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Legislation - Survey and Analysis of Criminal and Tort Aspects of Shoplifting Statutes

Wilbur J. Markstrom S.Ed.
University of Michigan Law School

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LEGISLATION—SURVEY AND ANALYSIS OF CRIMINAL AND TORT ASPECTS OF SHOPLIFTING STATUTES—Shoplifting[1] not only results in heavy financial losses for the merchant[2] but also poses special problems in criminal law and general law enforcement.[3] One such problem arises from the fact that most such thefts involve relatively small amounts, with the result that the public does not seem extremely concerned about the matter when an individual case comes up for prosecution. Another peculiar difficulty is that perhaps more than any other single crime shoplifting is an offense committed by amateurs, both adult and juvenile.[4] This serves to make both detection and prosecution difficult. Finally, the right of the individual to be free from unlawful or unreasonable interference with his person or property[5] is more directly involved in this area of criminal law enforcement than in most others.

Merchants have done much on their own in order to decrease shoplifting losses. Retail associations have disseminated information with regard to the best methods to be used in preventing and discouraging pilferage.[6] Closed circuit television has been effective as a means of identifying and apprehending shoplifters.[7] Private detectives vested with police authority may be a potent weapon in the protection of their employers' property.[8] And with the passage of new shoplifting legislation the merchants have initiated

1 Shoplifting, broadly defined, is larceny or theft of goods or merchandise displayed for sale in a store. Employee pilferage and shopper victimization will not be discussed in this comment.

2 See the statutory preamble to the new Florida shoplifting legislation, 22 Fla. Stat. Ann. (1944; Supp. 1958) §811.022, which estimates an annual $4,500,000 loss in Florida alone; and N.Y. TIMES, Oct. 27, 1954, p. 30:1, which estimates a weekly loss of $100,000 in thefts from New York City stores. These losses generally are borne by the honest customer.

3 F.B.I. UNIFORM CRIME REPORTS, Vol. XXV, No. 2, p. 108, Table 37 (1954) reports an increase in known shoplifting offenses of 11.4% from 1953 to 1954. Vol. XXVI, No. 2, p. 109, Table 37 (1955) reports a 4.4% increase from 1954 to 1955.

4 See, e.g., N.Y. TIMES, Feb. 24, 1957, p. 24:2, reporting that police blamed a high school student shoplifting fad for a large part of a loss totalling $100,000 in a Sharon, Pennsylvania shopping center. The new Ohio shoplifting legislation [Ohio Rev. Code (Baldwin, 1958) §2935.041] provides merchants with special privileges for dealing with juvenile offenders. See comment, 62 YALE L.J. 788 at 790 (1953); note, 32 IND. L.J. 20 at 28-33 (1956).

5 See, generally, Seavy, "Principles of Torts," 56 HARV. L. REV. 72 (1942); TORTS RESTATEMENT SECOND, Tentative Draft No. 1, §120A, comment *a* (1957). The Michigan Legislative Committee on Shoplifting has concluded that all doubts should be resolved in favor of the privacy and rights of citizens: 69th Mich. Leg. (Reg. Sess. 1958) No. 23, p. 249 at 250.

6 E.g., National Retail Merchants Association, Store Management Group pamphlet entitled "Watch Out for That Thief," on file in the Michigan Law Review office.

7 N.Y. TIMES, Oct. 7, 1956, §3, p. 1:4. Large convex mirrors appropriately placed throughout stores may be just as effective; N.Y. TIMES, June 22, 1957, p. 23:6.

8 See note, 32 IND. L.J. 20 at 26 (1956).

publicity campaigns aimed at forewarning and thereby frightening off the would-be thief. But the expense of such "self-help" programs makes them available only to large merchants. And, perhaps more important, these measures do little to remove or lessen that which probably more than any other factor deters a merchant from taking action against pilferage: the fear that he will be liable in damages if he apprehends a suspected shoplifter who is later proved innocent.

I. DOCTRINES APPLIED APART FROM THE NEW SHOPLIFTING LEGISLATION[9]

At common law, a property owner could use reasonable force to defend[10] or recapture[11] his property only if he was correct in believing that an interference with his property was threatened by the party against whom he acted. If an innocent person was accosted, detained, questioned or searched, the merchant was generally civilly liable for his wrongful conduct. This liability might be imposed in actions of false imprisonment,[12] false arrest,[13] assault and battery,[14] malicious prosecution,[15] slander[16] or even insult and outrage.[17]

The merchant's position at common law was made still more difficult by the fact that in most jurisdictions an arrest by a private individual without a warrant,[18] for an alleged misdemeanor, even if committed in his presence, was illegal unless the misdemeanor constituted a breach of the public peace.[19] An illegal arrest sub-

9 See, generally, Wilgus, "Arrest Without a Warrant," 22 MICH. L. REV. 541, 673 and 798 (1924); comment, 46 ILL. L. REV. 887 (1952), cont. in 47 N.W. UNIV. L. REV. 82 (1952); comment, 62 YALE L.J. 788 (1953).

10 PROSSER, TORTS, 2d ed., p. 92 (1955); 1 TORTS RESTATEMENT §77 (1934).

11 PROSSER, TORTS, 2d ed., p. 100 (1955); 1 TORTS RESTATEMENT §§100-106 (1934).

12 E.g., Great Atlantic & Pacific Tea Co. v. Smith, 281 Ky. 583, 136 S.W. (2d) 759 (1940).

13 E.g., Martin v. Castner-Knott Dry Goods Co., 27 Tenn. App. 421, 181 S.W. (2d) 638 (1944). See 21 A.L.R. (2d) 643 (1952).

14 E.g., Morgan v. Loyacomo, 190 Miss. 656, 1 S. (2d) 510 (1941).

15 E.g., Grove v. Purity Stores, 153 Cal. App. (2d) 234, 314 P. (2d) 543 (1957).

16 E.g., Camp v. Maddox, 93 Ga. App. 646, 92 S.E. (2d) 581 (1956).

17 No merchant has been held liable for insulting language alone, but where such language is combined with other wrongful acts recovery has been allowed on a theory of tortious misconduct toward an invitee. Mansour v. Mobley, 96 Ga. App. 812, 101 S.E. (2d) 786 (1957). With regard to the tort of insulting or abusive language, see, generally, Prosser, "Insult and Outrage," 44 CALIF. L. REV. 40 (1956); 15 A.L.R. (2d) 108 (1951).

18 Arrest without a warrant may be defined as an ". . . apprehension without any special authorization but merely under a general authority which the officer or private person has (or thinks he has) under the circumstances." Perkins, "The Law of Arrest," 25 IOWA L. REV. 201 at 229 (1940). For a definition of arrest, see Wilgus, "Arrest Without a Warrant," 22 MICH. L. REV. 541 at 543 (1924).

19 However, a private person may arrest for a felony committed within his presence, or a felony committed outside his presence if it was in fact committed and he has reason-

jected the arresting party to civil liability regardless of the guilt of the party accused. Although many jurisdictions have by statute broadened the arrest powers of both peace officers[20] and private persons,[21] few states have enabled a merchant to arrest suspected shoplifters without the fear of liability for a mistake either in identity or the fact of commission.[22] In addition, the effectiveness of legislation broadening the arrest power of private individuals has often been limited by judicial interpretation, since the statutes are in derogation of common law rules.[23] Legislation broadening the power of police officers to arrest without a warrant in cases of misdemeanors, enacted in most states,[24] is basically ineffective in

able grounds for believing the person arrested committed it. The common law rules are discussed in Wilgus, "Arrest Without a Warrant," 22 MICH. L. REV. 673 (1924). The classification of a theft from a store as a felony or misdemeanor depends on the value of the merchandise taken. See, e.g., Utah Code Ann. (1953) §76-38-5, providing that if the value of the property is less than $50, theft is a misdemeanor. With this approach the usual shoplifting theft is a misdemeanor. But see 3 Alaska Comp. Laws (1949) §65-5-42 and 3 Alaska Comp. Laws (Cum. Supp. 1958) §65-2-2, and Mich. Comp. Laws (1948) §750.360, classifying shoplifting as a felony. Several states make all larcenies felonies. E.g., 7 Tenn. Code Ann. (1955) §39-4204.

20 Peace officer is defined in Wilgus, "Arrest Without a Warrant," 22 MICH. L. REV. 541 at 561-562 (1924). See also Doherty v. Lester, 4 Misc. (2d) 741, 159 N.Y.S. (2d) 219 (1957), finding that a private detective is not a peace officer; Sennett v. Zimmerman, 50 Wash. (2d) 649, 314 P. (2d) 414 (1957), finding that a deputized store detective had officer's arrest powers.

21 See Appendix II for a state-by-state classification of the arrest powers of both peace officers and private citizens, before and after recent shoplifting legislation.

22 But see Wyo. Stat. (1957) §7-156 and Neb. Rev. Stat. (1943; re-issue 1956) §29-402, which allow private persons to arrest without warrants where "petit larceny has been committed" and the arresting person has "reasonable grounds to believe the person arrested is guilty." Texas expressly allows a merchant to arrest without a warrant in order to prevent the consequences of a theft. Tex. Code Crim. Proc. Ann. (Vernon, 1954) §§212, 325. Section 325 has been held to give store employees the power to arrest a suspected pickpocket; Lasker v. State, 163 Tex. Cr. 337, 290 S.W. (2d) 901 (1956).

23 E.g., the statutory "presence" requirement is often restrictively interpreted. See Alsup v. Skaggs Drug Center, 203 Okla. 525, 223 P. (2d) 530 (1949). See State v. Pluth, 157 Minn. 145, 195 N.W. 789 (1923), and Smith v. Hubbard, (Minn. 1958) 91 N.W. (2d) 756 for what is necessary to meet such a "presence" requirement.

24 Most states by statute allow an officer to arrest without a warrant where the offense is committed in his presence. See Appendix II for a state-by-state classification. Several states go farther and permit such arrests where the officer has reasonable grounds to believe the person committed a misdemeanor and the misdemeanor has in fact been committed. E.g., Colo. Rev. Stat. Ann. (1953; Supp. 1957) §39-2-20. Iowa and Illinois have similar statutes. Ill. Rev. Stat. (1959) c. 38, §657; Iowa Code (1958) §755.4. Officers in Michigan possess the same power because shoplifting is classified as a felony. Mich. Comp. Laws (1948) §764.15. In Wisconsin the officer may arrest without a warrant if he has reasonable grounds to believe a misdemeanor has been committed and the arrest is necessary to prevent the consequences. Wis. Stat. (1958) §954.03. Hawaii allows an officer to arrest and detain on a reasonable suspicion that the person has committed or intends to commit an offense. Hawaii Rev. Laws (1955) §§255.3-255.4. R.I. Gen. Laws (1956) §12-7-3 (c) is similar. In Texas, officers, like private persons, may arrest to prevent the consequences of a theft. Tex. Code Crim. Proc. Ann. (Vernon, 1954) §§212, 325. In Williams v. State, 155 Tex. Cr. 439, 236 S.W. (2d) 136 (1951), an officer was allowed to arrest a suspected misdemeanant under §325.

dealing with suspected shoplifters primarily because the officer is rarely present when the pilfering is committed or attempted. Moreover, like statutes broadening the arrest power of private citizens, legislation doing the same for peace officers has been restrictively interpreted.[25]

A number of states, apart from recent shoplifting statutes, have tried to give storekeepers some protection by recognizing "probable cause or reasonable grounds to suspect the commission of a theft" as a mitigating circumstance to be used to reduce exemplary and punitive damages in civil actions brought by persons unlawfully detained or arrested.[26] Some jurisdictions have gone farther and judicially recognized "probable cause" as a complete defense in cases which would otherwise have been unlawful detention of a suspected shoplifter by a merchant.[27] However, this defense generally has been extended only to short detentions for the purpose of investigation and has not been available in actions for false arrest.[28]

II. RECENT SHOPLIFTING LEGISLATION

Statutory broadening of arrest powers and judicial development of defenses for the merchant were not sufficient to cope fully with the unique problems of shoplifting. Legislation of various types, all dealing specifically with the shoplifting problem, has been enacted by thirty-seven states.[29] Twenty-three states have new criminal legislation. Twelve states have enlarged the power of peace officers to arrest without a warrant where suspected shop-

[25] See note 23 supra. The officer's arrest power may be further limited if he delays in making the arrest. See 58 A.L.R. (2d) 1056 (1958). And he can use only a limited amount of force in arresting a suspected misdemeanant. See 3 A.L.R. 1170 (1919) and 42 A.L.R. 1200 (1926); Wilgus, "Arrest Without a Warrant," 22 MICH. L. REV. 798 at 814-815 (1924).

[26] See 137 A.L.R. 504 (1942) and 49 A.L.R. (2d) 1460 (1956). For an extended discussion of the judicial doctrine of probable cause in cases of unlawful detention, see comment, 47 N.W. UNIV. L. REV. 82 (1952).

[27] Collyer v. S. H. Kress & Co., 5 Cal. (2d) 175, 54 P. (2d) 20 (1936); Montgomery Ward v. Freeman, (4th Cir. 1952) 199 F. (2d) 720. TORTS RESTATEMENT SECOND, Tentative Draft No. 1, §120A (1957). In Teel v. May Dept. Stores, 348 Mo. 696, 155 S.W. (2d) 74 (1941), an instruction on probable cause was allowed in an action for false imprisonment, but this may be due to the fact the actions of the plaintiff included false personation, a felony. See also Little Stores v. Isenberg, 26 Tenn. App. 357, 172 S.W. (2d) 13 (1943) (merchant's detention clearly unreasonable); S. H. Kress & Co. v. Bradshaw, 186 Okla. 588, 99 P. (2d) 508 (1940) (plaintiff unaware of any detention during the investigative period). But see Great Atlantic & Pacific Tea Co. v. Smith, 281 Ky. 583, 136 S.W. (2d) 759 (1940).

[28] E.g., Montgomery Ward & Co. v. Wickline, 188 Va. 485, 50 S.E. (2d) 387 (1948); Martin v. Castner-Knott Dry Goods Co., 27 Tenn. App. 421, 181 S.W. (2d) 638 (1944). See TORTS RESTATEMENT SECOND, Tentative Draft No. 1, §120A, comment *d* (1957).

[29] All statutory citations may be found in Appendix I. Throughout the text the statutes will be referred to only by state of enactment.

lifters are involved, and one of these has broadened the arrest power of its private citizens. Twenty-eight states have created statutory privileges for the merchant who seeks to apprehend suspected shoplifters.

In discussing the new statutes, their possible interpretation, practical application and effectiveness will be considered. In the discussion which follows, it will be assumed that the typical shoplifting situation involves an actual or suspected misdemeanor. References to either officers' or citizens' arrest powers will be to arrests without warrants for misdemeanors.

A. *Criminal Provisions*

Prior to the adoption of the new statutes shoplifting was generally prosecuted under larceny statutes.[30] Because the elements needed to prove larceny do not coincide with the evidence often available in shoplifting cases, convictions were difficult to obtain.[31] For example, unless a witness saw the taking and subsequent departure from the premises without payment for the goods, it was hard to prove the essential element of an intent to deprive the owner of his property or to appropriate the property to the taker's own use. In an attempt to facilitate criminal prosecutions, some of the new statutes provide that certain specific acts shall constitute the crime of shoplifting. Statutory presumptions which shift to the defendant the burden of producing evidence have been created. Finally, stronger penalties which increase in severity with the commission of subsequent offenses have been imposed.

Georgia and West Virginia have defined four distinct acts, any one of which constitutes the crime of shoplifting:

> ". . . wilfully to take possession of any merchandise offered for sale by any store with the intention of converting the same to the use of such person without paying to the owner the value thereof."
>
> ". . . wilfully to conceal upon his person or otherwise any merchandise offered for sale by any store with the intention of converting the same to the use of such person without paying to the owner the value thereof."
>
> ". . . wilfully to alter any label, price tag or marking upon any merchandise offered for sale by any store with the intention of depriving the owner of all or some part of the value thereof."

30 E.g., N.Y. Consol. Laws (McKinney, 1944) §§1290 (defining larceny) and 1298 (defining petit larceny).

31 See, generally, note, 32 IND. L.J. 20 (1956).

> ". . . wilfully to transfer any merchandise offered for sale by any store from the container in or on which the same shall be displayed to any other container with intent to deprive the owner of all or some part of the value thereof."[32]

Several other states have framed criminal legislation in terms of more than one distinct act,[33] but the majority have adopted a single standard of criminal conduct, enacting either the "take possession without payment" or "willful concealment" type statutes.[34]

On their face, the "take possession without payment" statutes seem to encounter the same difficult proof problems encountered under the broader larceny statutes. These statutes all continue to require proof of an intent to convert. To prove such intent, the merchant might have to allow the thief to leave the premises, or at least go beyond the check-out counter, thereby affording the suspect a means of escape. Moreover, it will not be difficult for the suspect, often an amateur with no past criminal record, to convince the jury that he simply forgot to pay for the goods. Since the prosecution must prove the elements of the crime beyond a reasonable doubt, the "forgot to pay" defense will probably be quite successful. For this reason nine states have enacted statutory presumptions to the effect that a willful concealment of goods is sufficient to create a presumption of the necessary intent to convert.[35] Similarly, some of these also provide that the finding of goods concealed upon a person or among his belongings, or upon the person or among the belongings of another, is prima facie evidence of willful concealment.[36] These statutory presumptions are not likely to create constitutional problems[37] and should aid

32 W. Va. Code (Supp. 1959) §5990(8).

33 Texas defines shoplifting as the removal of goods from their place with an intent to take and deprive the owner of value, or the altering of labels or shifting of containers with intent to defraud. Oregon and Rhode Island define shoplifting in terms of both willful concealment and taking possession without payment, requiring an intent to convert under either test.

34 See the classification in Appendix III. The Indiana statute is similar to the "take possession without payment" statutes, defining shoplifting as taking, stealing or carrying away merchandise with a felonious intent.

35 Arkansas, Connecticut, Kentucky, Mississippi, Pennsylvania, South Carolina, South Dakota, Tennessee and West Virginia.

36 Arkansas, Connecticut, Mississippi, Pennsylvania, South Carolina, South Dakota and Tennessee. These statutes create evidentiary rules stating that the ultimate fact (intent to convert to own use) will be inferred from some other fact (concealment of goods) until evidence to the contrary is produced. See 4 WIGMORE, EVIDENCE, 3d ed., §1356, p. 724 (1940).

37 In Tot v. United States, 319 U.S. 463 (1943), the Court at 467 states: ". . . a statutory presumption cannot be sustained if there be no rational connection between the

in the apprehension and prosecution of shoplifters by allowing the merchant to approach the shoplifter before he leaves the premises.

Potentially, the most effective criminal provision is the "willful concealment" type of legislation. Although the West Virginia law quoted above requires the showing of an intent to convert as part of its willful concealment provision, several other statutes merely provide that the willful concealment of goods without authority while on the premises is sufficient to constitute the crime.[38] In those states with no statutory intent requirement, prosecution is facilitated by the fact that an offender can be accosted on the premises, and also by the use of statutory presumptions which provide that goods found concealed upon the person constitute prima facie evidence of willful concealment.[39]

Only two states expressly provide that the crime of shoplifting shall be limited to the theft of goods under a certain dollar value. In one case the stated value is $50,[40] in the other $75.[41] The states which have criminal legislation and do not so provide may face a somewhat peculiar difficulty arising from the fact that the more specific shoplifting provision may be held to bar any prosecution under the general larceny statutes. It would be possible for a court to use this argument to hold that a person who "shoplifted" an article of great value could not be prosecuted for grand larceny, a felony, but must be prosecuted for shoplifting, a misdemeanor.[42] Such a holding, however, would clearly not be in line with the policy underlying the enactment of the new criminal provision.[43]

fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience." Shoplifting legislation of the type under discussion should have no difficulty under this test.

38 Idaho, Maine, New Hampshire, North Carolina, and Virginia.

39 Idaho, Maine, New Hampshire and North Carolina use such presumptions.

40 Texas.

41 Washington.

42 See, e.g., State v. Richman, 347 Mo. 595, 148 S.W. (2d) 796 (1941), holding that enactment of a statute making the drawing of a check with insufficient funds to cover it a misdemeanor operated to withdraw that conduct from the operation of a statute making obtaining money under false pretenses a felony. *Accord:* State v. Becker, 39 Wash. (2d) 94, 234 P. (2d) 897 (1951); People v. Breyer, 139 Cal. App. 547, 34 P. (2d) 1065 (1934). Cf. Price v. United States, (5th Cir. 1934) 74 F. (2d) 120. See, generally, 2 SUTHERLAND, STATUTORY CONSTRUCTION, 3d ed., §5204 (1943).

43 Georgia and West Virginia have avoided this difficulty by providing that if the value of the stolen goods exceeds $50 the crime shall be punished as a felony. Kansas provides that the crime shall be punished as a felony if the value of the goods exceeds $50 or was the subject of grand larceny.

Statutory penalties for the new crime of shoplifting correspond to those for petit larceny in many states.[44] A few states have provided varying penalties according to the value of the goods taken.[45] Some states have placed heavier sanctions on subsequent offenses,[46] and most of these make a third offense punishable by imprisonment in a state penitentiary for a year or more.[47] The Oregon statute, which allows a maximum punishment of seven years for any offense, is unusual in its severity and will probably not be utilized by the Oregon courts to the extent permissible.

While the new criminal provisions may be of some value in gaining convictions,[48] they could not be really effective unless some steps were taken to make it less difficult to apprehend suspected shoplifters. Aware of this, legislatures have made the new criminal provisions one part of the overall attack. As the other parts of the new approach, the states have generally done either or both of the following to facilitate the apprehension of offenders: broadened arrest powers of individuals and police officers, and created statutory privileges in order to lessen the potential civil liability of merchants who mistakenly detain or accost innocent persons.

B. *Broadening of Arrest Powers*

Several states, as part of the current wave of legislation, have broadened the arrest powers of police officers by permitting them to make arrests without warrants where there is reasonable ground or probable cause to believe that the crime of shoplifting has been

44 The Maine statute, which provides for a fine of not more than $100, or imprisonment for not more than six months, or both, is fairly typical of the statutes which do not provide progressive penalties for subsequent offenses.

45 See the discussion of the Georgia, Kansas and West Virginia statutes in note 43 supra.

46 Arkansas, Connecticut, Indiana, Kansas, Kentucky, Mississippi, New Mexico, South Carolina, South Dakota, Tennessee and Texas. Cf. Ill. Rev. Stat. (1959) c. 38, §393, which creates progressive penalties for subsequent offenses of larceny.

47 Arkansas, Kansas, Kentucky, Mississippi, South Carolina, South Dakota, Tennessee and Texas provide that a third offense shall be punishable by one to five years imprisonment. New Mexico makes a third offense punishable by imprisonment for three to five years. Indiana is the most severe, providing for disenfranchisement and imprisonment for two to ten years.

48 The Pennsylvania statute contains a unique provision calling for conviction for the crime of shoplifting in a "summary proceeding." This aspect of the Pennsylvania statute is severely criticized on the ground that it violates constitutional jury trial guarantees in comment, 32 TEMP. L.Q. 445 (1959).

committed[49] or attempted,[50] even though not in the officer's presence. Three statutes require that a charge of shoplifting be placed against a suspect before the officer may arrest,[51] while three other statutes combine this approach with the more generally used reasonable ground test by providing that such a charge by a merchant constitutes a reasonable ground upon which the officer can arrest.[52] Unless some such specific standard of reasonable grounds is stated in the statute, the judiciary will have to establish a reasonable grounds formula. This will probably be in the form of the test now generally used in felony cases where officers arrest without warrants, namely, whether a reasonable and prudent man, possessed with the knowledge possessed by the officer, could reasonably believe that the party to be apprehended has committed or attempted to commit the particular crime.[53] It will also be the courts' task to determine what other limitations are to be placed on the new statutory powers. For example, it seems likely that the courts will place the same general reasonable force and time limitations on the new statutory arrest powers as are placed on similar common law powers.[54]

West Virginia is the only jurisdiction which has broadened the arrest powers of the private individual as a part of its anti-shoplifting legislation. This was done by making shoplifting a breach of the peace, thereby allowing the merchant to arrest if the crime is committed in his presence. However, the fact that most jurisdictions have not broadened the arrest powers of the private individual along with those of police officers does not mean the

[49] Alabama, Florida, Louisiana, Nebraska, New Mexico, Ohio, Oklahoma, Tennessee and Utah require a reasonable belief that the crime has been committed. See also the West Virginia statute, which makes shoplifting a breach of the peace.

[50] Arizona, Minnesota and Washington give the officer broadened arrest powers where he reasonably believes the person has committed or attempted to commit the crime of shoplifting.

[51] Arizona, Minnesota and Washington.

[52] Louisiana, New Mexico and Utah. Under the Utah statute such a charge may not be made by a minor.

[53] People v. La Bostrie, 14 Ill. (2d) 617, 153 N.E. (2d) 570 (1958). See also Christ v. McDonald, 152 Ore. 494, 52 P. (2d) 655 (1935). In an action for false arrest the defendant must justify the arrest. Harrer v. Montgomery Ward & Co., 124 Mont. 295, 221 P. (2d) 428 (1950). Where the facts are not in dispute the question of probable cause is for the court. Schneider v. Shepherd, 192 Mich. 82, 158 N.W. 182 (1916). Cf. Gibson v. J. C. Penney Co., 165 Cal. App. (2d) 640, 331 P. (2d) 1057 (1958).

[54] See, generally, Wilgus, "Arrest Without a Warrant," 22 MICH. L. REV. 798 at 814-815 (1924). Two statutes expressly provide such limitations. Under the Ohio statute the officer can exercise his newly-created power only within a reasonable time after the unlawful taking has been committed. The New Mexico statute allows the officer to arrest off the merchant's premises only in the event he is in pursuit.

new arrest provisions are of no direct benefit to the merchants. Where an officer makes an unlawful arrest at the instigation of a merchant, the merchant can be held liable as an instigator of or participant in the unlawful action.[55] One defense to such an action is that the acts involved were not a sufficient participation in the unlawful arrest to form a basis for liability. Thus, for example, a merchant cannot be held liable if he merely gives information to the arresting officer, accompanies the officer during the investigation, or identifies a suspect.[56] But a surer defense is to show that the arrest was lawful in itself. The new statutes, by broadening the arrest powers of officers, will therefore directly benefit the merchants by narrowing their possible liability for participation in unlawful arrests.

C. *Privileged Conduct and Statutory Defenses Under the New Legislation*

The third and most important prong in the current multi-pronged attack on shoplifting is the enactment of statutory privileges and defenses which will henceforth be available to merchants in civil actions arising out of their efforts to detain suspected shoplifters.[57] The statutory broadening of arrest powers, to the extent that it operates as a defense in damage actions, is this type of legislation. Beyond this, the failure of the common law privileges with regard to the defense and recapture of property sufficiently to protect the merchants[58] has brought on further legislative change. This change has taken the form of statutory privileges which may be exercised without fear of civil liability.

[55] See, e.g., Alsup v. Skaggs Drug Center, 203 Okla. 525, 223 P. (2d) 530 (1949), holding a store liable for instigation of an unlawful arrest. See, generally, 21 A.L.R. (2d) 643 (1952); PROSSER, TORTS, 2d ed., p. 51 (1955).

[56] See, e.g., Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N.W. (2d) 238 (1958); Checkeye v. John Bettendork Market, (St. Louis Mo. Ct. App. 1953) 257 S.W. (2d) 202; Simpson v. Burton, 328 Mich. 557, 44 N.W. (2d) 178 (1950).

[57] Most of the statutes also provide that a person exercising a statutory privilege will not be held criminally liable therefor. E.g., the Alabama statute provides that the merchant exercising the privilege "shall not be criminally or civilly liable for false arrest or false imprisonment. . . ."

[58] This failure may be partially traced to the fact that if a court is able to find that the merchant has in fact arrested the plaintiff, it can hold the plaintiff for making an unlawful arrest without regard to doctrines of defense and recapture of property. See comment, 46 ILL. L. REV. 887 at 894-899 (1952), for a discussion of this problem. Some courts have also been quick to find the detention on which a false arrest claim can be based. See, e.g., Ashland Dry Goods v. Wages, 302 Ky. 577, 195 S.W. (2d) 312 (1946), holding that retention of a customer's purse along with a statement that she could not leave until a package was wrapped was sufficient evidence from which to find a detention. See also Little Stores v. Isenberg, 26 Tenn. App. 357, 172 S.W. (2d) 13 (1943). For a contrary approach, see Swetnam v. F. W. Woolworth & Co., 83 Ariz. 189, 318 P. (2d) 364 (1957).

These provisions raise a host of questions. First, what type of conduct is covered by the statutory language? Second, under what circumstances may the privileges be exercised? Third, what types of limitations, statutory or otherwise, will be used to qualify the privileges? Fourth, what persons are entitled to exercise the privileges? Finally, what is the effect of a judicial determination that the conduct of the merchant is the kind of conduct deemed privileged by the statute? These questions should be considered in two different ways: first, with regard to the characteristics common to all or most of the statutes, and second, with a view to the variations among them.

Nineteen of the twenty-eight states which have legislatively granted new privileges to storekeepers have done so by allowing the detention of suspected thieves under certain circumstances.[59] Because this "right to detain" type of legislation is by far the most common, the discussion to follow will be with regard to statutes of this type, although much that is said may be equally applicable to all the new legislation purporting to lessen the potential civil liability of merchants. Legislation granting privileges to merchants in terms other than a "right to detain" will be specifically discussed at a later point.

(1) *Statutes Giving Merchants a Right To Detain Suspects.* Five states legislatively recognizing a right to detain have done so in identical or nearly identical language, which reads as follows:

> (1) "A peace officer, or a merchant, or a merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person and that he can recover them by taking the person into custody, may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time. Such taking into custody and detention by a police officer, merchant, or merchant's employee shall not render such police officer, merchant or merchant's employee criminally or civilly liable for false arrest, false imprisonment, or unlawful detention."
>
> (3) "A merchant or merchant's employee who causes such arrest as provided for in subsection (1) of a person for larceny of goods held for sale shall not be criminally or civilly liable for false arrest or false imprisonment where the merchant or merchant's employee has probable cause

[59] A state-by-state classification may be found in Appendix III.

> for believing that the person arrested committed larceny of goods held for sale."[60]

Other statutes of this type are variations of this.

Because of the dangers to personal freedom inherent in any legislation validating certain types of detention, a requirement that such detention be only for a particular purpose is necessary in order to sanction the invasion of individual liberties only where the problem to be remedied so demands.[61] A number of states have adopted a purpose requirement similar to that in the Alabama statute, quoted above: a merchant may detain in order to "attempt to effect a recovery."[62] A slight variation of this, which may permit the use of somewhat more physical force, is "to effect a recovery."[63] Since goods could be recovered by turning the suspect over to an officer as well as by direct recapture by the merchant, the privilege to some extent also encompasses detention in order to deliver to police authorities. But suppose that upon being accosted the suspected thief surrenders the goods and tries to run. May the merchant, knowing the suspect no longer has the goods, detain him for the purpose of delivering him to the police? A strict application of the statutory language would result in the denial of the privilege in such a case, and the merchant would have to rely upon the privileges accorded him by the common law. However, it seems unlikely that these statutes will be so interpreted, since most states, like Alabama, provide in a subsequent section that anyone *who causes an arrest* as provided for in the prior section shall not be civilly liable therefor. While this might refer only to the party who takes a person into custody to recover the goods and incidentally causes his arrest, it can also be taken to mean that the privilege encompasses detention for the purpose of delivering to the proper authorities.[64]

60 Ala. Code (1940; Supp. 1957) tit. 14, §334. States with substantially identical provisions are Florida, Nebraska, Oklahoma and Tennessee.

61 Three statutes permitting detention contain no express purpose requirement. The Georgia statute, which allows a person to detain *or* arrest any person reasonably suspected of shoplifting, is the most difficult to deal with. The Oregon statute, which allows a merchant to detain *and* interrogate is likely to be interpreted as meaning detention for purposes of interrogation. The South Dakota statute, which allows detention until promptly notified police arrive, may be interpreted to mean detention for the purpose of calling in the police.

62 In addition to the states mentioned in note 60 supra, this provision may be found in the statutes of Kentucky, New Mexico and Utah.

63 Adopted in Arkansas and Pennsylvania.

64 See also the Oklahoma statute, which permits a merchant to detain for the purpose of attempting a recovery, and at a later point expressly provides that the suspect may be detained until an officer can be summoned, thereby making it clear that in Oklahoma detention for purposes of recovery encompasses detention in order to summon the police.

A few statutes allow detention only for the purpose of causing an arrest, or of delivering to a peace officer and placing a charge against the offender.[65] If any recovery is to be effected, it apparently must be through the intervention of the police. Similarly, it may be that the merchant will be given no privilege to interrogate unless an officer is present. In some states this type of privilege is indirectly broadened by provisions which allow police greater latitude in arresting without a warrant. However, privileges of this type, which are clearly prosecution-oriented,[66] have an inherent weakness, since in many instances where a juvenile or amateur offender is involved the merchant may have no desire to prosecute. If he does not, he must choose between risking liability with only the common law privileges available in his defense, or allowing the goods to be taken. While putting the merchant to this choice can clearly be justified on the ground that prosecution is the desired end and a merchant who thinks otherwise should not be accorded a privilege, this argument seems unrealistic.[67] The rule most in accord with the realities of the situation is that which allows detention of a suspect either to try to recover the goods *or* to deliver the suspect to the police. One state has adopted such a provision.[68]

Other jurisdictions have adopted less precise purpose requirements. These include detaining "to question," "to investigate," and "to investigate ownership of the goods."[69] None of these seems to go so far as to justify the use of force to recover the goods, so that a merchant effecting such a recovery would have to depend on common law recapture doctrines. On the other hand, detention for purposes of investigation is somewhat broader than detention in order to deliver to the police, since it is not primarily prosecution-oriented, while at the same time it should be interpreted to permit detention for the purpose of calling in the police to aid with the investigation.

[65] Minnesota (in order to deliver to officer and make charge), New Mexico (in order to deliver to officer) and Ohio (in order to cause arrest). Virginia permits a merchant to cause an arrest without speaking in terms of detention.

[66] This is particularly true of the Minnesota and South Dakota statutes. Minnesota states that detention must be for the purpose of delivering to law authorities and placing a charge against the suspect; South Dakota provides that a merchant who is requested to sign a complaint and testify and fails to do so may not assert the statutory privilege.

[67] Ohio has recognized this difficulty by providing that where juveniles are involved the detention may be not only for the purpose of causing an arrest, but also in order to recover the stolen items or communicate with the parents of the offender.

[68] New Mexico.

[69] Illinois, Kansas, Louisiana and Massachusetts. The Oregon statute may be interpreted to mean detention for the purpose of interrogation. See note 61 supra. The Mississippi statute allows a merchant to question, without mention of detention.

Once it has been decided that a merchant may detain for a particular purpose, legislatures must set forth the circumstances in which the merchant may exercise his privilege. Most of the statutes[70] provide that the suspect may be detained only when the merchant has "probable cause" or "reasonable grounds" for holding a particular belief: the variation in statutory language occurs with regard to the type of belief which must be held. The most frequently used test is again found in the Alabama statute: the detaining actor must have "probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person and that he can recover them by taking the person into custody."[71] The last part of this test is a natural complement to provisions allowing detention for the purpose of recovering goods. States allowing detention for other purposes have generally adopted the same test, absent the language concerning recovery of the goods.[72] While the Alabama statute suggests that two independent "belief" tests must be met, this will probably not be the case. The courts should realize that while the statute does invite judicial consideration of such circumstances as physical size and the number of parties involved in order to determine whether there were reasonable grounds for believing that the goods could be recovered, it is always reasonable for a merchant to believe that the fact of detention will in itself result in recovery of the goods. With this realization, the second test embodied in the Alabama statute becomes relatively meaningless.

A few states require that the actor have reasonable grounds for believing that the newly-defined crime of shoplifting has been committed.[73] Where this is combined with a provision that willful concealment either constitutes or is prima facie evidence of the new crime,[74] a shopkeeper should be allowed to detain whenever he sees willful concealment or has reasonable grounds to be-

70 Only the Arkansas and Pennsylvania statutes contain no such express requirement, both simply providing that shoplifters "may be detained." It is likely, however, that the requirement will be implied. See Cohen v. Lit Bros., 166 Pa. Super. 206, 70 A. (2d) 419 (1950).

71 Ala. Code (1940; Supp. 1957) tit. 14, §334(1). Substantially the same provision has been enacted in Florida, Kentucky, Nebraska, Oklahoma and Tennessee.

72 Illinois and Minnesota require a reasonable belief that the suspect has wrongfully taken or is wrongfully taking. New Mexico, Ohio and Utah require a reasonable belief that the suspect has wrongfully taken.

73 Georgia, Kansas and Oregon. Louisiana's statute is analogous, requiring a belief that theft has been committed. Similarly, the Massachusetts statute requires reasonable grounds for believing that the detained person was committing or attempting to commit larceny of goods held for sale.

74 Both Georgia and Oregon provide that the fact of willful concealment shall constitute the crime of shoplifting.

lieve such concealment has taken place. However, the advisability of making the privilege exercisable only on a belief that the elements of a statutory crime are present may not be wise, since the technical elements of the crime may not be generally known.

An objective standard will be used to determine whether or not the merchant had reasonable grounds or probable cause for his belief,[75] this being a question of law for the court to decide[76] with the jury being used to determine disputes in the facts on which the resolution of that question depends.[77]

With the exception of Louisiana and Minnesota, all the statutes giving a merchant some privilege to detain add the proviso that the detention must be "in a reasonable manner and for a reasonable length of time." The reasonable manner limitation encompasses a number of elements. First, whether or not a given manner of detention is reasonable may turn on whether it is a manner well adapted to carry out the privilege.[78] For example, a detention which is made unnecessarily public may be unreasonable. Similarly, detention and interrogation carried on in an insulting and humiliating way may be unreasonable when it could have been done equally well in a courteous manner.[79] Second, application of the reasonable manner requirement should include an examination of the place of detention. Third, the requirement incorporates a test of reasonable force.[80] Several factors may be of

[75] Cf. Brodie v. Huck, 187 Va. 485, 47 S.E. (2d) 310 (1948), a malicious prosecution case stating that in order to find probable cause the prosecutor must believe in the guilt of the accused and that that belief must be reasonable. In the case of the new shoplifting statutes, an honest and strong belief that the prohibited act has occurred should suffice as long as the existing circumstances would lead a reasonable and prudent man to the same conclusion. This test is expressly set out in the Georgia statute.

[76] Roberson v. J. C. Penney Co., 136 Cal. App. (2d) 1, 288 P. (2d) 275 (1955); Collyer v. S. H. Kress & Co., 5 Cal. (2d) 175, 54 P. (2d) 20 (1936). Cf. Crim v. Crim, 39 Ala. App. 413, 101 S. (2d) 845 (1958), suggesting that probable cause as a justification in a malicious prosecution case is a question of law because of the danger that the jury, when faced with the fact of the individual's defamation, may overlook the justifiable and commendable acts of citizens who have grounds for believing that a serious breach of social conduct has occurred. See note, 3 U.C.L.A. L. REV. 269 (1956).

[77] Roberson v. J. C. Penney Co., 136 Cal. App. (2d) 1, 288 P. (2d) 275 (1955), note, 3 U.C.L.A. L. REV. 269 (1956); Cohen v. Lit Bros., 166 Pa. Super. 206, 70 A. (2d) 419 (1950). Cf. Elletson v. Dixie Home Stores, 231 S.C. 565, 99 S.E. (2d) 384 (1957) (malicious prosecution case).

[78] See Collyer v. S. H. Kress & Co., 5 Cal. (2d) 175, 54 P. (2d) 20 (1936), holding that a detention for purposes of investigation was reasonable although the compulsion used was threat of arrest and the plaintiff was asked to restore the property, since the court felt this was the only way defendant could protect his property. See also Teel v. May Department Stores Co., 348 Mo. 696 at 706-707, 155 S.W. (2d) 74 (1941).

[79] See PROSSER, TORTS, 2d ed., p. 105 (1955).

[80] Both the Minnesota and Louisiana statutes, which contain no reasonable manner limitations, contain express provisions for the use of no more than reasonable force. The Minnesota statute further requires that the suspect be promptly informed of the purpose of the detention and that he not be questioned against his will.

importance with regard to the use of force. It may be that the courts will adopt some established test by analogy to common law privilege doctrines.[81] For example, it may be that force will be held reasonable up to the point where a breach of the peace occurs or serious bodily harm is inflicted.[82] On the other hand, it may be that the question will simply turn on the facts of each case. Another factor will be the extent to which the privilege itself envisions the use of force. The right to detain in order to effect a recovery may implicitly permit the use of more force than the right to detain to "attempt" to effect a recovery. The right to detain to investigate may not implicitly permit as much force as that where recovery is the purpose. Finally, the reasonable manner limitation must to some extent depend on the peculiar circumstances of each case: the age and sex of the suspect, the value of the goods thought stolen, etc. The question of reasonable manner, as well as reasonable time, is for the jury.[83]

What constitutes a reasonable length of time will depend on the particular facts and the privilege involved. If the statute allows detention in order to deliver to a peace officer, reasonable time must be at least the time required to get an officer on the scene. Common law authority on this question will undoubtedly be used as precedent.[84] Two states expressly provide that detention shall not exceed one hour, although a reasonable time may be less than one hour.[85]

Some statutes provide express limitations on the exercise of the privilege other than reasonable manner and time. Three states provide that the detention must take place on or in the immediate vicinity of the merchant's premises, a requirement which may be read into the reasonable manner limitation anyway.[86] Louisiana

81 See comment, 24 TENN. L. REV. 1177 at 1182 (1957).

82 E.g., the degree of force deemed reasonable in order to recapture personal property is force reasonably necessary and not intended to cause death or serious bodily harm. 1 TORTS RESTATEMENT §106 (1934). This same test is embodied in the Wisconsin statute, discussed at note 103 infra.

83 See, e.g., Little Stores v. Isenberg, 26 Tenn. App. 357, 172 S.W. (2d) 13 (1943) (reasonableness of investigation is for the jury); Curlee v. Scales, 200 N.C. 612, 158 S.E. 89 (1931) (where privilege to protect property was asserted in assault and battery case, the question of excessive force was for the jury).

84 See, e.g., Collyer v. S. H. Kress & Co., 5 Cal. (2d) 175, 54 P. (2d) 20 (1936) (twenty-minute detention reasonable); Bettolo v. Safeway Stores, 11 Cal. App. (2d) 430, 54 P. (2d) 24 (1936) (detention of slightly less than fifteen minutes reasonable). See also TORTS RESTATEMENT SECOND, Tentative Draft No. 1, §120A, comment *f* (1957) ("Fifteen minutes may be too long where all that is necessary is to ask a clerk whether the other has paid.").

85 Louisiana and New Mexico.

86 Kansas, Massachusetts and Ohio. The American Law Institute has refused to express any opinion as to whether "reasonable manner" as used in the merchant protection

requires that the detention must be on the premises. Ohio provides that the privilege cannot be exercised until the suspect has left the premises. This latter limitation seems too severe, for it eliminates one of the basic values of the detention type statute, the ability of the merchant to act before the suspect leaves the store.[87]

The statutes vary somewhat with regard to who can exercise the privilege to detain. In general, however, three observations can be made. First, the statutes are rather broad in this respect because the merchant must not only be protected from liability for his own conduct but from vicarious liability arising out of the conduct of his employees.[88] Second, legislatures have sought to avoid judicial limitations based on the nature of employment by leaving out all references to specific types of employees. Third, the privilege is usually given to a broad class of persons, in accord with a policy of granting the privilege to persons most likely to witness circumstances creating a suspicion of shoplifting. The most common formulation is that the privilege extends to "any peace officer, merchant or merchant's employee."[89] Some states do not extend the privilege of detention to peace officers, often adding merchant's "agents" to the list.[90] The use of the term

doctrine includes detention in the immediate vicinity of the merchant's premises as well as detention on the premises. TORTS RESTATEMENT SECOND, Tentative Draft No. 1, §120A, caveat (1957).

87 Ohio has made this limitation less severe where the store is of a self-service type. In such a case, the suspect may be detained after he passes the check-out counter. The requirement is clearly meant to assure that the person detained intends to convert the goods. In this connection it should be noted that Ohio has not enacted a new criminal provision covering shoplifting.

88 See, e.g., Montgomery Ward & Co. v. Wickline, 188 Va. 485, 50 S.E. (2d) 387 (1948); comment, 47 N.W. UNIV. L. REV. 82 at 92-98 (1952). Cf. Szymanski v. Great Atlantic & Pacific Tea Co., 79 Ohio App. 407, 74 N.E. (2d) 205 (1947) (store liable for conduct of employees of independent contractor hired as store detectives); Combs v. Kobacker Stores, (Ohio App. 1953) 114 N.E. (2d) 447 (store liable for conduct of a fellow partner). The merchant defendant may escape liability by showing that his agent or employee acted outside the scope of his authority. E.g., Rigby v. Herzfeld-Phillipson Co., 160 Wis. 228, 151 N.W. 260 (1915); Rogers v. Sears, Roebuck & Co., 48 Wash. (2d) 879, 297 P. (2d) 250 (1956). See, generally, 35 A.L.R. 645 (1925) and 77 A.L.R. 927 (1932).

89 Alabama, Arkansas, Florida, Kentucky, Louisiana, Mississippi, Nebraska, Oklahoma, Oregon, Pennsylvania and Tennessee. The Utah statute is similar, adding the term "agent." The Arizona statute, discussed in text at note 107 infra, extends its privilege to this same group. The Louisiana statute refers to "specifically authorized employees," thereby raising the question whether this is to be interpreted to mean specifically authorized to exercise the privilege at any time, or specifically authorized with regard to the particular detention.

90 Merchant or employee: Kansas, Minnesota and Ohio. Owner, operator, manager or employee: New Mexico. Merchant, agent or employee: Georgia, Illinois, Massachusetts and Virginia. The Massachusetts statute provides that detention must be by agents or employees "authorized for such purpose." The Virginia statute is unique in extending the privilege to attendants of parking lots owned or leased by the merchant, or operated under an agreement with the merchant.

"agent" creates some uncertainty, for an agent may occupy a position with regard to the merchant which is totally unrelated to his business: e.g., a personal real estate agent. This being so, the term as used in this context will probably be interpreted to mean an agent in some way connected with the particular business, an interpretation which will in most instances coincide with that of the term "employee."

The final major problem is the effect to be given a judicial determination that a person authorized to exercise the statutory privilege properly has done so. Three distinct approaches are found in the statutes. Four states simply set forth the privileged conduct without specifying the extent to which its exercise results in immunity from civil liability.[91] Two others provide that no civil or criminal liability shall arise out of the exercise of the privilege.[92] And the majority list the types of civil actions in which the privilege operates as a defense.[93] Each approach has its weaknesses.

Those statutes which are silent on the extent to which the privileged conduct operates as a defense in civil suits in a technical sense at least make the defense a matter of implication. This at once creates both an uncertainty and a flexibility in the law. A court could hardly hold that such a statute gave a merchant no defense in civil suits, for this would have the effect of making the concept of privileged conduct meaningless. This means the courts will hold either that the statute provides a defense in some types of action and not in others, or that the statute provides a defense in all actions. Because of the dangers inherent in applying a statutory defense in only certain types of civil actions,[94] and because of the likelihood that courts will feel such classification to be a legislative matter, these statutes will most likely be held to supply a defense in all civil actions arising out of the detention of suspects. Thus what is said about statutes expressly providing that no liability shall result from the exercise of the statutory privileges is equally applicable to those silent on the matter.

The statutes which provide that no liability shall result from the exercise of the privilege avoid the difficulty encountered by those which enumerate the classes of actions in which the statute

91 Kentucky, New Mexico, Ohio and Oklahoma.
92 Illinois and Utah.
93 See notes 95, 96 and 99 infra.
94 See text at notes 97 through 99 infra.

provides a defense, namely, the likelihood that an ingenious plaintiff will be able to bring his action in a form which is technically outside the statute but which will produce the same result. For example, a large number of states allowing detention of suspected shoplifters provide that no liability for false arrest, false imprisonment or unlawful detention shall be incurred thereby.[95] Several others limit the defense to actions for false arrest and false imprisonment.[96] These statutes are likely to be interpreted as providing no defense in actions for slander or assault and battery. Yet any publicly-initiated detention is likely to give rise to the elements of a slander action,[97] and most detention will contain the elements of at least a technical assault.[98] It appears, therefore, that these statutes prohibit the effective exercise of the privileges they create by failing to encompass all the classes of actions available to the wronged suspect.[99]

The apparent reason for expressly extending the defense only to certain classes of actions is a fear that the removal of all liability will leave the wronged individual completely remediless. But while this fear is to be respected, the extension of the defense to some actions and not to others is not the best way to meet the problem. The proper balance between the rights of the wronged suspect and the merchant is best arrived at by making the statutory privilege a bar to the recovery of exemplary and punitive damages, as well as damages for mental anguish, and not to the recovery of actual out-of-pocket losses.[100] Such a rule allows the recovery of actual losses in all cases, rather than the recovery of overall damages in some cases and none in others.

(2) *Statutes Giving Merchants Privileges in Terms Other Than a Right To Detain.* Up to this point the discussion has

95 Alabama, Arkansas, Florida, Minnesota, Nebraska, Pennsylvania and Tennessee.

96 Georgia, Louisiana and Massachusetts.

97 See, e.g., Camp v. Maddox, 93 Ga. App. 646, 92 S.E. (2d) 581 (1956); Little Stores v. Isenberg, 26 Tenn. App. 357, 172 S.W. (2d) 13 (1943).

98 See, e.g., Morgan v. Loyacomo, 190 Miss. 656, 1 S. (2d) 510 (1941), where the court found assault and battery in the defendant's act of seizing a package from the plaintiff's arms and tearing it open, while making accusations against the plaintiff.

99 Four states which expressly or impliedly give the merchant a right to detain have sought to avoid this difficulty by making the list of actions in which the defense is available more comprehensive. Kansas and Oregon make the statutory privilege a defense in actions for slander and assault, as well as false imprisonment, false arrest and unlawful detention. Virginia adds malicious prosecution to this list. Mississippi is very careful to miss nothing, adding the phrase "or otherwise" to a very comprehensive list of types of actions.

100 The Michigan statute takes this approach. See the discussion in the text at note 106 infra.

directly concerned only statutes which in some manner give the merchant a privilege of detention. Brief mention should be made at this point of several other statutes which deal with the civil liability of merchants.

Montana and Alaska have extended a very limited privilege to the merchant: he may only request that persons on his premises place or keep in full view any merchandise removed from its place of display or elsewhere. Both statutes provide that the proper exercise of the privilege shall be a defense in any type of civil action.[101] The privilege would apparently not extend to attempts to detain or recover the goods, and the use of the word "request" indicates that no use of force is contemplated.

The newly-enacted Texas statute on the other hand is as broad as the Montana and Alaska statutes are narrow, providing that all persons with reasonable grounds to believe the crime of shoplifting has been committed "have a right to prevent the consequences of shoplifting" by openly seizing any goods so taken and taking them, along with the offender if he can be taken, without delay to a magistrate or police officer. The statute is silent on the extent to which the privilege shall operate as a defense, so it will probably operate as a defense in any type of civil action.[102] The language of "seizure" seems to encompass a greater degree of force than does recovery of goods or detention. Similarly, the absence of limitations on the classes of persons who may exercise the privilege makes the statute broader than most.

Two unique statutes are those of Wisconsin and Michigan. The Wisconsin statute is phrased in terms of the force which can be used by a person in order to prevent or terminate what he reasonably believes to be an unlawful interference with his property. Any reasonable force may be used if the actor reasonably believes it necessary, provided that force likely to cause death or great bodily harm shall not be deemed reasonable. Certain classes of third persons, including merchant's employees or agents, are authorized to exercise the privilege. These provisions may be construed to permit detention for questioning, since such detention is a logical incident to the prevention or termination of the believed unlawful interference. Perhaps the most peculiar fact about the Wisconsin statute is that by its terms it provides the merchant

[101] Alaska does this by simply providing that the person properly exercising the privilege shall not be "criminally or civilly liable." Montana achieves the same result by giving a comprehensive list of the classes of actions in which there shall be no liability.

[102] See text at note 94 supra.

with a defense to criminal liability only.[103] However, in light of the policy of the statute, analogous defenses for civil actions will probably be recognized by the courts of that state. If so, the privilege is likely to be qualified by limitations similar to those embodied in common law doctrines of defense and recapture, doctrines from which the statutory privilege is an obvious outgrowth.[104]

The Michigan statute takes a far different approach. It simply provides that in civil actions[105] arising out of conduct "involving" a person suspected of theft of goods held for sale where the merchant had reasonable ground to believe the person involved had committed a theft, no damages for mental anguish or exemplary or aggravated damages shall be allowed unless the merchant or his agents acted unreasonably. The measure is unique because it operates at the damage level rather than as a defense.[106] The merit of this type of legislation lies in the fact that it reduces the financial peril for the merchant who accosts a suspected shoplifter while at the same time it retains some form of redress for the innocent individual who can show actual damages resulting from the merchant's conduct.

Finally, two states have legislatively adopted variations of the defense judicially formulated in *Collyer v. S. H. Kress & Co.*[107] This is the so-called merchant protection doctrine, which simply provides that reasonable cause shall be a defense in false imprisonment actions brought by suspected shoplifters who were temporarily detained for investigation by merchants. Arizona provides that reasonable cause shall be a defense in actions for false imprisonment, false arrest or wrongful detention against merchants, their employees and peace officers by persons suspected of shoplifting. Washington has accorded the same defense to its police officers only. The statutes do extend the doctrine somewhat beyond its common law development, since it had not generally been available in actions for false arrest.[108] Also, the statutes may be interpreted to allow detention for purposes other

[103] Wis. Stat. (1957) §939.45.

[104] These limitations are fully discussed in comment, 46 ILL. L. REV. 887 (1952).

[105] Specifically, the statute applies to actions of false imprisonment, unlawful arrest, assault, battery, libel or slander.

[106] In this respect the Michigan statute closely resembles the doctrine allowing the use of probable cause as a device to mitigate damages. See note 26 supra. See also the Report of the Michigan Legislative Committee on Shoplifting, 69th Mich. Leg. (Reg. Sess. 1958) House Journal, No. 23, p. 249.

[107] 5 Cal. (2d) 175, 54 P. (2d) 20 (1936).

[108] See note 28 supra.

than investigation, unlike the common law rule. But the statutes still have defects. They are so lacking in precision that they fail to give merchants any standard which they can effectively use to evaluate their own actions. And they also fail to provide defenses in actions for slander and assault and battery, areas where protection is needed.

CONCLUSION

While the statutes under discussion have not been on the books for a long enough period of time for any trends in interpretation or determinations of effectiveness to be formulated, several conclusions can be drawn. First, it seems unlikely that any great decrease in the amount of shoplifting will take place in those states which have done no more than enact new criminal legislation. The apprehension of criminals will remain just as great a problem as before. Second, according defenses in civil actions to merchants who seek to apprehend shoplifters should be a potent weapon against shoplifting for several reasons. These provisions supply a means for dealing with juvenile offenders which may be more desirable than criminal prosecution. The non-professional shoplifter may be deterred by the mere fact of humiliation arising from apprehension by a merchant. And, perhaps most important, a merchant may act with some degree of speed when shoplifting is suspected. Third, the statutory privileges are likely to receive a strict construction from courts which will regard them as an infringement of individual freedom. There is undoubtedly a very real threat to that freedom in these statutes, for while it is true that theoretically the innocent person will be released and saved the humiliation of arrest and jailing, the fact remains that detention may be humiliating in itself. For this reason, it seems best to provide that where the merchant exercises a statutory privilege, the offended person may still recover his out-of-pocket losses, having no right to exemplary or punitive damages or damages for mental anguish.[109] The merchant's risk is substantially reduced, while some slight remedy is preserved for the innocent party who is actually injured.

Wilbur J. Markstrom, S.Ed.

[109] To a small extent, this result is now achieved by the fact that appellate courts often reduce excessive punitive and exemplary damages in false imprisonment and arrest cases arising out of shoplifting situations. See Hammargren v. Montgomery Ward & Co., 172 Kan. 484 at 502-504, 241 P. (2d) 1192 (1952). See, generally, 35 A.L.R. (2d) 273 (1954).

APPENDIX I

RECENT SHOPLIFTING LEGISLATION

State	*Year Enacted*	*Statutory Citation*
Alabama	1957	Ala. Code (1940; Supp. 1957) tit. 14, §334
Alaska	1957	Alaska Comp. Laws Ann. (Cum. Supp. 1958) §§20-1-5 to 20-1-6
Arizona	1958	Ariz. Rev. Stat. (1956; Supp. 1959) §§13-673 to 13-675
Arkansas	1957	Ark. Stat. Ann. (1947; Supp. 1959) §§41-3939 to 41-3942
Connecticut	1959	Public Act 596, Laws 1959
Florida	1955	Fla. Stat. Ann. (1944; Supp. 1958) §811.022
Georgia	1957, 1958	Ga. Code Ann. (1953; Supp. 1958) §§26-2640 to 26-2642; Ga. Code Ann. (1956; Supp. 1958) §105-1005
Idaho	1957	Idaho Code (1948; Supp. 1959) §18-4626
Illinois	1957	Ill. Rev. Stat. Ann. (1959) c. 38, §§252.1 to 252.4
Indiana	1959	Ind. Stat. Ann. (Burns, 1956; Supp. 1959) §§10-3024 to 10-3027
Kansas	1959	House Bill No. 388 (1959)
Kentucky	1958	Ky. Rev. Stat. (1959) §§433.234 to 433.236
Louisiana	1958	La. Rev. Stat. (1950; Supp. 1958) tit. 15, §§84.5 to 84.6
Maine	1955	Me. Rev. Stat. (1954; Supp. 1957) c. 132, §10-A
Massachusetts	1958	Mass. Laws Ann. (1956; Supp. 1958) c. 231, §94-B
Michigan	1958	Mich. Pub. Acts (1958) p. 211, Act No. 182
Minnesota	1957	Minn. Stat. Ann. (1947; Supp. 1958) §§622-26 to 622-27
Mississippi	1958	Miss. Code Ann. (1956; Supp. 1958) §§2374.01 to 2374.06
Montana	1957	Mont. Rev. Code (1947; Supp. 1959) §§64-212 to 64-213
Nebraska	1957	Neb. Rev. Stat. (1943; re-issue 1956; Supp. 1957) §§29-402.01 to 29-402.03
New Hampshire	1957	N.H. Rev. Stat. Ann. (1955; Supp. 1957) §582.15
New Mexico	1957, 1959	N.M. Stat. Ann. (1953; Supp. 1959) §§40-45-24 to 40-45-27
North Carolina	1957	N.C. Gen. Stat. (1953; Supp. 1959) §14-72.1
Ohio	1957	Ohio Rev. Code (Baldwin, 1958) §2935.041
Oklahoma	1957	Okla. Stat. (1958) tit. 22, §§1341-1342
Oregon	1959	Laws 1959, chapter 626
Pennsylvania	1957	Pa. Stat. Ann. (Purdon, 1945; Supp. 1958) tit. 18, §4816.1
Rhode Island	1959	House Bill No. 1482 (1959)
South Carolina	1956	S.C. Code (1952; Supp. 1959) §§16-359.1 to 16-359.4
South Dakota	1959	House Bill No. 620 (1959)
Tennessee	1957	Tenn. Code Ann. (1955; Supp. 1959) §§39-4235 to 39-4236, 40-824 to 40-826
Texas	1959	Tex. Penal Code Ann. (Vernon, 1953; Supp. 1959) Art. 1436e
Utah	1957	Utah Code Ann. (1953; Supp. 1959) §§77-13-30 to 77-13-32
Virginia	1958	Va. Code (1950; Supp. 1958) §§18-187.1 to 18-187.3
Washington	1959	Laws 1959, chapter 229
West Virginia	1957	W. Va. Code (1955; Supp. 1959) §§5990(8) to 5990(11)
Wisconsin	1957	Wis. Stat. (1958) §939.49

APPENDIX II

ARREST POWERS OF OFFICERS AND PRIVATE PERSONS WITHOUT A WARRANT FOR MISDEMEANORS IN A SHOPLIFTING CONTEXT*

State	*Powers Apart from Shoplifting Laws*		*Broadened by the Laws*	
	Private Persons	*Officers*	*Officers*	*Private Persons*
Alabama	(1)	(2)	§334(2)	
Alaska	(1)	(2)		
Arizona	CL	(2)	§13-674	
Arkansas	CL	(2)		
California	(1)	(2)		
Colorado	(1)	Note 24		
Connecticut	CL	CL		
Delaware	CL	(3)		
Florida	CL	(2)	§811.022(2)	
Georgia	(1)	(2)		
Hawaii	(1)	Note 24		
Idaho	(1)	(2)		
Illinois	(1)	Note 24		
Indiana	CL	(2)		
Iowa	(1)	Note 24		
Kansas	CL	CL		
Kentucky	CL	CL		
Louisiana	CL	(2)	§2	
Maryland	CL	CL		
Maine	CL	(2)		
Massachusetts	CL	(2)		
Michigan	CL	Note 24		
Minnesota	(1)	(2)	§622.27(2)	
Mississippi	(1)	(2)		
Missouri	CL	CL		
Montana	(1)	(2)		
Nebraska	Note 22	(2)	§2	
Nevada	(1)	(2)		
New Hampshire	CL	(3)		
New Jersey	CL	CL		
New Mexico	CL	CL	§40-45-27	
New York	(1)	(2)		
North Carolina	CL	(3)		
North Dakota	(1)	(2)		
Ohio	CL	(2)	§2935.041	
Oklahoma	(1)	(2)	§1342	
Oregon	(1)	(2)		
Pennsylvania	CL	(2)		
Rhode Island	CL	Note 24		
South Carolina	(1)	(2)		
South Dakota	(1)	(2)		
Tennessee	(1)	(2)	§40-825	
Texas	Note 22	Note 24		
Utah	(1)	(2)	§77-13-31	
Virginia	CL	CL		
Vermont	CL	CL		
Washington	CL	CL	§2	
West Virginia	CL	CL	§5990(11)	§5990(11)
Wisconsin	CL	Note 24		
Wyoming	Note 22	(2)		

* All notes referred to are in the text. The statutory citations are taken from the complete table in Appendix I.

SYMBOLS: CL—Common law rules applied.

(1)—statutes generally allowing a private person to arrest without a warrant for any public offense committed or attempted in his presence.

(2)—statutes generally allowing an officer to arrest without a warrant for any public offense committed or attempted in his presence.

(3)—statutes generally allowing an officer to arrest without a warrant when he has reasonable ground to believe the person committed a misdemeanor in his presence.

(1) *Statutes broadening arrest powers of private persons:* Ala. Code (1940) tit. 15, §158; Alaska Comp. Laws Ann. (1949) §66-5-37; Cal. Penal Code Ann. (Deering, 1949) §837; Colo. Rev. Stat. Ann. (1953; Supp. 1957) §39-2-20; Ga. Code Ann. (1953) §27-211; Hawaii Rev. Laws (1955) §255-3; Idaho Code (1948) §19-604; Ill. Rev. Stat. (1959) c. 38, §657; Iowa Code (1958) §755.5; Minn. Stat. (1957) §629.37; Miss. Code Ann. (1956) §2470; Mont. Rev. Code Ann. (1947) §94-6004; Nev. Rev. Stat. (1959) §171.240; 66 N.Y. Consol. Laws (McKinney, 1958) §183; N.D. Rev. Code (1943) §29-0620; Okla. Stat. (1937) tit. 22, §202; Ore. Rev. Stat. §133.310; S.C. Code (1952) §17-251 (larceny); S.D. Code (1939) §34.1608; Tenn. Code Ann. (1955; Supp. 1959) §40-816; Utah Code Ann. (1953) §77-13-4.

(2) (3) *Statutes broadening the arrest powers of police officers:* Ala. Code (1940) tit. 15, §154; Alaska Comp. Laws Ann. (1949) §66-5-30; Ariz. Rev. Stat. (1956) §13-1403; Ark. Stat. (1947) §43-403; Cal. Penal Code Ann. (Deering, 1949; Supp. 1957) §836; Del. Code Ann. (1953) tit. 11, §1906; Fla. Stat. Ann. (1944; Supp. 1958) §901.15; Ga. Code Ann. (1953) §27-207; Idaho Code (1948) §19-603; Ind. Stat. Ann. (Burns, 1956) §9-1024; La. Rev. Stat. (1950) tit. 15, §60; Me. Rev. Stat. (1954) c. 147, §4; Mass. Rev. Stat. (1956) c. 276, §28; Minn. Stat. (1957) §629.34; Miss. Code Ann. (1956) §2470; Mont. Rev. Code Ann. (1947) §94-6003; Neb. Rev. Stat. (1943; re-issue 1956) §29-401; Nev. Rev. Stat. (1959) §171.235; N.H. Rev. Stat. Ann. (1955) §594.10; 66 N.Y. Consol. Laws (McKinney, 1958; Supp. 1959) §177; N.C. Gen. Stat. (1953; Supp. 1959) §15-41; N.D. Rev. Code (1943; Supp. 1957) §29-0615; Okla. Stat. (1937) tit. 22, §196; Ore. Rev. Stat. §133.350; Pa. Stat. Ann. (Purdon, 1957) tit. 53, §37005; S.C. Code (1952) §§17-251, 17-253; S.D. Code (1939) §34.1609; Tenn. Code Ann. (1955) §40-803; Utah Code Ann. (1953) §77-13-3; Wyo. Stat. (1957) §7-12.

APPENDIX III

TYPES OF PROVISIONS ADOPTED BY THE STATES IN THEIR SHOPLIFTING LEGISLATION

State	*Criminal Provisions*				*Privileged Conduct*			*Broadened Arrest Powers*
	Take possession with intent to convert	*Willful concealment*	*Alteration of labels*	*Changing amount in container*	*Type of conduct privileged*		*When a defense*	
					Privilege to detain	*Other*		
Alabama					In order to attempt recovery of goods		FA, FI, UD	X
Alaska						Request that goods be kept in view	"no liability"	
Arizona	X					Implied. See text at note 108	FA, FI, UD	X
Arkansas	X(a)				In order to recover goods		FA, FI, UD	
Connecticut	X(a)							
Florida					In order to attempt recovery of goods		FA, FI, UD	X
Georgia	X	X	X	X	See note 61		FA, FI	
Idaho		X(c)						
Illinois					In order to investigate ownership		"no liability"	
Indiana	See note 34							
Kansas	X				In order to question		FA, FI, UD, A, D, S	
Kentucky	X(b)				In order to attempt recovery of goods		Statute silent	
Louisiana					In order to question		FA, FI	X
Maine		X(c)						
Massachusetts					In order to question		FA, FI	
Michigan						Implied. See text at note 105	FA, FI, A, B, L, S	
Minnesota					In order to deliver suspect to officer		FA, FI, UD	X
Mississippi	X(a)				In order to question. See note 69		FA, FI, UD, MP, S or "otherwise"	

Montana						Request that goods be kept in view	S, FA or "otherwise"	
Nebraska					In order to attempt recovery of goods		FA, FI, UD	X
New Hampshire		X(c)						
New Mexico	X				In order to attempt recovery or deliver suspect to officer		Statute silent	X
North Carolina		X(c)						
Ohio					In order to cause arrest		Statute silent	X
Oklahoma					In order to attempt recovery of goods		Statute silent	X
Oregon	X	X			See note 61		FA, FI, UD, A, B, S	
Pennsylvania	X(a)				In order to recover goods		FA, FI, UD	
Rhode Island	X	X						
South Carolina	X(a)							
South Dakota	X(a)				See note 61		FA, FI, UD	
Tennessee	X(a)				In order to attempt recovery of goods		FA, FI, UD	X
Texas	See note 33		X	X		Seizure of goods	Statute silent	
Utah					In order to investigate and attempt recovery of goods		"no liability"	X
Virginia		X			In order to cause arrest. See note 65		FA, FI, UD, MP, S, A, B	
Washington	X					Implied. See text at note 108	FA, FI, UD	X
West Virginia	X(b)	X	X	X				X
Wisconsin						Defend from interference with property	See note 103	

(a) Statutes providing that willful concealment of goods creates a prima facie presumption of intent to convert, and that a finding of goods upon the person or among the belongings of the suspect is prima facie evidence of willful concealment.
(b) Statutes providing that willful concealment of goods creates a prima facie presumption of intent to convert.
(c) Statutes providing that the finding of goods upon the person or among the belongings of the suspect is prima facie evidence of willful concealment.
ABBREVIATIONS: FI—false imprisonment; FA—false arrest; UD—unlawful detention; A—assault; B—battery; S—slander; D—defamation; MP—malicious prosecution.