "undesirable" into his house.

little protection to the migrant and no effective aid to the organizer or social worker seeking access to the migrant camps.

II

THE *State v. Shack* RATIONALE

In *State v. Shack*,[70] the New Jersey Supreme Court held that the state's trespass law protected only the legitimate possessory interests of a landlord.[71] Since a landowner may not use his ownership rights in land to harm others,[72] the court reasoned that he could not utilize the trespass laws to protect such prohibited uses.[73] To further buttress its analysis and result, the court invoked the recognized tort doctrine that necessity may justify trespass.[74] The court argued that the condition of the migrants made it necessary for outsiders to enter private land to aid them.[75]

Shack has been favorably noted[76] and often cited.[77] The *Shack* analysis provides a way around many of the difficulties posed by the tenancy rationale. *Shack* removes the trespass weapon from the landlord's legal arsenal and seems to provide unlimited access to the migrant camps.[78] However, this approach raises problems of its own. For instance, the court provided no guidelines delineating the

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[70] 58 N.J. 297, 277 A.2d 369 (1971). *Shack* involved the arrest for trespass of an organizer for the Southwest Citizens Organization for Poverty Elimination and an attorney affiliated with Camden Regional Legal Services. No one appeared to argue the state's case before the New Jersey Supreme Court. *Id.* at 299, 277 A.2d at 370.

[71] *Id.* at 302-03, 277 A.2d at 371-72.

[72] *Id.* at 303-05, 277 A.2d at 372-73.

[73] *Id.* at 302-03, 277 A.2d at 371.

[74] The court, citing the RESTATEMENT (SECOND) OF TORTS §§ 197-211 (1965), noted: "Hence it has long been true that necessity, private or public, may justify entry upon the land of another." 58 N.J. at 305, 277 A.2d at 373.

[75] *Id.*

[76] Comment, *Criminal Trespass*, 46 N.Y.U.L. REV. 834 (1971); 25 SW. L.J. 789 (1971). The author of the *N.Y.U. Law Review* Comment finds that *Shack* introduces a desirable flexibility into trespass law. I find the *Shack* opinion to lead to undesirable uncertainty.

[77] See, *e.g.*, Asociacion de Trabajadores Agricolas v. Green Giant Co., 518 F.2d 130 (3d Cir. 1975), for an instance where *Shack* was cited quite inappropriately.

[78] The *Shack* court indicated that the camp owner might bar salesmen, and could ask visitors to identify themselves. However, his right to control access extended no further. The court concluded:

> But the 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 . . . .

58 N.J. at 308, 277 A.2d at 374. The *Shack* court did not consider whether the wages paid migrants interfered with their opportunity to live in dignity. The *Shack* opinion, like many migrant-worker cases, is stronger on good intentions than on substance.

point at which the landlord's possessory interest might be protected by the trespass laws.[79] The use of the tort law necessity doctrine to support the result further complicates this issue. Under traditional tort law, necessity is a defense to trespass only in very narrow circumstances.[80] The defense is only available when the alleged trespass occurred to avoid the immediate threat of physical harm or damage to property,[81] or when the trespasser entered land to rescue someone in physical danger.[82] The common law zealously guarded the rights of landowners, and exceptions to the rule of "no trespass" were narrowly drawn.[83] Under *Shack,* however, any time the fundamental rights[84] of the migrants are endangered, trespass will be justified. The responsibility of determining when such "fundamental rights" are jeopardized is placed on the trial judge.

Judges who are not inclined to expand the traditional necessity defense are free to limit *Shack* to situations where the lives or health

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[79] The failure of the *Shack* court to delineate precise standards for the application of its ruling was perceived by the writer of the Comment in the *N.Y.U. Law Review* (*see* note 76 *supra*) as a virtue of the opinion. His praise of *Shack* exposes the weakness of the opinion:

> To guarantee access to the workers, it is necessary only that the court, *at a given point in time,* make a *sociological* determination of what human values need protection and balance these interests against what it *perceives* are the landowner's property rights.

Comment, *supra* note 76, at 848 (emphasis added). There is no question that judges are constantly making judgments about which values in society are fundamental. It is also indisputable that courts frequently weigh competing interests in arriving at a rule of decision. *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). I quarrel with the author of the *N.Y.U. Law Review* Comment, however, as to whether trespass law lends itself to such a balancing process. As this Note attempts to make clear, I argue that it is preferable to leave trespass as a strict liability tort in order to adequately protect the interests of landowners; this strict liability would not, however, reach those individuals protected by the first amendment who sought entry onto the land. The problem with *Shack* is that it diminishes the protection afforded landowners when there is a trespass and first amendment rights are not involved, but the trespasser is able to invoke some other "fundamental right" to justify his actions.

[80] As Dean Prosser noted, the situations where necessity has been recognized as a defense are "comparatively small [in] number." The most obvious example, of course, occurs when the defendant trespasses on land to save his own life. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 24 (4th ed. 1971) and cases cited therein.

[81] *See, e.g.,* Rossi v. DelDuca, 344 Mass. 66, 181 N.E.2d 591 (1962); Depue v. Flateau, 100 Minn. 299, 111 N.W. 1 (1907); Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908). Some courts have held that even when the trespass was committed to save valuable property or the trespasser's life, the trespasser is liable to the landowner for any damage done the landowner's property, although the trespasser is not liable unless actual damage to the property of the landowner has occurred. *See* Vincent v. Lake Erie Transportation Co., 100 Minn. 456, 124 N.W. 221 (1910). This principle has been accepted in the RESTATEMENT (SECOND) OF TORTS § 263 (1965).

[82] *See, e.g.,* People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721 (1956); People v. Gallmon, 19 N.Y.2d 389, 227 N.E.2d 284, 280 N.Y.S.2d 356 (1967), *cert. denied,* 390 U.S. 911 (1968).

[83] *See* note 80 *supra.*

[84] 58 N.J. at 308, 277 A.2d at 374.

of the migrants is threatened. This result is consistent with traditional tort law.[85] However, if courts read *Shack* broadly, the problem of determining what are "fundamental rights" becomes important. Could a court determine that a living wage was a fundamental right, and order access to preserve that right? Such a result is possible under *Shack*. If a union organizer was allowed entry, could he be arrested for trespass if after entry he carried on activity unrelated to this fundamental right?[86] Moreover, the holding of *Shack* is not limited to migrant-camp owner situations, but is broad enough to be applied to all trespass disputes.[87] Other trespassers could cite *Shack* to justify their actions. Thus, *Shack* substitutes a flexible standard of liability for traditional strict liability for trespass. It is questionable whether such a radical change in the law should have been undertaken by the courts absent legislative guidance. In any event, *Shack* significantly diminishes landowner protection against trespass. This result, in turn, raises constitutional questions.

The *Lloyd* decision can be interpreted as holding that the right of a property owner to be free from trespass is constitutionally protected.[88] If *Lloyd* is so read, it is open to question whether a state could constitutionally grant the public a greater "right to trespass" than is allowable under *Lloyd*. The freedom of a state to alter its trespass laws may thus be constitutionally circumscribed. Therefore, *Shack* would not avoid *Lloyd*'s stricture; it would simply force courts to deal with the *Lloyd* standards while using the "fundamental-rights" vocabulary of *Shack*.

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[85] *See* cases cited in notes 81-82 *supra*. Thus, doctors could probably enter upon a camp owner's land to provide medical services to ailing migrants under the necessity doctrine. Conceivably, social workers delivering food stamps might be able to argue that they were trespassing to "rescue" the migrants from starvation.

[86] To pose a hypothetical but not farfetched case: A union organizer enters the land of a camp owner to talk to the workers about unionization. This speech is found by the courts to be necessary to preserve a fundamental right of the migrants. While on camp property, the union organizer promotes the candidacy of a liberal political candidate or he urges the migrants to buy food at a cooperative store run by the union. Could the camp owner then claim that the organizer's activity was no longer related to a "fundamental right" of the migrants and thus call in the constabulary? *Shack* leaves such questions unanswered.

[87] The language of *Shack* is broad. The court states "[a] man's right in his real property of course is not absolute." 58 N.J. at 305, 277 A.2d at 373. Throughout its opinion, the court speaks of the limitations placed on landowners in general. *Id.* at 305-06, 277 A.2d at 373-74.

[88] The *Lloyd* Court spoke of the "Fifth and Fourteenth Amendment rights of private property owners" as being constitutionally protected when those rights were invaded by trespassers. 407 U.S. at 570. The Court expressly pointed out that it had "never held that a trespasser . . . may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." *Id.* at 568.

III

Marsh Redivivus

A possible means to avoid a *Lloyd* balancing test in the access cases, while still granting first amendment protection to outsiders and migrants, has been advanced by the United States Court of Appeals for the Fifth Circuit in *Petersen v. Talisman Sugar Corp.*[89] and the Seventh Circuit in *Illinois Migrant Council v. Campbell Soup Co.*[90] Both courts found that migrant camps were "company towns"[91] and held that in such situations *Marsh v. Alabama*[92] dictated that full first amendment rights would be guaranteed to those entering such a "town."[93] *Marsh,* the courts held, was the only precedent applicable to the company-town situations.[94] Under *Marsh,* the courts argued, a company-town owner had only the rights of a municipality to regulate free speech.[95]

Under the rationale of *Petersen* and *Campbell Soup* a migrant

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[89] 478 F.2d 73 (5th Cir. 1973). Because fact situations are so important in a determination that a particular camp is a "company town," it is important to consider the facilities provided by the camp owner in *Petersen.* The *Petersen* camp contained a kitchen, mess hall, recreation facilities, and a store. A chaplain conducted regular services at the camp. A store sold general merchandise. The camp covered 38,000 acres and was 25 miles from the nearest town. *Id.* at 75-76. In People v. Rewald, 65 Misc. 2d 453, 318 N.Y.S.2d 40 (Cayuga Co. Ct. 1971), the court found the camp in question to be a company town. The *Rewald* camp had a food service open to members of the public, a church, a grocery store, a baseball field and a basketball court, public showers, a barber shop, a telephone, lighted streets, a sewage system, and a day-care and health center. *Id.* at 454-55, 318 N.Y.S.2d at 42-43.

[90] 519 F.2d 391 (7th Cir. 1975). This case was an appeal from a dismissal of the Illinois Migrant Council's action for a declaratory judgment and for damages. The district court found that, on the basis of the pleadings, the camp in question was not a "company town." The pleadings contained only sketchy allegations about the municipal services provided by the camp. In reversing the district court, Judge Tuttle pointed out that the pleadings should have been read in a light most favorable to the plaintiff Migrant Council. So read, Judge Tuttle argued,

> [i]t would . . . seem reasonable to infer that a community of 150 persons, located some miles from any other town, must have some means of protecting itself from crime and fire, and must have some means of disposing of its sewage.

Id. at 395. Thus, the court argued, the camp in question could be found to be a company town within the meaning of Marsh v. Alabama, 326 U.S. 501 (1946). The case was remanded to the district court for a further finding of facts. 519 F.2d at 397.

[91] 478 F.2d at 82; 519 F.2d at 395.

[92] 326 U.S. 501 (1946).

[93] 478 F.2d at 82; 519 F.2d at 396.

[94] The court in *Campbell Soup* succinctly stated its view of this issue:

> If Prince Crossing has the characteristics of a municipality and serves as a functional equivalent of a normal town to its inhabitants, it is not necessary to attempt to define the use to which the public is invited to put the town to [*sic*], or to evaluate alternative means of communication.

519 F.2d at 396-97.

[95] 478 F.2d at 82; 519 F.2d at 396.

camp owner could in all likelihood reasonably regulate the time and place where meetings are held.[96] Reasonable regulation of camp streets would be tolerated.[97] Certain parts of the camp not normally dedicated to a "public" use might be declared off-limits to speakers.[98] The camp owner could not, however, require speakers to obtain an invitation from the migrants before speaking.[99] Large public gatherings could not be absolutely forbidden.[100] Although the camp owner might be able to regulate the places where notices of union meetings or other activities were posted,[101] he could not prohibit the posting of such notices *in toto* (as he could if migrants were merely tenants rather than residents of the company town). The company-town rationale would significantly limit the control of the camp owner over his property. However, the *Petersen* and *Campbell Soup* cases present their own difficulties.

First, the criteria for determining when an employer's property becomes a company town have never been clearly defined. In *Marsh*,[102] the Court noted that the company property was a town because of the level of "municipal" services it provided.[103] The Court also emphasized that outsiders coming into the town would have

[96] *See, e.g.*, Abernathy v. Conroy, 429 F.2d 1170 (4th Cir. 1970) (upholding a limitation on hours during which parades were permitted).

[97] *See, e.g.*, Davis v. Francois, 395 F.2d 730 (5th Cir. 1968); Hamer v. Musselwhite, 376 F.2d 479 (5th Cir. 1967); Clemmons v. Congress of Racial Equality, 201 F. Supp. 737 (E.D. La. 1962).

[98] This follows from Adderly v. Florida, 385 U.S. 39 (1966). The Court in *Adderly* held that the first amendment did not protect protesters who sought to demonstrate on government-owned property if that property was not normally dedicated to a public use. It follows that if a company town's owner can exercise all the powers of a municipality in regulating free speech, he could declare property not normally open to the migrants off-limits to outsiders.

[99] It has long been held that the first amendment protects the right to speak even if the audience does not wish to hear the speaker. *See, e.g.*, Bond v. Floyd, 385 U.S. 116 (1966) (state legislator's statement opposing American involvement in Viet Nam protected by the first amendment even though statement found offensive to fellow legislators in legislative context); Cox v. Louisiana, 379 U.S. 536 (1965) (duty of police to protect picketers who were exercising first amendment rights despite hostility of crowd gathered to watch picketing).

[100] *See* Cox v. Louisiana, 379 U.S. 536 (1965).

[101] *See* Chicago Park Dist. v. Lyons, 39 Ill. 2d 584, 237 N.E.2d 519, *cert. denied*, 393 U.S. 939 (1968). The *Lyons* court held that the state could forbid the posting of religious tracts on car windshields if the disseminator of the tracts had other means for getting the tracts to the public. The court found that the state had a legitimate interest in regulating littering so long as the pursuit of that interest did not have the effect of totally stifling speech.

[102] Marsh v. Alabama, 326 U.S. 501 (1946).

[103] In stating the facts of the case for the Court, Justice Black noted:

> The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchant and service establishments have rented the stores . . . and the United States uses one of the places as a post office . . . .

Id. at 502-03.

little notice that the land in question was privately owned since the company made no effort to restrict access to the property.[104] The exact weight, if any, to be given these factors was left unclear in *Marsh*,[105] and no other courts have significantly developed the analysis.[106] However, even under the sketchy criteria of *Marsh* it seems that a company could, by decreasing the level of services provided to its employees and by restricting access to the company-owned property, effectively convert a company town into mere private property. *Marsh* makes the first amendment protections afforded nonem-

[104] The Court noted:

> The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center.

Id. at 503.

[105] The exact weight to be given these factors was left unclear by the *Marsh* Court, probably because the Court did not think of the case as one involving the narrow question of what constitutes a company town. Justice Black, writing for the majority, spoke of the *Marsh* rule as if it were applicable to all situations where property rights and first amendment rights conflict. He wrote:

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.

Id. at 509. In his concurring opinion, Justice Frankfurter also wrote as if *Marsh* were intended to be of general applicability. *Id.* at 510.

Courts read *Marsh* as addressing the general problem of resolving the conflict between property rights and first amendment rights rather than as a narrow "company town" case. *See, e.g.*, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968) (finding *Marsh* in point in determining whether a shopping center could forbid picketing on its premises); Wolin v. Port Authority, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (*Marsh* relevant to determining whether a bus terminal could forbid handbilling); *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967) (*Marsh* relevant to railroad station context); People v. Barisi, 193 Misc. 934, 86 N.Y.S.2d 277 (Magis. Ct. 1948) (*Marsh* applicable to railroad station dispute).

It took the ingenuity of the *Lloyd* Court to limit *Marsh* to its facts. Thus, the only guideline as to what now constitutes a "company town" lies in the *Lloyd* Court's reading of *Marsh*. In discussing *Marsh* in *Lloyd*, Justice Powell referred to the company town as an "economic anomaly." 407 U.S. at 561. He then analyzed the factors that made the company town situation different from the ordinary conflict between property rights and first amendment rights:

> [Company] towns were built . . . by private capital with *all* of the customary services and utilities normally afforded by a municipal or state government: there were streets, sidewalks, sewers, public lighting, police and fire protection, business and residential areas, churches, postal facilities, and sometimes schools. . . . The [*Marsh*] Court simply held that where private interests were *substituting for* . . . government, First Amendment freedoms could not be denied . . . . Indeed, . . . [in *Marsh*] there were *no* publicly owned streets, sidewalks, or parks where such rights could be exercised.

Id. at 561-62 (emphasis added). Justice Powell's limitation of *Marsh* can be fairly read to provide two criteria for deciding when privately owned land becomes a company town: (*1*) the town must supply *all* the customary services of a municipality and (2) the town must be so isolated that the speakers seeking first amendment protection have no alternative other than entering the town to reach the residents. So read, the scope of *Marsh* is now very narrow.

[106] *See* note 105 and accompanying text *supra*.

ployee outsiders depend on the benevolence of the employer in furnishing services to his employees.[107] Thus, if the camp owner could show that he did not provide certain municipal services, or that he restricted access so as to ban all outsiders, it appears that under *Marsh* and *Petersen-Campbell Soup* the outsiders would have no first amendment protection.[108] By relying on a *Marsh* analysis to protect the rights of those seeking to aid the migrants, the *Petersen* and *Campbell Soup* courts furnish an incentive to other camp owners to decrease the services provided the workers.[109] In light of the usual extreme hostility of camp owners to the social workers and union organizers who seek entry to the camps, such a decrease is not far-fetched.

In addition, the precedential value of *Marsh* was called into question in both *Lloyd* and *Central Hardware v. NLRB,*[110] in which Justice Powell, writing for the Court, referred to the company town as an anachronism. In *Lloyd,* the Court undertook an extended analysis of the balancing process to be applied when property rights and speech rights conflict. This slighting of *Marsh* as precedent, and the attempt of the *Lloyd* Court to reconcile all the cases in the area of the conflict between speech rights and property rights indicates that the Court may have intended *Lloyd* to preempt the field.[111] If so, an analysis of the migrant camp situation under *Lloyd* standards is essential.[112]

IV

Lloyd AND THE MIGRANT CAMPS

In *Asociacion de Trabajadores v. Green Giant Co.,*[113] the United States Court of Appeals for the Third Circuit held that the mi-

[107] Thus, under the *Lloyd* Court's reading of *Marsh* (*see* note 105 *supra*), it would seem that, at a minimum, the camp owner would have to furnish a substantial number of the services provided by a municipality to be subject to the *Marsh* rule. A camp owner worried about suits by potential troublemakers could cut back on the services he provides the migrants in order to avoid granting access to his camp. The migrants might be deprived not only of the counsel of social workers and union organizers, but also of police and fire protection and recreation facilities. On the facts of *Petersen* and *Campbell Soup* a court could find that a company town situation existed even under the restrictive scope given *Marsh* by the *Lloyd* court. The company town rationale fails to protect the migrants, however, as soon as one imagines a camp that does not furnish a large number of services to the migrants. These serviceless camps seem to be common. *See* notes 1-9 and accompanying text *supra;* notes 122-25 *infra.*

[108] *See* note 105 *supra.*

[109] *See* note 107 *supra.*

[110] 407 U.S. 539 (1972).

[111] *Id.* at 545.

[112] *See* note 105 *supra.*

[113] 518 F.2d 130 (3d Cir. 1975). *Green Giant* was an action by the union for declaratory relief. The union sought an order granting access, which was refused by the district court. The

grant-camp access problem was within the scope of the *Lloyd* balancing test. The court noted that the camp was not a company town,[114] that property rights and free-speech rights were in conflict, and hence *Lloyd* was in point.[115] The court held that the labor camp in question served a quasi-public function[116] and that the speech of the petitioners was directly related to the public use to which the land had been put.[117] Thus, two of the three *Lloyd* prerequisites to a finding that first amendment rights would take precedence over property rights were satisfied by the union petitioner. The court held, however, that the union had not met its burden of proof in showing that no adequate alternative means of communicating its message existed.[118] Such a showing was "indispensable" to the plaintiff's case.[119] The court affirmed the verdict of the district court denying access to the petitioners.[120] The *Green Giant* court thus pinpointed the key issue in any discussion of *Lloyd* in the migrant-camp context—the adequacy of alternative means of communication.

Lloyd set forth three tests which must be satisfied before first amendment rights will outweigh property rights when the two conflict. The first prerequisite is that the private land take on, to some significant degree, the attributes of public land devoted to public use.[121] The migrant camp seems to meet this test easily. Although camp owners may not provide enough municipal services to qualify as company towns under *Marsh,* the typical camp will serve some public functions for its residents. At a minimum, sewage disposal and streets are typically provided.[122] The camp usually has a

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court of appeals affirmed the judgment. Green Giant's camp covered 3,500 acres near Middletown, Delaware. The camp had a first aid station, and fire and police protection were furnished by state and local authorities. Green Giant made no attempt to restrict its workers' travels to and from the camps.

[114] The court read *Marsh* in light of *Lloyd* to mean that the camp must be "indistinguishable from a town" before *Marsh* could apply. *Id.* at 137.

[115] The court noted:

> Where the private enterprise has some, but fewer than all, of the attributes normally associated with a community, a composite set of facts, tested under the formula of *Lloyd,* might warrant . . . a circumscribed access to the property . . . .

Id.

[116] *Id.* at 138.

[117] *Id.*

[118] *Id.* at 141.

[119] *Id.* at 138.

[120] *Id.* at 141.

[121] *See* note 22 *supra.*

[122] These sewage facilities may be minimal and of poor quality, but they are often at least an attempt to provide a "municipal" waste disposal system, which is a "public function."

company store at which the migrants shop.[123] The owner in recruiting his labor force extends an invitation to one group of the public—the potential labor force—to make use of his property.[124] Although the general public may be excluded from the camp once the labor force has been recruited,[125] thus raising issues under *Marsh* about the extent of restriction of access, the invitation to the public to enter for a time, taken together with the services performed for the residents, appears to vest the camp with enough "public functions" to meet the *Lloyd* test.

Lloyd also demands that the speech of those asserting first amendment rights be reasonably related to the public uses to which the land is put.[126] This prerequisite would also seem to be easily met in most migrant-camp access controversies. The *Lloyd* court specifically mentioned the union-organizing situation as one in which the relation between message and use would be clear.[127] The "message" of a social worker about food stamps or health services obviously is related to the company store or health-care facilities provided in most camps.[128] Whereas some messages might be so unre-

[123] The camps in Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973), Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971), Franceschina v. Morgan, 346 F. Supp. 833 (S.D. Ind. 1972), and State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971), all had company stores. On the other hand, at least one of the five camps described by Friedland and Nelkin lacked even a small commissary. FRIEDLAND & NELKIN 37-38. Absent statistical evidence, one could venture the judgment that at least camps of average quality have such a store. The existence of such a store is not, however, crucial to a finding of a "public function" under *Lloyd* in light of the other "public" functions performed by the camps. Friedland and Nelkin do indicate that many of the camps they studied in Florida have company stores. *Id.* at 5.

[124] Crews are generally recruited through the use of crew leaders or contractors, who contract with farmers to furnish a crew of specified size. The Farm Labor Service of the United States Employment Service also does some recruiting for the farmers who contract with the agency. Since the United States Employment Service forces farmers who contract with it to meet certain minimum health and safety standards in their camps, most farmers prefer to do business with the independent contractors. FRIEDLAND & NELKIN 19.

[125] *See, e.g.*, Velez v. Amenta, 370 F. Supp. 1250, 1252-53 (D. Conn. 1974), for a description of security procedures at a typical camp. In the *Velez* tobacco camp, visitors were barred at certain times of the day, had to leave before 9:00 P. M., and were forced to go through a screening process before they were allowed to enter.

[126] *See* note 23 *supra.*

[127] 407 U.S. at 562-63 (distinguishing Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968), on its facts). The continuing vitality of *Logan Valley* was called into question in a four-man plurality opinion of the Court in Hudgens v. NLRB, 44 U.S.L.W. 4281, 4285 (Sup. Ct., Mar. 3, 1976). Whether the "relatedness" test of *Lloyd* survived *Hudgens* is an open question. Four Justices in *Hudgens* were content to eliminate any "relatedness" inquiry when free-speech rights and property rights conflict.

[128] Thus, the social worker could argue that the "reasonable relation" test requires only a nexus between speech and use that is easily satisfied if the speech in question directly relates to some identifiable public use to which the land is put. Since the land is used for housing and for cooking, messages about food stamps and welfare are related to the camp's "public" function.

lated as to fail the *Lloyd* relatedness test,[129] most outsiders could easily establish the nexus between the message and the land use as demanded by *Lloyd*.

The crucial issue arises under the third *Lloyd* standard. *Lloyd* demands that those seeking access show that entry upon privately owned land was their only adequate means of communicating their message.[130] This test was borrowed from an independent line of cases concerning the right under the National Labor Relations Act of nonemployee union organizers to enter company property during an organizing campaign. The leading case in this series of decisions is *NLRB v. Babcock & Wilcox Co.*[131] The NLRB and the courts in applying *Babcock-Wilcox* have developed a broad definition of what constitutes an "adequate" alternative avenue of communication sufficient to deny outside organizers access to company property.[132] For instance, the expense to the union in using alternative means of communication has been held to be irrelevant to the issue of whether organizers should have access if alternative means of communication exist.[133]

Did the *Lloyd* Court, by adopting, almost directly, language from the *Babcock-Wilcox* line of cases, intend that the standards developed in those cases be applied in all instances where free-speech rights and property rights conflict? The *Lloyd* Court left the meaning of the "adequate-alternative" test unclear. Courts in apply-

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[129] For instance, the message of a politician, like the message of the Viet Nam protester in *Lloyd*, would not be specifically related to the unique public uses to which the migrant camp was put. Rather, the message would be directed to an amorphous audience composed of the general public rather than a specific audience of migrant workers at a particular camp. The message would in no way be related to the particular conditions of the specific camp.

[130] *See* note 24 *supra*.

[131] 351 U.S. 105 (1956).

[132] See, *e.g.*, S.E. Nichols of Ohio, Inc., 200 N.L.R.B. 1130, 1973 CCH LABOR LAW REP. ¶ 24,921 (1973); Dexter Thread Mills, Inc., 199 N.L.R.B. 543, 1972 CCH LABOR LAW REP. ¶ 24,662 (1972); Monogram Models, 192 N.L.R.B. 705, 1971 CCH LABOR LAW REP. ¶ 23,271 (1971), for examples of situations in which the NLRB has denied access to outside union organizers under *Babcock-Wilcox*.

[133] For an example of the length to which courts will go to find that adequate alternatives exist under *Babcock-Wilcox*, see NLRB v. Sioux City & New Orleans Barge Lines, 472 F.2d 753 (8th Cir. 1973). In that case, the Inland Boatman's Union sought access to the defendant's barges for its organizers during an organizing campaign. The NLRB granted access. The court found that the union had made repeated attempts to call the company's employees at home. This was difficult because the employees lived in 15 states. Mailings were unsuccessful. In the course of the organizing drive, only 35 of 118 employees had been actually contacted by the union. *Id.* at 754-55. The expense of contacting the 35 employees was considerable. Nevertheless, the court refused to enforce the Board's order granting access, holding that, in view of the infringement on the employer's property rights that would result from enforcement, the union had not made the "strong showing" of a lack of alternative means of communication necessary to an order granting access. *Id.* at 756.

ing the *Lloyd* tests have ignored *Babcock-Wilcox* in their analyses and have read the "adequate-alternative" test narrowly. The *Babcock-Wilcox* cases, however, do furnish an appropriate standard for interpreting the *Lloyd* "adequate-alternative" test.[134] A complete analysis must therefore consider whether the "adequate-alternative" language was meant to be read broadly, as in the *Babcock-Wilcox* cases.

The Court in *Lloyd* deemphasized the effectiveness of alternative media. The same disregard of the effectiveness of an alternative avenue of communication is present in the *Babcock-Wilcox* analysis. As the dissenters in *Lloyd* noted, the protesters asserting their right to enter a shopping center to handbill lacked

> easy access to television, radio, the major newspapers, and the other forms of mass media . . . . The only hope that these people have to be able to communicate *effectively* is to be permitted to speak in those areas in which most of their fellow citizens can be found.[135]

[134] *Compare* Hudgens v. NLRB, 501 F.2d 161 (5th Cir. 1974), *rev'd*, 44 U.S.L.W. 4281 (Sup. Ct., Mar. 3, 1976), and Handen v. People, 526 P.2d 1310 (Colo. 1974), *with* NLRB v. Sioux Barge Lines, 472 F.2d 473 (8th Cir. 1973). *Hudgens* involved picketing by striking warehouse employees at a store owned by their employer situated in a shopping center. In considering the question of alternative access, the court indicated that the targeted audience of the protesters would be taken into account in determining whether alternative means of access existed. The audience the protesters sought to reach were customers of the employer. The court found it to be too expensive to reach these customers by radio or television. 501 F.2d at 168-69. The court distinguished *Babcock-Wilcox* by noting that in an organizational campaign the targeted audience was clearly identifiable by name, while in the case at bar the audience was a less readily identifiable group, although more readily identifiable than the public in general. *Id.* at 168. Thus, the court argued, different standards of weighing the adequacy of alternative avenues of communication were warranted depending upon the nature of the audience sought to be reached. The *Handen* court went even further and argued that the *method* of communication chosen by the protesters should be taken into account in determining whether adequate alternative channels of communication exist. Thus, if protesters wish to distribute handbills, the alternatives available to the protesters should be judged in light of their adequacy to do so. 526 P.2d at 1314. The *Hudgens* approach makes some sense and does not depart radically from *Babcock-Wilcox* or *Lloyd*. Courts have in the past under *Babcock-Wilcox* considered the nature of the targeted audience as being of some relevance in determining whether access should be granted. *See* NLRB v. S & H Grossinger's Inc., 372 F.2d 26, 29 (2d Cir. 1967). The Supreme Court, however, refused to follow the analysis of the *Hudgens* court, albeit on grounds unrelated to the question of what constituted an adequate alternative avenue of communication. Instead, the Court held, in a plurality opinion, that a shopping center was not the functional equivalent of a municipality. 44 U.S.L.W. at 4285. The Court thus held only that the *first Lloyd* test was not met in the *Hudgens* case, and remanded the case to the NLRB for a determination in light of *Babcock & Wilcox*. *Id.* at 4286. *Babcock & Wilcox*, of course, continues to control cases under the jurisdiction of the NLRB regardless of whether a functional equivalent of a municipality is involved in the case. The *Handen* approach, in contrast, overlooks entirely the clear statement in *Lloyd* that alternative avenues of communication must be examined by courts in determining whether to allow access. 407 U.S. at 567. Presumably, alternative avenues means that courts should look not only at alternative sites for speech, but also at alternative media for communicating the message.

[135] 407 U.S. at 580-81 (dissenting opinion, Marshall, J.) (emphasis added).

The majority ignored these arguments and instead simply noted that some alternatives did exist for the protesters.[136] This perfunctory evaluation of the actual availability of a supposedly effective alternative media resembles the analysis in *Babcock-Wilcox* NLRA cases.

Even if *Babcock-Wilcox* was not the precise model that the *Lloyd* Court relied on in announcing the "adequate-alternative" test, the *Babcock-Wilcox* model is nevertheless an attractive one to use in non-NLRA free-speech and property rights cases. The advantages of the *Babcock-Wilcox* approach can be briefly stated.

The *Babcock-Wilcox* approach provides maximum protection for property rights with a minimum infringement of the right of free speech. For instance, if no alternative means of communication is available, under *Babcock-Wilcox* free speech then takes precedence over property rights. Under *Babcock-Wilcox,* as the necessity for exercising free-speech rights in one location decreases, the corresponding protection given to property rights increases. The sole question becomes one of determining at what point free-speech rights must yield to property rights. The *Babcock-Wilcox* line of cases would draw the line as soon as some adequate alternative means exists for communicating the speech without trespass, regardless of the effectiveness of the alternative means. This may deny the right to speak effectively to those seeking to convey their message on private property. On the other hand, to allow access to private property whenever no *effective* alternative means of communication exists would severely limit the protection given property rights in any balancing test. Presumably, those seeking entry to speak on private property are doing so precisely because they believe that they have no effective or inexpensive alternative way to communicate with the

[136] In considering the adequacy of the alternative avenues available to the respondents in *Lloyd,* the Court noted that the respondents could have moved from the shopping center to the streets and sidewalks outside the center to deliver their handbills. The respondents had in fact taken this course after being ordered to leave the center. *Id.* at 566-67. The dissent, however, pointed out that this was a superficial reading of the facts of the case and flew in the face of the finding of the district court that the shopping center itself was the only place where handbills could be effectively distributed. The alternative avenue proposed by the majority, the dissent noted, would require

> respondents to run from the sidewalk, to knock on car windows, to ask that the windows be rolled down so that a handbill could be distributed, to offer the handbill, run back to the sidewalk, and to repeat this gesture for every automobile leaving Lloyd Center . . . .
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> . . . .

Id. at 583 n.7 (dissenting opinion, Marshall, J.). The Court's cavalier treatment of the practical difficulties for respondents in using "available" alternative avenues of communication is similar to the disregard of the expense to the union in pursuing alternative avenues of communication found in the labor cases. *See* note 133 *supra.*

public they seek to reach. In such circumstances, standards of effectiveness would be difficult for courts to develop. Would handbilling on a street be an effective way to reach customers of a gasoline station when the message sought to be conveyed was "Don't buy gasoline"?[137] Would television be an equally effective way to reach shoppers at one particular store in a shopping center as leafletting directly in front of the store? As these examples illustrate, courts would have an almost impossible task were they forced to evaluate the effectiveness of alternative means of communication every time there was a speech-property rights conflict.

Babcock-Wilcox, on the other hand, does not sacrifice free-speech rights to property rights; rather, the *Babcock-Wilcox* test recognizes that trespass is an absolute infringement on the property rights of the landowner, whereas requiring speakers to communicate in an alternative forum does not absolutely infringe speech rights. Under *Babcock-Wilcox,* speech rights are preferred over property rights, but only in those situations where the two cannot co-exist. Thus, the *Babcock-Wilcox* standards allow an absolute infringement of property rights only in situations where there would be a corresponding absolute infringement of speech rights. If property rights are worthy of protection, it seems the *Babcock-Wilcox* standards protect those rights better than an "effectiveness" test, while not significantly infringing the exercise of first amendment rights.

What would be the consequences of applying the *Babcock-Wilcox* formulation of "adequate alternatives" to the migrant-camp problem? Although courts have found "alternative avenues" of communication to exist in most *Babcock-Wilcox* cases, at least one case suggests that the position of the friends of the migrants would not be hopeless. In *NLRB v. S & H Grossinger's Inc.,*[138] the United States Court of Appeals for the Second Circuit granted access to a nonemployee union organizer in a situation closely analogous to the migrant-camp context. In *Grossinger's,* the company's employees lived on the employer's premises.[139] The employees were transients working during the summer tourist season at a summer resort.[140] The union had made repeated attempts to reach the employees

[137] Other, more realistic, situations suggest themselves. Would speaking on a street corner to pedestrians entering a mall he as effective a means of communication as giving those pedestrians handbills once they entered the mall? Presumably, under a comparative-effectiveness standard, batteries of social psychologists would descend on the courts ready to prove that reading is better than hearing, or vice versa.

[138] 372 F.2d 26 (2d Cir. 1967).

[139] *Id.* at 29.

[140] *Id.*

away from work with little success.[141] These efforts were "ineffective"[142] since it was "impossible to distinguish between [resort] guests and employees."[143] The employees had no telephones.[144] Because of staggered working hours the employees as a group could not be reached by radio advertisements.[145] Under these circumstances, the court found that the union had no alternative save entry upon the property to reach the workers, and thus granted access.[146] Although other courts in "resort" cases have not granted access to organizers, all the courts that have considered the issue have based their denial of access on the failure of proof by the union that alternative avenues of communication had been tried and had failed.[147]

Although the burden of showing a lack of adequate alternatives is difficult, it can be met.[148] It would seem that the migrant-camp situation is one in which organizers could meet their burden of proof. Like the employees in *Grossinger's*, most migrants have no telephone[149] nor easy access to radio or television.[150] In addition, since most migrants are Spanish-speaking[151] and many migrants are illiterate,[152] attempts to reach migrants by television or newspaper

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[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.* at 30.

[147] *See* NLRB v. Tamiment, Inc., 451 F.2d 794 (3d Cir. 1971) (access denied because union made no sbowing of attempted use of alternatives before seeking access order); NLRB v. Kutsher's Hotel, 427 F.2d 200 (2d Cir. 1970) (facts showed that "reasonable" efforts by union to reach employees by alternative means had not been made).

[148] *Cf.* NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948) (granting union organizer access to isolated lumber camp). This case arose before the decision in *Babcock-Wilcox*, so its viability as precedent is somewhat in doubt.

[149] *See* Petersen v. Talisman Sugar Corp., 478 F.2d 73, 76 (5th Cir. 1973) (camp had no telephone); Velez v. Amenta, 370 F. Supp. 1250, 1252 (D. Conn. 1974) (camp had only pay telephones).

[150] *See* FRIEDLAND & NELKIN 219. Although many camps have one community television, the migrants lack the individual access to television of most Americans. Moreover, since only one station can be viewed at a time, outsiders would be forced to either guess the viewing habits of the migrants, or undertake costly advertising on all channels.

[151] The number of Spanish-speaking Americans in the migrant labor force varies by region, with Mexican-Americans predominant in California and Texas. Migrants in the South include a large number of blacks. *See* FRIEDLAND & NELKIN 195-205. In the Northeast, particularly in the area from New Jersey west to Michigan, large numbers of migrants are Puerto Ricans. For instance, the union involved in Asociacion de Trabajadores Agricolas v. Green Giant, Inc., 518 F.2d 130 (3d Cir. 1975), and in Velez v. Amenta, 370 F. Supp. 1250 (D. Conn. 1974), was comprised primarily of Puerto Ricans.

[152] While statistics on illiteracy are not available for migrants as a group, some indication of the extent of illiteracy among migrants can be gleaned by examining the illiteracy figures for Spanish-speaking Americans in the Southwestern United States, a group from which many

advertisements would be difficult and probably futile.[153] It has been shown that few migrants leave camps to go into towns.[154] Even if migrants did frequent towns, it would be difficult for organizers to distinguish migrant from nonmigrant Hispanic-Americans.[155] This difficulty in identifying the target group of employees off the employer's premises was a factor leading to the granting of access in *Grossinger's*.[156] Thus, even under the strict standards of *Babcock-Wilcox* and *Lloyd* it would seem that those seeking to enter migrant camps could show the complete lack of alternative means of communication short of entry into the camp. In such a situation, *Lloyd* clearly dictates that the free-speech rights of those seeking entry outweigh the property interest of the camp owner and that, therefore, an order granting access is appropriate.

CONCLUSION

Courts have offered at least four rationales to support grants of access to migrant-labor camps. Courts have used landlord-tenant law, trespass law, and a "company-town" first amendment approach to support access to camps. At least one court, however, using the "tests" for access to private land in free-speech cases advanced by the Supreme Court in *Lloyd Corp. v. Tanner*,[157] has found that those seeking access to labor camps must show that they have no adequate alternative means of communication for reaching their migrant

migrants are drawn. Census figures from 1960 show that 27.6% of Spanish-speaking Americans in the Southwest had less than four years of schooling and were thus classified as "functional illiterates." *See* L. GREBLER, J. MOORE & R. GUZMAN, THE MEXICAN-AMERICAN PEOPLE 18 (1970).

[153] Those outsiders seeking to reach the migrants would he forced, at a minimum, to advertise in both English and Spanish. Written materials would have less impact than in the usual labor-organizing situation because of the illiteracy of many of the migrants. Even if radio and television were used to reach the migrants, few would get an opportunity to hear and see such advertisements.

[154] The fear the migrants have of townspeople, and the reasons for that fear, were described by Friedland and Nelkin:

> [C]amps are physically isolated from population centers. But even more significant is the social isolation that is a product of [the migrant's] fears of the local community. . . . Their appearance . . . serves to reinforce community stereotypes and perpetuates their isolation.

FRIEDLAND & NELKIN 47-48.

[155] Migrants in the Southwest are Mexican-Americans in an area already heavily populated by Mexican-Americans. This increases the difficulty of identifying migrants once they manage to reach a town. Even when the migrants are readily identifiable in a town, their fear of outsiders and of town life in general would make it extremely difficult for outsiders to contact them while in town.

[156] NLRB v. S & H Grossinger's Inc., 372 F.2d 26, 29 (2d Cir. 1967).

[157] 407 U.S. 551 (1972).

audience before access will be granted. This Note argues that the *Lloyd* approach to the problem of access is a clearly preferable ground for decision in access cases. In most situations, those seeking entry to migrant camps can meet the tests laid down by the *Lloyd* Court and can thus gain access to the camps.

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