The Merchant, the Shoplifter and the Law

I. INTRODUCTION

Measured by several indices, shoplifting would not be considered a major crime in America. Rarely does the offense result in physical injury to victims of theft or to bystanders. Rarely does a shoplifter steal enough merchandise per offense to significantly harm the merchant. Rarely does a person make a profession of shoplifting.

Measured in terms of its total financial cost to the merchant and to the public, however, shoplifting constitutes a major problem. Today, the value of goods stolen from merchants annually is over $2 billion, more than double the loss resulting from shoplifting in 1960. While the average value of goods stolen per offense during this period has remained fairly constant, the number of offenses committed annually has increased by over 100 percent, leading J. Edgar Hoover to term shoplifting "the fastest growing larceny violation in the nation." The consequences are disturbing. In 1967, at an international security conference in Los Angeles, delegates were told that prices charged to consumers are raised approximately ten percent by merchants to compensate for shoplifting losses. To the merchants themselves, many of whom operate at such a low profit margin that they must sell $30 of merchandise to recoup a one

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3. See, e.g., R. CAVEN, CRIMINOLOGY 107 (3rd ed. 1962), reporting that the average amount stolen per offense is $15.
5. In 1967, according to Bus. Week, Dec. 23, 1967, at 20, and Nation's Bus., June, 1967, at 44, 45, the value of goods taken by shoplifters was $2 billion. The UNIFORM CRIME REPORTS 25 (1967) and 24 (1969) reveal that from 1967 to 1969 the number of shoplifting offenses per 100,000 population increased significantly while the value of the goods taken per offense remained constant. Therefore, in 1969, the total value of goods taken by shoplifters far exceeded $2 billion.
7. BUS. WEEK, supra note 5, at 20.
dollar loss from theft, the results of shoplifting are often fatal. Yet, despite the magnitude of shoplifting, few offenders are apprehended and the number of suspects actually prosecuted is negligible. There appear to be three reasons for this inaction. First, few offenses are observed. Second, even if a shoplifter is detected, many merchants are unwilling to take the time and expense necessary to prosecute. Finally, even the merchant who would otherwise apprehend and prosecute suspects is frequently reluctant to do so for fear of subjecting himself to a countersuit for slander, assault and battery, false arrest or false imprisonment.

Recently, however, in an attempt to minimize losses from shoplifting by increasing the rate of apprehension and prosecution of offenders, the merchants, their protection agencies, insurance companies and governmental officials have advocated and implemented numerous changes. To increase the rate of detection, convex mirrors, infra-red circuits, cameras, closed-circuit television and other expensive devices have been installed in many stores, and additional store detectives have been employed. To increase the merchant's willingness to prosecute—despite the effort and expense involved—several insurance companies and retail executives have suggested prosecuting all offenders detected, arguing that the costs of prosecution are far outweighed by the deterrent effect such actions have upon future shoplifters. Finally, to decrease the merchant's fear of countersuit resulting from his apprehension and prosecution of suspects, 25 states during the past ten years have enacted or amended laws intended to give the merchant greater immunity from slander, assault and battery, false arrest and false imprisonment than had been provided at common law.

While some of these innovations have been effective, others

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10. Shoplifting was one of the major reasons why John's Bargain Stores, a 474-store chain which in 1966 sold $62 million merchandise filed for bankruptcy in 1967. The estimated amount of pilferage equalled ten percent of its total sales. Id. at 76; Bus. Week, supra note 5, at 20.
13. Id.
15. R. Cavan, supra note 3, at 21; S. Curtis, supra note 11, at 128.
have not significantly benefited the merchant. The use of the new devices, and the additional detectives have, of course, improved the rate of detection of offenders. Nevertheless, the rates of apprehension and arrest have not significantly increased,\(^\text{18}\) indicating the continued reluctance of retailers to confront the detected suspect. While it would be expected that the merchant has now become aware of the possible deterrent value of increased efforts to apprehend and prosecute, the fear of countersuit still discourages him from doing so.\(^\text{19}\) The reason for such continuing fear is apparently three-fold.

First, most merchants are not aware of the state laws affecting their rights to accuse, apprehend and arrest suspected shoplifters.\(^\text{20}\) The books and pamphlets which detail for them methods for improving detection of shoplifters are virtually silent with respect to the law as it relates to the confrontation of suspects, limiting discussions of that problem to such statements as the following: "[T]he problem of countersuit is even greater. . . than with employee theft. . . . Therefore, before you take any action regarding a suspected shoplifter, you must consult your attorney and your protective agency."\(^\text{21}\) The one source which does list the applicable laws was published in 1960.\(^\text{22}\) Since that time, 13 states have enacted new statutes directly pertaining to the merchant's immunity from civil liability for accusation, detention and arrest,\(^\text{23}\) and 12 states have amended, repealed or reenacted their existing legislation.\(^\text{24}\) If the merchant had knowledge of these laws, he would know what steps he could take with impunity and would pursue them. Without such knowledge, however, he is reluctant to detain the suspect in any manner whatsoever.\(^\text{25}\)

Second, even if the merchant knows of the existence and con-

\(^{18}\) One store manager estimates that for every shoplifter apprehended, 59 escape. \textit{Life}, supra note 14, at 72A. Only from ten to 35 percent of those apprehended are prosecuted. M. \textit{Cameron}, supra note 12, at 24.

\(^{19}\) Interview with the representative of a large chain store, August 15, 1970.

\(^{20}\) Id.

\(^{21}\) A. \textit{Alexander}, supra note 9, at 84, 85.


\(^{23}\) Colo., Del., Ind., Iowa, Mo., Nev., N.J., N.Y., S.C., Vt., W. Va., Wis. \& Wy. For statutory provisions see note 63 infra.

\(^{24}\) Ill., Kan., Ky., La., Md., Mich., Neb., N.M., Ohio, Okla., Tex. \& Wash. For statutory provisions see note 63 infra.

\(^{25}\) Interview with the representative of a large chain store, August 15, 1970.
tent of all shoplifting laws applicable to him, he is often still unable to ascertain their meaning. The Colorado Supreme Court has stated in interpreting its shoplifting legislation: "At the outset we readily concede that the statute is certainly not a model of clarity and that it is ambiguous."26 The Colorado statute is not atypical in this respect. Most of the legislation is capable of being interpreted in numerous ways, such that the merchant is still unable to determine just what his rights are. Although the construction of such statutes by the courts helps to clarify their meaning, few courts to date have been involved in decisions regarding these statutes because most of the legislation is of recent origin and most cases are settled before ever reaching the courts. Therefore, even the knowledgeable merchant is often uncertain of his legal rights.

Third, even if the merchant were aware of the relevant law and its application to him, he would still restrict his efforts to protect his property from shoplifters in order to avoid liability. That is, throughout the 50 states, both common and statutory law—although providing merchants with some immunity from countersuit—still severely limit their rights to accuse, apprehend, and arrest suspects. Such restrictions are based upon the rationale that the rights of the customer to maintain his personal dignity and reputation and his physical well-being outweigh the property rights of the merchant, notwithstanding the present incidence of shoplifting violations. In J.C. Penney Co. v. Cox,27 the Mississippi Supreme Court balanced the customer's personal rights with the retailer's rights to detain a customer upon meager evidence that the suspect had stolen his goods and concluded:

Shoplifting is not uncommon in the merchandising field, and some rules and regulations must exist for the protection of the merchant; public policy makes it necessary to provide for the protection of merchants against shoplifting . . . . The protection of merchants from shoplifters [however] would not under any circumstances be justification for the usurpation of the rights and freedoms of the individual citizens of this state and country. The evils of shoplifting are probably great in this country at this time. Yet, taking care of the interests of the merchants would not justify giving them complete power and authority to infringe upon the rights of their customers and allow the merchants, without regard to the feelings of the customers, to require them to submit to certain humiliations and disgrace of being indiscriminately accused of stealing or to

27. 246 Miss. 1, 148 So. 2d 679 (1963).
be subjected to search upon the mere whim of the merchant or his employees. In \textit{Davis v. Mississippi},\textsuperscript{29} in which the police interrogated suspects merely because they were similar in appearance to an offender, the United States Supreme Court noted:

Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry . . . .\textsuperscript{30}

Although the fourth amendment is of questionable applicability in cases in which a private merchant rather than a policeman detains a suspect, it obviously will matter very little to a suspected person's dignity whether his detention and interrogation is accomplished by a merchant or a policeman.

Therefore, even the recent shoplifting statutes, although often enacted as "emergency legislation"\textsuperscript{31} and frequently hailed as solutions to the shoplifting problem by merchants, are not intended to—and do not—significantly increase the merchant's immunity from liability. In fact, numerous lawsuits tried under these statutes have still resulted in substantial recoveries by accused, detained or arrested suspects.\textsuperscript{32} In many respects this is a fortunate result since it prevents the wholesale violation of the customer's freedom from indignity and physical abuse. Yet, many of these statutes and the common law rules could be reformed to maintain or even increase the personal liberty of the customer while allowing the merchant a greater opportunity to recover his goods and to prosecute suspects who are actually guilty of shoplifting. This conclusion becomes apparent from an examination of how present shoplifting legislation and case law vary from the original common law in balancing the customer's rights with the property interests of the retailer who accuses the suspect of shoplifting, detains the suspect to search or to question him without police intervention and who employs the police to aid him in recovering his goods or in prosecuting the customer.

\textsuperscript{28} Id. at 11, 148 So. 2d at 684.
\textsuperscript{29} 394 U.S. 721 (1969).
\textsuperscript{30} Id. at 726. The \textit{Davis} case involves rape suspects rather than alleged shoplifters, but the effect of investigatory seizures upon these two types of suspects is similar.
\textsuperscript{31} Ind., N.M., Okla. For statutory provisions see note 63 infra.
II. ACCUSING THE SUSPECT

Frequently a merchant approaches a customer upon or outside the premises and directly or indirectly accuses him of shoplifting. Sometimes such action is induced by the customer's suspicious appearance or actions, or because the retailer, an employee or another customer actually believes he has seen the suspect taking goods. In other cases, it is simply the store's policy randomly to accuse people of theft in order to deter prospective shoplifters. In most of these cases customers immediately present sales slips or otherwise prove their innocence. The merchant then apologizes and takes no further action. He therefore risks no liability for assault and battery or for false arrest and will probably avoid liability for false imprisonment. However, such brief confrontation could still subject the merchant to liability for slander. To determine what the merchant can say under what circumstances without risking such liability, it is necessary to examine first the elements of slander, and second the privileges protecting the merchant from liability for slander at common law and as affected by statute.

A. ELEMENTS OF SLANDER

In order for a person to recover for slander, three criteria must be met. First, the words spoken must be reasonably and fairly susceptible of a defamatory meaning. Second, the words must be slanderous per se unless special damages are proved. Finally the words must be published.

1. Defamatory Words

For words to be defamatory, they must expose their object to public hatred, shame or ridicule in the eyes of "right-thinking" people. The court generally determines whether the language in question is capable of a defamatory meaning; if it decides that the language is susceptible of both a defamatory and a non-defamatory interpretation, the jury determines which of the

33. Clark v. Kroger Co., 382 F.2d 562 (7th Cir. 1967).
34. Summers v. W.T. Grant Co., 178 F.2d 916, 917 (5th Cir. 1950).
meanings would be attributed to it by persons of ordinary understanding under the circumstances. If the language is only capable of one meaning, the court decides whether or not it is defamatory.

Several courts, in deciding shoplifting cases, have been required to determine whether words spoken by a merchant to a customer were defamatory under the above definition. While it has been consistently held that direct accusations of shoplifting are defamatory, more difficult problems are encountered when the utterances merely carry some implication that the customer is stealing merchandise. In most cases of this type, the words have been ruled defamatory. However, words which would be regarded as perfectly innocent and non-accusatory in other circumstances are not usually considered slanderous by the courts even though they seemingly constitute indirect accusations of crime when uttered by a clerk to a customer.

2. Actionable Per Se

Even if the words are defamatory, however, a person cannot recover unless he proves either that damages to him actually resulted from the defamation or shows that the words are actionable per se—in which case damages are presumed and need not

39. Id.
40. Id.
42. In Chretien v. F.W. Woolworth Co., 160 So. 2d 854 (La. App. 1964), defendant's manager had been informed by a customer that plaintiff had secreted merchandise in the plastic bag she was carrying. He therefore approached plaintiff and asked her whether she was sure she had paid for everything and whether she would like to pay for the merchandise that was in her bag. The court ruled that such words "were opprobrious and of an accusatory nature." In Roper v. Great Atl. & Pac. Tea Co., 164 A.2d 478 (D.C. Mun. Ct. App. 1960), while a young girl waited in line with her father at the checkout counter of defendant's store, defendant's manager threw a package of gum in front of them and said that he believed the girl would like to pay for the package since she had "stuffed her pockets full of them back there at the candy counter." Recovery was allowed because of the defamatory nature of the utterances. Plaintiff's complaint in Camp v. Maddox, 93 Ga. App. 646, 92 S.E.2d 581 (1956) alleged that he made a purchase at defendant's store and then left the premises. Defendant called the boy back to the store and asked, "What did you do with the mints? . . . The mints you picked up in there." In denying the general demurrer to the complaint, the court ruled that those words constituted indirect accusations of larceny and were therefore defamatory.
be proved. Since an accused shoplifter is often unable to show actual damages, it is usually necessary that he prove the words were actionable per se if he is to prevail. While some courts have ruled that "words which falsely charge a person with or impute to him the commission of a crime for which he is liable to be prosecuted and punished are actionable per se," most have held that "only where the crime charged involves moral turpitude may the oral accusation be said to be slanderous per se." Whatever definition is used, any words directly or indirectly accusing the suspect of shoplifting are actionable without proof of specific damages.

3. Publication

Even if the words uttered do constitute accusations of crime, recovery will still be denied if those utterances are not published. Publication means that a third person—someone other than the plaintiff—must hear the words and must understand them. If the words are spoken in a language incomprehensible to the third person, there is no publication. However, for purposes of publication, the third person may be a stranger, another employee or even a friend or spouse. Moreover, most jurisdictions hold that purchases. Upon leaving the store, defendant's agent tapped her on the shoulder and asked her if she had bought anything in the store. When she replied negatively, he asked "What about that bag in your hand?". The court ruled that there was nothing opprobrious about the agent's remarks and therefore dismissed the case. Plaintiff in Banks v. Food Town, 98 So. 2d 719 (La. App. 1957) left defendant's store without making a purchase. Defendant's employee followed plaintiff and yelled only, "Hey, fellow!" The court decided that these words alone did not amount to slander. In Summers v. W.T. Grant Co., 178 F.2d 916 (5th Cir. 1950), plaintiff purchased a doll buggy from defendant but left it at defendant's store. A few days later she returned, took the buggy and walked out of the store. A clerk followed her and said: "You will have to come back inside. . . . Everything that goes out of this store that is paid for is wrapped." Nevertheless, the court ruled that these words did not constitute an accusation of theft and therefore were not slanderous.

“where the alleged slanderous remarks are made under such circumstances that third persons present could have overheard the remarks and understood them to refer to the plaintiff,” the jury may infer that legal publication occurred even though no third parties testify that they did, in fact, hear the conversation. Since it is generally difficult to locate the customers who overheard the accusations, allowing such inference is extremely beneficial to the plaintiff and detrimental to the merchant.

B. Privileges Against Slander

1. Common Law

Even though a statement is defamatory, actionable per se and published, the speaker’s liability may be excused because of common law privilege. There are two types of privilege—absolute and qualified. If an absolute privilege is proved, the communicant may not be held liable under any circumstances. Truth, in most jurisdictions, raises an absolute privilege. Therefore, if a person actually is shoplifting, an accusation of theft by the merchant will not subject him to liability. When the guilt of the suspect cannot be established, however, the merchant’s common law defenses are limited to the plea that an unabused, qualified privilege was exercised.

A qualified privilege exists whenever a store owner or employee makes the statements in order to recover goods allegedly stolen from him or to discharge any other legal or moral duty—provided his words are uttered in good faith. The “good faith” qualification is designed to achieve a balance between the rights of the merchant to protect his goods and the rights of the customer to preserve his dignity and reputation. It is uncertain exactly where the common law draws the line between the merchant’s right to accuse and the customer’s dignitary interest, since what constitutes “good faith” is disputed by the courts. A few apparently feel that if the defendant or his agent “honestly

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52. Crellin v. Thomas, 122 Utah 122, 247 P.2d 264 (1952). However, in Hutchins v. Page, 75 N.H. 215, 72 A. 689 (1909), the court ruled that even a person publishing the truth is subject to liability for libel or slander if his communications are motivated by malice and Me. Rsv. Stat. Ann., tit. 14, § 152 (1964) says that truth is only a defense if the speaker had no “corrupt or malicious motives.”
believes" that an offense has occurred, he is qualifiedly privileged to accuse the suspect of committing it.\textsuperscript{54} Such a standard seems ill-advised. It permits a merchant to damage the reputation of his customer on a hunch that the customer is stealing. The more generally accepted rule holds that when a person is accused of shoplifting, the defendant, in order to escape liability, must show more than his honest belief based upon mere suspicion or upon information supplied by an unidentified customer. Instead, the utterances must be based upon grounds which would lead a reasonably prudent man to believe the party guilty of the alleged misconduct.\textsuperscript{55} Whichever definition is used, however, the courts unanimously agree that the burden of proving the facts necessary to sustain the claim of qualified privilege is placed upon the defendant.\textsuperscript{56}

Even if a qualified privilege is shown, it still may be abused if the words are uttered with malice, if they do not relate to the subject of the occasion or if they are unreasonably communicated to uninterested parties.\textsuperscript{57} In such cases the merchant would be liable. Generally, however, the courts in shoplifting cases deny the existence of malice even when the defendant’s accusations have been uttered in a loud, crude manner.\textsuperscript{58} The reasoning is that normally the defendant or his agent does not know the customer personally and therefore, would probably not be acting purely out of malice.\textsuperscript{59} With respect to the relevancy of the utterance, if the defendant merely accuses the suspect of shoplifting, the statement is undoubtedly within the scope of the privilege. Finally, while a few courts have held that “the fact that the alleged slanderous words may have been uttered in the presence and hearing of other persons who were accidentally

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\item \textsuperscript{54} Southwest Drug Stores, Inc. v. Garner, 195 So. 2d 837, 840 (Miss. 1967).
\item \textsuperscript{56} Williams v. Kroger Grocery & Baking Co., 337 Pa. 17, 10 A.2d 8 (1940).
\item \textsuperscript{57} Scott-Burr Stores Corp. v. Edgar, 181 Miss. 486, 503, 177 So. 766, 770 (1938); Gust v. Montgomery Ward & Co., 229 Mo. App. 371, 377, 80 S.W.2d 286, 290 (1935); Perry Brothers Variety Stores, Inc. v. Layton, 119 Tex. 130, 140, 25 S.W.2d 310, 313 (1930).
\item \textsuperscript{58} Gust v. Montgomery Ward & Co., 229 Mo. App. 371, 377, 80 S.W.2d 286, 290 (1935); contra, Southwest Drug Stores v. Garner, 195 So. 2d 837, 840 (Miss. 1967).
\end{itemize}
present and to whom the remarks were not addressed, would not overthrow the qualifiedly privileged nature of the communication."60 most have realized that even the accidental presence of third persons causes the suspect as much humiliation as if the merchant had invited the listeners to overhear the accusation. These courts have concluded that "defamatory statements . . . [lose] their privileged character. . . [if] made in a store open to the general public in the presence and hearing of customers who [are] there on the implied invitation of [defendant] and who [have] no interest in the subject matter of the statements."61

In any case, once the qualified privilege is shown to exist, the burden of proving an abuse of that privilege rests with the plaintiff customer.62

2. Statutes

Forty states have now enacted legislation which ostensibly increases the merchant's immunity from civil liability in situations where he confronts alleged shoplifters.63 None of these statutes have strengthened the common law defenses to slander, with the result that even in these states, the merchant is not at liberty freely to accuse.

The statutes, as they pertain to defenses against slander, fall within two categories. First, the shoplifting legislation of two

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60. Scott-Burr Stores Corp. v. Edgar, 181 Miss. 486, 503, 177 So. 766, 770 (1938).
states is limited to statutes providing "that the merchant has the right to request in a reasonable manner any person on his premises to place and keep in view any merchandise which such person has removed or which the merchant reasonably believes he has removed from its place of display for any purpose." Yet, unlike common law, the statutes do not authorize the merchant to make direct accusations under any circumstances, nor may the merchant question the suspect concerning where he obtained the merchandise, or to request the production of a sales slip or of other proof of purchase. While it is doubtful that these statutes, where they have been enacted, have superseded the common law privileges, the adoption of such legislation is superfluous, confounding the merchant who may attempt to understand the applicable shoplifting statutes in this state.

The other 38 states have enacted general statutes pertaining to the merchant's right to detain and to arrest suspected shoplifters. Fourteen of these states, although enumerating within their respective statutes the privileges provided by those laws, omit any reference to defense against slander. Whether this fact indicates that the statutes afford no protection against slander is uncertain. In Chretian v. F. W. Woolworth Co., the Fourth Circuit Court of Appeals of Louisiana ruled:

> [T]he rights and qualified privilege granted by the statute do not clothe the storekeeper with immunity when its manager resorted to slander. The accusation of theft against plaintiff made in the presence of other persons was at the risk of the storekeeper if the suspicion of shoplifting proved baseless.

Even if other Louisiana courts and the courts of the other 13 states decide that their statutes were intended to protect against slander, neither these statutes nor those of the other 24 states expand the common law privilege. If anything, these statutes limit the merchant's defenses. While it has previously been


64. Mont. & Vt. Nevada's general shoplifting statute also includes a similar provision.


67. Id. at 656.
noted that many courts hold that a qualified privilege exists at common law whenever the merchant honestly believes that the suspect is shoplifting, the statutes in question all provide either that the belief must be based upon "reasonable grounds," "reasonable belief," or "probable cause" or that the suspect must actually have shoplifted. Moreover, many of the statutes permit the merchants to exercise the statutory privilege only when they have confronted the suspects on the premises of their store or in its immediate vicinity, while common law imposes no such limitations upon the qualified privilege to defame.

It is questionable whether the statutes of these 38 states were intended to limit liability from slander. More probably, the purpose of the enactments was to increase the protection of the merchant against liability for assault and battery and false imprisonment, since in these areas the common law privileges are severely restricted. As was stated in Simmons v. J. C. Penney Co., in which a merchant had merely confronted a customer outside defendant's store and accused her of shoplifting taking no further action:

[W]hile the actions of Mr. Brock might technically be classified as a detention of Mrs. Simmons for purposes of questioning, we do not believe that this is the type of situation envisioned by the [shoplifting] statute, but rather was a simple inquiry made by Mr. Brock . . . .

Thus, even in those statutes where the privilege against slander was specifically included, it was apparently added as an afterthought without realizing that the privilege was provided just as effectively by common law. Therefore, with respect to slander, these statutes too are confusing and superfluous.

III. DETAINING THE SUSPECT

Merely approaching the suspect and accusing him of shoplifting generally does not serve to recover the goods. Even if the suspect is guilty, he will often deny the theft or perhaps will simply attempt to leave the store without replying. In such cases the suspect will escape if the merchant does not take further action to detain him. If the retailer chooses to do nothing, the goods will probably never be recovered. Yet, if the merchant

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68. See notes 103–106 and accompanying text infra.
69. See notes 144–146 and accompanying text infra.
70. 186 So. 2d 358 (La. App. 1966).
71. Id. at 362.
72. Once the suspect leaves the store it will be impossible to obtain a warrant for his arrest or to search him or his property. Moreover,
uses physical force to prevent the suspect's escape or if he detains the customer through the expressed or implied threat of force, he may subject himself to liability for assault, battery or false imprisonment. Since the value of goods stolen per offense is generally very small and the amount of recovery in actions for personal trespass is often very large, the merchant is presented with a serious dilemma. If he is to recover his goods without risking large financial loss in the courts, he must be aware of the elements of these two torts and the common law and statutory defenses against them.

A. ASSAULT AND BATTERY

1. Elements

In most cases in which a battery has been committed, an assault has also occurred. A battery is any harmful or offensive contact with the plaintiff which is caused by the defendant with intent to bring about such contact or an apprehension thereof. An assault involves the same elements but there need be no actual contact; it is sufficient if the actions of the defendant created in the mind of the plaintiff "a well-founded fear of an imminent battery, coupled with the [defendant's] apparent present ability to effectuate the attempt, if not prevented." In shoplifting cases, the offensiveness of the contact and the actor's intent are usually not at issue: when the suspect is restrained from escaping or when he is searched, the contact is definitely offensive and the merchant intended that it should be. Thus, the merchant can only prevail if his conduct is privileged.

2. Privileges

a. Common Law

Common law recognizes two privileges whereby the merchant can avoid liability for assault and battery. First, if the suspect consents to the touching, the merchant is not liable. As a matter of common sense this privilege would not apply when the

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73. See note 32 supra.
merchant seizes the plaintiff to prevent his escape: if the suspect had consented to remain, there would have been no need to touch him. Frequently, however, courts have held that a merchant’s search of a suspect was privileged nevertheless because the customer consented to it either verbally or impliedly by his failure to resist.\textsuperscript{77} A second privilege sanctions the prompt use of reasonable force to recover goods that have been taken from one by force or fraud.\textsuperscript{78} This privilege, however, is far more limited than the corresponding defense against slander, because in the former case the suspect must actually have taken the goods before the merchant can escape liability.

b. Changes in Common Law

With respect to most incidents of assault and battery, the only privileges which may be exercised by the actors are those which have long been acknowledged by common law. When the merchant seizes or searches a suspected shoplifter, however, such that his action may also constitute false imprisonment, the privileges pertaining to this tort may also be invoked to escape liability for the assault and the battery. Of the 37 states with general shoplifting statutes, 19 either explicitly state that a merchant shall not be liable for any assault or battery committed while detaining a suspect in a reasonable manner if the other statutory requirements (including reasonable grounds for suspicion) are met, or else declare that a retailer shall not be liable in any way for a reasonable detention.\textsuperscript{79} Though the other 18 statutes and the courts in common law jurisdictions have not specifically authorized such a defense, it seems logical that it would be permitted when the proper case arises.

In Burnaman v. J. C. Penney Co.,\textsuperscript{80} for instance, the Texas court first construed its then-existing statute to provide a defense against false imprisonment to the merchant who detains a person in a reasonable manner if there are reasonable grounds to believe that the suspect shoplifted. Plaintiffs also sought recovery on an assault and battery claim. Although the statute did not specifically provide a defense against assault and battery and although the common law privilege would not have protected the

\textsuperscript{77} Id.


defendant (because the plaintiff did not actually steal any merchandise), the court nevertheless dismissed the claim. The court reasoned that "[s]ince a search would be a legal incident of the detention or arrest under 325 [the shoplifting statute], the claim for assault would fall within the claim for false imprisonment since the two are interrelated." Since the search was authorized by the Texas shoplifting statute which provided protection against false imprisonment, the court concluded that the assault and battery charges arising from the search must also fail.

No other court has decided this issue. This is probably because, while most cases involving detention of a customer by a merchant contain the elements necessary to establish assault and battery, recoveries for batteries not physically injurious are typically only nominal: the plaintiff generally does not seek recovery for these torts but rather claims only that he was falsely imprisoned. If, however, other courts interpret similar statutes in the future they will likely adopt the Burnaman rule. Otherwise, merchants in those states would be permitted to use reasonable force to detain the suspect without fear of the false imprisonment tort while remaining liable for assault and battery as a result of using that very same force.

B. FALSE IMPRISONMENT

1. Elements

False imprisonment is generally defined as "[a]n act which directly or indirectly is a legal cause of confinement of another within boundaries fixed by the actor for any time, no matter how short in duration ... if the act is intended to confine the other or a third person, and the other is conscious of the confinement, and the confinement is not otherwise privileged." Setting aside the matter of privilege for the moment, three criteria must be met before a claim of false imprisonment can succeed. First, the plaintiff must actually have been confined; second, the actor must have intended the confinement, and third, the plaintiff must have been conscious of the restraint.

With respect to the first element, the presence of actual confinement exists only if the plaintiff is restrained "under such

81. Id. at 636.
circumstances as to lead a reasonably prudent person in the same situation to believe that [he] could not escape if [he] wished. . . . 84 It is not necessary that actual force be used to confine the suspect. As the court stated in Hurst v. Montgomery Ward & Co.,

False imprisonment consists of the direct restraint of personal liberty. There need not be actual force; the restraint may be from the fear of force, as well as from force itself. Words alone, are frequently sufficient to bring about the actual restraint of liberty. 85

In Hurst, the employee screamed that she would tear plaintiff's clothes off and would have her arrested if she did not stand still. A demurrer to plaintiff's charge of false imprisonment was denied. In Stevens v. O'Neill, 86 a female store detective told plaintiff she would have to be searched and then sent for a male employee. The two employees then walked through the store with the female suspect between them and led her to a back room. On these facts, the appellate court affirmed the jury's verdict for plaintiff, stating that the statements and actions of the employees constituted "the exercise of such a dominion over her that the jury might very properly find that restraint was exercised. . . ." 87

However, submission to the mere verbal direction of another, "unaccompanied by force or threats of any character, does not constitute false imprisonment." 88 In Grayson Variety Stores, Inc. v. Shaffer, 89 for example, where the employee told plaintiffs that they had better come back to the store, the necessary restraint was held not to have been established. Likewise in Lerner Shops of Nevada v. Marin, 90 the court refused to find the requisite restraint in the defendant's verbal request that plaintiffs accompany him back to the store.

Second, the merchant must have intended to cause such restraint. Intent is established when the merchant's purpose is to cause such restraint or if he knows with substantial certainty 91 that his actions will confine the suspect against his will. It

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85. 145 S.W.2d 992, 995 (Mo. App. 1940).
86. 51 App. Div. 364, 64 N.Y.S. 663 (1900).
87. Id. at 365, 64 N.Y.S. at 664.
89. Id.
is improbable that once restraint is shown to exist, the defendant could prove that he did not intend it. Unless the defendant's agent was of such low mentality or tender age that he did not realize that his actions constituted a restraint, or unless he accidentally restrained the plaintiff—an unlikely occurrence—such proof would be impossible.

Third, even if the plaintiff would have been unable to escape at will and even if the defendant had intended to restrain him, false imprisonment cannot be established unless the plaintiff is aware of the restraint. In Harre v. Montgomery Ward & Co.,92 in which the defendant's employee kept the suspect in the store until the police arrived by pretending to have his check verified, the court concluded that the customer was not falsely imprisoned, stating:

There is no liability for intentionally confining another unless that person knows of the confinement. . . . There is no evidence in this case to prove that the plaintiff was conscious of any restraint of his liberty or under the belief and impression that he was subject to the actual control or will of defendants or any one else prior to the appearance of the officers at the store office.93

In S. H. Kress & Co. v. Bradshaw,94 in which a clerk used other delaying tactics to keep a customer in the store, the court similarly dismissed the false imprisonment claim on the grounds that Mrs. Bradshaw was not at the time conscious of the detention.

2. Privileges

a. Common Law

Common law originally admitted two privileges to false imprisonment. The first was the privilege to use reasonable force promptly to recover goods that had been taken by another through force or fraud. Although this defense was generally pleaded in assault and battery cases, the few courts that decided the issue ruled that the privilege could also be invoked to defend against false imprisonment charges.95 The second privilege was that if, under state law, the merchant would have been authorized to make or cause the suspect's arrest under the circumstances, he would also be protected if he detained the plaintiff without resorting to the police or the courts. In Great Atlantic

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93. Id. at 355, 221 P.2d at 443.
& Pacific Tea Co. v. Paul, the court explained that "[w]hatever technical distinction there may be between an 'arrest' and a 'detention' the test of whether legal jurisdiction existed in a particular case has been judged by the principles applicable to the law of arrest."96 In most states, however, the arrest laws would not permit the defendant to arrest a suspect unless he was actually shoplifting.97 Therefore, the merchant would not be protected against liability for false imprisonment even though the detention was based upon reasonable grounds. Such limitations reflected the common law view that no innocent person should have to suffer the indignity of being involuntarily restrained without there being a remedy against the person detaining him.

b. Changes in the Common Law

Maryland still follows the original common law doctrine98 and the situation in many other states is uncertain, but a majority of the states have now expanded the merchant's immunity from liability for false imprisonment. A few of these states have modified the privilege judicially. The majority, however, have expanded the defense by enacting shoplifting legislation.

In 1936, in Collyer v. Kress,99 the Supreme Court of California significantly modified the common law privilege. In a case in which plaintiff was grabbed, searched and questioned in an effort to recover the goods allegedly stolen, the court ruled:

In an effort (sic) to harmonize the individual right of liberty with a reasonable protection to the person or property of the defendant, it should be said that such a charge of false imprisonment where a defendant had probable cause to believe that the plaintiff was about to injure defendant in his person or property, even though such injury would constitute but a misdemeanor, that probable cause is a defense, provided, of course, that the detention was reasonable.100

Exactly what constituted probable cause or reasonable detention was not detailed. Exactly how long the detention could last was not explained. Whether a person could be detained outside the premises was not discussed. Yet, the Collyer decision did definitely establish the principle that in certain circumstances a

96. Id. at 655, 261 A.2d at 738.
97. See notes 196-203 infra.
99. 5 Cal. 2d 175, 54 P.2d 20 (1936).
100. Id. at 180-81, 54 P.2d at 23.
merchant was privileged to detain a suspect even though that suspect was later found innocent. This ruling instituted a wave of similar decisions in California and other states,\textsuperscript{101} broken only by occasional decisions which persistently continued to uphold the original common law privilege.\textsuperscript{102}

Despite this departure from the common law in \textit{Collyer}, many states during the past 20 years have codified this expanded privilege originally adopted by their courts, and many others—whose courts had previously followed the original common law doctrine—have enacted legislation modifying that doctrine to include the enlarged defense. Today, of the 38 states which provide by statute for the detention of suspected shoplifters, 33 definitely protect the merchant from liability for false imprisonment if there is “probable cause,” “reasonable cause” or “reasonable grounds” for believing an offense had been committed even though, in fact, there had been no theft.\textsuperscript{103} The language of the other five statutes is ambiguous, creating some uncertainty whether the statutes are effective only when the person is actually concealing with intent to convert, whenever he is concealing goods, or whenever the merchant has reasonable or probable cause to believe the suspect is guilty. Nevertheless, the courts of Colorado\textsuperscript{104} and Mississippi\textsuperscript{105} have construed their statutes to protect the merchant whenever “reasonable grounds” or “probable cause” exist. The statutes of the other three states,\textsuperscript{106} however, unlike those of Colorado and Mississippi, do not mention “reasonable grounds” or “probable cause.” How the courts of those states will interpret their legislation cannot now be ascertained.

Even though a majority of states have expanded the common law privilege either judicially or by statute, the privilege remains


\textsuperscript{105} J.C. Penney Co. v. Cox, 246 Miss. 1, 148 So. 2d 679 (1963).

\textsuperscript{106} Ark., Pa. & S.D.
subject to several limitations. In most states it is effective only when: 1) the agent detaining the suspect has a certain degree of belief in his guilt; 2) the detention is for a specified purpose; 3) the restraint occurs in a limited area; 4) the detention is exercised in a reasonable manner; 5) the suspect is held for a limited time, and 6) the detention has occurred within a reasonable time after the alleged theft has been committed. Other detentions will not be privileged, and the merchant exceeding the narrow statutory boundaries will therefore be liable for false imprisonment.

1. Belief in Suspect's Guilt

The states with expanded privileges against false imprisonment use various terms to describe the degree of belief in a suspect's guilt that a merchant must possess before he may with impunity detain the customer. Eighteen statutes adopt the Coll- yer rule which states that "probable cause" to believe that the suspect has committed or is committing a crime is sufficient.107 Six statutes require that there must be "reasonable cause" to believe the suspect guilty of the theft;108 six say there must be "reasonable grounds";109 one requires "reasonable grounds or probable cause" to exist;110 two state that there must be "good faith and probable cause based on reasonable grounds";111 one declares that if a "man of reasonable prudence" would believe the plaintiff was shoplifting, the detention is privileged,112 and one requires "reasonable and probable grounds."113 Although some courts have held that these various incantations have somewhat different meanings when referring to the right of policemen to make arrests, they have generally been regarded as equivalent in determining the right of merchants to detain shoplifters. In Great Atl. & Pac. Tea Co. v. Paul, the court stated that "for the purpose of this opinion, we assume [probable cause] is equivalent to 'reasonable belief' under 120A [of the Restatement (Second) of Torts]."114 The court in J. C. Penney Co. v. Cox115 con-

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110. Mo.
111. Colo. & Miss.
112. Ga.
113. Utah.
115. 246 Miss. 1, 10-11, 148 So. 2d 679, 683 (1963).
tinuously interchanged the words, and in _J. C. Penney Co. v. O'Daniell_, the court declared that "the test of probable cause is whether defendant had reasonable ground for believing, from the facts he knew or should have known, that the person detained was engaged in the theft of his property."

In deciding these countersuits by suspected shoplifters, courts have frequently been required to review the issues of who has the burden of proving the existence of "probable cause," "reasonable cause" or "reasonable grounds" and whether the trier of fact or law should determine whether such grounds have been established. Generally, it has been held that the burden of proving sufficient cause rests upon the defendant merchant. With respect to the second issue, "it is well settled that the presence or absence of probable cause is to be determined by the court as a matter of law and not by the jury as a question of fact" unless the evidence is in conflict. Even if the evidence is disputed, however, it is the duty of the court to instruct the jury as to what facts, if established, would constitute probable cause, and only questions as to the existence of those facts are properly submitted to them.

Since only five state statutes attempt to specify in any manner the situations where probable cause or reasonable grounds exist, the courts are generally free to determine the applicability of these statutes to specific cases. Judges have consistently been reluctant to admit the existence of reasonable grounds or probable cause because of the concern that the expanded privilege will seriously impair the personal rights of both

116. 263 F.2d 849, 851 (10th Cir. 1959).
121. The Oklahoma statute provides that concealing merchandise is conclusive of reasonable grounds. Missouri law states that willful concealment constitutes reasonable grounds. The Massachusetts statute declares that the concealment of unpurchased goods is sufficient while New York and Washington provide that reasonable grounds shall include but not be limited to knowledge that the person has concealed possession of unpurchased merchandise. For statutory provisions see note 63 supra.
the innocent and the guilty customer.\textsuperscript{122} They have therefore held that a "reasonable belief" is more than an "honest belief" based upon mere suspicion that a suspect is guilty\textsuperscript{123} and have allowed recovery because of a lack of reasonable grounds in cases in which plaintiff merely placed his hand under his shirt and walked off at a rapid pace,\textsuperscript{124} wore an army coat with bulging pockets,\textsuperscript{125} wore a scarf out of the store that had not been worn when plaintiff entered even though there was no evidence that the defendant sold scarves similar to the one plaintiff wore,\textsuperscript{126} or happened to be in a department when an item was reported missing.\textsuperscript{127} The courts have also denied the existence of probable cause in situations in which another customer merely reports his belief that the suspect has been shoplifting.\textsuperscript{128} However, if the missing items are actually found upon the suspect even though he is later acquitted of shoplifting,\textsuperscript{129} and if the employee reports having actually seen the items being concealed by the plaintiff,\textsuperscript{130} or the suspect is wearing clothes previously purchased from defendant with the tags still on them,\textsuperscript{131} courts have generally found that the defendant's belief in the suspect's guilt suffices to invoke the privilege. While there are some situations then in which a merchant may detain an innocent customer without subjecting himself to liability, the stringent interpretation of the "reasonable grounds" standard by the court has prevented the legal balance between personal rights and property interests from shifting drastically in favor of the merchant's right to recover his goods.

\textsuperscript{122} J.C. Penney Co. v. Cox, 246 Miss. 1, 11, 148 So. 2d 679, 684 (1963).
\textsuperscript{123} Id.; Butler v. W.E. Walker Stores, Inc., 222 So. 2d 128 (Miss. 1969).
\textsuperscript{124} Banks v. Food Town, 98 So. 2d 719 (La. App. 1957).
\textsuperscript{127} Gust v. Montgomery Ward & Co., 229 Mo. App. 371, 80 S.W.2d 286 (1935).
\textsuperscript{128} J.C. Penney Co. v. Cox, 246 Miss. 1, 11, 148 So. 2d 679, 684 (1963).
\textsuperscript{131} In Clark's Brooklyn Park, Inc. v. Hranicka, 246 Md. 178, 227 A.2d 728 (1967), the court ruled that such circumstances did constitute reasonable grounds. However, since Maryland has consistently followed the pre-Collyer doctrine concerning the privilege against false imprisonment, the presence of reasonable grounds was not sufficient to invoke the privilege but only to mitigate damages.
2. Purpose of Detention

In Collyer v. Kress,132 the court held that a merchant could detain only for the purpose of investigation, a limitation accepted by most of the courts which adopted Collyer's modification of the common law privilege against false imprisonment. Moreover, in 33 of the 38 states which through legislation now authorize detention,133 that detention may only be for specified purposes. Indiana and Oklahoma permit the widest scope of detention. In Indiana, a person may be held in order to discover his identity, to determine whether merchandise is in his possession and to inform interested parties. In Oklahoma, a merchant may detain a suspect for the purpose of effecting a recovery, searching the suspect and conducting an investigation. In these states the merchant can undoubtedly question and search a suspect whether or not the merchant believes that the suspect still has the merchandise in his possession. In the other states, however, in which the purpose is limited to "effecting a recovery," investigating the circumstances of ownership or possession "questioning or interrogating concerning ownership" or "detaining until the police arrive," it is more difficult to ascertain exactly what the merchant can do with the detained suspect. Such difficulty frequently prevents the merchant from doing anything to recover his goods because of fear of liability.134

Thirteen statutes allow merchants to detain in order to effect a recovery of their property.135 Such language apparently authorizes a search of the suspects136 and permits merchants to question customers concerning their possession of merchandise. However, the terminology, if narrowly interpreted, still severely limits the merchant in two respects. First, if the suspect drops the merchandise and runs from the store, the purpose of the merchant's detaining him could not possibly be to effect a recovery of the goods. Second, even if the merchant did momentarily detain the suspect and the customer admitted the crime and re-

132. 5 Cal. 2d 175, 54 P.2d 20 (1936).
133. The statutes of Arizona, Georgia, Iowa, Michigan and Virginia do not specify the purposes for which detention is permitted. However, the Iowa statute explicitly prohibits the merchant from searching the suspect without his consent, unless a police officer directs the search. For statutory provisions see note 63 supra.
134. Interview with the representative of a large chain store, August 15, 1970.
136. The Ohio statute, however, specifically prohibits a merchant from searching a suspect.
turned the goods, the statute would prohibit any further detention. Even if the retailer had not yet discovered the identity of the suspect, he would be required to free him. Therefore, in the states in which detention is limited only to effecting a recovery, the expanded privilege may not significantly expand common law. Yet, if the only concern of the legislatures in these states is to allow merchants to recover their goods rather than to punish offenders, such a statute is probably the best means of balancing the merchant’s property rights with the customer’s personal rights.

Eight states authorize the merchant to detain only to investigate ownership or to question and investigate ownership. This includes questioning the plaintiff concerning whether he possesses the goods, where he got them and whether he paid for them. Whether it permits the retailer to request the suspect to identify himself, however, is uncertain. Moreover, it is difficult to ascertain whether under such statutes, the store manager or owner can search the suspect without exceeding his privilege. In Collyer, when detention was authorized to investigate, and the plaintiff was searched without his consent, the California Supreme Court still held that the detention was privileged. Whether this interpretation will be followed by other courts is not yet apparent. If it is not followed, the effect of the statute will be to allow the merchant to embarrass the suspect and impair his freedom by involuntary detention without permitting the retailer to recover the goods in the suspect's possession without the customer’s consent. Since the only possible justification for authorizing the involuntary restraint of the customer relates to the protection of the merchant’s property interest, denying the merchant full opportunity to recover his goods after detaining the suspect is certainly undesirable. If the legislatures are so concerned with protecting a person’s freedom from search—which is understandable—they should not disturb the common law balance between personal rights and property interests in any way.

Six states provide that the merchant may detain to interro-

137. In Utah, however, detention can be for purposes of investigating the theft and for recovering goods, so even a narrow interpretation of “effecting recovery” would not prevent a merchant from detaining a suspect who had already disposed of the goods.
139. 5 Cal. 2d 175, 54 P.2d 20 (1936).
gate or to question concerning guilt or ownership.\textsuperscript{140} It seems evident that such statutes do not authorize a search without the suspect's consent. No case, however, has yet decided this issue.

In Delaware, Minnesota, South Dakota and Wisconsin, a merchant may detain for the sole purpose of delivering the suspect to a law enforcement officer. This apparently indicates that he may not question the suspect under any circumstances, that he may not search the suspect and that he may not use any other means of self-help to recover his goods. The rationale behind the law is sound. It is easy for a merchant to overstep his statutory authority and to abuse suspects physically or mentally, and therefore, that authority should be narrowly defined. Yet in some respects, the statute is undesirable. First, the merchant is forced to turn the suspect over to the police in order to escape liability for false imprisonment. Suppose the suspect is a child who has only stolen a few cents worth of candy and who the merchant feels is not likely to steal again: the action of delivering him to the police may stigmatize the child, causing him unnecessary harm. Only the Wisconsin statute avoids this unfortunate possibility by providing that a minor need not be turned over to the police but instead can be returned to his parent or guardian. Second, if after momentary detention, the suspect produces a sales slip or otherwise proves he has bought the merchandise in question or that he has taken no merchandise, the laws require that he still be held until the police arrive in order for the merchant's detention to be privileged. Such a requirement is, of course, foolish. Moreover, detention after proof of innocence is obviously detention in an unreasonable manner for an unreasonable time. The privilege might thus be unavailable to the retailer.

3. Area of Detention

The Restatement (Second) of Torts, after stating that a person who reasonably believes that another has stolen his chattel may detain the suspect, adds:

Thus far the cases which have recognized the privilege stated in this Section have been concerned with a detention on the premises of the actor. In the absence of sufficient authority, the Caveat is intended to leave open the question whether the privilege extends to the detention of one who has left the premises but is still in their immediate vicinity, as, for example, where the person suspected has gone out of the door of

\textsuperscript{140} Colo., La., Mass., Miss., Ore. & Wyo.
Ten statutes specifically limit the area in which the detention may occur. In Delaware, Louisiana and Nevada, the legislation provides that the detention must occur upon the premises of the merchant. Once the suspect has stepped outside the store, interfering with him is apparently not within the merchant's statutory privilege. Such a limitation is unduly restrictive since a merchant stopping a customer who has just left the store deprives that suspect of no more rights than if he had been detained within the mercantile establishment. Moreover, since it is difficult to prove intent to convert goods in a store with a central checkout counter until the customer has passed that counter without paying, a strict interpretation of these three statutes would permit the merchant to apprehend the suspect only in the narrow area between the checkout counter and the door. Fortunately, the courts in these states will probably attempt to broaden this restriction. For instance, the Louisiana Appellate Court in Simmons v. J. C. Penney Co. in invoking the statutory privilege to protect defendant reasoned as follows:

The fact that he [the defendant's agent] was only able to catch up with her immediately outside the door to the store was doubtless caused by Mrs. Simmons' proximity to the door at the time she went through this suspicious series of motions, and the distance which Mr. Brock was from the counter and the door at the time he observed her making these motions. We further believe that the sidewalk immediately in front of the store, particularly that portion which was covered by the awning or roof extending out from the J.C. Penney Company store building, could be properly classified as a part of the premises of the defendant.

Five statutes require that the detention be made on the premises or in the immediate vicinity thereof; one permits detention on or near the premises and finally, one law provides that the customer be apprehended on the premises unless the merchant is in "close pursuit." These provisions will probably be interpreted to allow detention only within the general shopping area where the store is located or perhaps the parking lot of the store. Although the other statutes and the expanded common law doctrine do not specify the authorized area of detention, cases decided

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141. Restatement (Second) of Torts § 120A, Caveat at 202 (1965).
143. Id. at 362.
144. Kan., Mass., N.Y., Ohio & Wash. For statutory provisions see note 63 supra.
145. S.C.
146. Va.
both prior and subsequent to the publication of the Restatement (Second) of Torts indicate that detention will be permitted not only upon the premises of the merchant but also in the immediate vicinity thereof.147

4. Manner of Detention

All common law decisions adopting the expanded privilege of detention, as well as 36 state statutes,148 require either that the detention be made in a reasonable manner or without the use of unreasonable force. Moreover, it is probable that courts in the other two states149 with general shoplifting statutes would rule that their legislation implies a similar limitation. While the use of reasonable force150 and the request that the suspect sign a confession151 have been regarded as detention in a reasonable manner, seizing a suspect and violently spinning him around without first requesting him to stop,152 or holding a suspect incommunicado until he signed a confession153 have been held to be sufficient to constitute abuses of the extended privilege subjecting the merchant to liability.

5. Period of Detention

It is evident that the statutes and courts adopting the expanded privilege require that the suspect only be detained for a limited time, even though five statutes do not explicitly list that restriction.154 The question then is to determine what constitutes a permissible period of detention. Five statutes set a specific limit. Under West Virginia law, the restraint may not exceed 30 minutes. In Indiana and Louisiana, the limit is one hour.155 Finally, New York and Washington provide that the re-

149. Ariz. & Va.
151. Id. at 182, 54 P.2d at 24.
154. Ariz., Colo., Minn., Miss. & Va. For statutory provisions see note 63 supra.
155. In Indiana, if the police arrive before the hour is up, the merchant must terminate his detention of the suspect.
striction may not exceed the time necessary for the customer to make or to refuse to make a statement and for the merchant to examine employees and store records in an attempt to determine the ownership of such merchandise. In the other states, the limitation is less certain, although a detention period of from 20 to 30 minutes has generally been regarded as reasonable. Which party bears the burden of proof on this issue is uncertain because of the lack of litigation, although one court has held that the burden rests with the plaintiff.

6. Period Between Alleged Crime and Detention

The apparent purpose of the original common law privilege to detain and of the expanded privilege developed by the courts and legislatures was to permit the merchant to catch the suspect while he still possessed the stolen goods, a purpose which could not be attained by resorting to the lengthy legal process of obtaining a warrant. It was not, however, to permit merchants to form vigilante groups to apprehend suspects months or years after the alleged shoplifting occurred. Likewise, although most of the statutes do not specifically limit the amount of time allowable between the alleged offense and the detention, the courts construing them undoubtedly will only allow merchants to invoke the privilege within minutes after the crime occurs. As the court held in *J. C. Penney Co. v. Cox*:

The authorities hold that where a person has a reasonable ground . . . to believe another is stealing his property, as distinguished from those where the offense has been completed, he is justified in detaining the suspect . . . for a reasonable length of time, for the purpose of an investigation.

Therefore, under these statutes, a merchant cannot detain a customer in his store simply because that customer allegedly shoplifted the last time he visited the merchant's establishment.

IV. ARRESTING THE SUSPECT

In many cases, the merchant does not want to use self-help to recover goods, or he may have used it and found that it was an unsuccessful means of regaining his merchandise, or he may have found it successful but nevertheless desires to prosecute the

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158. 246 Miss. 1, 10, 148 So. 2d 679, 683 (1963) (emphasis added).
offender. In these cases, the merchant will invoke the aid of the 
police. Many retailers feel that if they simply hold the suspect 
without questioning or searching him until the police arrive, or if 
they simply direct the police to arrest the suspect without per-
sonally detaining him, there is no danger of their being civilly 
liable. They are mistaken. The merchant may be liable both for 
false imprisonment and false arrest.

Although the elements of false imprisonment have already 
been detailed, the characteristics of false arrest and the differ-
ences between that tort and false imprisonment deserve consider-
ation. While the words are often used interchangeably (and in-
accurately) by courts and by legislatures, most courts recognize a 
technical distinction between the two. While false imprisonment 
occurs whenever one person restrains another with intent, false 
arrest requires that the suspect actually be told he is under ar-
rest, that he actually be delivered to a judge or to the police, or 
that the defendant's purpose is to take the suspect into the cus-
tody of the law. In McGlone v. Landreth, for instance, the 
court held:

The testimony as it appears in the record does not establish an 
arrest of plaintiff by the cab driver in the first instance. The 
evidence does not show that the cab driver advised plaintiff 
she was under arrest, or that she had violated the city ordi-
nance, and he did not take her before a magistrate or deliver 
her to a peace officer.

Thus while every arrest is an imprisonment, with the requisite 
elements of restraint and intent, an imprisonment does not neces-
sarily constitute an arrest.

There are two stages where a merchant may become liable 
for false arrest by seeking the aid of the police. First, if a mer-
chant detains a suspect for the purpose of holding him until the 
police arrive, he may be liable for that detention. Second, if the 
police arrive at the merchant's request, the suspect may recover 
from the retailer for any arrest made by the police—even if the 
merchant has not himself touched, detained or even communi-
cated with the customer in any manner. The customer cannot re-
cover in either case if the merchant can show either that he did 
not arrest the customer or procure the arrest, or that he was priv-
ileged to arrest the suspect.

P.2d 428, 433 (1950); McGlone v. Landreth, 200 Okla. 425, 195 P.2d 268 
(1948).

A. Arresting the Suspect or Procuring the Arrest

1. By Detaining the Suspect until the Police Arrive

Even if the merchant merely holds the suspect against his will for no other purpose than to deliver him to the police, he is nevertheless subject to liability for false arrest. The restraint together with the intent to turn the customer over to the authorities is sufficient to persuade the courts that an arrest has occurred. Therefore, even if the police never arrive, or if they arrive but refuse to detain the suspect for want of evidence, the customer may still recover from the retailer for false arrest.

2. By Causing the Police to Make the Arrest

For a private citizen to be liable for an arrest made by a policeman, he must, by affirmative action, persuasion or request, have "procure[d] an unlawful arrest and detention of another."161 If, however, "he merely states to a peace officer his knowledge of a supported offense and the officer makes the arrest entirely upon his own judgment and discretion, the informer is not liable"162 even if the information is inaccurate,163 unless the informer is actually aware of the inaccuracy.164 Although the principle is easy to state, the distinction between causing an arrest and simply laying the facts before the police is extremely difficult to ascertain.

When the merchant actually aids in making the arrest through the use of physical force or delaying tactics, he is generally regarded as having caused the arrest. For instance, in S. H. Kress & Co. v. Bradshaw,165 in which an employee of the defendant engaged the plaintiff in casual conversation until the police arrived in order to keep her in the store, the court found for the plaintiff. Although it held that defendant's detention of the customer until the police arrived did not render her liable for false imprisonment since the plaintiff was not aware of the detention, the court found that the defendant was responsible for the arrest and imprisonment by the police, since "a well-established principle of law is that all who by direct act or indirect procurement personally participate in, or proximately cause, the false imprisonment or unlawful detention of another are liable

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162. Id.
165. 188 Okla. 598, 99 P.2d 508 (1940).
therefore."\textsuperscript{166} In \textit{Harrer v. Montgomery Ward & Co.},\textsuperscript{167} in which the clerk similarly detained the suspect in the store until the police arrived by pretending to have plaintiff's check validated, the court held that "the evidence and the inferences fairly and reasonably arising therefrom tended to show [that] the defendants instigated, encouraged and by their acts participated in the arrest."\textsuperscript{168} The plaintiffs therefore were granted recovery for false arrest. In \textit{Gerald v. Caterers, Inc.},\textsuperscript{169} the plaintiff was an employee of defendant. About the time he quit, defendant's supervisor noted money missing from the cash register. He then called the plaintiff and told him to come to the defendant's establishment to receive his check. The supervisor told the police that plaintiff would be coming and the police were there to arrest him when he arrived. After his innocence was established, plaintiff brought suit against the defendant for false arrest. A jury returned a verdict for the plaintiff which was affirmed on appeal, with the appellate court stressing that "defendant through its manager [told] plaintiff to come to the drive-in to pick up a nonexistent check as a pretext to having him present where he could be arrested, and arranged for the police to be there."\textsuperscript{170}

Even if the merchant uses neither force nor delaying tactics, and in fact does not touch the customer nor communicate with him at all, he nevertheless may be liable if he actually instructs the police to make the arrest. For instance, in \textit{McDermott v. W. T. Grant Co.},\textsuperscript{171} a female clerk in defendant's store observed two men across the street whom she felt were acting suspiciously. She told the manager; the manager ran to a policeman and declared: "I want that man locked up. He's one of the three men who has been in my store and have stolen things."\textsuperscript{172} The officer arrested the suspect and took him to police headquarters. In a subsequent suit for false arrest, the jury returned a verdict for plaintiff and the court affirmed, stating that "it could have been found that the defendant's manager actively instigated the arrest and that he did not merely report the facts to the officer and leave the results to the officer's judgment."\textsuperscript{173}

\textsuperscript{166.} Id. at 594, 99 P.2d at 514.
\textsuperscript{167.} 124 Mont. 295, 221 P.2d 428 (1950).
\textsuperscript{168.} Id. at 304, 221 P.2d at 433.
\textsuperscript{169.} 382 S.W.2d 740 (Mo. App. 1964).
\textsuperscript{170.} Id. at 744.
\textsuperscript{171.} 313 Mass. 736, 49 N.E.2d 115 (1943).
\textsuperscript{172.} Id. at 737, 49 N.E.2d at 116.
\textsuperscript{173.} Id. at 738, 49 N.E.2d at 116.
In most other cases, however, the merchant is rightly regarded by the courts as a citizen merely doing his duty of presenting what he knows to the police and is not liable for false imprisonment or arrest. To decide otherwise would be to deprive police of the informers they undoubtedly need to properly go about their business. Even calling the police and later identifying the suspect as the one who the defendant believes committed the crime is not usually regarded as sufficient to cause an arrest. In *Delp v. Zapp's Drug & Variety Stores*, defendant thought he saw plaintiff stealing dye from the store and called the police. In the meantime, plaintiff left the store and some of defendant's employees followed her. When the deputy sheriff arrived at the store, the detective took him to where the other employees were standing and pointed the plaintiff out to the officer. The court refused to hold defendant liable for the subsequent arrest. In *Davis v. Weil Clothing Co.*, defendant's floor manager told police he had received a bogus check from the plaintiff and subsequently identified the plaintiff as the forger. The officer asked him if he was sure the plaintiff was the criminal because if he was the officer would arrest him. The floor manager affirmed the identification and the suspect was arrested. The court subsequently dismissed the plaintiff's suit for false arrest, stating: "We think that defendants' view is correct that the evidence here, on identification of plaintiff as the man who passed the bogus check, amounts only to the giving of information to the police officer."  

B. Privileges  

Even if the merchant detains the suspect to deliver him to the police or provokes the police to make an arrest, he will not be liable if he is privileged to take such action. In cases where he is not protected, however, the merchant will be in a difficult position. Even though he is privileged to detain a suspect in order personally to recover his goods without police intervention, he will not be able to seek the aid of legal authorities if the customer during such detention denies his guilt. Moreover, a retailer who apprehends a suspect whom he knows has shoplifted several times will nevertheless be unable to prosecute him until a warrant is obtained. By that time, the suspect—if he can be located at all—probably will have disposed of the evidence.

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175. 367 S.W.2d 19 (Mo. App. 1963).
176. Id. at 24.
While the privileges available to the retailer who detains the suspect until the police arrive are obviously those granted by law to the private citizen, there is some dispute concerning whether those defenses or those granted to police officers are applicable to merchants who merely cause arrests that are actually made by the police. A determination of that issue is vital since in many states the officer has more freedom to arrest than the citizen. The weight of authority is apparently that only a citizen's privileges may be invoked. In *Harris v. Terminal Railroad Association*, the defendant instigated the arrest of the plaintiff by police. The court ruled:

The officer would be absolved from any liability, if he had reasonable grounds to suspect that a crime had been committed by the plaintiff, even though it may afterwards turn out that she was not guilty, but the only justification which the individual or unofficial citizen could invoke, would be that the party arrested is actually guilty.

In *Howell v. Viener*, it was held on similar facts that a citizen "stands as if he had made the arrest himself." The court then analyzed the Mississippi statute concerning the power of a private person to make an arrest. The majority view with respect to this issue is preferable. The main reason for giving the police more liberty to arrest than the private person is apparently that the police—because of their experience and knowledge of the law—will exercise a more-informed discretion than an ordinary citizen in deciding whether or not to make an arrest. Before a court will rule that a citizen has actually caused an arrest, he must actually have formulated the plan for making the arrest or substituted his discretion for that of the police. Therefore, the same rationale for restricting direct arrests by private persons applies equally to limiting the rights of citizens to cause arrests ultimately made by the police.

Even after resolving that issue, the exact privileges protecting the merchant against liability for false arrest are still difficult to articulate because of the number of laws in each state bearing upon the issue and because of the unclear language used by most of the state legislatures in drafting the statutes and by the courts in developing the common law principles. Before at-

179. 203 Mo. App. 324, 218 S.W. 686 (1920).
180. *Id.* at 332, 218 S.W. at 688.
181. 179 Miss. 872, 879, 176 So. 731, 732 (1937).
tempting to clarify the nature of these privileges, it is necessary to determine whether shoplifting laws have given merchants any special rights to make or cause the arrest of suspected shoplifters—rights which are available to them peculiarly, and which are unavailable to other private citizens. If no such rights exist, the merchant must then seek his power to arrest from the general citizen's arrest laws.

1. Privileges Granted by Shoplifting Statutes

The shoplifting statutes in three states clearly give merchants the right to arrest the suspect without being liable for false arrest at either of the above stages—provided all the same conditions necessary to avoid false imprisonment are met. In Ohio, the law provides that a merchant may detain a suspect "in order to recover [stolen] items without search or undue arrest or in order to cause an arrest to be made by a police officer." In Georgia, the defense is available to any owner, operator or employee who "shall detain or arrest or cause to be detained or arrested any person reasonably thought to be engaged in shoplifting." The law in Utah immunizes from liability merchants who detain or who cause arrests. The language of these statutes indicates that the legislators in these states realized the distinctions between detention without police aid and arrest through the intervention of the police. They desired to authorize both, feeling that a merchant with reasonable grounds to suspect that a customer is guilty should not only be entitled to use methods of self-help to recover his goods without being subject to liability, but should also be authorized to employ police aid with impunity. In the other 35 states with shoplifting statutes and in the common law states, however, the import of this legislation upon the merchant's right to arrest or cause an arrest is not nearly so certain.

Eighteen statutes, in addition to the common law doctrine, permit the merchant to detain a suspect but fail to mention the merchant's right to hold the customer until the police can be summoned to make an arrest.\(^2\) Whether or not these statutes would permit the retailer to invoke police aid while maintaining his

\(^{182}\) Ark., Colo., Ill., Iowa, Kan., Ky., La., Mass., Miss., Mo., N.M., N.Y., Ore., Pa., S.C., Wash., W. Va. & Wyo. The New Mexico statute however, permits the merchant to detain the suspect or to take him into custody. No New Mexico court has interpreted this provision but the reference to "detaining" and "taking into custody" as two separate acts indicates that the legislature may have intended to allow merchants both to use self-help methods and to seek the aid of the police and the courts.
statutory privilege has not been litigated in most of these states. Indications are that courts will construe such laws as only protecting the merchant who uses self-help in an effort to retain or regain possession of his goods.

For instance, the court in Cooke v. J. J. Newberry & Co.,\textsuperscript{183} was required to construe the New Jersey shoplifting statute. The applicable provisions of that statute state:

A law enforcement officer, or special officer, or a merchant, who has probable cause for believing that a person has willfully concealed unpurchased merchandise and that he can recover such merchandise 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 not more than a reasonable time. Such taking into custody by a law enforcement officer, or special officer, or merchant shall not render such law enforcement officer, special officer, or merchant criminally or civilly liable in any manner or to any extent whatsoever.

Any law enforcement officer may arrest without warrant any person he has probable cause for believing has committed the offense of shoplifting . . . .

A merchant who causes such arrest as provided for in this section of a person for shoplifting shall not be criminally or civilly liable in any manner or to any extent whatsoever where the merchant has probable cause for believing that the person arrested committed the crime of shoplifting.\textsuperscript{184}

The court noted that "the first paragraph of [the above statute] deals only with the merchant's taking of the suspect into custody, and the custody spoken of in that paragraph is only for the purpose of recovering the goods." It then explained that "[t]he word arrest does not appear in that paragraph," and that only the second and third paragraphs authorize calling the police.\textsuperscript{185} The seventeen statutes in question, however, only contain language comparable to that in the first paragraph of the New Jersey legislation. If such language is interpreted in a manner similar to that in which the first paragraph of the New Jersey statute was construed, detention for purposes of summoning the police and causing the police to make an arrest would not be sanctioned by these statutes.

Other authorities support the reasoning of the New Jersey court. The \textit{Restatement (Second) of Torts}\textsuperscript{186} says that the merchant is privileged to detain "without arresting" any customer who is reasonably suspected of shoplifting. This conclusion was

\textsuperscript{183} 96 N.J. Super. 9, 232 A.2d 425 (1967).
\textsuperscript{186} \textit{Restatement (Second) of Torts} § 120A (1965).
reinforced by the explanation that the common law "only permits temporary detention on the premises and not the taking of the other into custody." "If the actor purports to make an arrest," concluded the Restatement, "he is not privileged unless the circumstances fall within" the general citizen's arrest laws.\textsuperscript{187} It is true that most of the statutes in question provide that detention by the merchant gives him qualified immunity from "false imprisonment and false arrest," while the Restatement model and the common law doctrine contain no mention of the torts against which the law would be a defense. But the statutory use of the words, "false arrest," is not apparently equivalent to the proper, technical use of these words and is not designed to protect the merchant who resorts to police aid. In \textit{Weyandt v. Mason's Stores, Inc.},\textsuperscript{188} the court was required to determine whether persons acting under the Pennsylvania shoplifting statute\textsuperscript{189} were also acting "under color of law," such that the case could be tried in federal district court as a "federal question." The applicable portion of the statute provided:

\begin{quote}
Persons so concealing such goods may be detained, in a reasonable manner and for a reasonable length of time, by a peace officer or a merchant or a merchant's employe in order that recovery of such goods may be effected. Such detention by a peace officer, merchant, or a merchant's employe shall not render [him] civilly or criminally liable for false arrest, false imprisonment, or unlawful detention.\textsuperscript{190}
\end{quote}

Despite the language of the statute, the court ruled, "The permitted action furthers purely private interests and the statute designates such action as a 'detention' rather than arrest."\textsuperscript{191}

The statutes of seven other states either permit the merchant to "cause an arrest" or declare that he shall not be liable for "causing such an arrest." To determine whether the legislatures of these states intended to permit the merchants to use their expanded privilege to attain police protection or to limit the privilege to the exercise of "self-help" techniques, the exact use of these words in the statutes bears examination.

The New Jersey statute previously examined has been construed to permit merchants to detain suspects until police arrive and to direct the arrest of those suspects by the police without

\begin{footnotes}
\item \textsuperscript{187} Id. Comment \textit{d} at 203.
\item \textsuperscript{188} 279 F. Supp. 283 (D.D.C. 1968).
\end{footnotes}
subjecting themselves to false arrest if they act in a reasonable manner based upon reasonable grounds. In *Cooke v. J. J. Newberry & Co.*, the plaintiff was first detained and interrogated by a security officer. When she refused to sign a confession, the security officer called the police. When they arrived, he signed a complaint. Subsequent to her acquittal, the plaintiff brought suit for false arrest and false imprisonment. Her claims were denied, based upon the following interpretation of the New Jersey statute:

The second and third paragraphs of section 100 plainly contemplate that after getting (or failing to get) the merchandise, the merchant may (as often he should) call the police. If he does, the section says (second paragraph) the responding policeman may arrest without warrant on probable cause (i.e., on what he learns from the merchant) in which case (third paragraph) the "merchant who causes such arrest as provided for in this section, of a person for shoplifting shall not be criminally or civilly liable in any manner and to any extent whatsoever where the merchant has probable cause for believing that the person arrested committed the offense of shoplifting."

Here Earabino took plaintiff into custody, and then decided not to accept the stretch pants or their price but to cause her to be arrested. He had a legal right to do so.

Five of the remaining six statutes providing for "causing arrests" are nearly identical to each other and similar to the New Jersey statute except that their third paragraphs state:

A merchant or merchant's employee who causes such arrest as provided for in subsection 1 [Paragraph 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 for believing that the person arrested committed larceny of goods held for sale.

The difference is that paragraph three does not pertain at all to paragraph two but only to a merchant who causes such arrest as provided for in paragraph one. Paragraph one, however, permits one to detain only to effect a recovery, and says nothing about granting the merchant the right to detain a person until the police arrive, or ordering the peace officer to make an arrest. "Caus[ing an arrest]" is therefore regarded by the legislature as equivalent to "causing a detention" and thus seemingly does not authorize the merchant to invoke the aid of the police.

Virginia also authorizes a person to "cause an arrest." Its

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193. Id. at 15, 232 A.2d at 428.
194. Ala., Fla., Neb., N.D. & Tenn. For statutory provisions see note 63 supra.
statute provides that a merchant who causes the arrest of a shoplifter shall not be civilly liable if he causes such arrest on the premises or in close pursuit. Again, the words are apparently used as a substitute for the word, "detention." There is no mention of using the police or of a distinction between detaining and arresting. How the Virginia courts would construe the statute in the case of an actual arrest, however, cannot now be determined.

As was previously noted, four states—Minnesota, Delaware, South Dakota and Wisconsin—provide that a suspect may be detained by the merchant solely for the purpose of summoning a law enforcement officer. These statutes do not explicitly state that the merchant will also be protected against false arrest for the subsequent arrest and detention, if any, by the officer that is summoned. However, such protection can probably be inferred. That is, any time the police are summoned at the request of the merchant, the merchant detains the suspect until their arrival, and an arrest is subsequently made, the merchant would probably be deemed to have taken sufficient action to have caused the arrest by the police. Therefore, the merchant is actually directing the arrest rather than leaving the decision to the police. It is difficult to believe that legislatures intended to protect the merchant from liability for false arrest for his personal detention until the police arrive and yet subject him to liability for the subsequent actions of the police. In fact, the Minnesota and South Dakota statutes specifically state that when the officer arrives, a charge must be made by the merchant if he is to enjoy statutory immunity from liability.

Indiana, Nevada, Oklahoma and Texas provide some protection for the merchant who seeks police aid although the exact effect of the statutes is uncertain. The Indiana, Oklahoma and Nevada laws permit merchants to detain in order to inform the police or other law enforcement officials of the facts relevant to such detention. Provided that merchants in these states do not actually instruct the police to make an arrest and do not take part in the arrest except to hold the suspect until the police arrive and then to inform them of the facts, the merchant appears to be protected from liability for the policeman's action. The third section of the Texas shoplifting statute merely provides that a merchant may detain a shoplifter for the purpose of investigating ownership. However, section two states that "all persons have a right to prevent the consequences of shoplifting by seizing any goods and bringing them, with the supposed offender, if he can be
taken, before a magistrate for examination or delivering the same to a peace officer for that purpose.” This section apparently protects the merchant from liability at both stages, assuming the arrested customer actually has the goods in his possession.

Finally, the laws of Arizona and Michigan state that the merchant is protected against liability in any action brought by an alleged shoplifter. Such a sweeping privilege would apparently include the defense against liability for using the police, although it is not certain that the legislatures of these states desired to extend the privilege beyond the use of self-help methods of detention.

2. Arrest Privileges Apart from the Shoplifting Statutes

In New Jersey, Georgia, Ohio and Utah, the merchant who acts reasonably in seeking police aid is immune from liability for false arrest at either stage. In the other states with shoplifting statutes, and in the common law states, the application of the shoplifting laws in these situations is not certain. These latter statutes, therefore, confuse the merchant who does not know whether he may call the police or not. Adding to the confusion is the fact that even if the shoplifting statutes do not authorize merchants to make or cause arrests, such power may be derived from the general citizen’s arrest laws.

At common law, a merchant may arrest a suspect without a warrant only for a misdemeanor amounting to a breach of the peace that was actually committed by the suspect in the retailer’s presence or for a felony actually committed, if the merchant had reasonable grounds to believe the suspect committed it.195

In the 18 states still following the common law doctrine,196 if the crime is a misdemeanor not amounting to a breach of peace, the suspect can recover for false arrest even if he is found guilty of the crime. Moreover, even if the offense constitutes a breach of the peace, it must still have been committed by the suspect in the arrestor’s presence. Therefore, if a customer or an employee reported the shoplifting to the store manager, and the manager detained the suspect for delivery to the police or caused the arrest by the police, the manager would be liable. Finally, even if the citizen had reasonable grounds to believe that the suspect had committed a felony, that citizen would still be liable.

195. Moll v. United States, 413 F.2d 1233 (5th Cir. 1969).
if no felony had in fact, been committed. Such a doctrine was designed to insure that any person suspected of a minor offense would not be subjected to physical abuse and indignity by a private person since the courts felt that even if he were guilty of the offense, his personal rights were more important than the interests of the state in punishing a person committing such offense.

Even in the 32 states with citizen’s arrest statutes, the arrest powers are restricted. In five states,\(^{197}\) the citizen is not authorized to make an arrest for any misdemeanor and two permit only arrests for misdemeanors when they constitute breaches of the peace.\(^ {198}\) Of the others, 20 require that the suspect must have actually committed an offense in the arrestor’s presence;\(^ {199}\) two permit arrests when petit larceny has been committed and where there are reasonable grounds to believe the suspect guilty of the offense;\(^ {200}\) one allows arrests when the arrestor has reasonable grounds to believe the crime has been committed in his presence;\(^ {201}\) one authorizes the arrests where the offense has been committed and there is a reasonable suspicion that the person arrested committed it,\(^ {202}\) and one allows such arrest on reasonable grounds that any offense has been committed in or out

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198. N.C. GEN. STAT. §§ 15-39, -40 (1965); TEX. CODE CRIM. PROC. art. 14.01 (1966), as amended, (Supp. 1970). Ariz. Rev. Stat. Ann. § 13-404 (1956), also explicitly provides that the misdemeanor must constitute a breach of the peace. However, in State v. De Santi, 8 Ariz. App. 77, 80, 443 P.2d 439, 442 (1968), the court ruled that "a private person has the right to place a thief under arrest without a warrant even in the absence of a breach of the peace, and even though the offense be a petty theft . . . ."


of his presence. In addition, a majority of the statutes permit the arrestor more freedom if the crime allegedly committed constitutes a felony than if it is a misdemeanor, even if the misdemeanor constitutes a breach of the peace.

In most of these states, it is obviously important to determine whether shoplifting constitutes a breach of the peace and whether it is a felony or misdemeanor. The courts have generally held that the offense is not a breach of the peace. As the court ruled in the Paul case, "Breach of the peace signifies disorderly dangerous conduct disruptive of public peace and it is clear that the usual shoplifting incident does not fit within this category." Therefore, in states permitting arrests only when misdemeanors constitute breaches of the peace, a merchant arresting a suspect is liable for false arrest even if the suspect is found guilty, unless the shoplifting statute otherwise provides. In West Virginia, however, the shoplifting statute provides that "an act of shoplifting as defined herein is hereby declared to constitute a breach of the peace . . . ." In the 43 states where the extent of the freedom of a private citizen may depend upon whether the offense allegedly committed was a felony or a misdemeanor, three statutes provide that all shoplifting offenses

204. Of the 22 statutes cited in notes 198 and 199 supra, which provide that a private person can arrest a suspect only when he has actually committed a felony or a misdemeanor amounting to a breach of the peace in the presence of the private person, 18 also provide that the private person can arrest a suspect when a felony has actually been committed, even though not in the citizen's presence, if the citizen has reasonable grounds to believe that the suspect committed the offense. These states are Ala., Alas., Ariz., Cal., Ga., Idaho, Iowa, Kan., Minn., Miss., Nev., N.D., Okla., Ore., S.C., S.D., Tenn. and Utah. In North Carolina no private person can arrest a suspect for any offense that was not committed in the citizen's presence, but a person can arrest a suspect when a felony has actually been committed in his presence and he has reasonable grounds to believe the suspect committed it, while he can only arrest a suspect who has actually committed a misdemeanor amounting to a breach of the peace. In New York, the only difference between the privilege of a citizen to arrest a person committing a felony or a misdemeanor is that the misdemeanor must actually have been committed in his presence while the felony could have been committed out of his presence. The statutes of Colorado and Texas draw no distinctions between the two types of offenses. For statutory provisions see notes 198 and 199 supra.
207. In Georgia, Ohio and Utah, the shoplifting statutes definitely permit merchants to make or cause arrests. See note 63 supra for statu-
are felonies. In ten states, the first offense is a misdemeanor, no matter how much is stolen. In the other states, the value of the goods stolen is determinative. In three states, thefts exceeding $20 constitute felonies while two other states set the figure at $25. In six states shoplifting is only a felony if the value of the goods stolen is over $50.

In New Jersey the shoplifting statute has been interpreted by the courts to also authorize arrests by merchants. See note supra. In Hawaii and Illinois arrests by private citizens based upon reasonable grounds to believe the suspect was committing an offense are permissible whether that offense constitutes a felony or a misdemeanor. See notes 202 and 203 supra. In Colorado one can only arrest when either a felony or a misdemeanor is committed in his presence. See note 199 supra.


212. Ala. Code tit. 1, § 7 (1960), tit. 14, § 331 (1959), as amended, (Supp. 1969); Miss. Code Ann. § 2374.02 (Supp. 1968). Ala. Code tit. 14, § 331, however, sets the value of goods stolen for purposes of constituting larceny and felonies at $5 if the items are stolen from "shops or storehouses." This may cover the shoplifting situation.

less than $75 subjects one to prosecution for a misdemeanor\(^{214}\) and 14 states set the dividing line at $100 or at a higher figure.\(^{215}\) Since the average amount stolen per offense is approximately $15,\(^{216}\) most cases of shoplifting would thus be classified as misdemeanors in most states. The merchant’s freedom to arrest or cause the arrest of suspected shoplifters in these states is therefore severely limited. Even in most of those states in which he can make arrests for misdemeanors not amounting to breaches of the peace, the suspect must not only have actually been guilty of the offense, but the person making the arrest must actually have witnessed the violation.

That many of the shoplifting statutes and general citizen’s arrest laws only permit the merchant to detain the shoplifter but not to have him arrested is unfortunate. To allow a merchant to detain a suspect whom he knows has shoplifted without permitting him to seek police aid if the customer refuses to return the goods gives the retailer just enough power to subject the customer to the indignity of involuntary detention without giving him sufficient authority to recover his goods. To permit the merchant to detain a frequent offender and convince him to return the goods without authorizing that merchant to deliver the admitted criminal into custody of the law is even more undesirable. Even if the legislators and the judges feel that the right of a merchant to deliver a suspect to the police must be more severely restricted than the merchant’s right to detain the customer without police intervention, because interrogation by the police is more humiliating than questioning by the retailer, there is still apparently no reason to prohibit the retailer from having the detained suspect arrested if it should turn out that he actually is guilty of the offense—whether or not the theft occurs in the merchant’s presence.


\(^{216}\) See note 3 supra.
As the rate of shoplifting legislation decreases and the amount of literature concerning shoplifting proliferates, the merchant will undoubtedly become more aware of the laws applicable in the states in which he operates. As more and more courts begin to interpret their state's shoplifting statutes or their common law doctrines, the retailer will also be able to determine exactly what these laws mean. With such increased understanding, he will know what steps he can take within the law and he will probably pursue them.

However, his freedom to accuse, detain and arrest will depend primarily upon the protection granted by the legislatures and the courts. He will, therefore, continue to present figures showing the disturbing losses from theft and their effect upon him and the consumer. In turn, the courts and the legislatures will continue to sympathize with the merchant and will desire "to assist the store owner in reducing the mounting problem of loss from shoplifting."217 Yet, as in the past, the lawmakers will probably also realize that the suspected customer needs protection too, and unfortunately, in an effort to balance these competing interests, they will probably continue to allow merchants to take enough action to injure the dignity and reputation of suspects without permitting them sufficient means to recover their wares. Therefore, it is unlikely that the common law privilege against slander, unchanged by any statute to date, will be expanded by future legislation. Moreover, while more states may expand the common law defenses against assault, battery and false imprisonment to protect the merchant who detains the innocent customer when reasonable grounds for belief of guilt exist, that privilege will also be severely limited. Courts will continue to be reluctant to concede the existence of reasonable grounds in cases before them, and the defense will probably still be limited to situations in which the suspect is detained in a reasonable manner for a specified purpose for a reasonable time in the vicinity of the store. Finally, while more states may allow the merchant to make or cause arrests, others will continue to limit his privilege to self-help efforts unless their general citizen's arrest statutes or common law doctrines otherwise provide. Thus, the merchant's right to regain his property and to prosecute offenders will remain—as it has always been—a narrowly restricted one.
