Shoplifting Protection for Merchants in Wisconsin

Robert W. Muren

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol57/iss1/7

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
SHOPLIFTING: PROTECTION FOR MERCHANTS IN WISCONSIN

The crime of shoplifting has grown to major proportions. It has been estimated that in Metropolitan Milwaukee, for the year 1972, approximately $40 million worth of merchandise was taken from area stores. For the state as a whole, the figure approximates $110 million. Nationally, for the year 1970, over $7 billion was taken by the nation's shoplifters.¹

Probably the main factor in the sudden rise in shoplifting has been the advent of self-service. Fewer clerks result in increased temptation. Other factors which are cited for the rise in this crime are the breakdown of the general moral fabric, inflation and the high cost of living.

Despite the fact that this is thievery, many shoplifters feel that shoplifting is not illegal. Some shoplifters state that they take merchandise simply to avoid a long wait in line in order to pay for it. They justify this on the basis that they have purchased overly-priced merchandise from the store on previous occasions and the store surely won't miss one item. Others feel that by shoplifting they can show their hostility against the "establishment". One other reason for the increase in shoplifting has been the need of those individuals in dire need of drugs to obtain money. This type of shoplifter will return the goods that he has stolen and receive a cash refund for them.²

The increase in shoplifting has occurred despite the efforts of merchants. They have utilized various techniques to combat shoplifting. These include trained store detectives, electronic cameras, etc.

¹ These figures were obtained through the courtesy of the Downtown Association of Milwaukee.
² The crime of shoplifting can be committed in any number of ways. Probably the most common situation is where the suspect will simply take some item off a shelf and stick it in his pocket, or perhaps the pocket of one of his children, with the hope that no one has seen him do so.

Because of the dangerousness of this method, shoplifters have discovered other, more stealthy, techniques. These include taking clothes into a dressing room and putting them on under baggy outer garments or, in the case of very heavy women, inserting metal clips on the inside of their dresses and then simply clipping items underneath their dresses. In conjunction with this, quite a bit of merchandise is found concealed in women's undergarments.

Finally, one last method which has become quite popular is the trick of price-tag switching. This involves taking a price tag off a lower priced item and putting it over a more expensive one. This method is extremely popular with those individuals who feel that although stealing is a crime, price-tag switching is not.
electronic sales-tags, two-way mirrors, and cooperation between stores in passing pictures and information about known shoplifters.  

However, enforcement against shoplifters has presented problems to merchants. Prosecution against shoplifters can lead to poor public relations and also be very time consuming and cause great inconvenience to the merchant. Besides this, one of the greatest problems faced by the merchant is the possibility of a suit being instituted against him by the accused shoplifter. This could include an action based on any of the following: false imprisonment, false arrest, unlawful detention, malicious prosecution, assault and battery, or slander.

The purpose of this article is to explore the possible liability of the merchant for stopping a suspected shoplifter and the effect that Wisconsin Statute section 943.50 will have in the efforts to reduce some of this liability.

I. THE MERCHANT'S COMMON LAW LIABILITY

At common law there were three basic rules which could be said to potentially apply to shoplifting.

First, one in possession of real or personal property was privileged to defend it by use of force if the actor reasonably believed that the other's intrusion could be prevented or terminated only by the immediate infliction of harmful or offensive contact. In other words, the one in possession, if he had a superior right to the property, had a privilege to resist a trespass to the property by the use of reasonable force which would otherwise amount to assault, battery, false imprisonment or false arrest. This privilege did not arise where the intruder had a privilege to intrude upon the property or where there was no immediate and urgent necessity to take action. Also, if the individual acted upon a reasonable, though mistaken, belief that the intrusion was not privileged, he would be liable for any offensive contact unless the intruder intentionally or negligently caused the actor's mistake.

However, the defense of possession of property was not adaptable to protecting the merchant from liability. By necessity, the

4. Restatement (Second) of Torts § 77 (1965).
6. Restatement, supra note 4, at comment (f).
merchant must allow individuals to enter his store and examine the goods before purchasing them. A merchant could not reasonably believe that a customer would steal his goods until the customer had pocketed or concealed the goods without paying for them and then exited the store. By that time complete dispossession had occurred and the merchant could not assert that he was acting in defense of possession of his property.\(^7\)

The second common law rule which could be said to apply to shoplifting is that pertaining to the recapture of chattels. According to this doctrine, the use of force against another for the sole purpose of retaking possession of a chattel is privileged if the chattel was tortiously taken from the actor's possession, the actor was entitled to immediate possession of the chattel, action was taken by the actor promptly after his dispossession or after his timely discovery of dispossession and the amount of force exerted to recapture the chattel was only that which was reasonably necessary to effect the recapture.\(^8\) In essence, the merchant would be allowed to recapture his chattels under the theory of fresh pursuit if he used reasonable force. The actor's reasonable but mistaken belief that another had tortiously taken his property did not create the privilege described by this doctrine unless the mistake was induced by the intruder.

However, the doctrine of fresh pursuit is very limited and most courts do not rely upon it as a justification for false imprisonment or false arrest. They look instead to the laws of arrest.

This brings us to the third common law rule pertaining to shoplifting. Under the common law a private citizen was privileged to arrest another under two situations: (1) he could make an arrest for a felony if the felony had in fact been committed and the arrested person committed it; (2) he could make an arrest for a misdemeanor which constituted a breach of the peace and which was committed in his presence.\(^9\)

When this doctrine is examined in the light of case law in Wisconsin it soon becomes evident that a merchant will not be privileged in arresting a shoplifter without a warrant, even if the

---

9. Wis. Stat. § 976.04(5) (1969). This statute states that close pursuit includes fresh pursuit. Close pursuit "shall not necessarily imply instant pursuit, but pursuit without unreasonable delay."
misdemeanor was committed in his presence. In the case of *Radloff v. National Food Stores, Inc.*,¹¹ the court held that the store employees had no right to arrest a shoplifter as the alleged crime was a misdemeanor and the employees did not have a warrant to arrest the shoplifter. In applying the common law to the *Radloff* case the court said that the authority of a private citizen to arrest without a warrant for a misdemeanor committed in his presence "should be limited to instances where the public security requires it, that is to acts which involve, threaten, or incite violence."¹² The court concluded that misdemeanor theft did not constitute a breach of the peace in that sense.

After examining the common law closely, it soon becomes evident that little protection was afforded a merchant in his struggle to prevent shoplifting.

Prior to 1969 there were several laws enacted by the Wisconsin Legislature which could also have been interpreted as dealing with shoplifting.

Wisconsin Statute section 939.49 authorizes a merchant or his employee, acting upon reasonable belief that another person is unlawfully interfering with the merchant's property, to use reasonable force to prevent or terminate such interference. This apparently provides a defense to an action for battery where the storekeeper reasonably believes a theft occurred and uses reasonable force upon an innocent person. However, the statute provides only a defense to criminal liability for use of force upon another person. Although the language of the statute does not expressly limit its applicability to criminal actions, the statute was enacted as part of the 1955 Wisconsin Criminal Code and is classified under the subchapter heading "Defenses to Criminal Liability". Since storekeepers are primarily concerned with the defense of civil suits which may arise incident to recapture, the statute seems to be of little value to them.¹³

The possible alternative for the merchant, prior to 1969, was to have a police officer arrest the shoplifter with or without a warrant. Wisconsin Statute section 954.03(1) (1967) provided that "an arrest by a peace officer without a warrant for a misdemeanor ... is lawful whenever the officer has reasonable grounds to be-

¹¹ 20 Wis. 2d 224, 121 N.W.2d 865, reh. denied, 20 Wis. 2d 237a, 123 N.W.2d 570 (1963).
¹² Id. at 237b, 123 N.W.2d at 571.
lieve that the person to be arrested has committed a misdemeanor . . . and will not be apprehended unless immediately arrested.”

In view of the above common law rules and statutory enact-
m ents it appears that prior to 1969, although a merchant could
recover his property from the shoplifter, that was the extent of his
authority. Any arrest of the shoplifter would have to be made
pursuant to an arrest warrant utilized by a police officer. If the
merchant detained a suspected shoplifter until the police officer
arrived to make an arrest, the merchant could be subjected to
liability upon one of the following grounds: false imprisonment,
false arrest, malicious prosecution, assault and battery or slander.

Of these five, false imprisonment was and still is the primary
threat to the merchant because little is needed to constitute a cause
of action sounding in it. In essence, all that need be proved is an
unjustified restraint.

False imprisonment is basically the unlawful restraint by one
person of the physical liberty of another. Mere loss of freedom
cannot constitute false imprisonment even though it is unjust; the
imprisonment must be unlawful. In order to constitute a false
imprisonment, it is essential that there be some restraint of the
person. The restraint or detention which constitutes false imprison-
ment may be brought about by the imposition of either actual or
apparent barriers. It is not necessary that there be confinement in
jail or prison. All that is said to be necessary is that the liberty of
the individual be restrained against his will and without sufficient
authority either directly or indirectly, in any manner or by any
means. The wrong may be committed by acts or words or both,
and by merely operating upon the will of the individual or by
personal violence or both. A wrongful restraint, for even a slight
amount of time, is actionable without any showing of actual dam-
ages. However, a voluntary submission to a request is not an
imprisonment, nor is involuntary submission actionable if it is
under lawful process or is otherwise justied.

14. Wis. Stat. § 954.03(1) which referred only to misdemeanors, contained limitations
which were abolished by § 968.07. This new section increased the power of a law enforce-
ment officer to arrest for all crimes when he has reasonable grounds to believe that a person
has committed a crime.
17. Id. at § 11.
False imprisonment is clearly distinct from malicious prosecution. False imprisonment proceeds "upon the theory that the plaintiff has been arrested without authority or law and unlawfully deprived of his liberty, while (malicious prosecution) proceeds upon the theory that the plaintiff has been lawfully arrested under a warrant charging a criminal offense, and that such prosecution is malicious and without probable cause."\(^2\)

Basically, most cases speak of false arrest in the same breath with false imprisonment, and again with malicious prosecution. The distinction lies in the existence of valid legal authority for the arrest.\(^2\)

There are justifications for an imprisonment which can serve as a defense to any false imprisonment action. One justification for an imprisonment is found under the law of arrest. As mentioned previously, at common law a private citizen was privileged to arrest another under two situations: (1) he could make an arrest for a felony if the felony had in fact been committed in his presence and the arrested person committed it; (2) he could make an arrest for a misdemeanor which constituted a breach of the peace and which was committed in his presence.\(^2\)

A second justification is the privilege of temporarily detaining a suspected thief for investigation. This privilege is set forth in the Restatement (Second) Torts:

One who reasonably believes that another has tortiously taken a chattel upon his premises, or has failed to make due cash payment for a chattel purchased or services rendered there, is privileged, without arresting the other, to detain him on the premises for the time necessary for a reasonable investigation of the facts.\(^2\)

The privilege to detain a suspected thief differs from the privilege of arrest in that it permits only a temporary detention on the premises for only the time necessary in order to conduct a reasonable investigation. What is reasonable will depend upon all the circumstances, including the nature of the misconduct suspected, the amount involved, the explanation or denial offered by the other,


\(^{21}\) W. Prosser, Torts § 12 (3d ed. 1964); 35 C.J.S. False Imprisonment § 4 (1960). When the detention is accomplished by reason of asserted legal authority the term false arrest is proper. False arrest embraces a false imprisonment and the only distinction is that a false imprisonment contemplates a discourse of action between private persons.

\(^{22}\) Restatement, supra note 10.

\(^{23}\) Restatement (Second) of Torts § 120A (1965).
his willingness to cooperate and the time required to consult readily available sources of information.\textsuperscript{24} The primary advantage offered by this privilege is that it protects the storekeeper who has made a reasonable mistake in believing that a theft has occurred.\textsuperscript{25}

However, prior to 1969, this privilege apparently offered no solution to the shoplifting problem in Wisconsin.\textsuperscript{26} This was because of the distinction drawn by the Restatement between detention and arrest.\textsuperscript{27} Under the Restatement, a detention within the scope of the privilege is a temporary restraint imposed for the purpose of investigating the possibility of theft of the actor's chattel, while an arrest is a taking of a person into custody for the purpose of instituting a criminal proceeding against him. The latter is not privileged unless justification is found under the arrest statutes.\textsuperscript{28}

II. EFFECT OF WISCONSIN STATUTE SECTION 943.50

It is apparent that prior to 1969 the merchant was not offered much protection against shoplifters. Because of stringent require-

\begin{itemize}
  \item \textsuperscript{24} Id. at comment (f).
  \item \textsuperscript{25} Id. at comment (e).
  \item \textsuperscript{26} Supra note 13, at 482. The article stated that the Wisconsin Supreme Court had not, at the time of the Radloff case (1961), ruled on whether this privilege should apply in Wisconsin. This opinion was based on the fact that the governor had vetoed a bill which would have created the privilege in Wisconsin. Supposedly the governor vetoed the bill on the ground that it might have intruded upon the rights of innocent citizens. Message returning Bill No. 339, S., Senate Journal, (August 16, 1963) 1806.
  \item \textsuperscript{27} Peloquin v. Hibner, 231 Wis. 77, 84, 285 N.W. 280, 284 (1939).
  \item \textsuperscript{28} RESTATEMENT, supra note 23, at Comment (d).
\end{itemize}
ments of justifiable arrest and the consequent need for protection of the merchants, Wisconsin has moved, with a growing number of states, to recognize probable cause as a defense to an action for the detention of a suspected shoplifter, whether it be for a misdemeanor or not.

In 1969, Assembly Bill 730 was passed to enact section 943.50 of the statutes which created the crime of shoplifting. The act, in general, provides that the intentional concealment of unpurchased merchandise is evidence of an intent to deprive the merchant permanently of the possession of the goods without paying for them. In addition, the discovery of unpurchased merchandise concealed upon the person or among his belongings or concealed by a person upon the person or belongings of another is evidence of intentional concealment. The purpose of this statute was to recognize probable cause as a defense in an action for the detention of a suspected shoplifter. Therefore, the statute provides that a merchant, merchant's adult employee or peace officer who has probable cause for believing that a person has violated this statute may detain the person for a reasonable length of time to make an investigation. Proof of such probable cause and the reasonableness of the detention is a legal defense to any civil or criminal action for false imprisonment.

In many states the validity of a statute creating the separate crime of shoplifting has been upheld on the grounds that there is a reasonable basis for regarding theft committed in a store or other mercantile establishment as a separate social evil distinct from theft committed under other circumstances.

Because of the importance of this statute to many merchants, each subsection will be analyzed separately.

A. Subsection (1)

Whoever intentionally alters indicia of price or value of merchandise or who takes and carries away, transfers, conceals or retains possession of merchandise held for resale, by a merchant without his consent and with intent to deprive the merchant permanently of possession or the full purchase price of such merchandise may be penalized as provided in subsection (4).  

29. Prior to the enactment of Wis. Stat. § 943.50 most shoplifters, because of the small amount stolen, were prosecuted under Wis. Stat. § 943.20(3)(a) (1969).
30. 52A C.J.S. Larceny § 1(5) (1968).
31. Wis. Stat. § 943.50(4) deals with the penalties imposed for being convicted of
The purpose of this subsection is to define what action constitutes the crime of shoplifting in Wisconsin. The statute refers to a situation where a person intentionally alters a price tag or the value of merchandise. This phrase was included in the definition of shoplifting because a popular form of this crime is to take a price tag off a lower priced item and either put it over the price tag of a higher priced item or remove the other tag completely and put the lower priced tag on the higher priced item. In this manner, although the individual is still paying for the item he is defrauding the merchant of part of the item’s value. Therefore, it would appear that the purpose of this phrase is to try to stop this type of conduct by defining it as shoplifting.

It should also be noted that besides the intentional alteration of price the statute also states that one “who takes and carries away, transfers, conceals or retains possession of merchandise held for resale, by a merchant without his consent and with intent to deprive the merchant permanently of possession, or the full purchase price of such merchandise” is guilty of shoplifting. In conjunction with this last sentence, Wisconsin Statute section 943.20(1)(a)\(^2\) which defines theft should be examined.

When this comparison is made it becomes apparent that the wording of these two sections is quite similar, which leads to the conclusion that although shoplifting is an alternative form of prosecution for theft this special definition is needed in order to define under what factual circumstances probable cause will serve as a legal defense to a civil action for false imprisonment.

This definition of shoplifting should not be confused with theft under section 943.20(1)(a) for section 943.50 can only be resorted to when “merchandise held for resale by a merchant is taken without his consent and with an intent to deprive the merchant permanently of possession or the full purchase price” of the merchandise. If there are goods taken from the store which are not held for resale—such as furniture or items in the manager’s office—then the individual guilty of taking these goods would be prosecuted under section 943.20(1)(a) and not under section 943.50.

shoplifting. The penalties imposed are the same as those under Wis. Stat. § 943.50(3)(a), (b) & (c).

32. Wis. Stat. § 943.20(1)(a) (1969) provides that:

Whoever does any of the following may be penalized as provided in sub. (3) (a):

Intentionally takes and carries away, uses, transfers, conceals, or retains possession of movable property of another without his consent and with intent to deprive the owner permanently of possession of such property.
However, this subsection is not complete in and of itself for it does leave some questions unanswered. For example, in order to determine what constitutes the crime of shoplifting one would have to know how the terms “merchant” and “merchandise held for resale” are defined.\(^3\) Probably these would not include failures to pay for the fare for train or bus rides, or the admission to theaters, amusement parks, or circuses. But does it cover the failure to pay for a meal in a restaurant?

**B. Subsection (2)**

The intentional concealment of unpurchased merchandise which continues from one floor to another or beyond the last station for receiving payments in a merchant’s store is evidence of intent to deprive the merchant permanently of possession of such merchandise without paying the purchase price thereof. The discovery of unpurchased merchandise concealed upon the person or among the belongings of such person or concealed by a person upon the person or among the belongings of another is evidence of intentional concealment on the part of the person so concealing such goods.

The purpose of this subsection is to alleviate the necessity for proving independently an intent to deprive the merchant permanently of possession of the shoplifted article.

In order to obtain a conviction under section 943.20(1)(a) it is necessary to prove that the defendant, among other things, took and carried, used, transferred, concealed or retained possession of property with intent to deprive the owner permanently of its possession.\(^4\)

The Wisconsin Jury Instructions—Criminal provides that:

The intent to deprive the owner permanently of possession of his property means that the defendant has a purpose permanently to deprive the owner of such possession. You cannot look into a man’s mind to find out his intent. While this intent to deprive the owner permanently of possession of his property must be found as a fact before you can find the defendant guilty of theft (under section 943.20(1)(a)), it must be found, if found at all, from his acts and his words and statements, if any, bearing upon his in-

---

33. For example, 22 Okl. St. Ann. § 1343 (1970) provides definitions to these and other terms before defining the crime of shoplifting. Even Wis. Stat. § 943.20(2)(b), which defines theft in Wisconsin provides a definition as to what constitutes movable property under Wis. Stat. § 943.20(1)(a).

34. Wis. J.I.—Criminal 1441 Theft (Larceny).
tent. When there are no circumstances to prevent or rebut the presumption, the law presumes that a reasonable person intends all of the natural, probable, and usual consequences of his deliberate acts.35

Much of this proof necessary to show intent under section 943.20(1)(a) is alleviated by subsection (2), for if unpurchased merchandise is found concealed upon the person or among his belongings or found concealed by the person upon the person or among the belongings of another when the person has passed to another floor or beyond the last station for receiving payment for the item, then such concealment is deemed intentional concealment which is evidence of an intent to deprive the merchant permanently of possession of such merchandise.

The only question which remains unanswered is whether the intentional concealment of unpurchased merchandise which is evidence of an intent to deprive the merchant permanently of possession is an inference, rebuttable presumption, or a conclusive presumption. If this subsection simply means that such evidence is admissible on the intention to deprive the merchant permanently of possession but not that a presumption is raised, the merchant is in little better position than before the statute was adopted, because finding unpurchased goods on a person in a store would be admissible as relevant and material on the question of intent to deprive the merchant permanently of possession even without the statute.36

However, this question appears to have been answered in the case of State v. Johnson.37 There the court stated:

Mere possession of stolen property raises no inference of guilt, but Wisconsin from early times has followed the rule that unexplained possession of recently stolen goods raises an inference of greater or less weight, depending upon the circumstances . . . Such inference, being in the nature of a presumption of fact, calls for an explanation of how the possessor obtained the property. Such presumption is not conclusive and may be rebutted.38

The first sentence of this subsection talks about the intentional

35. Id. at comment.
36. 11 Drake L. Rev. 31, 47 (1961). The original draft of Assembly Bill 730 provided that intentional concealment was prima facie evidence but this was deleted by Amendment 8.
37. 11 Wis. 2d 130, 104 N.W.2d 379 (1960).
38. Id. at 139, 104 N.W.2d at 384.
concealment of unpurchased merchandise which continues from one floor to another or beyond the last station for receiving payments in a merchant's store.

When the statute talks about taking unpurchased merchandise from one floor to another it would appear that the situation they are referring to is where there is a separate check-out counter for each floor. If there was no check-out counter on the floor it would be difficult to say that the merchandise was unpurchased for the individual had not yet had an opportunity to pay for it.

In conjunction with this, the statute makes no reference to a situation where the store may have only one floor in which some departments have their own check-out counters. Apparently, under the statute the individual would not be guilty of shoplifting if he failed to pay in the department where he obtained the item unless he also failed to pay at the last general check-out station.

The first sentence also states that if the individual continues past the last station for payment in the merchant's store without paying for the merchandise then this is evidence of an intent to deprive the merchant permanently of possession of the merchandise. The question which is not answered is whether the shoplifter has to be apprehended while still in the merchant's store or whether the individual can be apprehended outside the store and, if so, does the apprehension have to take place within the immediate vicinity of the store. The Restatement allows a merchant to detain an individual on the premises in order to make a reasonable investigation of whether the individual had tortiously taken the chattel or failed to make payment for it. However, the Caveat to this section states that, "no opinion is expressed as to whether there may be circumstances under which the privilege may extend to the detention of one who has left the premises but is in its immediate vicinity."

Despite the fact that the Restatement expresses no opinion on this subject, others have. Logically, the right to detain should not be confined to suspects apprehended on the premises themselves, but should extend to fresh pursuit reasonably near the premises.

39. Assembly Amendment 1 to Assembly Bill 730 deleted the words "inside or outside" from the original wording of the bill. It originally provided that, "[t]he intentional concealment of unpurchased merchandise inside or outside the merchant's store . . . ."
30. Supra note 23, at Caveat.
41. Note, Merchants Liability For False Imprisonment, 17 S.C.L. REV. 729 (1965). The probable limits of fresh pursuit are prompt and persistent efforts to recover the property without any undue lapse of time during which it may be said pursuit has come to a halt.
To go to extremes, in *J.C. Penney Co. v. O'Daniell,*\(^42\) employees pursued the plaintiff out of the store, in and out of several stores, and finally stopped her aboard a bus. Applying Oklahoma law, the case indicated that this was permissible.

A more reasonable interpretation was discussed in the case of *Bonkowski v. Arlan's Department Store,*\(^43\) in which the Michigan Supreme Court found that the privilege in favor of a merchant to detain for reasonable investigation a person whom he reasonably believes to have taken a chattel unlawfully extends to the detention of one who has left the premises but is in the immediate vicinity.

To conclude the discussion on this subsection, the last sentence states that "the discovery of unpurchased merchandise concealed upon the person or among the belongings of such person or concealed by a person upon the person or among the belongings of another is evidence of intentional concealment on the part of the person so concealing such goods." Apparently, this part was designed to cover a situation where either the individual retains the shoplifted item himself or where he takes the item but conceals it in another's belongings—such as the pocket or purse of one of his children. By the inclusion of the last part of this sentence, it is possible to charge an individual with shoplifting even if the item isn't found on his person or among his belongings. However, conviction would be subject to the probable cause requirement under subsection (3), which, in this case, would be the observation by a floorwalker of the individual taking the item without paying for it, and the finding of the item concealed on the person or among the belongings of another.

C. **Subsection (3)**

A merchant or merchant's adult employee who has probable cause for believing that a person has violated this section in his presence may detain such person in a reasonable manner for a reasonable length of time to deliver him to a peace officer, or to his parent or guardian in the case of a minor. The detained person must be promptly informed of the purpose for the detention and be permitted to make phone calls, but he shall not be

---

\(^{42}\) W. PROSSER, TORTS § 22 (3d ed. 1964).

\(^{43}\) 263 F.2d 849 (10th Cir. 1959).
interrogated or searched against his will before the arrival of a peace officer who may conduct a lawful interrogation of the accused person. Compliance with this subsection entitles the merchant or his employee affecting the detention to the same defense in any action as is available to a peace officer making an arrest in the line of duty.

The purpose of this subsection is to provide that when a merchant or one of his adult employees has probable cause to believe that a person has committed the crime of shoplifting and in response to this the suspected shoplifter is detained in accordance with the guidelines set forth by this subsection, the merchant or his adult employee has a valid defense against any action for false imprisonment arising out of the detention. Prior to the enactment of this statute the only protection the merchant had against shoplifters was the privilege discussed earlier and the laws of arrest.

The key to this subsection is that a suspected shoplifter may be detained only if the merchant or his adult employee has probable cause to believe that the person committed the crime in his presence.

Probable cause to arrest must be measured by the facts of the particular case and refers to that quantum of evidence which would lead a reasonable police officer to believe, albeit based on hearsay, that the defendant probably committed a crime. But it is not necessary that the evidence be sufficient to prove guilt beyond a reasonable doubt or that guilt is more probable than not, it being necessary only that the information lead a reasonable officer to believe that guilt is more than a possibility.44

This doctrine achieves the same result as the doctrine of defense of possession of property allowing a merchant a reasonable mistake in detaining a suspected shoplifter.45

Wisconsin has not been the only state to adopt probable cause as a justification for detaining a suspected shoplifter. Forty-three states now have statutes extending some form of immunity to mer-
chants who detain suspected shoplifters.\textsuperscript{48}

Prior to the recognition of probable cause as a defense, there was clear authority under the common law for an involuntary detention that did not amount to an arrest. In California, in 1936, the doctrine of probable cause as a defense for detaining a suspected shoplifter was introduced. In the case of \textit{Collyer v. S.H. Kress Co.},\textsuperscript{47} a man was seen by several store employees putting

\begin{itemize}

Other states have statutes with various idiosyncrasies. Montana and Vermont give a merchant the right to request an individual to place or keep in full view merchandise which he has removed from display counters. Mont. Rev. Codes Ann. § 64-213 (1970); V.S.A. § 2566 (1971).


Arizona alone imposes no limitation that the detention must have been for a reasonable time in a reasonable manner. A.R.S. § 13-675 (1972).

Virginia exempts a merchant from civil liability only when he causes an arrest and does not provide immunity when he detains. Va. Code Ann. § 18.1-126 (1971).

Eight jurisdictions have no statute protecting merchants who detain or cause the arrest of the suspected shoplifter: Alaska, California, Connecticut, District of Columbia, Idaho, Maine, New Hampshire, and Rhode Island. Of these eight all but California have a statute declaring shoplifting to be a crime.

47. 5 Cal. 2d 175, 54 P.2d 20 (1936). In this case the court recognized that considerable confusion existed as to whether or not probable cause was a defense to an action for false imprisonment and admitted that statements had been made to the effect that probable cause was no defense to actions for false imprisonment. After distinguishing the cases in which such statements had been made, however, the court went on to say that probable cause was a defense. Its language, frequently cited by other courts is as follows:

Ordinarily, the owner of property, in the exercise of his inherent right to protect the same, is justified in restraining another who seeks to interfere with or injure it, . . . However, there seems to exist considerable confusion in the cases as to whether probable cause is a defense to false imprisonment cases involving misdemeanors. The broad statement occasionally appears to the effect that probable cause is no defense in actions for false imprisonment . . . The cited cases involved unlawful arrest under the authority of illegal process issued in civil actions. In such instances, as in all cases involving solely the legality of the process, it is obvious that probable cause is not
various items in his pockets. As he was leaving the store, he was stopped by a female store detective who escorted him to an upstairs room under threat of calling the police. There he was detained for questioning for twenty minutes until he was actually arrested by the police. The court held that a property owner was justified in detaining a person when he had probable cause to believe that the person was stealing his property. The detention must be only for the purpose of investigation of the circumstances and the investigation must be conducted in a reasonable manner and only for a reasonable time.

The Restatement (Second) Torts codified this position in its section 120A which influenced the development of the law in other jurisdictions.

Although the spread of the Collyer doctrine has been slow, it

pertinent to any issue in the case. Because of like irrelevancy, the statement may properly be made in cases of illegal arrest upon suspicion by a private person where, by statutory authority or otherwise, he is permitted to make such an arrest only when the offense is being committed in his presence. However, those authorities which hold, where a person has reasonable grounds to believe that another is stealing his property, as distinguished from those where the offense has been completed, that he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner must necessarily proceed upon the theory that probable cause is a defense. And this is the law because the right to protect one's property from injury has intervened. In an effort to harmonize the individual right to liberty with a reasonable protection to the person or property of the defendant, it should be said in such a charge of false imprisonment, where a defendant had probable cause to believe that the plaintiff was about to injure the 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. As already indicated, the rule should be different if the offense believed to be in the process of commission related to the person or property of another. And, of course, we may properly refer to probable cause as a defense in false imprisonment cases as constituting that justification for the arrest which may be announced by statutory enactment.

48. Examples of improper purposes of detention are: Banks v. Food Town, Inc., 98 So. 2d 719, 721 (La. Ct. App. 1957) (conducting a search without a warrant); Teel v. May Department Stores Co., 348 Mo. 696, 707, 155 S.W.2d 74, 79 (1941) (extorting a confession).

49. A third limitation was set forth by the court. This was that the privilege was applicable only in cases where the suspect was believed to be steals property "as distinguished from those where the offense has been completed." 5 Cal. 2d at 180, 54 P.2d at 23. This limitation was ignored in a case decided five days later in which the suspect was detained when he had already stolen an article and was on the sidewalk outside the store. Bettolo v. Safeway Stores, Inc., 11 Cal. App. 2d 430, 54 P.2d 24 (1936). This limitation has subsequently been ignored by jurisdictions which have followed Collyer in other respects. See, Comment, The Protection and Recapture of Merchandise From Shoplifters, 47 Nw. U. L. Rev. 82 (1952).

50. Supra note 43, at 351.
now appears that the desire of the merchants for increased immunity from suit has been answered, at least in Wisconsin, by recognizing probable cause as a defense to an action for false imprisonment. However, because the plaintiff in a false imprisonment action need not allege or prove want of probable cause, the burden of proving the existence of probable cause as an element of justification is on the one asserting the lawfulness of the detention.51

Where the facts of the case are not in dispute, probable cause is a question of law for the court to decide. If there is conflicting evidence on the issue of probable cause, then it is a jury question.52 However, perhaps in one specific instance the issue of probable cause will not even be litigated. This would occur in the situation where the accused is brought to trial for shoplifting and the issue of probable cause is litigated there. At a subsequent trial for false imprisonment, the issue of probable cause could not be litigated again because of the doctrine of collateral estoppel.53 Therefore, the ruling from the previous trial on this issue would govern.

In Wisconsin, probable cause will serve as a defense to an action for false imprisonment if the merchant or one of his adult employees has probable cause to believe that the crime was committed in the presence of such merchant or adult employee.

In most cases, this means that the merchant or his adult employee must have seen the suspect take the item, retain it, and fail to pay for it. If these events occur, there is probable cause to believe that the individual has committed the crime of shoplifting. However, a problem arises when a customer informs the merchant or one of his employees that he has seen another customer take merchandise and put it in his pockets. Is the customer's word sufficient to establish probable cause so that a merchant or his adult employee would be justified in detaining the individual? According to section 943.50(3), the customer's warning to the merchant or his employee would probably not be sufficient to establish probable cause to detain the suspect because the crime must have


53. Ashe v. Swenson, 397 U.S. 436 (1970). Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in any future lawsuit.
been committed in the presence of the merchant or his employee before probable cause will serve as a defense to an action for false imprisonment.

However, ordinarily when a police officer is making an arrest, hearsay information may be used to determine whether the officer had probable cause to make an arrest. Because the statute here deals with a mere detention instead of an arrest, why shouldn’t the merchant or his employee be allowed to detain a suspect based on hearsay information from a customer? Perhaps the refusal to allow hearsay to act as a basis for establishing probable cause in this situation is to protect citizens as much as possible from an unjustified detention. One of the reasons for the failure of prior shoplifting bills to pass the legislature was the concern that this privilege of detention would impinge upon the rights of innocent citizens. Therefore, when this bill was passed the privilege to detain was limited to certain instances, presumably to afford citizens as much protection as possible against unjustified detention. Freedom from improper restraint is one of the most basic rights in a free society, and any expansion of the merchant’s arrest power must be considered for its possible effects upon this right.

If the merchant has probable cause to believe that an individual has taken some item from his store, then he may detain him until the police arrive. This privilege empowers the merchant only to detain a suspected shoplifter. There is a distinction between arrest and detention. In order to constitute an arrest, a person must be taken into custody for the purpose of instituting a criminal proceeding against him. Detention, within the scope of the privilege, is a temporary restraint imposed for the purpose of investigating the possibility of theft of the actor’s chattel.

In examining the first sentence of subsection (3) it should be noted that only the merchant or one of his adult employees may detain the suspected shoplifter if they have probable cause to do so. When this section of the statutes was created, the age of

54. Supra note 44, at 625.
55. Supra note 26, at 487.
56. Supra note 23, at comment (d).
57. Assembly Amendment 4 tried to substitute the words “manager or supervisor” for employee but this amendment was defeated. Assembly Amendment 5 tried to limit those individuals who would be privileged to detain a suspected shoplifter. It provided that:

No person detaining another shall come under this subsection unless he has received three hours of instruction in the law of crimes against property and false imprisonment by the local police in a manner approved by the department of justice.
majority in Wisconsin was twenty-one. However, since the passage of Senate Bill 453, the age of majority in Wisconsin has been lowered to the age of eighteen. Therefore, any employee eighteen years or older should be justified in detaining a suspected shoplifter if he has probable cause to do so. This creates a problem, for minors are allowed to work in Wisconsin if the requirements of Wisconsin Statutes Chapter 103 are met. If section 943.50 is followed, a minor employee, despite the fact that he has seen an individual intentionally conceal an item and fail to pay for it, may not detain a suspected shoplifter without fear of being liable for an action for false imprisonment. Although an argument may be made that in order to protect a minor employee from harm by a suspected shoplifter the minor should not be allowed to detain him, who is to say that an eighteen year old is better qualified to avoid danger than a sixteen year old may be? One of the arguments used to avoid lowering the age of majority to eighteen was that the eighteen-year-olds were not old enough to cope with adult responsibilities. Perhaps the best way to remedy this would be to allow only certain employees to detain a suspected shoplifter. This limitation, however, would have an adverse effect on the merchant in a small store for he has only a limited amount of employees to begin with.

Another question which arises is what type of individual working in the merchant’s store is considered to be a merchant’s employee so as to qualify for the protection provided in the statute. Wisconsin Statute section 102.070 provides a definition for the

However, this also was defeated.

This would appear to show some legislative intent to safeguard the rights of innocent citizens by limiting the individuals privileged to detain a suspected shoplifter. Apparently though, the legislature felt the amendments were too restrictive.

58. Wis. Laws 1971, ch. 213.

59. In comparison to the Delaware Statutes, the term “adult employee” seems quite liberal, for 11 Del. C. § 647 (1970) provides that only the merchant or one of his employees over the age of twenty-five years old is entitled to protection under the statute.

60. This section provides that:

Every person in the service of another under any contract of hire, implied or express, all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer, including minors (who shall have the same power of contracting as adult employees), but not including (a) domestic servants, (b) any person whose employment is not in the course of a trade, business, profession or occupation of his employer, unless as to any of said classes, such employer has elected to include them. Item (b) shall not operate to exclude an employee whose employment is in the course of any trade, business, profession or occupation of his employment, however casual, unusual, desultory or isolated any such trade, business, profession or occupation may be.
term "employee" as used in conjunction with workmen's compensation. In Lincoln County v. Industrial Commission, the court stated that the relation of "employer and employee" exists where one performs work under a contract which compels him to do work under the control of the employer and gives the employer the right to direct his conduct and to dismiss him from service. With this definition in mind, the question to be answered is whether a security officer employed by a separate firm but hired to protect a store is an employee entitled to protection as a merchant's employee under section 943.50, or whether the employee is the employee of the independent contractor.

According to the definitions found under section 102.07 the vital questions for the purpose of determining whether a borrowed employee retains his employment with his original employer or becomes the employee of the special employer are whether the employee actually or impliedly consented to work for the special employer, whose work he was performing, who had the right to control the details of the work being performed, and who was the primary beneficiary of the work.

A way to possibly include a store detective as an employee of the merchant is to strictly construe the independent contractor relationship. An independent contractor is one who contracts to do a specific job according to his own methods and without being subject to the control of his hirer except as to the result of his work. A contract providing for a continuous service of a store detective, and not for a specific job, has been held to negate an independent contract relationship. Further, the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of the particular work itself has been held to be almost conclusive evidence of an employer-employee relationship.

The question of who is an employee, whether the employee's acts were authorized, and whether he was acting within the "scope of his employment" are also important in case the individual who

61. 228 Wis. 126, 179 N.W. 632 (1938).
63. Adams v. F.W. Woolworth Co., 144 Misc. 27, 257 N.Y.S. 776 (1932). Besides this approach, the case of Nelson v. R.H. Macy Co., 434 S.W.2d 767 (Mo. App. 1968), applied the doctrine of respondeat superior to hold a department store liable for the acts of a police officer employed by the department store during his duty hours to protect the store from, and to apprehend shoplifters.
detains the suspected shoplifter is judged not to have had sufficient probable cause to do so or the detention is deemed to have been unreasonable. In such a case if the employee’s acts were authorized and he was acting within the scope of employment, then the merchant will be held liable for the acts of his employee. The majority of courts do not require that express authority be given to the employee in order to hold the merchant liable for the employee’s acts—he may be held liable on the theory of implied authority. The reasoning behind this theory is that the employees entrusted with property for sale or safe-keeping, or assigned to positions requiring performance of certain duties to protect the property in the store, have implied permission from their employers to do all things proper and necessary to protect the property and to perform their duties. Therefore, the employer becomes liable for his employee’s acts within the limits of the employee’s implied authority and scope of employment, however erroneous or mistaken the employee’s acts.64 Also, the wider the permissible discretion an employee has, the easier it is to find implied authority to detain the search.65

The most important limit upon the “scope of employment” requirement is that the employee must be in the act of recovering his employer’s property.66 Where an employee takes steps to punish a suspected shoplifter, or to vindicate the law, or to punish what he conceives to be a personal wrong, or to punish the invasion of his personal rights, the employee is not performing his duties to sell or protect his employer’s property. He is acting outside the scope of his employment, on a “frolic of his own”.67 For such actions,

64. J.J. Newberry Co. v. Judd, 259 Ky. 309, 82 S.W.2d 359 (1935) (liberality in favor of the person imprisoned or otherwise injured must be exercised in determining the scope of the authority of the agent and the responsibility of the principal); McCrory Stores Corporation v. Satchell, 148 Md. 279, 129 A. 348 (1925). Here the store manager was held to have acted within his implied authority, because the goods for resale were entrusted to him for safe-keeping, in attempting to recover the goods he thought had been stolen; the store owner was held liable for the manager’s assault and false imprisonment of the plaintiff erroneously suspected.

65. Id. at 82 S.W.2d at 363. Here it was stated that the designation of “manager” or “assistant-manager” carried with it the implication of general power and permitted a reasonable inference of authority to conduct and control the employer’s business in the store, and that his acts were most surely those of the principal.

66. Long v. Eagle 5, 10 and 25¢ Store Co., 214 N.C. 146, 198 S.E. 573 (1938). Here the court stated that the fact that the store manager called the police to arrest and search the plaintiff did not relieve the store from liability; the fact that the store manager had the plaintiff arrested and searched immediately was evidence showing that the manager was attempting to protecting the employer’s property.

67. Supra note 36, at 42.
the employer cannot be held liable. The injured person’s action is against the employee.

Returning to the discussion of Wisconsin Statute section 943.50(3), although the merchant or his adult employee may have had probable cause to detain, the qualified privilege of detention without fear of liability for false imprisonment may be lost by the manner in which it is exercised. Subsection (3) provides that the suspected shoplifter may be detained if there is probable cause to do so, but such person must be detained in a reasonable manner and only for the reasonable length of time necessary in order to deliver him to a peace officer or to his parent or guardian in the case of a minor.\textsuperscript{8}

Basically, what is a reasonable manner and a reasonable length of time is within the domain of the jury (the right to detain a person in a reasonable manner for a reasonable length of time for the purpose of investigation was first set forth in the Collyer case.\textsuperscript{68}) and depends on the particular facts and circumstances of each case. A court might decide that it is unreasonable as a matter of law to search the person or seize goods in his possession. However, no federal constitutional right is at stake, for the Fourth Amendment protects citizens only from governmental searches and seizures and not those by private persons.\textsuperscript{70}

The detention must be made in a reasonable manner. What is reasonable depends upon the facts of each case. However, a question which is not answered by the statute is whether the merchant is permitted to use any force to detain a shoplifter who will not remain voluntarily. According to Collyer,\textsuperscript{71} one may use only reasonable force to effect the detention of a suspected shoplifter and if this is exceeded, justification will be lost.\textsuperscript{72} Likewise, the right to detain is no license to insult or abuse and if the actor is excessively vehement there may be liability for slander\textsuperscript{73} and assault as well.\textsuperscript{74}

\textsuperscript{68. Supra note 47. The right to detain a person in a reasonable manner for a reasonable length of time for the purpose of investigation was first set forth in the Collyer case.}
\textsuperscript{69. Delp v. Zapp’s Drug & Variety Stores, 238 Ore. 538, 395 P.2d 137 (1964).}
\textsuperscript{70. “Moreover, the Fourth Amendment protects only against searches and seizures which are made under governmental authority, real or assumed, or under color of such authority.” Burdeau v. McDowell, 256 U.S. 465, 467 (1921). The provisions of the Fourth Amendment were applied to the states in Wolf v. Colorado, 338 U.S. 25 (1949).}
\textsuperscript{71. Supra note 47.}
\textsuperscript{72. Peak v. W.T. Grant Co., 386 S.W.2d 685 (Mo. 1964); Teel v. May Department Stores Co., 348 Mo. 696, 155 S.W.2d 74, 137 A.L.R. 495 (1941).}
\textsuperscript{73. Burnaman v. J.C. Penney Co., 181 F. Supp. 633 (S.D. Tex. 1960); Little Stores v. Isenberg, 26 Tenn. App. 357, 172 S.W.2d 13 (1943). In this case where the alleged defamatory words—“you didn’t pay for your groceries”—were spoken in a crowd, a publication...
It is obviously beyond reason to confine a person in a small room
to compel a confession. One may request a confession, for re-
covery of the goods is no less a confession, but he cannot compel
or coerce a confession. Nor is he allowed to conduct a search of
the person against his will. When the tenor of conduct begins to
more closely resemble punishing the offender than protecting prop-
erty, the merchant has gone as far as he can go.

In Wisconsin there are some specific requirements which must
be met in order for the detention to be deemed conducted in a
reasonable manner. The detained person must be promptly in-
formed of the purpose for the detention, given the opportunity to
make phone calls, and be asked if he would voluntarily confess or
allow a search. If he refuses to be interrogated or searched the
merchant may not do so against his will before the arrival of a
peace officer. If the merchant does, he is not entitled to the protec-
tion provided by this statute, for the detention would not be
deemed to have been conducted in a reasonable manner. However,
once the peace officer has arrived the officer may conduct a
lawful interrogation of the accused.

In addition to the requirement that the detention be conducted
in a reasonable manner, it must be conducted for only a reasonable
length of time. In Wisconsin the purpose of this detention is sup-
posedly limited to the summoning of a peace officer. Only if the

---

always involves a technical assault and if combined with a battery it does not change the
character of the action but merely serves to increase actual damages.

1964); W.T. Grant Co. v. Owens, 149 Va. 906, 141 S.E. 860 (1928).


8. Capital Times, Dec. 4, 1969. This article stated that immediately after the passage
of the bill a conference was held in Madison involving the Madison Police Chief, Wilbur
Emery, the Assistant District Attorney, Andrew Somers, and numerous merchants. In reply
to a question concerning the questioning of suspected shoplifters both Emery and Somers
concurred in an opinion that only the police are required by law to inform a suspect of his
rights, and so the merchant could, with impunity, and without jeopardizing any case against
the suspect, question him to their heart’s content. The article went on to add that:

The new law specifically forbids questioning a suspect against his will but, as a
private citizen not bound by the Miranda decision regarding police questioning
procedures, the merchant can ask anything. While the suspect needn’t answer the
questions he probably wouldn’t be aware of this and would testify against himself.
individual voluntarily agrees to be interrogated or searched may this be done during the detention. In view of this it may be said that Wisconsin has set a presumptive limit on what constitutes a reasonable time for the detention—that being the time until the police arrive after being promptly notified.\(^7\)

Other states also have this presumptive limit on what constitutes a reasonable time; not more than thirty minutes in West Virginia\(^8\) or more than one hour in Louisiana;\(^9\) until the police arrive after being promptly notified in South Dakota;\(^10\) and for time to examine records in Hawaii\(^11\) and Washington.\(^12\)

In general, whether the reasonable time requirement is met depends heavily on the particular facts and circumstances of each case. This could mean that if the police are not promptly notified and the shoplifter is held for an unreasonable period of time, based on the facts and circumstances of the case, the merchant could forfeit the privilege given to him by section 943.50. In *Collyer*,\(^13\) a detention of twenty to thirty minutes was reasonable; but approximately the same length of time consumed in attempts to extract a signed confession would be patently unreasonable.\(^14\) It has also been held that once the purpose for which the statute allows a detention is satisfied—the goods are returned,\(^15\) payment is tendered,\(^16\) or the suspect is vindicated by the cashier\(^17\)—any further delay is unreasonable.

As mentioned previously, the purpose of this detention is to deliver the suspected shoplifter to a peace officer or to his parents or guardian in the case of a minor. It should be noted that the statute does not say that the suspected shoplifter should be delivered only to his parents or guardian if a minor is involved. Therefore, it would appear that any shoplifter, no matter what his age,

---

\(^7\) It may be assumed that Wisconsin has set a presumptive limit on what constitutes a reasonable time, for Assembly Amendment 4 to Assembly Bill 730 which would have limited a reasonable time to "not over one-half hour" was defeated.


\(^9\) LSA-C.Cr.P. art. 215 (1967).


\(^12\) RCWA 9.01.116 (1970).

\(^13\) Supra note 47.

\(^14\) Wilde v. Schwengmann Bros. Giant Supermarkets, supra note 75.

\(^15\) Teel v. May Department Stores Co., supra note 72.


\(^17\) Id. See also Little Stores v. Isenberg, supra note 73.
may be held until the police arrive at which time he may be turned over to them.90

The second sentence of subsection (3) of section 943.50 provides guidelines for a reasonable detention and also sets forth the rights of the suspect. This provides that the detained person must be promptly informed of the purpose for the detention and be permitted to make phone calls, but he shall not be interrogated or searched against his will before the arrival of the peace officer who may conduct a lawful interrogation of the accused person. When speaking of the rights of the suspected shoplifter, it must be remembered that the merchant is merely detaining the suspect and not arresting him. If he does arrest him, then section 943.50 will not afford him any protection. With this in mind it may be easier to understand why more rights are not given to the suspect.91

However, a strict interpretation of the term "arrest" includes the detention of a person. Therefore, it may be argued that, in essence, this detention is really an arrest. But if this detention does constitute an arrest then why isn't the merchant required to inform the suspect of his rights as set forth in Miranda v. Arizona?92 Apparently, the Wisconsin Legislature has felt, as expressed by the statute, that a detention under these circumstances is not an arrest.93 However, in order to protect the suspected shoplifter some

---

90. Compare this with N.C. Gen. Stat. § 14-72.1 (1971) which provides that the merchant should call the minor's parents or guardian ad litem while the minor is being detained.

91. In conjunction with this, Assembly Amendment 3 to Assembly Bill 730 proposed to insert that:

Immediately upon initiating detention, the person being detained shall be advised that he is not required to answer any questions, that anything he says may be taken down and later used against him, that he may select and consult with an attorney before speaking to the merchant, merchant's employee, or peace officer who is seeking to detain him and that, if he cannot afford to retain an attorney the court will appoint an attorney in the event the person detained is arrested and charged with a violation of this chapter.

This amendment was defeated though. It would appear that the rights which this proposed amendment would have given to the defendant are those given to a defendant after he has been arrested and not just while he is being detained.

92. 384 U.S. 436 (1966). Basically, before any interrogation may take place after an arrest the accused must be informed that he has the right to remain silent, that anything he says can and will be used against him in court, that he may refuse to answer questions or stop talking at any time, that he has the right to counsel being present at any interrogation and that if he is indigent counsel will be appointed for him. In addition, before any interrogation may take place the accused must have expressly waived these rights and been willing to engage in conversation.

93. This is a significant departure from the law of arrest, for in the case of State v. Harrison, 260 Wis. 89, 50 N.W.2d 38 (1951), the court held that:

It was sufficient in respect to the time when the defendant was entitled to be
safeguards against impulsive detentions are written into the statute.

First, the suspected shoplifter must be informed of the purpose for his detention. Probably the main reason for this requirement is that ordinary citizens do not detain one another in this sense.94 Once the purpose of the detention is known the suspect may be able to convince the merchant that he did, in fact, pay for the merchandise or else that he returned the merchandise before leaving the store.

The second safeguard is that the suspect must be permitted to make phone calls. It may be assumed that this is in conformance with Miranda95 in that probably the only way to have an attorney present during any interrogation is to call him. However, it should be noted that the statute does not state that the merchant must inform the suspect that he will be permitted to make phone calls. It merely states that he may do so. Therefore, if the suspect is not aware of this privilege he may not exercise it although, in actuality, he would like to have made a phone call. Since the legislature felt that this safeguard was necessary enough to provide for it in the statute, it is submitted that the merchant should be required to inform the suspect that he has the right to make phone calls.

The final safeguard provided for the suspect is that the merchant or his employee shall not interrogate or search the suspect against his will. This seems only fair for if this is indeed only a detention and not an arrest then there should be no interrogation or search allowed. This is based on the fact that if a peace officer is allowed to interrogate or search an individual in only limited instances where no arrest has been made,96 then the ordinary citizen should have no greater privilege when only a detention is involved.

However, this safeguard, as worded in the statute, presents

---

94. In conjunction with this see Wis. Stat. §§ 968.24 and 968.25 where the legislature has determined that the "stop and frisk" laws of Wisconsin do not constitute an arrest but merely a detention. However, the detention can turn into an arrest. U.S. v. Mitchell, 179 F. Supp. 636 (D.D.C. 1959) where the court held that the taking of a person, detained for questioning, to a police telephone constituted a taking of the individual into custody. If this occurs, then the police officer must inform the suspect of his rights under the Miranda decision.

95. Supra note 92.

96. Two instances of this situation in Wisconsin can be found in Wis. Stat. §§ 968.24 and 968.25.
problems in that the statute merely states that the suspect should not be interrogated or searched against his will. This would seem to imply that the merchant can question or search the suspect unless the suspect specifically objects. Then, if any incriminating statements are made by the suspect or evidence is found concealed on him by the merchant, this may be used against the suspect in court to convict him of shoplifting. At least when an individual is arrested he is informed, before the police interrogate him, that he has the right to remain silent and that anything he says can and will be used against him in court. It would appear that despite the fact that we are merely dealing with a “detention” the same Miranda statement of rights should be given to the suspect in this situation in order to protect his constitutional rights. Otherwise, if the suspect is ignorant of the fact that he may remain silent, he may make some incriminating statement which he will later regret. In conjunction with this, the statute further provides that when a peace officer arrives he may conduct a lawful interrogation of the suspect. It may be assumed that before this interrogation the peace officer, because of the fact that he is making an arrest, will inform the accused of his rights as set forth in Miranda. Therefore, if the accused is informed of his rights before any statement will be given to a peace officer, why should the merchant be allowed to interrogate the accused before the arrival of the officer and obtain the same information which the officer will obtain? This most definitely appears to deprive the accused of his constitutional rights against self-incrimination.

If these supposed safeguards are complied with and all the other requirements of the statute are met then the statute states that the merchant or his employee effecting the detention shall be entitled to the same defense in any action against him as is available to a peace officer making an arrest in the line of duty. In view of this if the merchant or his employee complies with the statute he may not be liable in an action for false imprisonment, false arrest, assault and battery (if only reasonable force is used to detain the suspect) or slander.

One last problem deals with the application of this statute to a

---

97. Supra note 92.

98. The question of police protection from liability was brought up in the case of Rubin v. Schrank, 207 Wis. 375, 241 N.W. 370 (1932). In that case the court held that a sheriff is protected from liability in performing official duties when a writ is regular on its face and he is not chargeable with knowledge to the contrary.
situation where a municipality also has an ordinance dealing with shoplifting. Which law should apply and under what circumstances is one applied over the other? This problem may be especially crucial if the municipality which has a shoplifting ordinance does not provide the protection for the merchant which section 943.50 does.99

III. CONCLUSION

As one may readily note, there are numerous problems with the Wisconsin shoplifting statute, especially in the area of protection of constitutional rights. Originally the fear of possible improper detentions and violation of civil liberties were the stumbling blocks on which the merchandising associations failed in earlier legislatures.100 Evidently the evidence of thriving thievery became strong enough to overcome this impediment and to persuade the lawmakers to pass a statute pertaining to shoplifting. Despite this, the rights of innocent citizens are also relevant to the shoplifting arrest problem. A grant of power, if not carefully regulated, may lead to an abuse of power, and few powers present as great a potential for abuse as the arrest power. The rights of innocent citizens must be protected from possible arbitrary actions by storekeepers.

Besides the possible constitutional questions involved, the merchant may not be protected as he thinks, for any deviation from the statute could subject the merchant or his employee to liability for their actions. In view of this, the merchant should establish a checklist or an operating procedure to guide his employees in these situations—and see to it that they follow it. It would appear that the merchant is allowed to protect his interests by questioning the suspect, but he must follow certain guidelines which are designed to protect the individual. He must have probable cause to investigate the individual. He must conduct the investigation in a reasonable manner, and he must be careful not to commit any act against the suspect which is not necessary to protect his interest. [See Appendix].

99. For instance, the City of Milwaukee has such an ordinance. Milwaukee, Wis., Ordinances § 105-74 (1970) contains almost the exact same wording as Wis. Stat. § 943.50. However, the general practice in Milwaukee has been to prosecute under the city ordinance if the accused was a first offender and the price of the merchandise taken was under $100. This is to avail the accused of the counseling program in Milwaukee—a program in which the accused “works off” his sentence by working for a charitable institution for a specific period of time. A second offender is almost always prosecuted under the state statute.

100. Ever since 1959 merchandising trade associations have been trying to get a statute pertaining to shoplifting through the legislature.
As was stated by former Lt. Governor Jack Olson:

Since the merchants inevitably have to recover the cost of shoplifting from the consumer by improving the method of detecting, apprehending, and prosecuting the shoplifter, we are benefiting not only the merchant, but the law-abiding citizen as well by the passage of this statute.\textsuperscript{101}

In essence, this statute should help alleviate the fears of many merchants. But shouldn’t it also protect the constitutional rights of the accused? Inflammatory confrontations between merchants jealous of their wares and citizens jealous of their rights will inevitably lead to litigation over this ill-defined new power granted to the merchant. The merchant who wishes to avoid paying for a Supreme Court resolution of the undefined areas of the statute will instruct his employees to operate within the strict ambits of the statute, and to guard the rights of the individual as jealously as he would guard his own.

\textbf{Robert W. Muren}

\textsuperscript{101} Press Release 69-655, November 25, 1969.
APPENDIX

Suggested Checklist for Merchants and their Employees so as to Avoid Liability for False Imprisonment.

1. Only the merchant or his employees over the age of eighteen years old should be allowed to detain a suspected shoplifter.
   a. For larger stores who can afford to hire floorwalkers, it would be preferrable to allow only those individuals to initiate any action against a suspected shoplifter.

2. The merchant or employee effecting the detention should have probable cause to do so. Ideally, this would be the situation where the merchant or his employee saw the suspect take the merchandise, conceal it, and pass the last check-out counter without paying for it. Although probable cause extends beyond this situation, it is submitted that in order to obtain maximum protection under the statute, the detention should only be made when the person effecting the detention has actually seen the suspect take the merchandise and fail to pay for it.
   a. The merchant or one of his employees should never rely upon the word of a customer as a basis for probable cause that another customer has taken some merchandise without paying for it.
   b. In conjunction with the question of probable cause, it may be advisable to conduct a reasonable investigation before any detention is actually made. This would include checking with the cashier and checking the cash register tape given to the suspect for his purchases.

3. The purpose of a detention is to investigate the possibility of a theft of the merchant's chattels only. Therefore, any detention should be effected and conducted in a reasonable manner. This means avoiding a "scene" if at all possible. Shouting matches and the use of defamatory language should be avoided at all costs—for fear of liability for libel or slander.
   a. Use of force against a suspect is permitted if necessary to effect a detention. However, only reasonable force should be exerted.
   b. Although the statute does not state where the detention may be effected, it may be assumed that if a suspect is stopped and detained within the immediate vicinity of the store, that the detention will be deemed to have been conducted in accordance with the statute.

4. Once an individual has been detained, the merchant or his employee should immediately inform the suspect of the reason for the detention. This is for the purpose of allowing the suspect a chance to exonerate himself and to prevent any unnecessary detention.

5. Immediately after the detention has been effected, the police should be notified. If the suspect is a minor, his parents should also be notified. This is necessary for the suspect may be detained only for a reasonable length of time.

6. Although the statute states only that the suspect should be permitted to make phone calls, it would be advisable to inform the suspect that he has this right.
7. Any search or interrogation must be conducted in a reasonable manner. However, they may not be conducted against the suspect's will. Although the statute does not so provide, it is submitted that the suspect should be informed that he does not have to answer any questions or allow a search to be conducted. If the suspect then expressly refuses to be searched or interrogated nothing further should be done before the arrival of the police officer. Naturally, if the suspect does not object, then he may be interrogated and searched. However, in no case should the suspect be coerced or threatened into making a confession.

8. Finally, whenever a merchant or one of his employees detains a person he should keep in mind that the accused is entitled to have his rights protected. If the person effecting the detention keeps in mind that he should conduct the detention in a manner in which he would wish to be detained, then there should be no question as to the reasonableness of the detention.