

## Shoplifting and the Law of Arrest: a Problem in Effective Social Legislation

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# Comments and Casenotes

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## Shoplifting And The Law Of Arrest: A Problem In Effective Social Legislation

*"For the most part, the purpose of the criminal law is only to induce external conformity to rule."*

—Holmes, *The Common Law*\*

In the area of effective social control of shoplifting, the need for statutory alteration of the common law rule has become increasingly apparent in recent years. Many states have enacted statutes in response to this need. The introduction of legislation in the 1956 session of the Maryland legislature, and indications of further pressure for this in the current session, suggests the advisability of careful analysis of the problem.

### I.

In a crowded department store, on Christmas Eve, a customer was seen removing things from the open counters where they were displayed and putting them into his pockets. The elderly gentleman, a retired process server, was stopped by a store detective and her assistant, who had witnessed the actions, and was taken to the second floor offices of the store. After twenty minutes of denials, the customer was found to have in his possession the goods he was accused of having taken. He nevertheless refused to sign the store's confession blank, and was therefore arrested. In the ensuing criminal trial, held the day after Christmas, he was found innocent. He then filed suit for false arrest and malicious prosecution. On the first count the jury found in his favor, fixing damages at \$3,500.00.<sup>1</sup>

This is one of the many reported decisions where a person, who was believed to have committed larceny, has obtained a large verdict against an honest merchant whose sole fault lay in a desire to protect his own property. It

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\* *THE COMMON LAW* (1881), Lecture II "The Criminal Law," reprinted in *THE MIND AND FAITH OF JUSTICE HOLMES* (1943) 62.

<sup>1</sup> *Collyer v. S. H. Kress Co.*, 44 P. 2d 638 (Cal. App. 1935), rev'd 5 Cal. 2d 175, 54 P. 2d 20 (1936). Although this judgment was reversed on appeal, the case is a clear exemplification of possible jury reaction to false imprisonment claims. Under Maryland law, it appears that the verdict would have been sustained, see n. 2 *infra*, and the case is one in which a modification of the older common-law was required to support the equitable result obtained on the appeal (see n. 9 *infra*).

would appear that a similar result could be reached in Maryland.<sup>2</sup>

Each year, goods the value of which is conservatively estimated to be over \$100,000,000.00, are removed from stores by shoplifters.<sup>3</sup> In Maryland it is estimated that between \$2,000,000.00 and \$3,000,000.00 per year is lost in this way.<sup>4</sup> Accurate figures are impossible to obtain due to the accounting methods customarily employed by large stores. Many believe that the actual figures exceed these estimates.<sup>5</sup>

In addition to the amount of the annual loss, shoplifting has other ramifications: professional shoplifters are, of necessity, associated with the nationwide underworld of receivers, or "fences", and many of the thieves, although not themselves narcotic addicts, use a large portion of their daily proceeds to support narcotic addiction in others.<sup>6</sup>

## II.

The main difficulties that the merchant faces in his attempts to protect his own property are caused by the application of common-law rules relating to false arrest and false imprisonment. Although he may have a highly developed system of detection, in the case of the larger department stores, or have his entire staff on the lookout in the smaller stores, ultimately these protection services are faced with the difficult decision of whether to detain the suspect for a short time in an effort to determine if there has in fact been a crime committed by him, and in so doing risk suit for false imprisonment and false arrest, or to allow the suspect to leave the store carrying with him the merchant's property.

<sup>2</sup> *Safeway Stores, Inc. v. Barrack*, 210 Md. 168, 173, 122 A. 2d 457 (1956), where it is said:

"In the . . . action for false imprisonment, there must be a deprivation of the liberty of another without his consent and without legal justification. Although intent is necessary, 'malice' is not, nor is probable cause a defense. *Fleischer v. Ensminger*, 140 Md. 604, 620; *Prosser, Torts*, 2d ed. p. 52."

<sup>3</sup> *Wall Street Journal*, October 31st, 1956.

<sup>4</sup> Retail Merchants of Baltimore; *Cf.* \$12,500,000.00 estimated in Pennsylvania in *The Shoplifting Problem in Pennsylvania*, 61 Dickinson L. Rev. 255 (1957), and \$4,500,000.00 for Florida mentioned in the preamble to the shoplifting statute enacted in that state.

<sup>5</sup> *Waltz, Shoplifting and the Law of Arrest: The Merchant's Dilemma*, 62 Yale L. J. 788 (1953) *fn.* 5, where, on the basis of the 1948 United States Census of Business, the author concludes that in 1948 the total national loss was \$246,106,000.00.

<sup>6</sup> *Waltz, ibid.*, 791; Interviews. The author interviewed a number of merchants, enforcement and protection officers, and much of the factual data herein was culled from these talks. Occasionally this has been noted in the footnotes. Names of the persons interviewed have been withheld.

It is submitted that the common-law rules, developed at a time when the modern merchandising methods were unknown, are ill-adapted to the current needs.

The tort of false imprisonment is one of the most ancient known to Anglo-American law. There is evidence of a highly developed rule relating to the wrong as early as 1348.<sup>7</sup> This rule is applicable in all its stringency in Maryland today.<sup>8</sup> In some states, in the absence of statute, a limited privilege of temporary detention for investigation is afforded.<sup>9</sup> The Restatement of Torts 2d has recognized this privilege.<sup>10</sup> There it is stated:

“One who reasonably believes that another has tortiously taken a chattel upon his premises, or has failed to pay for a chattel . . . is privileged without arresting the other, to detain him on the premises for the time necessary for a reasonable investigation of the facts.”<sup>11</sup>

This is a very limited privilege.<sup>12</sup> Although such an approach is an improvement on the older common-law rule,

<sup>7</sup> f 104 pl. 85 Lib. Assis. (1348).

“. . . Et nota per Thorp que imprisonment est dit en chacun ca[s]e ou hom[m]e est arrest per force et encontre sa volunt, tout foit en la haut strete or ailours tout ne foit il my emprison en meason, etc.”

This quotation is Norman legal French, and the following is the best translation the author was able to obtain:

“And it was noted by Thorp that imprisonment is said to occur in each case where a man is arrested by force and against his will, in the high street or elsewhere, and it is not necessary that one be imprisoned in a house, etc.”

<sup>8</sup> Safeway Stores, Inc. v. Barrack, 210 Md. 168, 122 A. 2d 457 (1956).

<sup>9</sup> Montgomery Ward & Co. v. Freeman, 199 F. 2d 720 (4th Cir. 1952); Kroger Grocery & Baking Co. v. Waller, 208 Ark. 1063, 189 S.W. 2d 361 (1945); Collyer v. S. H. Kress & Co., 44 P. 2d 638 (Cal. App. 1935) rev'd in 5 Cal. 2d 175, 54 P. 2d 20 (1936); Bettolo v. Safeway Stores, 11 Cal. App. 2d 430, 54 P. 2d 24 (1936); Tell v. May Department Stores Co., 348 Mo. 696, 155 S.W. 2d 74 (1941); Cohen v. Lit Bros., 166 Pa. Super. 206, 70 A. 2d 419 (1950); Little Stores v. Isenberg, 26 Tenn. App. 357, 172 S.W. 2d 13 (1943). See also, as to the detention of one suspected of failure to pay for services: Cox v. Rhodes Avenue Hospital, 198 Ill. App. 82 (1916); Standish v. Narragansett S.S. Co., 111 Mass. 512, 15 Am. Rep. 66 (1873); Jacques v. Childs Dining Hall Co., 244 Mass. 438, 138 N.E. 843, 26 A.L.R. 1329 (1923); Lynch v. Metropolitan El. R. Co., 90 N.Y. 77, 43 Am. Rep. 141 (1882). All of these cases are discussed at length in an excellent Comment, *The Protection and Recapture of Merchandise from Shoplifters*, 46 Ill L. Rev. 887 (1952) and 47 Northwestern Univ. L. Rev. 82 (1952).

<sup>10</sup> RESTATEMENT OF TORTS, SECOND (1957) Tentative Draft No. 1.

<sup>11</sup> *Op. cit. ibid.*, §120A.

<sup>12</sup> “The specific problem is that of the suspected shoplifter in the department store or other place of business. When a man is apparently lifting goods off a counter, the shopkeeper is put in a very difficult position. He must either go ahead and detain that individual, in which case he risks liability for false imprisonment or for false arrest, in case he calls a policeman, or he must sit there or stand there and let the individual walk out of his shop, perhaps with the goods con-

there is still the uncertainty whether the courts of any particular jurisdiction will accept it as a reasonable alleviation of the harsh results of earlier cases. If accepted, the Restatement rule still leaves the position of the merchant very uncertain.<sup>13</sup>

Related to the law of false imprisonment, yet distinct from it, is the law of false arrest. Both at common-law, and under the statutes of all the states having legislation on the subject, it is settled that an officer may arrest without a warrant for a felony committed in his presence, when a felony has in fact been committed and he has reasonable grounds to believe it was committed by the person arrested. With regard to arrest by an officer without a warrant for a misdemeanor, two different rules are laid down, one restricting arrests for misdemeanors to breaches of the peace committed in his presence, the other allowing an arrest to be made when any misdemeanor is committed in the presence of the officer. The right of a private person to make an arrest is more limited, and is generally said to exist in but two situations: where the person arrested has committed an act amounting to a breach of the peace or a felony in the presence of the one making the arrest, and where a felony has in fact been committed and the person making the arrest has reasonable grounds to believe that the person arrested has committed it. Under these principles, where the suspect has merely committed a misdemeanor by the theft of goods, an arrest by a private person would not be warranted and would subject the person to liability for false arrest.<sup>14</sup>

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cealed on his person, with a fair certainty that he will never see him again. Whatever he does, he is likely to be wrong.

"In that situation, about a dozen courts now . . . have developed this very limited privilege on the part of a shopkeeper to detain the suspected thief for a short period of time, simply to investigate the facts, to check whether he has paid for the thing that he is carrying out of the store, to ascertain his name, identity or address, or to do whatever else is reasonable under the circumstances.

"It is obviously a very limited privilege."

Prosser, 1957 Proceedings of the American Law Institute, 281.

<sup>13</sup> Dean Prosser, the Reporter, recognizes this. Of the privilege, worked out on common-law bases, he says:

"It may be fairly futile. It does not include the power of search so far as the cases indicate. It may be fairly futile, except that the detention itself is likely to produce a result by making the shoplifter try to make a deal to get out of it. It has some value." *Op. cit. ibid.* 283.

<sup>14</sup> AMERICAN LAW INSTITUTE, MODEL CODE OF CRIMINAL PROCEDURE, (1930) §§21, 22, 25, 26, 36, and especially commentary to §21 at page 231; HOCHHELMER, THE LAW OF CRIMES AND CRIMINAL PROCEDURE, (2d ed., 1904) 80, Ch. 10, and especially 83, §67, Arrest without Process; Thomas, Procedure in Justice Cases (1909) 271, § 343; Kauffman, *The Law of Arrest in Maryland*, 5 Md. L. Rev. 125 (1941).

In addition to the civil liability the merchant risks under the present law, there is also the possibility that he may be held criminally accountable. Both false arrest and false imprisonment are common-law crimes.<sup>15</sup>

In view of the risks that the merchant runs each time he detains one who is suspected of having stolen property on the premises of his place of business, the merchant must be very sure of the guilt of a suspect before he is willing to ask any questions.<sup>16</sup>

### III.

The protection afforded by the police (very little, due to the practicalities of law enforcement) is but slight deterrence to the systematic raids of the professional, and of practically no value in guarding against the amateur. The professional restricts his activities to the higher price articles, and the police, when they do act, may be of some assistance in his apprehension. The amateur, however, has more cosmopolitan interests and, although less loss is attributable to his forays, he is much more difficult to apprehend.<sup>17</sup> The larger stores can afford the protection services of a full-time, trained staff of persons skilled in the detection, apprehension, and handling of those seen stealing. The smaller stores are unable so to protect themselves, and are forced to rely on the discretion and untrained abilities of their regular sales personnel. Mechanical devices are expensive, of limited usefulness, and are not generally employed. Only in the larger stores are any numbers of persons caught in the act. The professional and the more careful amateurs are seldom caught in the act and, in view of the current state of the law, only rarely detained for investigation.<sup>18</sup>

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<sup>15</sup> *Midgett v. State*, 216 Md. 26, 139 A. 2d 209 (1958); HOCHHEIMER, *ibid.* §316, False Imprisonment. The definition of false imprisonment is broad enough to include false arrest; it would appear that false arrest could also be considered as a type of assault, HOCHHEIMER, *ibid.*, §254, assault.

<sup>16</sup> Interviews.

<sup>17</sup> Interviews. This is due to the larger number of amateur shoplifters, most of whom were characterized as "impulse shoplifters" (*i.e.* those who yielded to the attractions of the modern merchandising display) and to the difficulty of determining in advance what might appeal to any one amateur. Much of the merchandise recovered from amateurs, both in department and grocery stores, is of trifling value. It is the number of such thefts rather than the amount stolen at any one time which causes substantial losses to be attributed to amateurs.

<sup>18</sup> Interviews. Many persons, not actually seen in the act, are allowed to leave stores even though a few questions would suffice to establish the suspect's guilt or innocence. In the main, those questions go unasked because of fear of prosecution.

## IV.

Because of the special character of the merchants' problems, statutes have been enacted in twenty-three states affording some measure of protection against shoplifting.<sup>19</sup> These statutes range from an amendment of a general larceny statute,<sup>20</sup> to statutes allowing the merchant, merchant's employee, or a peace officer, to detain those whom they have reasonable grounds for suspecting are guilty of the specifically defined crime of shoplifting, for a reasonable time and in a reasonable manner.<sup>21</sup> A classification of these statutes may be of assistance in analyzing what these statutes have accomplished:

1. Amendment of the general larceny statute:
  - Massachusetts<sup>22</sup>
2. Defining the crime of shoplifting:
  - a. In terms of possession or wilful concealment:
    - Arizona,<sup>23</sup> Idaho,<sup>24</sup> Maine,<sup>25</sup> Mississippi,<sup>26</sup> New Hampshire,<sup>27</sup> North Carolina,<sup>28</sup>
  - b. In terms of the traditional larceny concept:
    - (i) with a presumption from the possession of goods:
      - Arkansas,<sup>29</sup> Kentucky,<sup>30</sup> Pennsylvania,<sup>31</sup> South Carolina,<sup>32</sup>
    - (ii) without such presumption:
      - Georgia,<sup>33</sup> Virginia.<sup>34</sup>

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<sup>19</sup> These statutes are analyzed and classified below. The reference for each state appears at the appropriate place in the analysis.

<sup>20</sup> 9A ANN. LAWS MASS. (1956), Ch. 276, §28.

<sup>21</sup> See the analysis below.

<sup>22</sup> 9A ANN. LAWS MASS. (1956), Ch. 276, §28.

<sup>23</sup> LAWS ARIZ. (1958), Ch. 8 (§13-673).

<sup>24</sup> IDAHO CODE (1957 Cum. Supp.) §18-4626.

<sup>25</sup> 4 REV. STATS. ME. (1957 Cum. Supp.), Ch. 132, §10-A.

<sup>26</sup> H.B. 90.

<sup>27</sup> LAWS N.H. (1957) Ch. 81.

<sup>28</sup> 1B GEN. STATS. N.C. (1957 Cum. Supp.) §14-72.1.

<sup>29</sup> ACTS ARK. (1957), Art. 50, §4.

<sup>30</sup> H.B. 25, Ch. 11, §1 (1958), will be 1 K.R.S. §433.234.

<sup>31</sup> 18 P.S. (1958 P.P.) §4816.1.

<sup>32</sup> 2 S.C. CODE (1958 Cum. Supp.) §16-357.1-4.

<sup>33</sup> 10 GA. CODE ANN. (1958 Cum. P.P.) §§26-2640—26-2642.

<sup>34</sup> 4 CODE VA. (1958 Cum. Supp.) §§18-187.1-3.

3. Allowing reasonable detention of a suspect by the merchant without incurring civil or criminal liability:

Alabama,<sup>35</sup> Arkansas,<sup>36</sup> Arizona,<sup>37</sup> Florida,<sup>38</sup> Georgia,<sup>39</sup> Illinois (civil immunity only),<sup>40</sup> Kentucky,<sup>41</sup> Minnesota (detention for limited purpose only),<sup>42</sup> Mississippi (suspect may be questioned but not searched),<sup>43</sup> Nebraska,<sup>44</sup> Ohio,<sup>45</sup> Oklahoma (detention until a peace officer may be summoned),<sup>46</sup> Pennsylvania,<sup>47</sup> Tennessee,<sup>48</sup> Utah.<sup>49</sup>

4. Other approaches:

Montana: "Any merchant shall have the right to request any individual on his premises to place or keep in full view any merchandise such individual may have removed, or which the merchant has reason to believe he may have removed, from its place of display . . . [without being] criminally or civilly liable for slander, false arrest, or otherwise, on account of having made such request."<sup>50</sup>

Wisconsin: Defines a right of recapture and allows the merchant or other owner of property to threaten and use force against another to prevent or terminate what he believes is an unlawful interference with his property. The threat must be reasonable and the use of force may not be such as may cause great bodily harm or death solely for the defense of property. A third party, which specifically includes an employee, is accorded a similar privilege.<sup>51</sup>

<sup>35</sup> 53 CODE ALA. (1957 Supp.) §334.

<sup>36</sup> ACTS ARK. (1957) Art. 50, §4.

<sup>37</sup> LAWS ARIZ. (1958), Ch. 8 (§§13-674-5).

<sup>38</sup> 22 FLA. STAT. ANN. (1958 Cum. P.P.) §811.022.

<sup>39</sup> 10 GA. CODE ANN. (1958 Cum. P.P.) §§26-2640-42.

<sup>40</sup> 38 SMITH HURD ANN. STAT. ILL. (1958 Cum. P.P.) Ch. 38, §§252.1-4.

<sup>41</sup> H.B. 25, Ch. 11, §1 (1958), will be K.R.S. §433.234.

<sup>42</sup> MINN. STAT. ANN. (1958 Cum. P.P.) §622.27.

<sup>43</sup> H.B. 90.

<sup>44</sup> NEB. R.S. (1957 Supp.) §29-402.01.

<sup>45</sup> 29 PAGE'S OH. REV. CODE (1958 Supp.) §2935.041.

<sup>46</sup> 22 OKLA. STAT. ANN. (1958) §1341.

<sup>47</sup> 18 P.S. (1958 P.P.) §4816.1.

<sup>48</sup> 7 TENN. CODE ANN. (1957 Cum. Supp.) §§40-824-826.

<sup>49</sup> LAWS UTAH (1957) Ch. 166.

<sup>50</sup> MONT. REV. CODE, Repl. Vol. 4 (1957 Cum. Supp.) §64-213.

<sup>51</sup> WIS. STATS. ANN. (West, 1958) §939.49: cf. "The Protection and Recapture of Merchandise from Shoplifters" *op. cit. supra*, n. 9.

All of this legislation is new; prior to 1955 there were no statutes which gave the merchant any protection in any state. Some of the statutes are therefore worthy of comment.

The most common type of statute and one which was introduced by the Hon. Melvin R. Kenney and rejected by the Maryland legislature in 1956 is:

"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 may recover them by taking the person into custody, may, for the purpose of effecting 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 peace officer, merchant, or merchant's employee shall not render such peace officer, merchant or merchant's employee criminally or civilly liable for false arrest, false imprisonment or unlawful detention."<sup>52</sup>

Although the American Civil Liberties Union has stated that it would fight this type of bill and, in the event of its passage, attempt to have it held unconstitutional,<sup>53</sup>

<sup>52</sup> H.B. 148. It was introduced by Delegate Kenney February 21, 1956.

<sup>53</sup> Woman's Wear Daily, June 10, 1957, p. 1.

"ANTI-SHOPLIFT LAWS IN STATES FACE CHALLENGE. *Individual rights issue stressed.* Anti-shoplifting laws in force or pending in some twenty odd States may be challenged on the basis of possible infringement of individual rights guaranteed by the United States Constitution.

"These bills have, in most cases, been sponsored by supermarket operators and other merchant groups and they generally provide merchants, their employees and the police with some measure of immunity from the liability of false arrest when detaining suspected shoplifters on the premises. A prototype bill was passed by Florida in 1955 and other States have sought to follow suit.

"In the first such step on the national level, the American Civil Liberties Union has taken a position that the false arrest immunity is an infringement of the Bill of Rights.

"Specifically, to grant immunity from a false arrest action is an 'infringement on the right of a person to be secure in his person' as provided in the Fourth Amendment, Patrick Murphy Malin, executive director, A.C.L.U., said.

"The A.C.L.U. has just notified its 23 affiliates of the stand taken by its Due Process-Equality Committee.

"No test case is planned at this time. However, it is to be expected that local civil liberties groups will offer testimony at hearings on such bills in the various State legislatures.

"A.C.L.U. or its affiliates may also appeal to Governors to veto such bills when they come before them for signing as well as write letters to the newspapers and take similar steps to rally public opinion."

there are no reported cases in which the validity of such a clause has been adjudicated.

Illustrative of a better compromise is the statute recently enacted by the Legislature of Arizona:

“§13-673. A person who wilfully takes possession of any goods, wares or merchandise offered for sale by any wholesale or retail store or other mercantile establishment without the knowledge or consent of the seller, with the intention of converting such goods, wares, or merchandise to his own use without having paid the purchase price thereof, is guilty of shoplifting . . . .

“§13-674. A peace officer may, upon a charge being made, and without a warrant, arrest any person whom he has reasonable cause to believe has committed or attempted to commit the crime of shoplifting or wilful concealment in any wholesale or retail store or other mercantile establishment.

“§13-675. Reasonable cause shall be a defense to a civil or criminal action brought for false arrest, false imprisonment, or wrongful detention against a police officer, merchant or merchant's employee, by a person suspected of shoplifting . . . .”<sup>54</sup>

A similar enactment was adopted in 1958 in Georgia, in which it is provided that if as a result of a detention and arrest of a person reasonably thought to be engaged in shoplifting, the person so detained should bring suit for false arrest or for false imprisonment against the owner or operator of a store or his employee, no recovery may be had if it is established that the suspect behaved in such manner as to cause a man of reasonable prudence to believe that the suspect was shoplifting, and that the detention and arrest and the length of the detention was reasonable.<sup>55</sup> A 1958 Mississippi statute is of a similar type, although only questioning (not search) is permitted.<sup>56</sup>

The Arizona type of statute appears to consider more adequately than the earlier statutes the interests of both the merchant and the public. It helps the merchant by

<sup>54</sup> LAWS ARIZ. (1958) Ch. 8 (§13-673).

<sup>55</sup> H.B. 91.

<sup>56</sup> H.B. 90, Caveat: No official version of the Mississippi and Georgia civil statutes was obtainable. Mississippi's Secretary of State forwarded a mimeographed copy of the statute said to be the one that had been approved by the Governor April 2d, 1958; Georgia sent a copy of its earlier enactment. In neither case were the session laws available.

defining a specific crime of shoplifting (although that definition could be improved) and by giving him a defense of reasonable cause against civil and criminal suits. However, it protects the public by more clearly placing the burden of proving reasonable cause on the defendant merchant, an important matter left in doubt by the Kenney bill and its Florida prototype. It makes the crime a more readily enforceable one by extending the power of arrest without warrant.

## V.

The problem of resolving the conflict between the interests of the merchant and those of the general public is a difficult one. The extent of the difficulty is indicated by the different ways in which the twenty-three states now having statutes have approached the problem.

In drafting a statute of this type, it is important to keep in view the interests that are to be protected. An adequate definition of the crime of shoplifting involves no countervailing social interests, and without question the first approach to the problem is the enactment of an effective criminal statute under which special consideration is given to the shoplifting problem, not only as it exists in the larger stores which are in the main, those which have done the most lobbying for these bills, but also as it exists in the smaller ones. Of all the states which have enacted statutes defining the crime, the state which has given the most clear, comprehensive, and detailed consideration to all of these interests is Georgia. The statute there enacted defines certain ascertainable indicia of the crime, i.e.,

- (1) Removal of goods from the immediate place of display;
- (2) Concealment of goods removed from the place of display;
- (3) Alteration of a label or other marking on any goods;
- (4) The transfer of goods from the container in which they are displayed, to other containers.<sup>57</sup>

Such treatment of the crime achieves two desirable ends: the merchant is provided with a clear statement of what acts constitute the statutory crime of shoplifting, and the

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<sup>57</sup> 10 GA. ANN. CODE (1958 Cum. Supp.) §§26-2640 through 26-2642.

crime is rather simple to prove in court. The principle defect in the statute is the absence of presumptions which will aid in the prosecution of offenders. All of the facts that are essential, when such presumptions are added to the definition, are readily provable physical ones. The traditional larceny concepts are adhered to as distinguished from creating a new statutory crime of wilful concealment which other states have favored. Although there are requirements of intent in each of these approaches, the more traditional one is more likely to find acceptance from the bar and bench.<sup>58</sup>

Although the need for precise accuracy of language in affording statutory protection to merchants against unjustified suits is not necessarily as high as it is in establishing a new statutory crime, still it is felt that the use of vague words, such as "reasonable", "reasonably", etc., in the contexts of many of the statutes examined has the undesirable effect of failing to give to the public and to the merchants a clear statement of what their rights are under them. To some extent this is unavoidable due to the nature of the subject.

There is a need for statutory protection of the merchant against meritless civil suits. On the other hand it is not believed that all suits should be forbidden, for where the merchant has acted in a grossly unreasonable manner, it is only by civil suit that the aggrieved person is afforded any redress. The broad immunity granted by some of the statutes is to be eschewed, but at the same time it should be clear that to give only a definition of the crime of shoplifting, without providing the merchant with some means of enforcing his new protection is insufficient.

The grant of civil (but not criminal) immunity to the merchant or storekeeper, accompanied by provisions compelling him to prosecute all those who were discovered shoplifting, initially appealed to this author as placing the merchant in the proper position, giving him both responsibility and protection against shoplifters, while at the same time subjecting him to public control. However, the merchants seemed generally to object to the interference with

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<sup>58</sup> Illustrations of other criminal statutes with presumption are found in 3 MD. CODE (1957), Art. 27, §13 (Barratry); §§192-194 (connections or pipes circumventing gas and electric meters prima facie proof of intent to defraud); §321 (burden of proving a killed animal at place where usually killed was not intended for human consumption rests on the party charged); §376 (presence of a machine gun prima facie proof of possession or use of the machine gun by each person occupying the room where found).

their discretion in choosing whether or not to prosecute.<sup>59</sup> Also, protection service personnel interviewed felt that it would be too harsh to the truly penitent amateur to require prosecution of all cases.

In view of this, and accepting the fact that remedial legislation should change existing business practice only when necessary to effectuate its purposes, the author has decided that a more desirable initial approach to affording statutory protection to the merchant would be to grant a "reasonable cause" defense to all actions brought for false arrest, false imprisonment, and wrongful detention, somewhat like the approach which Arizona has recently adopted,<sup>60</sup> but with the definition of the crime of shoplifting perfected as in the Georgia statute. The principal difficulty with this approach lies in the definition of "reasonable cause". It is as ambiguous a phrase as "reasonable" and "reasonably" used in other statutes, and offers only

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<sup>59</sup> An illustration of the discretion used may be seen in the testimony in the case of Safeway Stores, Inc. v. Barrack, 210 Md. 168, 122 A. 2d 457 (1956), October Term 1955, No. 180, Appellants Brief pp. 17-18, and App. 21 and 23:

"Q. Is it (sic) true in your employment your job is to protect the Safeway, isn't it? A. It is.

Q. Isn't it also true to protect the patrons of the Safeway? A. Protect the patrons?

Q. The customers? A. I guess so, I don't know anything about that; my job is to try to break up shoplifting.

Q. If you saw somebody had stolen something from Safeway, you would have called the police immediately, wouldn't you? A. Not in all cases; we let most of them go; I wouldn't say most of them; I would say we let the majority of them go who are decent enough and say they are sorry they did it, we let them go and that is all there is to it.

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Q. You have testified that you, not only you, but detectives generally, arrest some customers and don't arrest other customers. A. We do.

Q. Would you explain the circumstances under which you would be likely to arrest people and when you would be likely not to arrest people? A. Well Mr. Anderson told me—

Q. Who is Mr. Anderson? A. Mr. Anderson is head of Safeway in Washington; he is the general superintendent; he told me to use my own discretion if the people acted nasty, just do what I wanted to do with them.

Q. Don't you mean that he was the Retail Operations Manager of the Washington D. C. Division? A. That's right.

Q. What is your procedure, for instance, if you see someone take some merchandise and put it in their pockets and then go through the check stand without paying for it; then you accost them and say 'How about that butter you forgot to pay for?' What happens if they say, 'Oh yes, I forgot to pay for it' and offer to pay? A. Well, I let them go; I hardly ever lock anybody up who is actually half-way decent, and sorry they did it. or they have some good excuse and they say that they are not going to do it again. If I locked everybody up I caught, I would probably be in court all the time.

<sup>60</sup> See *supra*, n. 54.

poor protection unless it is in some way limited or defined in advance. This may be accomplished by the inclusion of two provisions which, in combination, will provide the courts with an intelligible standard of reasonableness. A clause stating that the rule of construction that statutes in derogation of the common-law are to be narrowly construed shall not be applied, and a clause expressly providing that the statute should be construed to effect its intended purpose, when accompanied by a preamble setting out in some detail what that purpose is, should be adequate to do this. From that point the determination of particular factors to be considered in the evaluation of the reasonableness of the belief that a suspect has committed shoplifting would be left to the courts. To the extent that this accomplishes the definition of a legislative standard of reasonableness, the vagueness of the protection afforded by the Restatement's rule is minimized,<sup>61</sup> while still allowing the interpretation to be made on a case by case basis.

In addition to the possibility of defining a new crime of shoplifting, accompanied by statutory defenses to merchants who reasonably seek to detect and secure prosecution of offenders, some consideration should be given to the possibility of extending the practice already prevalent in Baltimore City, of allowing the stores to designate certain of their employees as special policemen, or "peace officers". These have deterrent value because they have the larger powers of an officer to arrest without a warrant. At the same time this "deputizing" process offers reassurance that a certain degree of control is retained by the police commissioner to see that enforcement under the statute is not abused. It is thought to be beyond the scope of this comment to consider the mechanisms of such a procedure, but from what the author has seen of the practice, it is to be recommended.

In the light of the foregoing, the author would suggest that the shoplifting problem can best be dealt with at this time by the enactment of a new statute, with a preamble and provisions substantially as in the proposed draft appended hereto.<sup>62</sup>

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<sup>61</sup> See *supra*, n. 11-13.

<sup>62</sup> For literature on the shoplifting problem in general, and other proposed drafts, see Comment, *The Shoplifting Problem in Pennsylvania*, 61 Dickinson L. Rev. 255 (1957); Waltz, *Shoplifting and the Law of Arrest: The Merchant's Dilemma*, 62 Yale L. J. 788 (1953); Note, *Shoplifting — An Analysis of Legal Controls*, 32 Ind. L. J. 20 (1956); Mayfield, *Shoplifting in Tennessee*, 24 Tenn. L. Rev. 1177 (1957).

## PROPOSED DRAFT OF SHOPLIFTING STATUTE

AN ACT ENTITLED . . . etc. . . .

WHEREAS merchants in Maryland are now suffering great financial loss at the hands of shoplifters, and

WHEREAS the retail and wholesale merchants have been handicapped in the apprehension and prosecution of shoplifters, by the difficulty of identifying and prosecuting shoplifting under existing common law and statutory crimes, and also by the application of the common-law rules relating to false arrest, false imprisonment, and wrongful detention, and

WHEREAS it is the sense of the Legislature that wholesale and retail merchants should be allowed to detain persons whose actions give rise to a reasonable belief that such persons are engaged in the crime of shoplifting, as defined herein, for a reasonable time and in a reasonable manner in order to ascertain the facts involved,

THEREFORE, BE IT ENACTED . . . etc.

SECTION 1: In any mercantile establishment, it shall be unlawful for any person

- (1) To remove any goods, wares or merchandise from the immediate place of display with the intent to appropriate the same to the use of the person so taking, or to deprive the owner of the use, or value, or any part thereof; or
- (2) To obtain or attempt to obtain possession of any goods, wares or merchandise, by falsely charging the same to a real or fictitious person with a like intent; or,
- (3) To conceal any such goods, wares or merchandise with a like intent; or,
- (4) To alter, remove, or otherwise disfigure any label or price tag with a like intent; or,
- (5) To transfer any goods, wares or merchandise from a container in which the same shall be displayed to any other container with a like intent;

and any person committing any of the acts mentioned shall be guilty of shoplifting.

SECTION 2: Any person who aids or abets in the commission of any of the acts set out in section one shall be guilty of shoplifting.

SECTION 3: Possession of any goods, wares or merchandise by any person in any mercantile establishment which

- (1) Have been removed from the place of display and concealed on or about the person of any such person; or,
- (2) Have any label or price tag altered by the person in whose possession they are found; or,
- (3) Have been transferred from the container in which they were displayed to any other container;

shall be deemed prima facie evidence of an intent, on the part of the person in whose possession they are found, to appropriate the goods, wares or merchandise to his use, and to deprive the owner of the possession, use, or the value or a part thereof.

SECTION 4: A peace officer may, upon a charge being made, and without a warrant, arrest any person whom he has reasonable cause to believe has committed or attempted to commit the crime of shoplifting, as heretofore defined, in any mercantile establishment.

SECTION 5: Reasonable cause shall be a defense to a civil or criminal action brought for false arrest, false imprisonment, or wrongful detention against a peace officer, merchant, or merchant's employee, by a person suspected of shoplifting of goods, wares or merchandise, as hereinbefore provided, PROVIDED HOWEVER that proof of the conviction of the person suspected of shoplifting of goods, wares or merchandise shall be deemed irrefutable proof of reasonable cause. The rule that statutes in derogation of the common law shall be strictly construed shall not be applied in the interpretation of this section, but the section shall be interpreted to effectuate its intended purpose as stated in the preamble hereof.

SECTION 6: Any person convicted of shoplifting shall be guilty of a misdemeanor if the value of the goods, wares or merchandise so taken or concealed is One Hundred Dollars (\$100.00) or less, and shall restore the goods, wares or merchandise to the owner thereof, or pay the full value therefor, and shall be fined or imprisoned, or both:

- (1) For the first offense: Not more than One Hundred Dollars (\$100.00) or from Sixty (60) to Ninety (90) days in jail, or both;
- (2) For the second offense: Not more than Five Hundred Dollars (\$500.00), or from Three (3) to Six (6) months in jail, or both;

Any person convicted of shoplifting shall be guilty of a felony if the value of the goods, wares or merchandise so taken or concealed is more than One Hundred Dollars (\$100.00), or if the person so convicted shall have been twice before convicted of shoplifting, and shall restore the goods, wares or merchandise to the owner thereof, or pay the full value therefor, and shall be punished by fine of not less than One Thousand Dollars (\$1,000.00) nor more than Ten Thousand Dollars (\$10,000.00), or by imprisonment for not less than Three (3) nor more than Seven (7) years in the penitentiary, or by both fine and imprisonment.

SECTION 7: If any part, section, paragraph, clause, sentence, or provision of this act shall be held invalid for any reason, the remainder of this act, or other applications thereof, shall not be affected thereby, and to this end, the provisions of this act are declared severable.

SECTION 8: This act is declared to be in addition to any other criminal provision heretofore existing in this state.

SECTION 9: All laws, or parts of laws, inconsistent with the provisions of this act are hereby repealed to the extent of the inconsistency.

SECTION 10: Nothing in this act shall affect any cause of action which has accrued prior to the effective date hereof.

NELSON R. KERR, JR.

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