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THE MIGRANT LABOR CAMPS: ENCLAVES OF ISOLATION IN OUR MIDST

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I. INTRODUCTION

THIS century has seen the evolution of America from a nation of rural communities into an urban-suburban society;[1] most of our domestic problems arise in an urban context; much of our national concern centers on improving the quality of the cities and their environs where most of the nation lives and works. It is therefore understandable, though not condonable, that many Americans have only very recently become even barely cognizant of the desperate existence of the migrant farm workers. However, news items of recent years reporting such events as the attempts of Cesar Chavez to unionize the California farm workers,[2] the national table grape boycott,[3] and the discovery of the bodies of twenty-four slain migrant farm workers outside Yuba City, California,[4] have increased public awareness and curiosity about the conditions of day-to-day living among the one million[5] migrant farm workers in this country.

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1. The process has by no means been arrested. In 1950, 64 percent of the American population resided in "urban" areas; by 1960, the percentage had increased to 69.9 percent. U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1970, table 15, at 16 (1970) [hereinafter cited as Statistical Abstract]. Furthermore, by 1969 only 5.1 percent actually resided on farms. Id., table 14, at 16.

2. The travails of the United Farm Workers Organizing Committee (UFWOC), formed out of an alliance between Chavez and the AFL-CIO, in gaining the recognition of California growers has been the subject of several books and articles. For a brief discussion of their accomplishments see text accompanying notes 109-14 infra. See generally P. Fusco & G. Horwitz, La Causa: The California Grape Strike (1970); P. Matthiessen, Sal Si Puedes: Cesar Chavez and the New American Revolution (1969); Berman & Hightower, Battle for Lettuce: Chavez and the Teamsters, The Nation, Nov. 2, 1970, at 427; Dunne, To Die Standing: Cesar Chavez and the Chicanos, The Atlantic, June, 1971, at 39; Meister, "La Huelga" Becomes "La Causa," N.Y. Times, Nov. 17, 1968, § 6 (Magazine), at 52.

3. See generally Meister, supra note 2; Taylor, Huelga, The Boycott That Worked, The Nation, Sept. 7, 1970, at 167; N.Y. Times, April 5, 1970, § 1, at 70, col. 4; id., April 2, 1970, at 29, col. 2.

4. See N.Y. Times, June 4, 1971, at 36, col. 2; id., May 30, 1971, § 1, at 21, col. 1; id., May 27, 1971, at 1, col. 7. The total degradation of these migrants' humanity is evidenced by the fact that the deceased migrants suffered such social isolation that they were generally not missed for weeks. Id., June 1, 1971, at 1, col. 6.

5. Population figures for migrant workers are difficult to determine accurately. See L.

An examination of these conditions reveals a life of poverty and deprivation[6] totally incongruous with the general level of affluence throughout the nation. In brief, the migrant farm worker ranks among the lowest paid,[7] least educated,[8] worst fed,[9] and worst housed[10] persons in the United States.

Shotwell, The Harvesters 31-34 (1961). It has been stated that "reliable" estimates range from one million to three million. Interview with Saul Shulman, sociologist, University of Florida, March, 1968.

6. Especially illustrative was a National Broadcasting Company presentation. Transcript of Migrant, an NBC White Paper, July 16, 1970 [hereinafter cited as White Paper]. Several books depict the everyday life of the migrant farmworker. See, e.g., L. Shotwell, supra note 5; J. Stewart & S. Sandage, Child of Hope (1968) (a photographic essay); D. Wright, They Harvest Despair (1965).

7. Estimates as to the annual income of the individual migrant farm worker are as low as $891. White Paper 12. The figures vary, however; one report estimates that in a good year a family with two adult workers earns approximately $3,500. President's Nat'l Advisory Comm'n on Rural Poverty, Rural Poverty in the United States 452 (1968). In the Atlantic coastal states the estimated hourly wage (neither room nor board provided) varies from a high of $1.41 in New Jersey to a low of $0.74 in South Carolina. Id. at 451. In four Texas counties in the lower Rio Grande valley (the "home" of many of the migrants who harvest the crops on the "mid-continent" route north through the midwest to Michigan), approximately 52 percent of the families earn less than $3,000. Hearings Before the Subcomm. on Migratory Labor of the Comm. on Labor and Public Welfare, 91st Cong., 1st & 2d Sess., pt. 8-B, at 5425 (1970) [hereinafter cited as 1970 Hearings]. The median family income in 1968 was $8,785 for nonfarm families, and $5,769 for farm families. Statistical Abstract, table 492, at 324.

8. " 'Migrant agricultural workers are often described as America's forgotten people and their children are referred to as the most educationally deprived group of children in our Nation. They enter school late, their attendance is poor, their progress is slow, they drop out early; consequently their illiteracy is high. Studies indicate that most migrant children are far below grade level and that their school achievement is usually under fourth grade.' " President's Nat'l Advisory Comm'n on Rural Poverty, The People Left Behind 49 (1967), quoting A. Celebrezze, former Secretary of Health, Education & Welfare; see S. Rep. No. 71, 90th Cong., 1st Sess. 25 (1967). See also S. Rep. No. 155, 89th Cong., 1st Sess. 11 (1965); S. Rep. No. 167, 88th Cong., 1st Sess. 7 (1963). At least one state, New Jersey, took steps twenty years ago to improve the educational opportunities of migrant children by establishing summer schools. Tobin, One Million Migrants, Saturday Review, Aug. 17, 1968, at 14. See generally White Paper 33-45.

9. Malnutrition and other diseases are present in significantly greater proportions among migrant farm workers than among the American populace in general. Dr. H. Peter Chase has stated that malnutrition among migrant children is ten times that of the "average" American child. N.Y. Times, Feb. 24, 1971, at 24, col. 3. Testimony before a Senate subcommittee indicates that the malnutrition often leads to permanent mental, physical, and pyschological impairment among migrant children. See 1970 Hearings, pt. 8-A, at 4982-5128.

Disease and mortality rates are extreme among migrant farm workers according to a study of Texas migrants. Their life expectancy is twenty years below the norm; death from influenza and pneumonia is 200 percent above the average; tuberculosis is 250 percent above the average. Id. at 4984.

10. See text accompanying notes 24-25 infra.

Possessing virtually no political impact,[11] the migrant workers have, more often than not, been both neglected and forgotten by the federal and state governments. Legislation which has been enacted to aid and protect other components of the labor force is generally either inapplicable or ineffective with regard to the migrant farm laborer. Farm labor is usually excluded from the coverage of state minimum wage statutes[12] and child labor laws.[13] When such laws *are* applicable to farm workers, the statutes often set discriminatorily lower standards.[14] Similarly, workmen's compensation is normally unavailable,[15] despite the fact that a higher percentage of accidents occur on farm jobs than in most other occupations.[16]

11. Due to the ephemeral nature of his visits to each state, the migrant farm worker seldom complies with the residence requirements for voting in state elections. Similarly, the migrants seldom are voting constituents of any congressional district. "The obligation to assure fairness to our migratory workers is particularly compelling because they are generally barred from voting by residence requirements, and hence can exercise little political influence on their own behalf." Report on Migratory Labor by the Association of the Bar of the City of New York, 111 Cong. Rec. 13328, 13330 (1965) (footnote omitted); see Givens, Legal Disadvantages of Migratory Workers, 16 Lab. L.J. 584, 585 (1965).

12. E.g., N.J. Rev. Stat. § 34:11-34 (1937); N.Y. Labor Law § 651(5) (McKinney Supp. 1970); N.C. Gen. Stat. § 95-86(3)(a) (1965); Ore. Rev. Stat. § 653.020(1) (1969 repl. pt.) (excludes farm piece work); Wash. Rev. Code Ann. § 49.46.010(5)(a) (1962).

13. E.g., Fla. Stat. Ann. § 450.081(4) (1966); N.C. Gen. Stat. §§ 110-1, 110-6 to -7 (1966); Tex. Pen. Code Ann. art. 1578a (Supp. 1970). Child labor standards are most appropriate in this area, for studies have shown that "approximately 375,000 children between the ages of 10 and 13 perform hired farm labor." S. Rep. No. 1006, 90th Cong., 2d Sess. 34 (1968). It is estimated that one-fourth of the farm labor force is under sixteen years of age. Id. at 32; N.Y. Times, March 22, 1971, at 19, col. 1 (a report on a study by the American Friends Service Committee). See also L. Shotwell, supra note 5, at 121-23.

14. Agricultural workers covered under the Fair Labor Standards Act are guaranteed $1.30 an hour (29 U.S.C. § 206(a)(5) (1970)) but are exempt from the law's overtime provisions. Id. § 213(b)(12); see Sherman, Farmworkers Amendments to the Fair Labor Standards Act, 5 Clearinghouse Review 207 (1971). The minimum wage laws of Texas provide that persons performing farm labor should receive an hourly wage $0.20 lower than the prevailing federal standard; that if housing is provided for the laborer, the minimum wage should be $30.00 a week; and that if housing is provided for the family of the laborer, the minimum wage law is inapplicable. Tex. Rev. Civ. Stat. Ann. art. 5159d, § 6 (1971).

The child labor statutes of several states set lower standards for agricultural labor. See, e.g., N.J. Rev. Stat. § 34:2-21.15 (Supp. 1967) (must be over 12 years old and cannot work more than ten hours a day); N.Y. Labor Law § 130(2)(e) (McKinney Supp. 1970), §§ 170(3), 171(2) (McKinney 1965); Ore. Rev. Stat. § 653.315(2)(a) (1969 repl. pt.) (excluded from limitation on work before 7 a.m. or after 6 p.m.).

15. E.g., Fla. Stat. Ann. § 440.02(1)(c)(3) (1966); Kan. Stat. Ann. § 44-505 (1964); Mich. Comp. Laws Ann. § 411.2a (1967); Mo. Rev. Stat. § 287.090(2) (1959); N.C. Gen. Stat. § 97-13(b) (1965); Tex. Rev. Civ. Stat. Ann. art. 8306, § 2 (1967); see Wineberg v. Department of Lab. & Indus., 57 Wash. 2d 779, 359 P.2d 1046 (1961). Contra, N.J. Rev. Stat. § 34:15-92 (Supp. 1969). See also Ore. Rev. Stat. § 656.027(5) (1969 repl. pt.) (limited exclusion for small farms).

16. The accident rate among farm workers is three times as great as that of the average occupational rate. 1970 Hearings, pt. 8-A, at 4984.

Migrant workers continue in their transient occupation because they feel they have no reasonable alternative. Most hired agricultural laborers have little formal education or vocational training and have known no existence off the farm.[17] Their economic position is so perilous that the daily necessity of securing food must dictate the terms of their existence. Furthermore, the migrant is intimidated into staying on the job by either the "crew boss" or the head of the labor camp, who often threatens to subject him to imprisonment or police harassment for debts owed.[18]

Broader and more potent legislative programs should be initiated to uplift the abhorrent housing conditions, improve the educational opportunities, and raise the health and nutritional levels of the migrant. Similarly, the economic disadvantages imposed by discriminatory statutes should be removed and the right of union representation should be recognized and protected by law. However, even the enactment of such legislation will prove ineffective unless the migrant is educated concerning the existence of these remedial programs and guarantees and unless government officials can easily provide the enacted benefits to the migrants. Thus, reasonable access to labor camps and farms on which the migrant and his family live during the course of their employment is a prerequisite to the success of any program designed to ameliorate the migrant farm workers' plight.

It should be noted, however, that even if such programs aid the migrant in raising his socio-economic status to an "acceptable" level, such progress might only be temporary and, in a sense, illusory. A more basic dilemma faces the migrant worker due to increased mechanization in har-

17. See note 8 supra. In discussing the "roots" of the black farm worker of the eastern seaboard, Miss Shotwell stated: "Overwhelmingly they come straight out of a rural background, with no work experience other than farming in between. Born of sharecropper parents, they have been tractored out of their livings as sharecroppers, tenants, or day laborers on farms." L. Shotwell, supra note 5, at 30.

18. Recruitment by the crew boss, leader, or labor contractor involves providing transportation north to participate in the summer and fall harvests. Normally the boss receives no compensation from the migrant but receives a "head fee" plus a fee from the grower for each basket or bushel picked by his crew. When faced with a maverick worker who wishes to abandon the crew (and thus deprive the boss of a portion of his income), the crew boss often threatens the worker with the debt owed for transportation not yet paid. See generally L. Shotwell, supra note 5, at 118-19, 225-26; D. Wright, They Harvest Despair (1965); Coles & Huge, Peonage in Florida, New Republic, July 26, 1969, at 18-19; Levine, The Migratory Worker in the Farm Economy, 12 Lab. L.J. 622, 624-25 (1961).

A similar threat is used by the owner of the labor camp: "The camps have their own stores and vendors, and are often guarded by 'camp boys' who walk around with guns. Migrants are told they cannot leave unless all their debts are paid; the ledgers are tallied by the men who own and run the camps." Coles & Huge, supra, at 18. See also Comment, Migrant Farm Labor in Upstate New York, 4 Colum. J. L. & Social Problems 1, 2-3 (1968); N.Y. Times, Aug. 17, 1970, at 1, col. 1 (abuses showing futility of actual resort to police aid).

vesting techniques. It is only a matter of time before agribusiness[19] converts from the manual harvesting which the migrant now performs so cheaply to potentially more economical mechanized methods.[20] As legislation and labor activities obtain for the migrant a fair wage and improved conditions (which increase the cost of his labor to the grower), these achievements will also accelerate the inevitable obsolescence of manual farm labor.[21]

Although no panacea exists for this complex problem, long-range planning in the areas of job training and education may mitigate the difficulties caused by the transition from manual to mechanized harvesting. Economic integration will be a necessity if the migrants' names are not to be added to the burgeoning list of those made dependent on welfare due to technological displacement. This is not to imply that short-range programs of alleviation are undesirable or unnecessary. Without significant improvement in the migrant farm workers' conditions, endeavors at job training and education will most likely prove futile.

This article will deal with one facet of the dilemma facing the migrant: the problem of ingress and egress to and from the labor camps. The migrant must be able to mingle freely with the community outside the farm if he is ever to achieve social and economic independence. Conversely, reasonable ingress is necessary to ensure visitation by those who

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19. The small scale farmer no longer adequately represents the farming situation in America. In the last generation, the average farm has doubled in size, and the value of its assets has increased tenfold. "Agribusiness" is here. "The top 9 percent of all farms now pay more than 70 per cent of the total annual farm wage bill. . . .

. . . The traditional, small family farm has been transformed into a faceless giant whose financial involvements with other industrial giants form a network of fantastic proportions." Hearings on S. 8, S. 195, S. 197 & S. 198 Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 141 (1967). See also Berman & Hightower, Battle for Lettuce: Chavez and the Teamsters, The Nation, Nov. 2, 1970, at 427; Time, The Candor That Refreshes, Aug. 10, 1970, at 59.

The "agrarian myth," so prevalent in the history of American thought, was intellectually decimated in R. Hofstadter, The Age of Reform 23-59 (1955). The myth continues, however, even in the face of the growth of agribusiness. Note, Agricultural Labor Relations—The Other Farm Problem, 14 Stan. L. Rev. 120, 125-26 n.41 (1961). See also Levine, supra note 18, at 622-23.

20 See Dunne, supra note 2, at 44; Friedman, Migrant Workers, Newsweek, July 27, 1970, at 60; Levine, supra note 18, at 628-30; Roysher & Ford, California's Grape Pickers Will Soon Be Obsolete, New Republic, April 13, 1968, at 11. See also Comment, Migrant Farm Labor in Upstate New York, 4 Colum. J.L. & Social Problems 1, 21 (1968).

21. See authorities cited in note 20 supra. It seems doubtful that in a competitive market of essentially fungible items the growers would prefer to retain manual harvesting by passing on any increased costs to the consumer in the form of higher prices rather than maintaining the price structure as nearly as possible by the implementation of cheaper mechanical harvesting.

would attempt to accelerate the migrant's integration and improve his conditions through government or private aid. An attempt will be made to briefly describe the particular problem of labor camp access, analyze the legal rights involved, and examine possible remedies to ensure access to and from the labor camps in the future.

II. The Labor Camps

Either by the terms of his employment or as a result of his social and financial status, the migrant farm worker and his family normally live in a labor camp during the harvest. Thousands of these camps,[22] privately or publicly owned, exist throughout the nation wherever there is migrant harvesting. Depending on local custom or on the grower's policy, this housing is either rented, normally on a weekly basis, or is provided as part of the compensation—a "fringe benefit"—to the harvesters.[23]

Most of the housing provided is, by contemporary standards, uninhabitable. Each family lives in severely cramped quarters, usually without indoor plumbing or heat and in some instances, without any electricity.[24] Conditions are less than sanitary; privies are often shared by as many as twenty-five families.[25]

Many of the labor camps, in addition to the pervasive squalor, have a prison-like atmosphere about them. These "closed camps," composed of a pathetic cluster of houses, are encircled by barbed wire and numerous "No Trespassing" signs.[26] These premonitory placards are often supplemented by padlocked gates, limited access dirt roads and, occassionally, by armed guards.[27] Frequently all visitors, business or social, are denied access to the camps without the prior express consent of the management

22. Statistics on the number of migrant camps are not readily available; however, in New York State alone, where registration is required, 750 camps were registered in 1966. President's Nat'l Advisory Comm'n on Rural Poverty, Rural Poverty in the United States 452 (1968). Eighty-two percent of these camps are open less than five months a year. Id.

23. See L. Shotwell, supra note 5, at 112-15.

24. See id. at 112-15; Coles & Huge, supra note 18; Compton, This Green Valley Isn't So Jolly, New Republic, Sept. 7, 1968, at 19-20; Time, Aug. 10, 1970, at 59; N.Y. Times, Aug. 31, 1970, at 32, col. 3; id., Aug. 19, 1970, at 26, col. 5; id., Aug. 8, 1970, at 19, col. 2. For general housing conditions, see White Paper 22-32.

25. See Compton, supra note 24.

26. See Hearings on S. 8, S. 195, S. 197 & S. 198 Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., pt. 1, at 142 (1967); Sherman & Levy, Free Access to Migrant Labor Camps, 57 A.B.A.J. 434 (1971).

27. See Hearings Before the Subcomm. on Migratory Labor of the Comm. on Labor and Public Welfare, 91st Cong., 1st & 2d Sess., pt. 1, at 192 (1969); Coles & Huge, supra note 18, at 18.

or ownership of the particular housing complex.[28] Since the laborers are often housed far from population centers, the decision to bar visitors from the camps may result in a virtual elimination of all contact with the outside world.[29] One observer has described such a camp:

> This camp is set about 5 miles out of the nearest town. They have barbed wire around the front of the camp, and also high trees, so that it is really invisible from the roadside to visitors who pass through. At the front of the gate, they have [an] . . . office [in which] . . . [t]he assistant manager stays . . . at least 16 hours a day . . . .[30]

The barriers which the prospective visitor encounters with regard to ingress are paralleled by the difficulties the migrant meets in seeking to leave the camp. Generally, "the migrant has neither the time, the money nor the transportation to leave the grower's fields or the confines of the residential camp . . . ."[31] Furthermore, the camp commissary system[32] often adds a further obstacle to egress. The store sells the migrants their necessities and then often prohibits them from leaving the camp until the debts thus incurred are satisfied.[33]

Access to and from the migrant labor camps has, at least until recently,[34] been the subject of few law suits. Neither the possibility of constitutional infirmities in the labor camp system nor the legal relationships between migrant and grower (or camp owner) arising out of the law of property have been fully explored or clearly determined. Labor organization may offer a tool to dismember the barriers to access, but the probability of organizational success (outside of the gains already made in California) is uncertain under current laws. All of these areas are worthy of further investigation.

The "closed camps" which exist throughout the nation are not, of course, standardized in the type of restrictions on access which are utilized. For the purpose of this article, a "closed camp" will be defined as a labor camp which imposes restrictions of any kind on ingress or egress to any person whomsoever. This definition encompasses the broadest spectrum of labor camps, ranging from those camps which enforce total isolation by means of guards and barbed wire fences to camps with only

28. See Coles & Huge, supra note 18, at 18; Sherman & Levy, supra note 26. See also Carr, Shame Is Still the Harvest, N.Y. Times, July 12, 1970, § 2, at 15, col. 5.

29. See Sherman & Levy, supra note 26, at 434-35.

30. Hearings Before the Subcomm. on Migratory Labor of the Comm. on Labor and Public Welfare, 91st Cong., 1st & 2d Sess., pt. 1, at 192 (1969).

31. Sherman & Levy, supra note 26, at 434.

32. The system is widely in use. For example, New York issued over 300 commissary permits in 1966. President's Nat'l Advisory Comm'n on Rural Poverty, Rural Poverty in the United States 453 (1968).

33. See Coles & Huge, supra note 18, at 18.

34. See note 116 infra and accompanying text.

the slightest forms of regulation, such as the necessity of giving notice of all arrivals and departures. In discussing the legal status of the closed camps, more exact references to points on this definitional spectrum affected by particular areas of the law will be employed.

III. Constitutional Inquiries

The closed camp system may impose upon the migrant farm laborer (or upon would-be visitors) restrictions which are proper subjects for scrutiny in light of certain constitutional guarantees and proscriptions. In this regard, the relevant constitutional provisions are of two types. First, there are those provisions which enumerate the substantive rights of the people which are not to be impaired by action of a governmental body, *i.e.*, by "state action." The provisions of this type which are of primary significance to the access problems of closed camps include the freedoms of speech, press, and assembly assured by the first and fourteenth amendments. Second, there are those provisions which absolutely proscribe certain conduct, regardless of whether it is perpetrated by the state or by individual persons. Germane to the migrants' problems is the prohibition of involuntary servitude found in the thirteenth amendment.

A. *State Action*

That the communicative freedoms embodied in the first amendment and made applicable to the states by the fourteenth amendment are normally sacrosanct only against state action is a well settled proposition often reiterated in the opinions of the Supreme Court[35] since its original promulgation in the *Civil Rights Cases*[36] decided in 1883. However, the concept of state action does not refer merely to those direct actions of the government of a legislative, judicial, or executive nature, but comprehends far more subtle instances of governmental involvement. Behavior of private individuals, which was once considered without the scope of constitutional objection, is no longer exempted from inquiry if commingled with a significant measure of governmental involvement.

Of course, if the migrant camp is owned and managed by the state or a political subdivision thereof, then state action is obviously present.[37] Nevertheless, in those situations where state action is not so blatantly

35. See, e.g., Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948); Marsh v. Alabama, 326 U.S. 501 (1946).

36. 109 U.S. 3 (1883).

37. See, e.g., Tucker v. Texas, 326 U.S. 517 (1946), where a peddler's conviction for criminal trespass for refusing to leave a village owned by the United States under a congressional plan to furnish housing to persons engaged in national defense activities was overturned.

present, several decisions in the last twenty-five years have raised the possibility of a finding of state action in the administration of these camps. Because the rationale and implications of a few of these decisions are somewhat obscure, it will be necessary to elucidate, if possible, their meaning.

In 1946 the United States Supreme Court decided *Marsh v. Alabama*,[38] a case involving the proprietary rights of the owners of a "company town." The town consisted of "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block'. . . ."[39] The Court further noted that "the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation."[40] However, a sign was posted which stated: " 'This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted.' "[41]

The case arose out of the criminal trespass conviction of a Jehovah's Witness who had entered the town and begun distributing religious literature on the sidewalks. The Court observed that had the company town been a de jure municipality there would have been no doubt but that the conviction would have to be overturned.[42] It had previously been established that "neither a State nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places"[43] nor can an "ordinance completely prohibiting the dissemination of ideas on the city streets . . . be justified on the ground that the municipality holds legal title to them."[44] The primary question, then, was posed by the Court as follows: "Can those people who live in or come to [the company town] be denied freedom of press and religion simply because a single company has legal title to all the town?"[45] The answer was in the negative.

It can be posited that *Marsh* rests on two independent and alternative bases rather than a formula representing an integrated whole. One of these

38. 326 U.S. 501 (1946). See generally the analysis in Note, Applicability of the Fourteenth Amendment to Private Organizations, 61 Harv. L. Rev. 344 (1948).

39. 326 U.S. at 502.

40. Id. at 503.

41. Id.

42. See Largent v. Texas, 318 U.S. 418 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. State, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938). But see Breard v. Alexandria, 341 U.S. 622 (1951). See also Hague v. CIO, 307 U.S. 496 (1939).

43. 326 U.S. at 504.

44. Id. at 504-05.

45. Id. at 505.

alternative bases is the "balancing test,"[46] *i.e.*, weighing the first and fourteenth amendment rights of the residents against the proprietary rights of the owner. If such a balancing test is used, without a functional analysis of the property and the resultant determination of whether or not the property is utilized as a municipality, the property owner's attempts to prohibit communication, visitation, or assemblage will always be upheld. Individuals do not have a right to hold a meeting or offer an oratorical display or publish upon another's private property *absent* a finding of state action in the maintenance of the property. Such state action can be considered as a buttress against the otherwise unfettered property rights of the owners.

Similarly, a functional analysis test[47] alone presents a distorted view of the intended import of *Marsh*. It is doubtful that Mr. Justice Black and the majority were fully equating a de facto town with a de jure municipality, since otherwise the decision would strip the owners of such property of all indicia of proprietary interest save that of bare and impotent title. Would, for example, the occupancy of the residents be subject to termination only if a hearing and the other attendant safeguards of due process were satisfied?[48] Would the employees of the town be public servants or private employees? The answers to these and other similar questions were probably not intended to be within the scope of the original pronouncement.

A seemingly more rational formulation of the opinion would be that both a balancing test and a functional analysis are necessary and that neither is independently sufficient. The courts seem to impliedly recognize that the dominion of a property holder over a parcel of land which is used in a manner which does not significantly affect other individuals is absolute, at least in the sense that he need not allow "outsiders" to assemble or speak or distribute literature within the boundaries of the parcel.[49] On

46. See, e.g., Spriggs, Access of Visitors to Labor Camps on Privately Owned Property, 21 U. Fla. L. Rev. 295, 299-302 (1969).

47. See Berle, Constitutional Limitations On Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power, 100 U. Pa. L. Rev. 933, 948-49 (1952); Note, Applicability of the Fourteenth Amendment to Private Organizations, 61 Harv. L. Rev. 344, 347 (1948).

48. See Escalera v. New York City Housing Auth., 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970).

49. See State v. Martin, 199 La. 39, 5 So. 2d 377 (1941); Commonwealth v. Richardson, 313 Mass. 632, 48 N.E.2d 678 (1943); Annot., 146 A.L.R. 655 (1943). The use of private property for commercial purposes may effectuate a shift in the balance from property rights to first amendment rights; however, the sit-in opinions, such as Bell v. Maryland, 378 U.S. 226 (1964), did not directly face the problem. See also Robinson v. Florida, 378 U.S. 153 (1964); Paulsen, The Sit-In Cases of 1964: "But Answer Came There None," 1964 Sup. Ct. Rev. 137.

the other hand, the dominion over property which constitutes a *town* or *municipality*, the functioning of which affects the lives of individuals other than the owner, is not always absolute, and the owner must reflect in his management—in effect, a substitute for municipal government and thus a form of state action—the rights guaranteed by the Constitution. The degree to which these constitutional rights are exercisable by the town's residents is determined by balancing their rights against the property rights of the owner of the town, which still remains private property although it performs a municipal function. Once a determination of state action has been made, if property rights conflict with first amendment rights, the resolution must be made in favor of the latter because of their nature as "preferred rights."[50] More succinctly, when a company town functions like any other town, the first amendment rights of individuals are secure against infringement by the management of the town.

The application of *Marsh* to the restrictions on access prevalent in many migrant labor camps is not inconsequential. Many of these camps are quite similar, if not identical, in their basic structure to the company town in *Marsh*.[51] A caveat is in order, however, for the more restrictive the conditions of the camp with respect to access the less likely it is that the *Marsh* holding will be applicable. The rationale of imparting upon the company town or migrant labor camp a degree of state action is grounded in its public function aspect. "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[52] The migrant labor camp must prossess a sufficient amount of "publicness" to fall within the rule postulated by the Court.[53]

A more recent case decided by the Supreme Court, *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*,[54] indicates that the degree of "publicness" necessary to a finding of public function, and thus of state action, need not be so great as to constitute a de facto municipality. In holding the injunction of peaceful picketing in a shopping center

50. For a discussion of the preferred status given the rights guarantee by the first amendment, see McKay, The Preference for Freedom, 34 N.Y.U.L. Rev. 1182 (1959).

51. See text accompanying notes 38-41 supra.

52. Marsh v. Alabama, 326 U.S. 501, 506 (1946). The requisite of "openness" has been criticized as unnecessary to the holding in Marsh. Note, Privileged Entry Onto Farm Property For Union Organizers, 19 Hastings L.J. 413, 416, 419 (1968).

53. For example, the first amendment guarantees do not require that entry be permitted into the inner hallways of private apartment buildings. Watchtower Bible & Tract Soc'y, Inc. v. Metropolitan Life Ins. Co., 297 N.Y. 339, 79 N.E.2d 433, cert. denied, 335 U.S. 886 (1948), noted in 48 Colum. L. Rev. 1105 (1948).

54. 391 U.S. 308 (1968).

to be an unconstitutional deprivation of first amendment rights, the Court stated that because of the free accessibility of the center to the public, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.[55]

In a recent district court case, *Folgueras v. Hassle*,[56] the restrictions imposed upon access to several migrant farm labor camps[57] were declared unconstitutional. The opinion, although generally claiming to be merely following such earlier decisions as *Marsh* and *Amalgamated Food Employees*, may have indicated an expansion of the rationales espoused in those cases. Although the court spoke of the need for state action,[58] nowhere in the opinion is it clearly stated whether that degree of openness was present which was considered essential to the findings of state action in *Marsh* and *Amalgamated Food Employees*.[59]

The opinion seems to base its finding of state action on the nature of the camps as de facto towns irrespective of the element of openness to those outside the camps.[60] This aspect of the opinion, if widely followed, would represent an end to the publicness test, replacing it with a more simplistic test of function.

The case of *Shelley v. Kraemer*,[61] decided in 1948, has engendered a voluminous amount of comment.[62] In that case the United States Supreme

55. Id. at 319-20 (footnote omitted). The converse is equally true. That is, even when property is publicly owned, "where property is not ordinarily open to the public, this Court has held that access to it for the purpose of exercising First Amendment rights may be denied altogether." Id. at 320; see Adderley v. Florida, 385 U.S. 39 (1966).

56. 331 F. Supp. 615 (W.D. Mich. 1971). The other aspects of this case are discussed in notes 129-33 infra and accompanying text.

57. Involved were fifteen camps in Western Michigan with approximately 220 dwelling units, 12 feet by 12 feet in dimension. Id. at 616-17.

58. Id. at 621.

59. The opinion recognizes the dissimilarities between the company town in Marsh and the shopping center in Amalgamated Food Employees, on the one hand, and the migrant camps there involved on the other. Id. at 623.

60. This proposition was originally put forth in the concurring opinion of Mr. Justice Frankfurter in Marsh. 326 U.S. at 510-11 (concurring opinion). The extension of the Marsh rationale beyond the "openness" or "publicness" test was recently denied in State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971).

61. 334 U.S. 1 (1948).

62. See, e.g., discussions of Shelley in Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473 (1962); Horowitz, The Misleading Search for "State Action" Under the Fourteenth Amendment, 30 S. Cal. L. Rev. 208 (1957); Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083 (1960); Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959); Note, State Action Reconsidered in the Light of Shelley v. Kraemer, 48 Colum. L. Rev. 1241 (1948); 10 U.C.L.A.L. Rev. 401 (1963).

Court found state action to exist when restrictive agreements forbidding conveyances of certain real estate to non-Caucasians were enforced in the state courts. The Court noted that judicial enforcement of what was otherwise a private activity was a sufficient involvement of governmental powers to constitute state action.[63] However, certain limitations on this doctrine were implicit in the Court's treatment; the decisive factor in finding state action was that, but for the judicial enforcement, the victims of the restrictive covenants would have occupied the premises.[64]

Unfortunately, the doctrine enunciated in *Shelley* will seldom aid those seeking access to migrant camps. It is not necessary for camp owners or management to employ state courts to keep visitors away—fences and guards are normally sufficient.[65] When enforcement may be legitimately carried out without judicial aid, no state action can be found under the rule of *Shelley*.

Likewise, there is normally lacking in migrant farm labor camps that degree of governmental regulation necessary to invoke a claim of state action. Since *Burton v. Wilmington Parking Authority*[66] was decided, a plethora of claims have attempted to show that a state had "insinuated" itself into a private function to such a degree that it was susceptible of constitutional regulation.[67] Courts have found, under certain conditions, that individuals have been denied their constitutional rights by the acts of private hospitals[68] and colleges[69] which amount to state action when state involvement through regulation and control was present. However, the crucial finding requires that

> the state must be involved not simply with some activity of the institution alleged

63. 334 U.S. at 20.

64. "These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. . . . The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." Id. at 19.

65. But see Folgueras v. Hassle, 331 F. Supp. 615, 617 (W.D. Mich. 1971), where defendant's use of force to keep trespassers off his property did not vitiate the court's finding of sufficient "openness" and, thus, state action under the Marsh rationale.

66. 365 U.S. 715 (1961).

67. 39 Fordham L. Rev. 127, 130 (1970).

68. E.g., Sams v. Ohio Valley Gen. Hosp. Ass'n, 413 F.2d 826 (4th Cir. 1969); Foster v. Mobile County Hosp. Bd., 398 F.2d 227 (5th Cir. 1968); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964), noted in 62 Mich. L. Rev. 1433 (1964). Contra, Mulvihill v. Julia L. Butterfield Memorial Hosp., 329 F. Supp. 1020 (S.D.N.Y. 1971).

69. E.g., Powe v. Miles, 407 F.2d 73 (2d Cir. 1968). See also Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970), noted in 39 Fordham L. Rev. 127 (1970). But cf. Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968).

to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of the complaint.[70]

Indeed, there is often state regulation of many facets of migrant camp life.[71] However, the imposition of health standards or a registration requirement cannot be the basis for a charge of state action when the camp owner refuses to allow visitors or permit the farm laborers to leave.

It would then seem that attacks on migrant labor camp restrictions on access will rarely succeed on the basis of a fourteenth amendment claim unless the camp is owned by either a state or political subdivision thereof. However, should it be established that the camp has always displayed a sufficient degree of openness and that one visitor or a class of visitors has been denied entry, then the doctrine of *Marsh* may be applied.[72] In most other instances, attempts at finding state action will prove to be a tenuous approach.

It should be noted that theories have been propounded which would totally eliminate the need for a finding of state action before an individual can successfully claim that there has been an unlawful interference with his constitutional rights. In 1883, in the *Civil Rights Cases*,[73] Mr. Justice Harlan in his forceful dissent argued that the first sentence of the first section of the fourteenth amendment created a dual citizenship for all, irrespective of the intended scope of that section's second sentence.[74] If our first amendment communicative rights are guaranteed as an incident of federal citizenship, it can be argued that such civil rights cannot be violated regardless of who the perpetrator is or whether or not state action is involved.

The original Bill of Rights was added to the Constitution because of the general fear that power is often abused at the expense of the citizenry. In the late 1700's only governments possessed the quantum of power required to impose significant artificial restraints and restrictions on the freedom of the individual. Today that power is possessed by many "semiautonomous economic organizations."[75] Accordingly, it has been

70. Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968). See also Mulvihill v. Julia L. Butterfield Memorial Hosp., 329 F. Supp. 1020 (S.D.N.Y. 1971).

71. For example, Florida regulates safety conditions to some extent (Fla. Stat. Ann. §§ 381.422-.502 (1959)), sanitary conditions (id. §§ 509.012-.302), and construction standards. Id. §§ 421.01-.54.

72. Cf. text accompanying notes 56-60 supra.

73. 109 U.S. 3 (1883).

74. Id. at 26-62 (dissenting opinion).

75. Miller, The Constitutional Law of the "Security States," 10 Stan. L. Rev. 620, 625 (1958). The rise of the "corporate state" has given rise to strong and spreading criticism of the economic and technocratic controls placed on the individal's choice of action. See generally T. Roszak, The Making of a Counter Culture (1969).

stated that the spirit of the first ten amendments can continue to exist meaningfully only if all organizations which have the power to significantly control the conduct of individuals are subordinated to the individual's constitutional guarantees.[76] Such an approach, although appealing, does not appear likely to achieve success in the courtroom since it would represent a large upheaval in prevalent concepts of jurisprudence.

B. *The Thirteenth Amendment*

In those situations in which no state action can be discerned, even under the more expansive theories and definitions of that term, the closed migrant labor camp may still be subject to constitutional scrutiny through which possible violations of the thirteenth amendment's prohibition against involuntary servitude may be detected.[77] The prohibitory language of that amendment, unlike that of the fourteenth, is absolute and is not restricted in its dictates to a specified type of transgressor; it is directed not only at political subdivisions but also at individuals.[78] That this proposition, seemingly self-evident from the language of the amendment, is correct was strikingly observed in the *Civil Rights Cases*,[79] the very decision which announced the doctrine of state action in cases arising out of the fourteenth amendment.

The thirteenth amendment may appear to many to be of only historical significance—the culmination of and natural sequel to Lincoln's Emancipation Proclamation—and thus totally devoid of any continuing legal import subsequent to the elimination of the institution of chattel slavery. Recently, however, certain forms of twentieth century discrimination have been successfully attacked as incidents or badges of slavery.[80]

76. Miller, supra note 75, at 661-66; see Berle, supra note 47. But see Wellington, The Constitution, The Labor Union, and "Governmental Action," 70 Yale L.J. 345, 374 (1961).

77. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1.

For a discussion of the congressional debates which flourished over the passage of the amendment, see tenBroek, Thirteenth Amendment to the Constitution of the United States, 39 Calif. L. Rev. 171 (1951).

78. Clyatt v. United States, 197 U.S. 207, 216 (1905); see tenBroek, supra note 77, at 172. See also United States v. Gaskin, 320 U.S. 527 (1944); Railroad Tax Cases, 13 F. 722, 740 (C.C.D. Cal. 1882), appeal dismissed, 116 U.S. 138 (1885).

79. 109 U.S. 3, 20 (1883).

80. See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), noted in 37 Fordham L. Rev. 277 (1968). Compare the language of Bailey v. Alabama, 219 U.S. 219, 241 (1911), with the earlier decision in Hodges v. United States, 203 U.S. 1, 17 (1906) (refuting the contention that the amendment impliedly guarantees the right to contract, buy and sell land, etc.). The argument has been made that the amendment insures "the equal right of all to enjoy protection in those natural rights which constitute that freedom." tenBroek, supra note 77, at 203. See also Note, The Reach of the Thirteenth Amendment, 47 Colum. L. Rev. 299 (1947).

Furthermore, the amendment explicitly forbids not only slavery, but "involuntary servitude" as well. The latter is a nebulous term and consequently the cases have been unsuccessful in defining it with any degree of clarity.[81] It is certain, however, that peonage is within its ambit.[82]

In an attempt to effectuate the purposes of the amendment, Congress has enacted legislation designed to eradicate the practices of peonage and involuntary servitude. Section 1581 of Title 18 of the United States Code makes it a criminal act for anyone to hold a person in peonage.[83] Peonage has been described as "a status or condition of compulsory service or involuntary servitude based upon a real or alleged indebtedness."[84] Thus, "[i]t is sufficient to constitute [peonage] that a person is held against his will and made to work to pay a debt."[85] The amount of the debt and the means of coercion are immaterial. Threats of prosecution may constitute sufficient coercion to establish peonage.[86] Furthermore, in conclud-

81. See United States v. Shackney, 333 F.2d 475 (2d Cir. 1964). See generally Shapiro, Involuntary Servitude: The Need for a More Flexible Approach, 19 Rutgers L. Rev. 65 (1964).

82. E.g., Taylor v. Georgia, 315 U.S. 25 (1942); Pierce v. United States, 146 F.2d 84 (5th Cir. 1944), cert. denied, 324 U.S. 873 (1945); Peonage Cases, 123 F. 671 (M.D. Ala. 1903). See also United States v. Reynolds, 235 U.S. 133 (1914); In re Peonage Charge, 138 F. 686 (C.C.N.D. Fla. 1905).

83. "Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1581(a) (1970).

The basic statute implementing the peonage prohibition of the thirteenth amendment is 42 U.S.C. § 1994 (1970): "The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited . . . ." See also 18 U.S.C. § 1584 (1970).

84. Pierce v. United States, 146 F.2d 84, 86 (5th Cir. 1944), cert. denied, 324 U.S. 873 (1945); see United States v. Reynolds, 235 U.S. 133 (1914); Peonage Cases, 123 F. 671 (M.D. Ala. 1903). The following description of peonage, based on the Peonage Cases, is offered by Professor Shapiro:

"The peon was not a slave in the pre-Thirteenth Amendment meaning, but was legally a freeman, with political as well as civil rights. He entered into the bondage relation from some choice, for a definite period, as the result of a mutual contract. The peon agreed with the master on the nature of the service, its duration, and the amount of compensation. It was an inequitable relationship brought about by a socio-economic condition, somewhat akin to European serfdom, in which contractual self-abasement might be entered into for a variety of reasons. In actual practice, from the moment of entering the relationship the 'political' and 'civil' rights were illusory." Shapiro, supra note 81, at 75 (footnote omitted).

85. Bernal v. United States, 241 F. 339, 342 (5th Cir. 1917), cert. denied, 245 U.S. 672 (1918). See also Pierce v. United States, 146 F.2d 84, 86 (5th Cir. 1944), cert. denied, 324 U.S. 873 (1945).

86. United States v. Clement, 171 F. 974, 976 (D.S.C. 1909).

ing whether coercion was present, the relationship between the parties must be examined to determine whether the threats overcame the will of the servant or whether the service was voluntary.[87]

When the migrant farm laborer is coerced into remaining with a crew leader or on a migrant farm labor camp because of threats of prosecution for debts owed the crew leader or camp owner, the statutory and constitutional bar against peonage is clearly applicable. *Pollock v. Williams*[88] discussed peonage in lumber camps under circumstances strikingly similar to the conditions in migrant farm labor camps detailed earlier in this article.[89] Although it is true that only in the most confining of camps are conditions likely to be found which would constitute peonage, it is also highly probable that these camps would be among the camps not sufficiently "open" to fall within the *Marsh* doctrine.

IV. The Grower's Property Rights and Duties

The law has often characterized a field hand as a mere servant who receives his housing as a gratuity from his "master" and who therefore has no standing to question the restrictions imposed upon the "gift." This obsolete view of the farm workers' servility has greatly influenced a perpetuation of the disregard for the barriers surrounding the rights to access imposed upon those who live in agricultural labor camps. Of the three categories in which the worker might be classified—servant, licensee, or tenant—the designation of "servant" carries with it the least amount of protection for the worker and allows the greatest amount of arbitrary action by the grower. The role of the licensee is slightly better. It appears, however, that in most instances the labor camp inhabitant is not a mere licensee or servant, but rather a tenant. For example, in *Tucker v. Park Yarn Mill Co.*[90] the court drew a similar distinction between a servant and an employee-tenant:

> Nor can the further contention of plaintiff that the relationship between the parties to this action, while plaintiff was occupying house, was that of master and servant, or employer and employee, and not that of landlord and tenant, be sustained. While plaintiff was in defendant's mill, engaged in . . . her duties as its employee, the relation between them was that of employer and employee, but while she was in the house [which her employer furnished for employees and for which sixty cents a week rent was deducted from her wages], occupying it as her home, defendant was her landlord and she was its tenant. It cannot be held that plaintiff, while in the house furnished

87. Id. See also United States v. Ancarola, 1 F. 676 (C.C.S.D.N.Y. 1880).

88. 322 U.S. 4 (1944).

89. Compare id. at 18-19, 19 n.30 & 20 n.32, with text accompanying notes 22-33 supra.

90. 194 N.C. 756, 140 S.E. 744 (1927).

her by defendant, to be occupied by her as her home, was in a place furnished by her employer for the performance of her duties as an employee. The house was not furnished her as a place in which to work. When she entered this house she was in her home. There she was under no duty to defendant as its employee, nor did defendant owe her any duty, while she was in the house, as her employer. Its duties to her, while in the house, arose solely from the relationship of landlord and tenant.[91]

The designation of the farm worker as tenant can similarly be founded on the distinct separation between work performed and place of habitation. The farmer may wish to have his labor force near at hand and, for that reason, may specifically describe available housing in the employment contract if one is entered into. However, the work and the housing are usually only related as a matter of convenience to either the farmer or the worker, and not by any actual dependency of one on the other. The field worker could pick the fruit no matter where he lived as long as he was within a distance reasonable for commuting. It is not necessary to live in the camps to do the job efficiently and completely. This is illustrated by the fact that many farms which have labor camps also draw on the day-haul worker from nearby communities to supplement their labor force.[92] Since the camp inhabitants and the day workers pick the same fields in the same manner, the distinction between work and housing is clear.

Some labor camps obviously come closer to traditional notions of tenancy than do others. A camp laid out on a single or double family dwelling plan is more suggestive of tenancy than a barracks full of single men's double bunks and lockers. Camps where food is served in a mess hall by the management are less likely to create a tenancy than are camps where meals are prepared individually for the family unit. The presence of a man's family indicates the presence of his "home" and the existence of nonworking members of the family in a labor camp is another example of how little the house and field work are related. The determining factor in a finding of a lease often is the worker's payment of rent for his housing.[93] "Rent" is used in the broad sense and means whatever return accrues to the owner for the use and occupation of his realty.

91. Id. at 759, 140 S.E. at 745.

92. "For years the seasonal farm labor needs of growers in many localities have been served by a 'commuter' program, popularly referred to as the 'day haul.'" U.S. Bureau of Labor Standards, Dep't of Labor, Bull. No. 245, The Day Haul Program, Commuting to Farm Jobs vii (1962).

93. Angel v. Black Band Consol. Coal Co., 96 W. Va. 47, 122 S.E. 274 (1924). Contra, Davis v. Long, 45 N.D. 581, 178 N.W. 936 (1920). Davis held that although payment of rent was a strong factor leading to the finding of a lease, other circumstances, such as the necessity of the employee's living on the premises to perform the work, would negate the presumption favoring the lessor-lessee relationship. In Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971), the court found the essential elements to be that "[t]he migrant pays for the dwelling he occupies; the landlord binds himself to provide a dwelling of

Once the farm worker is viewed as a tenant, his position is immediately enhanced.[94] His ability to entertain visitors is no longer a privilege to be granted or denied at the whim of management, but is preserved in the face of all but the most reasonable regulations on the part of the camp owners. It has been found by some courts that the implied license granted to a tenant with respect to access to the premises includes the right to have third party visitors, even against the strenuous objections and physical obstruction of the landlord.[95]

> It is settled that, when a landlord lets property to be occupied by several tenants, although he retains for certain purposes control of the common doorways, passageways, stairways and the like, he grants to his tenants a right of way in the nature of an easement, appurtenant to the premises let, through those places that afford access thereto. . . . It is also settled that this easement extends to the members of the tenant's family and to all his guests and invitees.[96]

Closely analagous to the labor camp situation is the factual context of *Davies v. Kelley*.[97] The premises were leased to multiple tenants, each of whom occupied a different portion. All tenants used certain parts of the building in common. Those generally used sections of the premises were not included in the tenant's lease, and thus the landlord was presumed to have retained control over such areas.[98] In order for a tenant to gain access to his particular demised portion of the tenancy, it is oftentimes necessary to utilize the streets, stairs, passageways, and other common areas. In *Davies* it was held that a right to use such portions for the beneficial enjoyment of the part demised arises in favor of each tenant and his invitees.[99]

Stripped of the excessive categorization of relationships between the owner and those present on his property, ownership is, in effect, merely a concept indicative of a collection of intangible rights which society has determined to be permissible for the owner to exercise. It has long been stated that property rights are not absolute and are subservient to the

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a fixed quality; the migrant occupies the dwelling exclusive of the landlord for an agreed upon term—the length of his employment." Id. at 624.

94. There is no case law successfully preventing an express invitee of a tenant from visiting, even when the only access is across the landlord's property. However, there is support for the proposition that a man cannot be a trespasser if he is invited by the occupant, either expressly or by implication. E.g., Flynn v. Chippewa County, 244 Wis. 455, 12 N.W.2d 683 (1944); Grossenbach v. Devonshire Realty Co., 218 Wis. 633, 261 N.W. 742 (1935).

95. E.g., Commonwealth v. Richardson, 313 Mass. 632, 48 N.E.2d 678 (1943); Montgomery v. Commonwealth, 99 Va. 833, 37 S.E. 841 (1901).

96. Commonwealth v. Richardson, 313 Mass. 632, 639, 48 N.E.2d 678, 682 (1943).

97. 112 Ohio St. 122, 146 N.E. 888 (1925).

98. See Note, Landlord's Retention of Power to Control Premises, 15 Clev.-Mar. L. Rev. 579, 583 (1966).

99. 112 Ohio St. at 127, 146 N.E. at 890.

greater good of society.[100] Recently, the recognition of the non-absolute nature of property rights has been even more vociferously advocated.[101] Applying this more modern view of the rights which accompany title to a piece of land to the migrants' situation, it is clear that the right to control access to and from the migrants' camp to their detriment should not be a right which runs with the land.

V. LABOR

Attempts at eliminating the bars to access through the unionization of migrant farm workers present certain problems. Although it seems certain that unionization of the migrants would succeed in removing the barriers surrounding accessibility to the camps, the more "closed" the camp, the less likely are the chances of forming the migrants into a strong unit capable of effective collective bargaining. Without open lines of communication to the migrant farm worker, attempts at unionization seem doomed from their inception.

The benefits of coverage by the National Labor Relations Act, which includes protection of organizational efforts[102] even on private property,[103] are denied to the agricultural worker.[104] The exclusion stems from hostility which arose out of organizational efforts in the 1930's[105] and the efforts of the powerful farm lobby.[106] The exclusion does not, of course, indicate an intent to make farm unions illegal.[107]

Another significant factor which hinders efforts at unionization is a lack

100. See 5 R. Powell, Real Property ¶ 745, at 493-94 (P. Rohan ed. 1970). See also H. Broom, Legal Maxims 238 (10th ed. 1939).

101. See, e.g., Cross, The Diminishing Fee, 20 Law & Contemp. Prob. 517 (1955); Powell, The Relationship Between Property Rights and Civil Rights, 15 Hastings L.J. 135 (1963). See also Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971); State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971).

102. Section 8(a) of the National Labor Relations Act enumerates acts of interference with the right of self-organization among the prohibited "unfair labor practices." 29 U.S.C. § 158(a) (1970).

103. E.g., NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); NLRB v. S & H Grossinger's Inc., 372 F.2d 26 (2d Cir. 1967).

104. National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1970). For an interpretation of the perimeters of the term "agricultural worker," see Di Giorgio Fruit Corp. v. NLRB, 191 F.2d 642 (D.C. Cir.), cert. denied, 342 U.S. 869 (1951); Bodine Produce Co., 147 N.L.R.B. 832 (1964). See also Lucas County Farm Bureau Coop. Ass'n v. NLRB, 289 F.2d 844 (6th Cir.), cert. denied, 368 U.S. 823 (1961).

105. C. McWilliams, Factories in the Field 211-63 (1939).

106. See Note, The Constitutionality of the NLRA Farm Labor Exemption, 19 Hastings L.J. 384, 384-86 (1968).

107. Madden, Origin and Early Years of the National Labor Relations Act, 18 Hastings L.J. 571, 583 (1967). See also Rummel, Current Developments in Farm Labor Law, 19 Hastings L.J. 371 (1968).

of identity among farm workers with regard to their roles as such. Most migrant farm workers feel that their present employment is merely a way station to a more lucrative occupation.[108] The resultant absence of a rural proletariat impedes progress in both the labor and political spheres.

Recent advances in union organization have, however, been made in California. The successes achieved by Cesar Chavez, the leader of the United Farm Workers Organizing Committee (UFWOC),[109] in bringing growers to the bargaining table are unparalleled in any other area where migrant farm workers are utilized in harvesting. By the end of the summer of 1970, the great majority of the table grape growers,[110] as well as many of the lettuce, nut, and citrus growers,[111] had signed union contracts.

The success of the UFWOC can be attributed to many factors. One of the most important was the choice of consumer picketing as the priority tactic.[112] Public backing for Chavez's efforts, especially on the pesticide issue, came from such diverse sources as church groups and older leaders of organized labor and contributed to the possibility of success.[113] How-

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108. Note, Agricultural Labor Relations—The Other Farm Problem, 14 Stan. L. Rev. 120, 128 (1961). Ironically, the feeling of impermanence shared by many migrants may be well founded, not because of opportunities upward, but due to technological displacement. See notes 20 & 21 supra and accompanying text.

109. Between 1959 and 1961 the AFL-CIO operated a pilot program to organize migrant farm workers in California. Daniel, Problems of Union Organization for Migratory Workers, 12 Lab. L.J. 636, 641-42 (1961). The National Farm Workers Association, founded by Chavez in 1965, merged with the Agricultural Workers Organizing Committee, the AFL-CIO affiliate, to form UFWOC. Taylor, supra note 3, at 167.

110. For a chronological history of UFWOC's successes, see N.Y. Times, April 2, 1970, at 29, col. 2; id., May 31, 1970, § 1, at 56, col. 4; id., June 30, 1970, at 34, col. 2; id., July 30, 1970, at 1, col. 5. See also authorities cited in note 2 supra.

111. See N.Y. Times, June 11, 1970, at 42, col. 6; id., June 8, 1970, at 27, col. 1.

112. See Taylor, supra note 3. See also Interview with Cesar Chavez in Fitch, Tilting with the System, The Christian Century, Feb. 18, 1970, at 204; Taylor, Why Chavez Spurns the Labor Act, The Nation, April 12, 1971, at 454-56. Farmers and growers have felt that an NLRA inclusion for farm unions would deprive the unions of the secondary boycott and thus weaken the bargaining position of Chavez and UFWOC. Id. at 454-55. Chavez has lately shown reluctance to such an inclusion. Fitch, supra, at 204. Whether an exempt union can commit an unfair labor practice within the meaning of section 8(b)(4) of the Act (29 U.S.C. § 158(b) (4) (1970)) by conducting a secondary boycott is not settled. See Di Giorgio Fruit Corp. v. NLRB, 191 F.2d 642, 646 (D.C. Cir.), cert. denied, 342 U.S. 869 (1951). But see Local 833, UAW, 116 N.L.R.B. 267, 278 (1956). However, "[w]hen consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute," and thus is not prohibited. NLRB v. Fruit Packers, Local 760, 377 U.S. 58, 72 (1964).

113. See Taylor, supra note 3. The issue of pesticide use was even included in the first collective bargaining contract signed by a grower in the table grape industry. N.Y. Times, April 2, 1970, at 29, col. 2.

ever, the situation appears to be atypical. The essential factor of outside aid could not, in itself, guarantee success. The migrant farm workers in California are, for the most part, Chicanos. The racial and ethnic solidarity which Chavez, a quiet but persistent leader, was able to utilize as a replacement for an identity as a particular laboring class[114] is not as predominant in other harvesting areas. Furthermore, the use of closed camps does not appear to be as prevalent in California, where many of the migrants form more permanent bases and the range of migration is somewhat shorter.[115]

VI. Recent Developments

In the past couple of years, activity designed to eliminate the barriers to access to and from the migrant labor camps has increased tremendously. Numerous lawsuits, praying for guaranteed access and other benefits to the migrants, have been filed.[116] Several decisions have strengthened the migrants' legal rights along with the position of those who attempt to communicate with them.

One of the most notable of the recent cases is *State v. Shack*,[117] decided by the Supreme Court of New Jersey. Two representatives of organizations which provide services for migrant farm workers[118] entered upon the property of a grower in order to assist two migrant farm workers with their medical and legal problems. The grower stated that all consultations must take place under his supervision and in his presence. These conditions were unacceptable to the visitors who then refused to leave. Upon written complaint of the farmer, the defendants were arrested and subsequently convicted of criminal trespass.

Several contentions were presented to the New Jersey Supreme Court upon an appeal brought to overturn the convictions. Numerous constitutional arguments were advanced by the defendants and rejected by the court.[119] In particular, much reliance was placed on the rationale of

114. See Dunne, supra note 2. See also Fitch, supra note 112.

115. See Levine, supra note 18, at 626-27.

116. See, e.g., Peper v. Cedarbrook Farms, Inc., No. 19,075 (3d Cir., filed Oct. 22, 1970); Flores v. Joan of Arc Co., No. 70-C-3065 (N.D. Ill., filed Dec. 9, 1970); California Rural Legal Assistance v. Zanger, No. C-70-2236 (N.D. Cal., filed Oct. 14, 1970); Olguin v. Fresh Pict Foods, Inc., No. C-2485 (D. Colo., filed Aug. 10, 1970).

117. 58 N.J. 297, 277 A.2d 369 (1971).

118. One defendant was a field worker for the Farm Workers Division of the Southwest Citizens Organization for Poverty Elimination (SCOPE), an organization which provides health services for migrant farm workers. The other defendant was a staff attorney with the Farm Workers Division of Camden Regional Legal Services. Both organizations are nonprofit corporations funded by the Office of Economic Opportunity. Id. at 298, 277 A.2d at 370.

119. Id. at 301-02, 277 A.2d at 371.

Marsh to the effect that the first amendment rights of the defendants and of the migrants were offended by the action of the farmer which was, in effect, state action. In rejecting this approach, the court stated:

> Those cases rest upon the fact that the property was in fact opened to the general public. There may be some migrant camps with the attributes of the company town in *Marsh* and of course they would come within its holding. But there is nothing of that character in the case before us, and hence there would have to be an extension of *Marsh* to embrace the immediate situation.[120]

The court reversed the convictions, however, on the ground that "under our State law the ownership of real property does not include the right to bar access to governmental services available to migrant workers . . . ."[121] Noting that the decision in these terms was more expansive, the court stated unequivocally that property rights are not absolute but must "serve human values. . . . Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises."[122]

Furthermore, the court refused to approach the determination of the migrants' rights in the context of archaic classifications of relationships between the property owner and those upon his land. Instead, the court stated that "[t]he quest is for a fair adjustment of the competing needs of the parties, in light of the realities of the relationship between the migrant worker and the operator of the housing facility."[123]

In summary, the court stated: "[W]e find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being."[124] Accordingly, the following people must be allowed access to the migrants:

(1) all representatives of government and recognized charitable agencies seeking to aid the migrant;
(2) all visitors of the migrant's choice;
(3) all members of the press, so long as there is no objection from the migrants; and
(4) peddlers whose exclusion would deprive the migrants of access to necessary items (other solicitors and peddlers may be denied entrance unless the grower's purpose is to gain a "commercial advantage").[125]

When property rights are construed as in *Shack*, the *Marsh* rationale

120. Id. at 301, 277 A.2d at 371.
121. Id. at 302, 277 A.2d at 371-72.
122. Id. at 303, 277 A.2d at 372. See note 101 supra and accompanying text.
123. 58 N.J. at 307, 277 A.2d at 374.
124. Id.
125. Id. at 307-08, 277 A.2d at 374.

diminishes in importance. A recent case in New York, *People v. Rewald*,[120] did, however, find that the attributes of the labor camp were extremely similar to the company town in *Marsh*. The camp had a grocery store, a church, a barber shop, public telephones, recreational facilities, and many other indicia of a de facto town. Many of the migrants had cars and shopped in neighboring communities. However, the owner did exercise a discriminatory control over visitors.[127] The defendant, a newspaper reporter, was arrested for criminal trespass upon refusing to leave the premises. Although discussing at length the similarities to *Marsh*, the court did not explicitly hold that state action was present nor that constitutional rights had been violated. Instead, due to the partial public use of the premises and the implied dedication to that extent, no rights of the owner were found to have been violated and thus no trespass resulted.[128] In effect, the court seemed to be stating that once the camp is opened to the public, property rights do not include the right to arbitrarily deny *some* visitors access to the camp.

Folgueras v. Hassle[129] represents another large step forward in establishing the right of migrants and visitors to free access to and from the labor camps. The constitutional aspects of this decision have already been discussed in conjunction with *Marsh*.[130] That part of the decision dealing with the constitutional questions was, however, an alternative holding. After finding that access would be guaranteed by the Constitution, the decision clearly established that property law dictates the same result. Commenting on the recently decided *Shack* case, the court stated:

> This court concurs with the New Jersey court in concluding that the property rights of the camp owner do not include the right to deny access to his camps to guests or persons working for any governmental or private agency whose primary objective is the health, welfare or dignity of the migrant workers as human beings.[131]

The decision in *Folgueras* also firmly established that the migrant farm workers were tenants and as such entitled to "invite and associate with guests of the tenant's own choosing."[132] In conclusion the court stated:

> Whether the court regards the question of access to migrant labor camps as one of constitutional law, the rights surrounding the ownership of real property or the rights of tenants in relation to their landlord, the law compels a single conclusion. The

126. 65 Misc. 2d 453, 318 N.Y.S.2d 40 (Cayuga County Ct. 1971).
127. Id. at 455-56, 318 N.Y.S.2d at 43.
128. Id. at 456-58, 318 N.Y.S.2d at 44-46.
129. 331 F. Supp. 615 (W.D. Mich. 1971).
130. See text accompanying notes 56-60 supra.
131. 331 F. Supp. at 624.
132. Id. at 625.

fundamental underlying principle is simply that real property ownership does not vest the owner with dominion over the lives of those people living on his property.

The migrants who travel across the country to work in the grower's fields and live on the grower's property are clothed with their full bundle of rights as citizens and human beings. They may not be held in servitude or peonage, and they are not serfs.

They are, however, citizens of the United States and tenants. As such they are entitled to the kinds of communications, associations, and friendships guaranteed to all citizens, and secured by the Constitution. The owner's property rights do not divest the migrants of these rights.[133]

Judicial action is not the only area in which attempts have been made to aid the migrant. Legislation has been enacted, both on the federal and state levels, which is designed to improve camp conditions[134] and eradicate disreputable practices by crew leaders.[135] More important, the United States Department of Justice has become increasingly involved in attempts to insure access to the camps.[136]

VII. CONCLUSION

The courts can no longer ignore the obvious fictional quality of the grower-owner's claim for protection of his "private" property, but should instead recognize the fact that the camp is the only "home" the migrants know. If the migrant worker has no safeguards for his freedoms of speech and assembly while he is housed in the labor camps, in which the majority of his life is spent, these freedoms have no reality for him.

The need for improvement in the migrants' status is apparent, as is the necessity of achieving "open" camps in order to establish the conditions which are requisite to that improvement. The means to that achievement are several and the likelihood of success varies with each method and each given set of circumstances. The constitutional attacks, based on a finding of state action and an interference with communicative rights or upon a finding of peonage, appear likely to arise only when restrictions are either very loose or very tight. The additional necessity of showing state involvement when claiming a violation of the migrant's first amendment rights is a burden which will often be difficult to overcome.

Attempts to unionize the migrant workers do not appear likely to succeed, at least not in the near future. Legislative aid is often piecemeal

133. Id. at 625.

134. See, e.g., the recent statutes passed in New Jersey, Acts of June 7, 1971, chs. 193 & 195, [1971] N.J. Laws 754, 756.

135. See 7 U.S.C. §§ 2041-53 (1970); Act of June 7, 1971, ch. 192, [1971] N.J. Laws 751.

136. N.Y. Times, Nov. 8, 1970, § 1, at 50, col. 1. See also the recent appropriations to be given to help ameliorate working and living conditions of migrant workers. Id., June 20, 1971, § 1, at 28, col. 1.

and seldom of any help with regard to access problems. The recent trend in general property law away from the absolute rights of ownership and toward the expansion of individual civil rights seems to offer the greatest hope for eliminating restrictions on access. Decisions such as *Shack* and *Folgueras* indicate a growing awareness of the problem on the part of progressive tribunals.

Conceptual vestiges of medieval English conditions have enveloped the fee in a Stygian mist of inviolability. The realities of the modern world bear no resemblance to those ancient considerations, and the law should attune itself to the change. The communicative activities protected by the Constitution should be recognized as equally guaranteed to the inhabitants of the camps by modern principles of property law. The rights which accompany the ownership in property do not include the right to isolate and impede the migrant.