RECENT DEVELOPMENTS

CRIMINAL LAW: CUSTOMER'S PERMANENT EXCLUSION FROM RETAIL STORE DUE TO PRIOR SHOPLIFTING ARRESTS HELD ENFORCEABLE UNDER CRIMINAL TRESPASS STATUTE

In *United States v. Bean*[1] the Superior Court for the District of Columbia held that a retail business establishment may exclude from its premises a particular member of the public solely on the grounds of his previous arrest for shoplifting in the establishment, and that criminal trespass statutes are applicable should such a person refuse a request to leave. Upon entering a Sears, Roebuck and Company store, Bean was recognized by a security officer as a person who had previously been arrested for shoplifting in the store, and was asked to leave. Bean left but he returned an hour later and refused to comply with a second request to leave. The security officer then sought to arrest him and a scuffle ensued. Criminal charges were brought against Bean for assault and unlawful entry. Testimony at the trial revealed that the store management maintained a picture file of all persons arrested in the store for shoplifting and routinely excluded such persons from the premises. It was also revealed that the defendant had been twice convicted of petit larceny, though apparently these convictions did not result from the previous Sears, Roebuck arrest. The reported decision denied defendant's motion for judgment of acquittal,[2] which under the applicable rules of procedure is made at trial after evidence of at least one side is closed.[3]

The District of Columbia unlawful entry statute under which Bean was prosecuted provides that "any person who [being on the property of another] without lawful authority to remain therein or thereon shall

1. Crim. No. 50426-70 (D.C. Super. Ct., May 12, 1971), *reprinted in* 99 DAILY WASH. L. REP. 965, col. 1 (1971).

2. *Id.* at 972, col. 3.

3. FED. R. CRIM. P. 29. The federal rules are in effect in the D.C. Superior Court. District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. CODE ANN. § 11-946 (Supp. 1971).

refuse to quit . . . shall be guilty of a misdemeanor."[4] The statute is similar to the criminal trespass statutes enacted in many jurisdictions,[5] and is of the type used frequently during the 1960's to prosecute "sit-in" demonstrators.[6] The statute merely enlarges upon the common law remedies available to a property owner, adding criminal prosecution by the state to the recovery of damages in tort and the right to use reasonable force to remove a trespasser. Whether a person has "lawful authority" to remain on the property is thus controlled by common law. The basic rule is that the owner of a business extends to all members of the public his express or implied permission to enter, but that this permission may be withdrawn at will and any person excluded.[7] The right to exclude has been overridden, however, by certain constitutional and statutory provisions preventing exclusions based on race[8] or exclusions infringing first amendment rights.[9]

The common law right to exclude has been upheld primarily in cases dealing with the ejection of an unruly, boisterous, or otherwise obnoxious patron.[10] Prior to *Bean*, no court had been called on to apply the rule to an exclusion based on a patron's previous arrest for shoplifting. A line of New York cases supports the right of racetrack operators to refuse admission to persons known or thought to be bookmakers.[11] These cases, however, are based as much on

4. D.C. CODE ANN. § 22-3102 (1967).

5. *See, e.g.*, BIRMINGHAM, ALA. CODE § 1436-43 (1944); MD. ANN. CODE art. 27, § 577 (1957); N.C. GEN. STAT. § 14-134 (1953).

6. *See, e.g.*, Bell v. Maryland, 378 U.S. 226 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); State v. Avent, 253 N.C. 580, 118 S.E.2d 47 (1961), *vacated and remanded per curiam*, 373 U.S. 375 (1963), *rev'd*, 262 N.C. 425, 137 S.E.2d 161 (1964). "Sit-in" cases as used in this recent development refer only to cases where the sit-in occurred as a protest against a policy of excluding black customers. The term does not include cases in which sit-in tactics are used to protest policies that are independent of refusing to serve a customer. Thus the term does not include such cases as People v. Weinberg, 6 Mich. App. 345, 149 N.W.2d 248 (1967), cited by the *Bean* court, in which the defendants staged a sit-in to protest alleged employment and loan practices of a savings and loan association.

7. *See, e.g.*, Silas v. Bowen, 277 F. Supp. 314 (D.S.C. 1967); Ramirez v. Chavez, 71 Ariz. 239, 226 P.2d 143 (1951); Johanson v. Huntsman, 60 Utah 402, 209 P. 197 (1922).

8. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000a-6 (1964); Shelley v. Kraemer, 334 U.S. 1 (1948). See text accompanying notes 16-18 *infra*.

9. Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946). See text accompanying notes 21-22 *infra*.

10. *See, e.g.*, Silas v. Bowen, 277 F. Supp. 314 (D.S.C. 1967); Ramirez v. Chavez, 71 Ariz. 239, 226 P.2d 143 (1951); Symalla v. Dusenka, 206 Minn. 280, 288 N.W. 385 (Minn. 1939).

11. Madden v. Queens County Jockey Club, 296 N.Y. 249, 72 N.E.2d 697 (1947); Gottlieb v. Sullivan County Harness Racing Ass'n, 25 App. Div. 2d 798, 269 N.Y.S.2d 314 (1966); People v. Licata, 63 Misc. 2d 585, 312 N.Y.S.2d 774 (App. T. 1970).

specific state racing commission regulations requiring that such persons be kept out of licensed racetracks[12] as they are on the common law right of an owner to exclude. In only one reported decision has a retail store excluded a customer on the grounds of previous criminal activity. *In re D.*[13] involved a 15-year old girl who had been caught opening pocketbooks belonging to other customers of a department store. The customers did not press charges, but the store ordered the girl to keep off its premises. Three months later she re-entered the store and was arrested for criminal trespass. In adjudging her a delinquent, the court stated that a store's right to exclude persons who had previously been involved in criminal acts on the same premises was "essential in order to properly protect the person and property of customers of the store."[14] The court's concern with protecting other customers, rather than the store itself, suggests that *In re D.* involves little more than the common law duty of a store to protect its patrons from foreseeable danger.[15] The case thus does not hold that *any* criminal activity may be the basis for exclusion from a retail store, but only such activity which, if repeated, would endanger patrons.

Just as the courts have never previously been called upon to apply the common law rule to an exclusion based on a patron's arrest record, neither have any of the statutory or constitutional modifications of the common law rule been construed to apply to such a situation. It has never been suggested, for example, that the 1964 Civil Rights Act[16] applies to retail outlets other than those with dining facilities, or that it affects discrimination based on factors other than race or religion. One court has held that since a higher percentage of blacks have arrest records than whites, employment discrimination based on arrest records and applied to blacks, in the absence of legitimate business justification, is within the Civil Rights Act.[17] While this holding might be relied on by blacks with arrest records, it would apparently be of no assistance if storeowners could establish a legitimate business justification for the exclusion.[18]

12. 19 N.Y. CODES, RULES, & REGS. §§ 4.46 (1962) (racing), 99.8 (1964) (harness racing).

13. 58 Misc. 2d 1093, 296 N.Y.S.2d 825 (Family Ct., Juv. T. 1968), *rev'd on other grounds*, 33 App. Div. 2d 1028, 308 N.Y.S.2d 262 (1970).

14. 58 Misc.2d at 1097, 296 N.Y.S.2d at 829.

15. *Compare* In re D., 58 Misc. 2d 1093, 296 N.Y.S.2d 825 (Family Ct., Juv. T. 1968) *with* W. PROSSER, LAW OF TORTS § 61, at 405 (3d ed. 1964).

16. 42 U.S.C. §§ 2000a to 2000a-6 (1964).

17. Gregory v. Litton Sys., Inc., 316 F. Supp. 401 (C.D. Cal. 1970).

18. The defense of "legitimate business justification" includes, but is considerably broader than that of "foreseeable danger to customers." Such a defense could justify exclusion of not

As with the statutory law, the two lines of constitutional interpretation which bear on the owner's power to discriminate at will with regard to the use of private property, have not been extended to reach *Bean*. The first of these lines originates in *Shelley v. Kraemer*,[19] in which restrictive housing covenants were not enforced by the Supreme Court because it found that judicial enforcement itself would constitute state action to which the fourteenth amendment applied.[20] The second line traces from *Marsh v. Alabama*[21] and *Food Employees Union v. Logan Valley Plaza, Inc.*,[22] in both of which the property rights of private owners were deemed to be restricted by the first amendment on the grounds that in each case the property served as a public facility.[23] The "sit-in" cases[24] presented the Supreme Court with the opportunity to extend either *Shelley* or *Marsh* to reach discrimination by private businesses which seek to attract and sell to the public. However, the opinions of the Court in these cases consistently turned on narrower grounds[25] although two of the concurring justices in *Bell v. Maryland* favored such an extension on the basis of *Shelley*.[26] Thus, the extent of the constitutional limitations on discrimination by private property owners in a retail commercial setting can at best be said not to have been clearly resolved. In summary, while the *Bean* court was presented with a case which seemed to be controlled by the common law rule allowing private property owners to discriminate at will, the situation was nevertheless one to which the common law had never in fact been applied. At the same time, while the case seemed to be but one step beyond existing constitutional and statutory restrictions on the rights of

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only shoplifters but also any other convicted criminal, so long as there is a reasonable relation between his conviction and the exclusion. *See generally* note 44 *infra*.

19. 334 U.S. 1 (1948).

20. In Barrows v. Jackson, 346 U.S. 249 (1953), the holding in *Shelley* was extended to preclude actions at law for damages for breach of racially-restrictive covenants.

21. 326 U.S. 501 (1964).

22. 391 U.S. 308 (1968).

23. In *Marsh*, owners of a company town sought to exclude a Jehovah's Witness who was distributing literature on its sidewalks. In *Logan Valley*, a shopping center sought to exclude persons picketing one of its stores.

24. *E.g.*, Bell v. Maryland, 378 U.S. 226 (1964); Griffin v. Maryland, 378 U.S. 130 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. Greenville, 373 U.S. 244 (1963); Garner v. Louisiana, 368 U.S. 157 (1961).

25. For example, comments by city officials urging segregation were found to be a conventional state action element sufficient to invoke the fourteenth amendment, Lombard v. Louisiana, 373 U.S. 267 (1963), as was the official deputization of the employee charged with enforcing the discriminatory policy, Griffin v. Maryland, 378 U.S. 130 (1964).

26. 378 U.S. 226, 255-60 (1964) (Douglas, J., concurring).

private property owners, prior courts had in fact consistently declined to take the crucial step.

In deciding *Bean*, the D.C. Superior Court noted the common law rule that licenses extended to business guests could be revoked at will, and found that through its security officer the Sears, Roebuck store had done so with regard to Bean solely because of his criminal record. The court was aware that the situation was a novel one, requiring more than routine citation of common law exclusion cases, and considered at some length whether the common law rule as applied to the defendant had been modified by constitutional interpretation. The court recognized that *Shelley* seemingly characterized as state action any state judicial enforcement of private discrimination,[27] but it concluded that the Supreme Court's consistent refusal to extend *Shelley* beyond enforcement of restrictive covenants, despite the obvious opportunities afforded by the sit-in cases, precluded an extension of *Shelley* beyond its facts.[28] As for *Marsh* and *Logan Valley*, the *Bean* court determined that the interior of a retail store does not serve as a public facility as that concept was used in those cases.[29] The court went on to note that the Civil Rights Act of 1964, and a similar D.C. statute,[30] were not applicable either to retail stores without restaurants or to discrimination on other than racial or religious grounds. Given the common law power to exclude and the absence of a constitutional or statutory modification, the court considered itself compelled to deny the motion for judgment of acquittal. However, in its concluding remarks the court recognized the burden on persons with previous arrests or convictions, observing that such persons "should not for that reason suffer the penalty of being unable to shop for the necessities of life."[31] The court, however, felt that judicial relief in the present circumstances would require a "tortured" interpretation of existing law, and that relief would thus have to come from the legislature if it came at all.

The court in *Bean* was apparently troubled by the implications of its decision, as indicated by its concluding remarks. Clearly the decision is troubling, for it represents a heretofore unrecognized gap between our ideals of criminal law and our actual practices. To

27. *United States v. Bean, supra* note 1, at 971, col. 2.
28. *Id.* at 971, cols. 2-3.
29. *Id.* at 972, cols. 1-2.
30. D.C. CODE ANN. §§ 47-2901 to 2903 (1967).
31. *United States v. Bean, supra* note 1, at 972, col. 3.

exclude from a retail establishment because of a criminal arrest or conviction is inconsistent with the notions that a man is not to suffer sanctions for criminal conduct until proven guilty, that there should be defined punishments directed toward rehabilitation, and that a man is to be judged on his own merits and not those of a class to which he may belong—albeit that the class has a high propensity to engage in criminal activities. Further, what presently amounts to an occasional inconvenience and humiliation could become a considerably more serious impediment to normal and economical living as large, impersonal self-service stores capture more of the retail market,[32] and as these establishments increase their shoplifting controls.[33] Although the *Bean* court was troubled, it could fashion no effective role for itself in extending protection to persons with arrest records. It did no more than state that "a proper role for the courts in this area would seem to lie only in imposing strict prohibitions on the promiscuous distribution of arrest records to private persons and a firm judicial policy of expunging such records where appropriate."[34] This view of the judicial role is somewhat mystifying, for in truth there appears to be no way in which it can

32. *See Slowdown Creeps Up on the Small Store*, BUS. WEEK, July 19, 1969, at 30. This trend is also indicated by the steady increase in the proportion of total retail sales made by FORTUNE'S 50 largest retail merchandisers, from 16% in 1959 to 20% in 1970. Total retail sales for each year may be found in the 1971 ECONOMIC REPORT OF THE PRESIDENT 246. Sales by the 50 largest retail merchandisers may be found as part of FORTUNE'S annual report on the 500 largest U.S. corporations. This report is normally published in May, June, or July.

33. Accounts of measures being taken to combat shoplifting, including small armies of security personnel, electronic surveillance and detection, and study of state-supplied picture files, may be found in *Shoplifting: The Pinch that Hurts*, BUS. WEEK, June 27, 1970, at 72, and Hellman, *One in Ten Shoppers is a Shoplifter*, N.Y. Times, March 15, 1970, section 6 (Magazine), at 34. These articles indicate that at present chief reliance is upon surveillance and electronic detection devices. Apparently there is little emphasis on exclusion of known shoplifters, and the sheer volume of known shoplifters might well cause the problems of identification to be overwhelming—one large New York store made 18,000 shoplifting apprehensions in 1969. *Id.* at 44. Retailers' concern for shoplifting prevention has been greatly sharpened by the 150% increase in shoplifting during the 1960's. *Id.* at 34.

A possible incentive for retail stores to deny entry to known shoplifters is the ever-present threat of being sued for erroneous apprehension for shoplifting, or false arrest, which places a premium on keeping a person *outside* the premises altogether, avoiding the possibility of having to confront him while he is inside the store. *See, e.g.*, Devercelli v. The May Dept. Stores Co., Civil No. GS 18034-70 (D.C. Super. Ct., June 15, 1971), *reprinted in* 99 DAILY WASH. L. REP. 1169, 1173 (1971) ($165,000 judgment for false arrest within department store). *See also* Wash. Post, July 21, 1971, at A-1, cols. 1-5 ("large judgments against stores have been handed down recently in court suits brought by suspected shoplifters who have sued for false arrest. . . . Hecht's has been ordered to pay $165,000 and $30,000 in two cases this year . . . .").

34. *United States v. Bean*, *supra* note 1, at 972, col. 3.

be effective. The legal and practical difficulties of precluding public access to official records have generally prevented protection of former criminals, even in states with expungement statutes.[35] Further, even effective control of official records would be undermined by the ease with which large retail stores can assemble their own files on persons arrested in their own stores. With equal ease they can trade these files among themselves so that a person with a shoplifting record could be excluded from all large stores in his area.[36] There are at present no legal theories with which a concerned judiciary can prevent this type of dissemination of private records, at least so long as the records are accurate. An invasion of privacy theory does not reach this case, for two reasons. First, publicity is necessary, and selective distribution does not qualify as publicity.[37] Second, there can be no invasion of privacy when the information that is distributed is of a public nature.[38] It has been uniformly held that information about criminal activity is public in nature, and that actual or alleged involvement in criminal activity deprives a person of his right to privacy.[39] In the end, the only remedy is for defamation, which is useless so long as the information is correct.[40]

The best judicial approach to discrimination on the basis of criminal record, at least as to exclusion from retail stores, is the direct holding that in a commercial setting the ownership of property accords no such power. However, the *Bean* court is correct in its conclusion that this holding could not turn on the constitutional arguments arising from *Shelley*, or *Marsh* and *Logan Valley*.[41] It is

35. *See* Kogon & Loughery, *Sealing and Expungement of Criminal Record—The Big Lie*, 61 J. CRIM. L.C. & P.S. 378 (1970); Comment, *Criminal Records of Arrest and Conviction*, 3 CALIF. W.L. REV. 121 (1967); Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470 (1971); Note, *Employment of Former Criminals*, 55 CORNELL L. REV. 306 (1970).

36. One wonders, however, whether such a result is possible in the larger metropolitan areas, given the sheer volume of known shoplifters. See note 33 *supra*.

37. RESTATEMENT (SECOND) OF TORTS § 652D, comment *b* (Tent. Draft No. 13, 1967); Prosser, *Privacy*, 48 CALIF. L. REV. 383, 393-94 (1960).

38. RESTATEMENT OF TORTS § 867, comment *c* (1939); RESTATEMENT (SECOND) OF TORTS §§ 652D, comment *a*, 652F (Tent. Draft No. 13, 1967); Prosser, *supra* note 37, at 383, 394. *See generally* Comment, *Privileges to Report Matters of Public Interest*, 21 S.C.L. REV. 92 (1968).

39. *E.g.*, Frith v. Associated Press, 176 F. Supp. 671 (E.D.S.C. 1959); Coverstone v. Davies, 38 Cal. 2d 315, 239 P.2d 876 (1952); Barbieri v. News-Journal Co., 56 Del. 67, 189 A.2d 773 (1963); RESTATEMENT OF TORTS § 867, comment *c* (1939); RESTATEMENT (SECOND) OF TORTS § 652F, comment *d* (Tent. Draft No. 13, 1967).

40. W. PROSSER, *supra* note 15, § 111, at 823-26.

41. See notes 19-23 *supra* and accompanying text.

true that *Shelley* could logically be extended to this case, since judicial enforcement of criminal trespass laws seems to involve at least as much state action as judicial enforcement of private restrictive covenants. However, as is emphasized in *Bean*, the Supreme Court has consistently avoided extending *Shelley*.[42] Of course, the issue is not clearly foreclosed by the sit-in cases, for in those cases the extension was only sidestepped, not rejected, by a majority of the Court, and was endorsed by two justices.[43] However, a *Shelley* attack on private business discrimination would be a substantial step which the Supreme Court itself has not as yet taken, and would surely require Supreme Court authorization. Further, even if *Shelley* were accepted as a basis for finding state action, it is not at all clear that any substantive constitutional provision would prohibit discrimination based on criminal record, assuming legitimate business justifications.[44]

As a matter of both judicial economy and legal theory, a more satisfactory approach would be a common law modification of the stated rule. A common law court could hold, consistently with the factual circumstances of conventional exclusion cases, that in the context of modern retailing and matured concepts of the role of corporate enterprise, a retailer may not exclude a person who neither endangers other customers nor has shown that the particular visit has been made for purposes other than legitimate business transactions. In this connection it should be remembered that while the defendants in *Bean* and the sit-in cases were prosecuted for the statutory offense of criminal trespass, the courts look to the common law to determine

42. See text accompanying notes 24-26 *supra*. Another case in which the Supreme Court refused to extend *Shelley*, despite Justice Douglas' dissent, is Black v. Cutter Labs., 351 U.S. 292 (1956).

43. Bell v. Maryland, 378 U.S. 226, 255-60 (1964) (Douglas, J., concurring).

44. Equal protection is the obvious approach to discriminatory practices. However, equal protection cases are subject to the defense that the discrimination is not arbitrary and unrelated to a legitimate goal. *E.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). Assuming that exclusion of known shoplifters would reduce shoplifting, equal protection thus seems useless unless discrimination on the basis of criminal record were deemed to invoke the stricter equal protection standard formally recognized by the Court in Shapiro v. Thompson, 394 U.S. 618, 638 (1969). However, criminal record discrimination involves none of the accepted fundamental rights or constitutionally-proscribed classifications which have invoked the stricter standard in *Shapiro* (right to interstate travel), Loving v. Virginia, 388 U.S. 1 (1967) (race and right to marry), and Williams v. Rhodes, 393 U.S. 23 (1968) (right to political association). In any case, equal protection has not yet restricted the ability of states themselves to discriminate against former criminals. *See* Kogon & Loughery, *supra* note 35, at 384-85; Note, *Discrimination on the Basis of Arrest Records*, *supra* note 35, at 474-75; Note, *Employment of Former Criminals*, *supra* note 35, at 308-12.

if such persons are trespassers. The *Bean* court felt that judicial relief for discrimination by private businessmen would require a "tortured" interpretation of the existing law.[45] The court thus ignored a critical characteristic of the common law—that rules change with the facts which give those rules meaning. The common law is primarily a process by which accepted rules are tested for continued validity by comparing the circumstances and societal attitudes from which they arose with the new sets of circumstances and attitudes brought before the courts in succeeding cases.[46] It is now appropriate to extensively modify the rule that a private businessman may discriminate among his patrons at will.

There are three obvious differences between the present cases involving discrimination based on race or criminal record, and the traditional cases such as those cited by the *Bean* court. The first, and the narrowest, is that the traditional cases almost uniformly deal with the rowdy and obnoxious customer who is disturbing or endangering other customers.[47] Only the rare case has supported an owner's right to exclude for a reason other than this one, or has supported

45. *United States v. Bean, supra* note 1, at 972, col. 3.

46. A discussion of this characteristic of the law may be found in E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948). Professor Levi summarizes his arguments at 1-4 and 102-04. A striking example of this process is the evolution of the "inherently dangerous" rule, leading to MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) and the breakdown of the privity limitation on liability for injuries caused by negligently-made products. E. LEVI, *supra*, at 8-27. The change could occur because an advancing industrial economy had modified the relationships of the various parties, the character of the sales transaction, and the buyer's capacity to protect himself against defective goods.

47. Of thirty-nine reported cases since 1900 which have dealt with exclusion of a patron from a retail establishment, twenty-four are concerned with apparently temporary ejection of a boisterous or rowdy patron. See, *e.g.*, cases cited in note 10 *supra*. The New York race track cases account for three more (these cases are discussed and distinguished at notes 11-12 *supra*), and *In re D.* is another (discussed and distinguished at notes 13-15 *supra*). Nine cases supported the right of retail establishments to exclude all blacks and to arrest sit-in demonstrators protesting against this policy. *See, e.g.*, State v. Avent, 253 N.C. 580, 118 S.E.2d 47 (1961); Greenville v. Peterson, 239 S.C. 298, 122 S.E.2d 826 (1961), *rev'd on other grounds*, 373 U.S. 244 (1963). Treating these sit-in cases as questionable precedent for a total power of exclusion by modern corporate retailers, one is left with two cases which lend direct support to permanent exclusion from a retail establishment for reasons possibly independent of race, protection of customers, and regulatory requirements. One of these involved exclusion from a gambling casino for prior misconduct of an undisclosed nature. Scott v. Justice's Ct., 84 Nev. 9, 435 P.2d 747 (1968). The other involved exclusion for undisclosed reasons from a one-man store owned by a larger corporation. Alabama Fuel & Iron Co. v. Courson, 20 Ala. App. 312, 101 So. 638 (1924). Of the cases cited in *Bean* which actually deal with exclusion from a retail establishment of a person seeking to transact business, *United States v. Bean, supra* note 1, at 970, col. 3, and at 971, col. 1, one is a sit-in case and the others all involve apparently temporary exclusion based on misconduct during the course of the visit in question.

permanent exclusion even for this reason.[48] It is not clear that a blanket power of permanent exclusion, on a basis such as race or criminal record, should be based on cases dealing with rowdy drunkards. Second, the basic rule was established at a time when retail shops were the personal business of their owner and his family. Typically, a more personal relationship existed between the proprietor and his customers, with greater elements of personal service in the proprietor's role. If there was justification for a right of arbitrary exclusion in such a context, this justification is quite completely lost in the context of large, impersonal, self-service corporate retailers.[49] One is hard-pressed to find any basis either in protecting personal privacy or in society's interest in encouraging entrepreneurship, for permitting exclusion of someone who wishes to do business in a corporate establishment that seeks to attract and sell to the general public. The third difference between the older exclusion cases and *Bean* is the current acceptance of the notion that private businesses may properly be subjected to societal burdens both as a method of effecting such social policies as racial integration and humane working conditions, and as a method of spreading both the burdens resulting from these policies and the normal risks inherent in a mass-production industrial economy.[50]

Against this evolving background of the nature of retail trade and of our concepts of the role of business in society, a court faced with the *Bean* situation must recognize that the basis for excluding shoplifters is not personal individual preferences or protection of other customers. Rather, it is that by doing so one excludes a class whose individual members are more likely to engage in shoplifting

48. See note 47 *supra.*

49. Concerning the continued growth of corporate retailing, see note 32 *supra.*

50. Child-labor laws, pollution control, workman's compensation, and the 1964 Civil Rights Act are legislative results of the realization that today's businesses have too great an impact on the quality of life, and on our efforts to bring social fact into line with social values, to be treated as strictly private. Similarly, the courts have eliminated the rule of caveat emptor and are now evolving a doctrine of strict products liability. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960). The courts have also imposed the full and extensive duty of care and standard of foreseeability owed to business invitees, W. PROSSER, *supra* note 15, § 61, the responsibility of a business enterprise for the negligence of its employees, *id.* § 69, and such contract doctrines as unconscionability, A. CORBIN, CONTRACTS § 128 (1963), and voidness as against public policy, *id.* § 1375. The older common-law concept that common carriers and innkeepers are public businesses, bound to serve all comers, RESTATEMENT (SECOND) OF TORTS § 259 (1965), is also precedent for the judicial capacity to impose public-interest burdens on businesses.

than is the average customer.[51] This may reduce the losses from shoplifting and the costs of store security operations, resulting in some combination of higher profits and lower consumer prices,[52] but one wonders whether these economic gains should be given great weight against the restrictions and public humiliation that an exclusionary policy imposes on former shoplifters, whether or not they are attempting to enter the store for a legal purpose. Our criminal system generally goes to great expense and formulates elaborate procedure to prevent the sacrifice of individual justice for the sake of more expedient law enforcement. Private businesses of a large and impersonal nature should not be allowed in their public contacts to defeat the fundamental societal policies of racial equality, individualized justice, and defined rehabilitative punishment. Our concern for private property should be reflected less in terms of property and more in terms of privacy and the emerging constitutional protections for privacy.[53] That property happens to be owned privately should not be allowed to mechanically control questions of access[54] in complete disregard of whether the property is a home, a semi-private office, a family shop, or one of the many Sears, Roebuck outlets. Discriminatory exclusion from business property may be eliminated by common law courts within their tradition of shaping legal rules to the existing factual setting and to prevailing perceptions of both social values and the proper roles of various segments of society.

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51. *See United States v. Bean, supra* note 1, at 972, col. 3.

52. Retailers estimate their annual shoplifting losses at two billion dollars. Hellman, *supra* note 33.

53. *See* Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965).

54. That rights arising from private ownership may be judicially limited was recognized recently in State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971), a criminal trespass prosecution against persons seeking to visit migrant farm workers at quarters owned by the workers' employer. In reversing the conviction, a unanimous court refused to extend *Marsh* or other constitutional doctrines. *Id.* at ____, 277 A.2d at 371. Rather, the court ruled that there was no trespass—no possessory right of the owner had been invaded, for he could have no right to "isolate the migrant worker in any respect significant for the worker's well-being." *Id.* at ____, 277 A.2d at 374. In so holding, the court stated that "[p]roperty rights serve human values. They are recognized to that end, and are limited by it." *Id.* at ____, 277 A.2d at 372. The *Shack* court was clearly exercising a common-law power to determine the rights accorded private ownership.