> unfortunates, whose only crime, if any, is against themselves, and whose main offense usually consists in their leaving the environs of skidrow and disturbing *by their presence* the sensibilities of residents of nicer parts of the community, or suspected criminals, with respect to whom the authorities do not have enough evidence to make a proper arrest or secure a conviction on the crime suspected.[31]

Persons in the former group should not be branded as criminals because idleness and poverty should not be treated as criminal offenses. As for the suspected or marginal criminal group the statute should not be used to subvert due process requirements.[32]

In light of the current movement away from status criminality[33] as an efficacious legal doctrine it would be an understatement to term the instant decision poor. This writer predicts that the United States Supreme Court will reverse the Georgia Supreme Court for the above mentioned reasons.

JAMES R. DIRMANN

CONSTITUTIONAL LAW—RIGHT OF FREE SPEECH—CONCEPT OF STATE ACTION

Logan Valley Plaza, Inc. (hereinafter called Logan Valley), owns a large new shopping center in Pennsylvania. The shopping complex is located on or near public roads and highways that are heavily traveled. There are five entrances to the shopping center which is freely accessible and open to the general public. Weis Markets, Inc. (hereinafter called Weis), was one of the business enterprises that had opened in the shopping center. Weis employed non-union personnel and just a few days after opening, members of Amalgamated Food Employees Union, Local 590, began picketing the Weis store despite a no trespassing sign posted on the exterior of the Weis store. This picketing, carried on by employees of competitors of Weis, was at all times peaceful, although occasionally there was congestion in the parcel pick-up area in front of Weis' store. Approximately ten days after picketing began, Logan, the owner of the shopping center, and Weis obtained an *ex parte* order enjoining petitioners from picketing and trespassing in front of Weis' store and Logan's parking areas

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31. *Id.* at 315, 229 N.E.2d at 430, 282 N.Y.S.2d at 744.
32. *Id.* at 316, 229 N.E.2d at 430, 282 N.Y.S.2d at 745.
33. Robinson v. California, 370 U.S. 660 (1962); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966); Easter v. District of Columbia, 361 F.2d 50 (D.C.Cir. 1966); Hughes v. Rizzo, 282 F. Supp. 881 (E.D.Pa. 1968); Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).

and center entrances. On appeal the Pennsylvania Supreme Court[1] allowed the injunction to stand on the sole ground that petitioners' conduct was a trespass on respondents' property. Thus, stripped of all descriptive verbiage, the question that went before the United States Supreme Court was whether the conduct of the pickets constituted a trespass on respondents' property. The Court held that the shopping center was freely open to use by the public and for first amendment purposes would be treated as the ". . . functional equivalent of a 'business block'. . . ."[2] Accordingly, the injunction against nonemployee peaceful union picketing was held invalid, even though Pennsylvania's trespass laws are generally valid.

It is essential to an understanding of the principal case and its significance that one understand the relation peaceful picketing has to free speech. In *Thornhill v. Alabama,*[3] the landmark decision in this area, an Alabama statute prohibited picketing in almost any form. In holding the statute invalid on its face, the Supreme Court made several important statements directly concerning the relation of peaceful picketing to the right of free speech. First, the court noted that, "The freedom of speech and of the press, which are secured by the First Amendment against abridgement by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgement by a state."[4] From this general conclusion it was next stated that, "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."[5] Third, and more specifically concerning labor picketing, the Court held that, "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."[6] Thus, *Thornhill* very clearly extends the right of free speech to the area of peaceful picketing in labor relations. A year later in *A.F.L. v. Swing*[7] the court repeated the principal that free speech must

1. Logan Valley Plaza, Inc. v. Amalgamated Food Employees Union Local 590, 425 Pa. 382, 227 A.2d 874 (1967).
2. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).
3. 310 U.S. 88 (1940).
4. *Id.* at 95; *accord,* Grosjean v. American Press Co., 297 U.S. 233, 244 (1935); Gitlow v. New York, 268 U.S. 652, 666 (1924). For the observation that all rights guaranteed by the first amendment are applicable to the states by the fourteenth amendment see Gray, *The First Amendment to the Constitution,* 42 FLA. B. J. 300, 301 (1968).
5. Thornhill v. Alabama, 310 U.S. 88, 101 (1940).
6. *Id.* at 102. For cases holding that picketing may be regulated only when there is a clear and present danger see Thomas v. Collins, 323 U.S. 516 (1945); Clemmons v. Congress of Radical Equality, 201 F. Supp. 737 (E.D. La. 1962); State v. Brown, 240 S.C. 357, 126 S.E.2d 1 (1962); American Civil Liberties Union of Sou. Cal. v. Board of Educ. of City of Los Angeles, 55 Cal.2d 167, 359 P.2d 45, 10 Cal. Rptr. 647 (1961).
7. 312 U.S. 321 (1941).

be guarded with a "jealous eye"[8] and it does not matter that the persons picketing were not in the employ of the employer being picketed. Similarly, in *Bakery & Pastry Drivers & Helpers, Local 802 v. Wohl*,[9] the court held that picketing involved the right of free speech, and peaceful picketing on a public street with no actual abuse of that right by excess picketing would be allowed. However, it was recognized in this case that, "A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual."[10]

Although picketing is recognized and protected as free speech, it is more. Picketing involves other conduct (marching, walking) and because conduct is mixed with speech, picketing may be subject to certain restrictions not applicable to cases involving pure speech only.[11] An excellent example of these valid restrictions was presented in *Cox v. Louisiana*.[12] In *Cox* there was a precisely drawn statute that prohibited a specific type of behavior (picketing and parading) in or near courthouses. The Court upheld the statute as valid, but ultimately held that the statute had been incorrectly applied in this case. Even so, the case vividly illustrates that there are certain forms of conduct which, when coupled with speech, may be regulated or prohibited. If a state needs to take appropriate measures for the purpose of furthering the state's interest in assuring justice under law or maintaining order, then a narrowly drawn statute will be allowed. Such a statute will not abridge the rights of free speech and free assembly even though the picketing and parading are ". . . intertwined with expression and association."[13] More recently this same point was emphasized in *Cameron v. Johnson*[14] which concerned a Mississippi statute[15] similar to the one in Louisiana. This statute was narrowly drawn and in upholding its validity the Court declared that, ". . . this statute does not prohibit picketing . . . unless engaged in a manner which obstructs ingress or egress to or from a court house."[16] And in *Adderly v. Florida*[17] a municipal government was allowed to restrict persons from public property not normally used by the public.

Such municipal regulations, however, will not be upheld if they are not purposeful, appropriate, reasonable, and designed to balance the right to peacefully disseminate information with the city's interest in maintain-

8. *Id.* at 325.
9. 315 U.S. 769 (1942).
10. *Id.* at 775.
11. For a candid analysis of the effect that the non-speech actions present in picketing may have on the right of free speech, see A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE (1968).
12. 379 U.S. 559 (1964).
13. *Id.* at 563.
14. 390 U.S. 611 (1968).
15. MISS CODE ANN. §2318.5 (Supp. 1966).
16. Cameron v. Johnson, 390 U.S. 611, 617 (1968).
17. 385 U.S. 39 (1966).

ing order and regulating the use of public land. There have been many instances where protestors and pickets have been allowed to exercise their rights where the facts were similar to the principal case except that title to the property was in a municipality rather than a private landowner. An early instance was originally a Georgia case,[18] *Lovell v. City of Griffin*.[19] The City of Griffin, by a broad ordinance, attempted to require persons handing out literature on the city streets to first obtain written permission from the city manager. A member of Jehovah's Witnesses, while attempting to distribute handbills without obtaining such permission, was stopped from doing so by city officials. The ordinance was struck down as invalid on its face since it was not restricted to any particular time or place, nor was it related to valid restraints such as maintaining public order. In resolving the *Lovell* problem, the Court reiterated the view that a fundamental right such as free speech was protected from infringement by state action by the fourteenth amendment.[20] Following in the same vein one year later, the Court held in *Schneider v. State*[21] that states cannot abridge the freedom of speech consistently with our Constitution in order to dispel slight inconveniences, but only when absolutely necessary. Of course a municipality could keep protestors from blocking a street because, "Prohibition of such activity bears no necessary relationship to the freedom to speak, write, print, or distribute information or opinion."[22] Note, however, that the municipality must balance the public needs of the community against the individual rights of the protestors. This is because, "Streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[23] The City of Dallas discovered this principal in the case of *Jamison v. Texas*.[24] There the City argued that its power over its streets was not limited to the making of reasonable regulations for the maintenance of order, but that Dallas had the absolute power to prohibit anyone the use of its streets. Emphatically, the Court said no to the Dallas argument because one may use a public street to express his views in an orderly fashion including the use of handbills or the spoken word.[25]

The above discussed cases are important to the principal case, *Logan Valley,* but they are not directly in point for those cases concerned picketing on public property. What would the Court do if title to the land were

18. Lovell v. City of Griffin, 55 Ga. App. 609, 191 S.E. 152 (1937).
19. 303 U.S. 444 (1938).
20. *Id.* at 450.
21. 308 U.S. 147 (1939).
22. *Id.* at 161.
23. Schneider v. State, 308 U.S. 147, 163 (1939).
24. 318 U.S. 413 (1943).
25. *cf.* Hague v. CIO, 307 U.S. 496 (1939).

in a private landowner? This inquiry leads us directly to the case of *Marsh v. Alabama*,[26] which was heavily relied upon and extended by the Supreme Court in its resolution of the principal case. The Court decided in *Marsh* that at least for first amendment purposes, privately owned property may be treated as though it were publicly held. The facts in *Marsh* were that the Gulf Shipbuilding Corporation wholly owned a company town called Chickasaw, Alabama. By appearance, this town was like any other small community complete with residential buildings, paved streets, and a business block. Strangers were free to make use of the town until a member of the Jehovah's Witnesses distributed religious literature on the business block of Chickasaw. Because Marsh refused to leave when asked to do so by town officials, she was arrested and prosecuted under an Alabama trespass statute. The Supreme Court overturned the conviction of Marsh because by attempting to operate Chickasaw, the Gulf Shipbuilding Corporation was acting as a quasi-municipal corporation and must be made to adhere to the same high constitutional requirements concerning first amendment rights as would a city or state as opposed to the lower standards of a private property owner.[27]

Thus, *Marsh* was decided by making the action of a private landowner the equivalent of state action for first amendment purposes and although the landowner would be able to regulate reasonably the use of his land, the test would not be that of a private landowner to absolutely regulate strictly private property; instead, it would be that of a municipality to regulate and balance the rights of free speech against the absolute needs of the municipality.

Marsh is an extremely important doctrine as evidenced in the decision in *Logan Valley* and a comparison of the two cases leads one to the undeniable conclusion that *Marsh* is the only direct authority upon which the decision in the principal case rests. In fact, the doctrine of *Marsh* had to be greatly extended to accommodate the proposition that a person who makes his private land completely accessible to the public for commercial purposes will be held to the constitutional standard of a municipality even though the private landowner never intended to act as a governmental agency.

It is not sufficient merely to state that *Marsh* was greatly extended to afford coverage of the *Logan Valley* case, but rather, it must be considered

26. 326 U.S. 501 (1946).

27. Two student notes have recently discussed the lower court decision of *Logan Valley Plaza, Inc. v. Amalgamated Food Employees Union Local 509*. One of these notes concluded that the *Logan Valley* case warranted a "limited application of the *Marsh* rationale." 5 HOUSTON L. REV. 193, 197 (1967). The other note concluded, "Although recognizing the rights of an owner of private property, the court in *Logan Valley* failed to recognize the burdens concomitant to those rights when that property changes from private to quasi-public." 25 WASH. & LEE L. REV. 53, 59 (1968). Once deciding that the Pennsylvania Supreme Court was wrong in these circumstances neither note discusses the significance of state action in the *Logan Valley* case.

why the Court strained to find state action instead of simply balancing the first amendment right of the picketers with the fifth amendment right of the landowners. The answer is deceptively simple, but extremely important. The first amendment prohibits Congress from making any law concerning the establishment or exercise of religion, or abridging freedom of the press or of speech. In other words, the first amendment restricts the federal government. First amendment rights, however, may not be abridged by the states because of the fourteenth amendment which in essence assures that no one will be *deprived* by a state of life, liberty, or property without due process of law, nor can a state *deny* to any person within its jurisdiction equal protection of the laws. Nowhere in the Constitution, however, is a private individual expressly forbidden to deprive another of his rights. To summarize, the first and fourteenth amendments address themselves to either federal or state action, but not to private action.[28] Thus, before the federal courts may adjudicate the rights of individuals, it must first ascertain whether a state has aided in the deprivation or denial of any constitutionally protected right. If so, the court may proceed to determine if such state action is constitutional. If no state action can be found, the injured party may be without a remedy.

The overriding problem, however, is not to realize that state action must be found, but rather to decide at what point it occurs, and it is here that the core of the problem lies for it appears that the Supreme Court determines each case on its own particular facts, while refusing to draw any hard and fast lines that will reach the actual substantive merits of each case. If the Court has refused to draw any hard and fast lines, writers have produced a mass of theories which tend to either crystalize the concept of state action or theoretically transform it into an inconsistently constructed maze. Which of these two the writers have done is difficult to determine.

Traditionally, the concept of state action has been applied to particular kinds of situations and relationships including state agencies and officers,[29] leasing cases,[30] state aid to private institutions,[31] the White Primary Cases,[32]

28. Civil Rights Cases, 109 U.S. 3 (1883).
29. Screws v. United States, 325 U.S. 91 (1945); *Ex parte* Virginia, 100 U.S. 339 (1879).
30. Wilmington Parking Authority v. Burton, 365 U.S. 715 (1961); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), *cert. denied* 353 U.S. 924 (1957).
31. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert denied*, 339 U.S. 981 (1950).
32. Nixon v. Condon, 286 U.S. 73 (1932) (A fourteenth amendment case in which it was decided that a state could not pass a statute delegating to political parties the right to decide who is qualified to vote); Grovey v. Townsend, 295 U.S. 45 (1935) (A case which upheld voting discrimination in primaries because there was no state statute and thus, no state action as required by the fourteenth amendment. This result was reached notwithstanding that state law regulated the primaries.); Smith v. Allwright, 321 U.S. 649 (1944) (This case used the fifteenth amendment to overrule *Grovey* largely because voting was peculiarly related to government and consequently the state had a duty not to permit private groups to discriminate in primaries); Terry v. Adams, 345 U.S. 461 (1953) (This case allowed Negroes the right to vote in private primaries held several months before the primary was held.

action of private organizations,[33] and judicial action by state courts.[34] As concerns a proper resolution of *Logan Valley,* this discussion will center on the last two of the above mentioned areas of action by private organizations and judicial action as state action.

Often private organizations undertake functions which are peculiarly related to government as illustrated by the action of the Gulf Shipbuilding Corporation in *Marsh* (governing a town), or by the action of private political parties as exemplified in the White Primary Cases[35] (discriminating in primary elections). Where such organizations are exercising a "governmental function," it is relatively easy to find state action and then to decide whether such is unconstitutional. Generally, the mere fact that the state permitted this type of governmental activity is sufficient grounds on which to locate state action. State non-action in not placing restrictions on such organizations is the important factor and there is no need for any compelling or positive action by a state to be found before such acts of the private organizations are reviewed.[36] Where the action involved is typically private instead of governmental, it becomes less clear that a state should be held liable on traditional grounds and to extend a doctrine like *Marsh* too far may strain the meaning and usefulness of its principle. Although some scholars favor the traditional approach because it affords built-in limitations,[37] others do not and would reach the solution by finding state action in judicial adjudication.[38] To understand what effect this idea would have on the concept of state action, it is necessary to look at the various problems posed and solutions presented by the courts and writers alike in the area of judicial adjudication as state action.

The premier case in this area is *Shelley v. Kraemer*[39] where Negroes had purchased property from white owners even though restrictive covenants required that such property be sold only to Caucasians. Other white landowners, also bound by the covenants, brought an action to divest the Negroes of title to the property. The state courts allowed such relief. On appeal, the Supreme Court recognized that no relief could be granted

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State had a duty to prevent private discrimination based on race when the private primary may result in the election of a private official.).

33. Marsh v. Alabama, 326 U.S. 501 (1946).
34. Shelley v. Kraemer, 334 U.S. 1 (1948). The situations in which state action has traditionally been applied and which are mentioned in footnotes 29-34 of this paper were taken from Lewis, *The Meaning of State Action,* 60 COLUM L. REV. 1083 (1960).
35. See cases cited note 32 *supra.*
36. "When a state permits this kind of private activity it must couple the permission with certain restrictions. If these are not supplied, the Court will supply them under the fourteenth amendment." Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083, 1088 (1960).
37. *Id.* at 1097-98.
38. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 S. CAL. L. REV. 208 (1956); Van Alstyne & Karst, *State Action,* 14 STAN. L. REV. 3 (1961); Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action,* 1965 DUKE L.J. 219.
39. 334 U.S. 1 (1948).

to the Negroes under the equal protection clause of the fourteenth amendment if no state action could be found, because standing alone between private individuals, the covenants were valid. The Court, however, held that state courts could not use their "coercive power" to deny equal protection of the laws on the basis of race where there is a seller willing to sell to the Negro. The difficulty with *Shelley* is not its holding but its implications.[40] If the holding of the court does refer only to the coercive or compelling force of a state court, what would happen if a state court only *permitted* discrimination, but did not compel it? Stated more practically, if a landowner were allowed to use self-help to throw the Negro off his property and the Negro then sued in a state court for damages, could the state court constitutionally refuse to allow damages? If the answer is yes (and it may be), the result that follows is that the rights of the parties will be determined not on the substantive merits, but rather on the posture the victim of the discrimination has in the courtroom. For if the Negro were being compelled to get off the land by a state court, he has both a right and a remedy; but, if the Negro were ousted by a private individual and then sued for damages he (Negro) would not prevail. This is a strange result. One writer suggests that *Shelley* is not so inconsistent as the above analysis suggests if the decree of the state court is not separated from the legal system in which it is operating.[41] The argument basically is that to have allowed the landowner in *Shelley* to prevent the transfer of the land by such restrictive covenants would be to allow him to restrict the alienability of land. To restrict the transfer of land would, in turn, be contrary to the common law property system which the state court was interpreting. Such an analysis as the foregoing does not go only shallowly to the state court procedure, but to the validity of the underlying common law rules which allowed the covenant.[42] This analysis, however, is not the only one that has been used to refine the decision in *Shelley*. One writer, to satisfy the intent of the framers, would limit the application of the state action concept to the action of state courts only when the intent of the state officials, court or laws is to discriminate,[43]

40. "*Shelley v. Kraemer* and its companion cases may represent the greatest expansion of the state action concept yet to occur, or they may make no more than a crack capable at most of spreading slowly as pressure increases." Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1109 (1960).

41. "But if *Shelley* stands for the principle that the power to enter into a covenant restricting land use and occupancy on the basis of race is lacking because that part of the common law that provides the particular property rights necessary for such an arrangement is invalid, then the majority's decision that a court cannot award damages for breach of restrictive covenant is easier to understand." *Id.* at 1114.

42. *Id.* at 1114. The author wrote that one ". . . can't separate the court decree from the legal system in which it was operating."

43. "In the case of the fourteenth amendment . . . the framers intended that only the actions of state officials acting for the state in carrying out a discriminatory intent which these officials had in their own minds, were to be prohibited by the fourteenth amendment." Avins, *"State Action" And The Fourteenth Amendment*, 17 MERCER L. REV. 352, 363 (1966).

while another writer would take the exactly opposing view that the intent of the framers of the fourteenth amendment is frustrated when state action is found only when there is positive as distinguished from permissive state action.[44]

There is one other school of thought on *Shelley,* however, which offers some very enticing thoughts and solutions. This is the school of theorists who would prefer the court to take a balancing approach that would reach the merits of each particular case, while doing away with the "misguided search for state action." The primary premise of this school of thought is that much is wasted when the court searches for state action and the point at which it occurred. Instead, the court should jettison the search and simply announce that state action has occurred[45] when the state court adjudicates the conflicting rights of the individuals involved. For in adjudicating private party rights, the state has, in effect, set forth its own policy (reflecting its common law, statutes, and constitution). Under this approach the inquiry becomes not whether the state action has occurred, but whether the state action in defining legal relationships between parties was constitutional.[46] This analysis illuminates the fact that merits should have nothing to do with whether or not state action is present. Thus, the approach would find that there was state action in *Shelley* and that the state action was unconstitutional ". . . because the creation and enforcement by state law of a duty on one private person not to deal with another private person because of the latter's race is in these circumstances a 'denial' of the equal protection of the law."[47]

What has been discussed concerning state action may be further explained by considering the scope of *Shelley* in several later cases, what the Supreme Court did with these cases, and what some legal theorists would prefer be done. One such case is *Rice v. Sioux City Memorial Park Cemetery*[48] where a cemetery owner refused to bury the plaintiff's husband, an Indian, de-

44. "At the present time state action stands as a barrier to effective judicial interpretation and effective legislative interpretation of the fourteenth amendment because it prevents both Congress and the federal courts from reaching individual action when, in their judgement, the situation might otherwise warrant such extension of the federal power." Peters, *Civil Rights and State Non-Action,* 34 NOTRE DAME LAWYER 303, 314 (1959). *See generally* Black, *Foreword: "State Action," Equal Protection, and California's Proposition* 14, 81 HARV. L. REV. 69 (1967).

45. "There is state action in the definition and enforcement of the right-duty relationship, and there is state action in adjudicating that there is no right-duty relationship." Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 S. CAL. L. REV. 208, 209 (1956).

46. "It is the thesis of this paper that in all of these problems there is state action, and that the sole issue, which tends to become obscured by the search for state action, is whether the particular state action in the particular circumstances, determining legal relations between private persons is constitutional when tested against the various constitutional restrictions on state action." *Id.* at 208-09.

47. *Id.* at 213. Note the use of the word "denial" which this balancing of interests approach interpretes as meaning that there may not be a denial of equal protection if the state only permits the discrimination.

48. 245 Iowa 147, 60 N.W.2d 110 (1953), *aff'd* 348 U.S. 880 (1954), *judgement vacated and petition for cert. dismissed on rehearing,* 349 U.S. 70 (1955).

spite a valid burial contract because the contract provided that only Caucasians could be buried in the cemetery. The plaintiff sued for damages for breach of contract. The Iowa Court denied damages and the Supreme Court upheld the result in the Iowa Court in an evenly divided decision. The Supreme Court later vacated that judgment and refused to rehear the case. Under the balancing approach, state action would occur when the Iowa Court heard and adjudicated the case. The issue that should have been controlling concerns whether there, "Is a 'denial' of equal protection of the laws if a state *permits* a private cemetery to refuse to bury non-Caucasians, because of their race, as distinguished from state action which *compels* a private cemetery to bury only Caucasians."[49] The Court might then conclude that the action of the state court in this situation was not sufficiently a "denial of equal protection" to be unconstitutional state action.

Another case subject to the same analysis is *Black v. Cutter Labs*[50] where an employer discharged an employee because she was a member of the Communist Party. The employee sought enforcement of an arbitration award. The Supreme Court of California held that the employer could dismiss for "just cause" under the contract and that the prerequisite "just cause" for dismissal was present.[51] The Supreme Court affirmed the judgment of the California Supreme Court on the ground that the case was one of local contract law which presented no substantive federal question. The balancing approach would concede that state action was present when the case was heard by a California Court and the Supreme Court should decide only whether the state court correctly and constitutionally determined the respective interests of each of the two private litigants.[52] Notice that in the *Black* case there was no compelling state action, but that the employer was allowed to rely only defensively on the "just cause" provision of the contract. Consequently, the courts of California probably acted constitutionally under the balancing test since those courts only permitted assertion of a defensive right instead of enforcing affirmatively the right of the employer to discharge the Communist employee.[53]

The *Sit-in Cases*[54] offer another excellent example where the Supreme

49. Horowitz, *supra* note 45, at 215.
50. 351 U.S. 292 (1956).
51. 43 Cal.2d 788, 278 P.2d 905 (1955).
52. "The Court did not decide on the merits that the particular employers business interests as weighed against the employee's circumstances and interests made the employer's decision constitutional because it was reasonable." Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action,* 1965 DUKE L.J. 219, 221 (1965).
53. Would it be a different case (a *Shelley* case) if the employer had sought to enjoin the Communist employee from coming on his premises? If so, would the rights of the employee depend on her positioning in the court?
54. For a listing of the principal *Sit-in Cases* and a thorough discussion of their relation to state action *see* Lewis, *The Sit-in Cases: Great Expectations,* [1963] Supreme Court Review 101.

Court could have applied the *Shelley* rule broadly, as the balancing advocates desire, to prevent racial discrimination in places of public accommodation. Although the Supreme Court in each case found that racial discrimination existed and corrected it, the court found unconstitutional state action on the narrow and peculiar facts of each case while never actually facing the broader issue of whether a state would be liable if it permitted racial discrimination rather than compelled it. Finally, in 1964, in the case of *Bell v. Maryland*,[55] the court came close to facing this unanswered question, but only in nebulous concurring opinions. These concurring opinions may at least stand for the proposition that the state's trespass laws could not be used to allow racial discrimination in places of public accommodation, but whether the concurring opinions were hinting at the idea that there could be no discrimination in places of public accommodation is not clear.[56] The Court, however, will not have to answer this sticky question as far as discrimination in places of public accommodation goes because Congress, a short time later, passed the Civil Rights Act[57] under its commerce power which made the state action question moot as concerns equal rights in public accommodation.

The crucial point to absorb, however, is that the need to find state action before resolving conflicting claims is moot only as to the public accommodation problem. As concerns many other constitutional areas including the right of free speech and labor picketing, the Supreme Court must still determine first whether there has been state action and second whether such state action is constitutional. Still unanswered is the question whether in a labor picketing case, such as *Logan Valley*,[58] the Supreme Court will eventually clarify whether the state may not prevent the peaceful exercise of free speech in privately owned shopping centers through its trespass laws or whether peaceful free speech picketing generally will be allowed in centers.[59] A final summary of *Marsh*[60] and *Logan Valley* should serve to refine this point.

If, as in *Marsh*, the Supreme Court finds state action on traditional grounds, then the above question does not have to be answered. But, when

55. 378 U.S. 226 (1964).
56. "And whether the state's decision to deny the claimed right is based upon some state policy which seeks to protect interests of the state, or upon some state policy which seeks to protect purely private interests oppossed to the asserted claim of right, it *equally involves a policy of the state*." Van Alstyne, *supra* note 52, at 232.
57. Title II of the Civil Rights Act of 1964, 78 Stat. 214, 42 U.S.C.A. §§2000(a)-(a-6).
58. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).
59. *But see* Taggard v. Weimacker's, Inc., ... Ala. , 214 So.2d 913 (1968). There the Alabama Supreme Court refused to apply *Logan Valley* to a small private business located just back from a public street. The Alabama court distinquished *Taggard* from *Logan Valley* on three grounds: 1. The trespass was only narrowly enjoined; 2. the trespass was on the property of a single store owner; and 3. the trespass obstructed the customers entering the store.
60. Marsh v. State of Alabama, 326 U.S. 501 (1946).

a doctrine like *Marsh* is extended to cover areas not easily covered by the traditional state action concept, such as in *Logan Valley,* the decisions will be harder to reconcile and more difficult to understand, conveying the impression that the Court has already decided the case on the merits and is merely looking for a legal principal on which to base its reasoning. If the balancing approach were applied no collateral state action would be needed for the Court would decide that state action had occurred when the state court decided the case and could then proceed to determine if such state action was constitutional.[61] The Court, however, has apparently decided to rest the first amendment state action cases on an *ad hoc* basis instead of answering the question posed several times in this paper and left unanswered by *Shelley.* The state action in *Marsh* was held to have occurred when Gulf Shipbuilding Corporation chose to govern a company town, although the facts would have allowed an application of *Shelley* with the state action occurring when the Alabama state court prosecuted the appellant under a state trespass statute. Likewise, in *Logan Valley,* a shopping center was treated as being the "functional equivalent of a business block"[62] simply because it was freely accessible to the general public, although the state action conceivably could have occurred when Pennsylvania enforced its trespass laws to bar the picketers from the shopping center.

Thus, it appears that the Supreme Court is limiting the concept of state action through judicial determination as announced in *Shelley* by simply ignoring that case when there is any other feasible grounds whatsoever on which to place the notion of state action. Whether this is being done because it is recognized that state courts should be allowed to settle peacefully the disputes of private litigants without the threat of constitutional review in every case or whether it is recognized that states do have a function to fulfill and to allow the Supreme Court to review every statute, court decision, or common law principle of a state would be to change the relationship of the Federal Government to states is not known. It is clear that to apply the balancing of interests test would be to do away with state action as the law has long recognized it since in fact all private action that is challenged would become state action. One must remember, however, that such a change could possibly lead to general principles that would guide the state courts in their decisions. Contra, it would leave no

61. Van Alstyne, *supra* note 52, at 247. There the writer gives his three reasons for adopting this balancing approach. First, it recognizes that the fourteenth amendment should look to the fairness of every state policy. Second, it avoids the false assumption that once state action is found, the fourteenth or fifteenth amendment has been avoided. Third, it illustrates that there does not have to be a collateral connection before state action may be found.

62. Amalgamated Food Employees Union Local 590 v. Logan Valley Praza, Inc. 391 U.S. 308 (1968).

area of neutrality in the states since non-action by a state may be action under the balancing test.[63]

Eventually, the Court will again come to the troublesome question of what is the limit of the concept of state action and when it does the Court must either redefine and reexplain adherence for a traditional concept of state action,[64] or decide that *Shelley* does indeed mean that first amendment rights are to be balanced with constitutional rights, regardless of whether the action of a state court was permissive or compelling, or hope that Congress will again preclude the need for such a determination as it did in the public accommodation cases.

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CONSTITUTIONAL LAW—RIGHT TO TRIAL BY JURY—THE EFFECT ON STATE STATUTE WHERE SIMILAR FEDERAL STATUTE HELD UNCONSTITUTIONAL

The recent decision of the Supreme Court in *U.S. v. Jackson*[1] casts some grave doubts upon the constitutional validity of the sentencing provision for capital offenses[2] contained in the new Georgia Criminal Code which becomes effective July 1, 1969.[3]

In *Jackson* the defendants were charged in count one of the indictment with a violation of the Federal Kidnaping Act, section 1201 (a) which provides:

> Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnaped, . . . and held for ransom . . . or otherwise, . . . shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.[4]

As the kidnap victim in this case had been harmed, the defendants' case fell squarely within the above quoted provision of the statute which creates by its terms an offense punishable by death, "if the verdict of the

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63. Lewis, *supra* note 54, at 128.
64. "The concept of state action, a helpful concept in the division of responsibility between the federal and state governments, need not be a rigid one. It does seem true, however, that it can exist as a meaningful concept only by adherence to some general principles that mark its limits." Lewis, *supra* note 36, at 1121.
1. 390 U. S. 570 (1968).
2. GA. CODE ANN. §26-3102 (effective July 1, 1969).
3. Ga. Laws 1968 pp. 1249-1351.
4. 18 U.S.C. §1201 (1964).