NOTES

SHOPLIFTING—AN ANALYSIS OF LEGAL CONTROLS

Shoplifting, the popular term for larceny in a store, is a crime that is apparently on the increase throughout the United States.[1] This type of larceny, a felony in Indiana,[2] is defined as a wrongful taking of merchandise held for sale with the intent to permanently deprive the owner of possession.[3] The increase in the commission of the crime, the diversification of the groups affected, and the problems inherent in a legislative attempt at control prompts an investigation of the crime, the criminals, the victims, and the possible remedies.[4]

To sustain a conviction each element of the crime of larceny must be proved beyond a reasonable doubt.[5] Theoretically, proof of these

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1. During the year 1954, major crimes were up 5%, establishing a new high estimate of 2,267,250 major crimes for 1954. The rise in the seventh straight year was due to increases in robberies, up 6.8%, burglaries, up 8.4%, and larcenies, up 5.8%. F.B.I. UN. CRIME REP. vol. xxv pt. 2 at 67 (1955). Total larcenies in Indiana excluding auto theft (80 cities reporting) numbered 22,524 in 1953, and 22,637 in 1954, *id.* at 78. Of the Indiana cities reporting, Bloomington reported 395, Evansville, 1,578; Fort Wayne, 1,308; Gary, 2,056; Hammond, 1,491; Indianapolis, 5,005; Lafayette, 604; Terre Haute, 722. Table 35, *id.* at 98. While the overall rise in larcenies was 4.5% in 409 cities of over 25,000, shoplifting jumped 11.4%. In 1953, there were 23,666 shoplifting crimes reported; in 1954, 26,353. Table 37, *id.* at 108. These figures are valuable for long-term trend study, but admittedly do not reflect incidence accurately.

2. All crimes punishable by death or imprisonment in the state are felonies in Indiana. IND. ANN. STAT. § 9-101 (Burns 1946); Short v. State, 63 Ind. 376 (1878); Barnhart v. State, 154 Ind. 177, 56 N.E. 212 (1899) (petit larceny); Gow v. State, 224 Ind. 519, 69 N.E.2d 175 (1946) (grand larceny). Grand larceny, the theft of goods of the value of $25.00 or upwards is punishable by a fine not exceeding five hundred dollars, disfranchisement and imprisonment from one to ten years. IND. ANN. STAT. § 10-3001 (Burns 1946). Petit larceny, the theft of goods of less than $25.00 value, is punishable either as a felony or a misdemeanor. IND. ANN. STAT. § 10-3002 (Burns 1946).

3. Currier v. State, 157 Ind. 114, 60 N.E. 1023 (1901); Robinson v. State, 113 Ind. 510, 16 N.E. 184 (1888).

4. The *Indiana Law Journal* has conducted a survey among Indiana retail merchants and enforcement officials in an attempt to gather basic data concerning: (1) the incidence of shoplifting, (2) the intensity of the problem among the various types of retail establishments, (3) the need and desire for regulation. Eight hundred and thirty-nine questionnaires were sent to retail merchants, and 278 returns were received, equaling a 33% return. One hundred questionnaires were sent to Indiana police chiefs of which 40 were returned, equaling a 40% return. The cities polled included those in every population class and the polling was dispersed geographically. Reference to survey returns, interviews, and correspondence will be by type. Specific names and addresses, whether corporate or personal will remain confidential, and are on file in the office of the Indiana Law Journal.

5. The prohibited conduct exists in feloniously taking and carrying away the personal goods of another. Davis v. State, 232 Ind. 272, 112 N.E.2d 215 (1952); Stillwell v. State, 155 Ind. 552, 58 N.E. 709 (1900); Robinson v. State, 113 Ind. 510, 16 N.E.

elements would not appear difficult; practically, proof is quite difficult. The interplay of circumstances about the crowded marketplace, the swiftness of the crime, and the prevalent lack of knowledge among retailers as to what constitutes legal evidence, leads stores to exercise a peculiar restraint in arresting shoplifters.[6] The reason for the restraint is the fear of civil action for false arrest,[7] slander,[8] or similar actions[9] brought on behalf of those customers mistakenly accused.[10]

One of the elements of the crime, intent, actually subjective in

184 (1888); McCorkle v. State, 14 Ind. (Tanner) 39 (1859). The necessary felonious intent is connoted by the word "steal" contained in IND. ANN. STATS. §§ 10-3001, 10-3002 (Burns 1946). Gow v. State, 224 Ind. 519, 69 N.E.2d 175 (1946) (Upholding the constitutionality of Section 10-3001 on this point.) An intention permanently to deprive the property owner of possession imports the felonious quality to the conduct; but formerly an intention to convert the property to the use and benefit of the thief was also necessary. Reg. v. Jones, 2 Car. & K. 236, 175 Eng. Rep. 98 (1838). The necessity of lucri causa or base motive of greed, is non-essential in Indiana. Best v. State, 155 Ind. 46, 57 N.E. 534 (1900); Keely v. State, 14 Ind. (Tanner) 36 (1859); See 2 BISHOP, CRIMINAL LAW §§ 842-848 (9th ed. 1923); CLARK & MARSHALL, A TREATISE ON CRIMES § 332 (5th ed. Kearney 1952). The goods taken must also be "personal." Haskins v. Tarrance, 5 Blackf. (Ind.) 417 (1840); HALL, THEFT, LAW AND SOCIETY, at 80-109 (2nd ed. 1952). These goods must be wrongfully taken. Barnhart v. State, 154 Ind. 177, 56 N.E. 212 (1899). Such a taking as would support an action for trespass de bonis asportatis will complete the crime; but the slightest asportation accompanied by the intent to dispossess is all that is required. Currier v. State, 157 Ind. 114, 60 N.E. 1023 (1901); Warnke v. State, 89 Ind. App. 683, 167 N.E. 138 (1929). Umphrey v. State, 63 Ind. 223 (1878). Similarly, one taking goods under a sincere belief that title is in him does not commit larceny. Baugh v. State, 200 Ind. 585, 165 N.E. 434 (1929). See Note, 4 IND. L.J. 551 (1929).

6. See note 28 *infra* and accompanying text.

7. See *e.g.* Montgomery Ward v. Fogle, 221 Ind. 597, 50 N.E.2d 871 (1943) (false imprisonment); Efroymson v. Smith, 29 Ind. App. 451, 63 N.E. 328 (1902) (false imprisonment); L.S. Ayres & Co. v. Harmon, 56 Ind. App. 436, 104 N.E. 315 (1914) (false arrest). Roberson v. J.C. Penny Co., 288 P.2d 275 (Cal. 1955); Montgomery Ward v. Freeman, 199 F.2d 720 (4th Cir. 1952); Aldrich v. Fox, 238 Ill. App. 96, 108 N.E.2d 139 (1952); Safeway Stores v. Gibson, 118 A.2d 386 (D.C. Mun. ct. 1952); Lester v. Albers Super Mkt., 94 Ohio App. 313, 115 N.E.2d 529 (1948); Titus v. Montgomery Ward & Co., 232 Mo. App. 987, 123 S.W.2d 574 (1938); Lewis v. Montgomery Ward & Co., 144 Kans. 656, 62 P.2d 875 (1936).

8. Alley v. Neely, 5 Blackf. (Ind.) 200 (1839); Becket v. Sterrett, 4 Blackf. (Ind.) 499 (1838); Writesman v. Pettis Dry Goods, 82 Ind. App. 504, 146 N.E. 835 (1925) (slander by corporate servant). For decisions of other jurisdictions, see, *e.g.*, Little Stores v. Isenberg, 26 Tenn. App. 351, 172 S.W.2d 13 (1943); Williams v. Kroger Grocery & Baking Co., 337 Pa. 67, 10 A.2d 8 (1940); Merrit v. Great Atlantic & Pacific Tea Co., 179 S.C. 474, 184 S.E. 145 (1936); Lily v. Belk's Dept. Store, 178 S.C. 278, 182 S.E. 889 (1935); Dean v. Black & White Stores, 186 Ark. 667, 55 S.W.2d 500 (1932).

9. Dickson v. Waldron, 135 Ind. 507, 34 N.E. 506 (1893) (assault); Indiana Bicycle Co. v. Willis, 18 Ind. App. 525, 48 N. E. 646 (1897) (malicious prosecution).

10. The police feel that merchants are too hesitant in reporting. Consequently only a small percentage of the thefts actually occurring come to police attention. In a medium sized city three youths were arrested with over $1,000 worth of goods that had been shoplifted in the community. Of this, $19.75 worth of goods had been reported stolen. Return #5, Police Survey. Twice as many merchants report hesitation because of the fear of liability rather than the loss of good will. Only in drug stores is loss of good will the major factor. Merchant Survey.

nature, must be inferred from the overt acts of the accused.[11] Customers who pick up merchandise from a counter and subsequently wander about the store, place the merchant in a dilemma as to whether to infer from such an act an intent to steal,[12] or to infer a mere desire to examine the article in a natural light.[13] As a consequence, merchants generally permit such customers to leave the store before apprehension,[14] believing it much easier to convince a hostile jury that a larceny has been committed when the accused has been found in possession of an unsold article outside the store.[15] Larger stores that employ store detectives provide the exception to this tendency; store protection agents prefer to apprehend immediately upon the taking, particularly in the case of a known shoplifter.[16] The store protection trade believes that concealment of unpaid-for merchandise is a reliable basis for proof of the intent to steal. If the shopper carries goods in such a manner that they remain visible to the clerks, then the shopper will not be detained until an exit is reached. In either case unless the store detective acts immediately upon becoming convinced that his suspicions are well founded, the vital evidence of goods in possession may be lost;[17] accomplished shoplifters are quick to sense sur-

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11. Davis v. State, 232 Ind. 272, 112 N.E.2d 215 (1952); Mattingly v. State, 230 Ind. 431, 104 N.E. 2d 721 (1952); Malone v. State, 169 Ind. 72, 81 N.E. 1099 (1907).

12. An entrapment routine is often employed to bait an unwary merchant into taking steps which may become the basis for a lucrative action for damages. The sham customer buys an article and obtains a sales slip. Later the customer surreptitiously replaces the article on a counter. While a clerk watches, the perpetrator retakes the article and secretes it. When apprehended, the customer protests his innocence in loud tones of outrage, hoping to evoke forceful quieting action on the part of the store agent. Then, after having been accused of theft (slander) or touched (battery) or prevented from leaving (false imprisonment), the suspect triumphantly produces the sales slip for the article and the entrapment is complete. This and much other useful information was gathered in interviews with various store protection agents at Indianapolis, Mar. 10, 1956, April 7, 1956; Evansville, April 28, 1956 (hereinafter cited as Interviews, Store Detective).

13. Customers often wish to examine colors and texture by daylight, or carry the article to an available clerk to pay for it, or ask someone's advice as to the prospective purchase. Interview, Store Detective. E.g. Efroymson v. Smith, 29 Ind. App. 451, 63 N.E. 328 (1902) (mother seeking daughter's advice).

14. Merchant Survey. This tendency perhaps has its foundation in the distinction between the retention and the recaption of property. See note 93 *infra* and accompanying text.

15. Martin v. State, 148 Ind. 519, 47 N.E. 930 (1897). See also, MINN. RETAIL FEDERATION, YOU CAN DO SOMETHING ABOUT SHOPLIFTING 33-34 (3rd printing 1955).

16. Interviews, Store Detective.

17. *Ibid.* Success as a store detective depends primarily upon the exercise of sound judgment and a long memory. The distinction between normal shopping conduct and criminal conduct can come to be sensed through experience. Once the decision to act is made, the store detective's first move is to the place of concealment of the article, at the same time propelling the suspect to the privacy of an office. There an effort is made toward obtaining a signed confession of the theft.

veillance and quicker to "ditch" stolen merchandise when detection is imminent.[18]

In Indiana the concealment of articles has been held, in some instances, to be sufficient evidence of intent to sustain a conviction for larceny,[19] and an inference of guilt may be drawn from the possession of recently stolen merchandise.[20] Further, the movement of the article necessary to constitute larceny is slight.[21] Courts in other jurisdictions have held, in cases dealing specifically with concealment and subsequent movement about a store, that such conduct would constitute either an attempt to commit larceny, or a larceny.[22] The crime has been successfully prosecuted even though the criminal did not leave the premises of the store and the movement of the article within the store was slight, apparently on the basis that the fact of concealment was enough to clarify the equivocal nature of the taking.[23]

Hardships of proof certainly act as a salutary deterrent upon merchant action of an accusatory nature; but merchants perhaps restrict themselves too much, as far as proof of the crime is concerned, by adopting rigid policies allowing all suspected customers to leave the store before apprehension. Storeowners primarily hesitate to detain within the store because the price of detaining an innocent shopper may be an action based upon false arrest, slander, assault and battery, or all three.[24] The store itself, as a corporate entity, is liable through the principles of agency for most of the acts of its personnel.[25] Furthermore, stores are

18. See People v. Bradovich, 305 Mich. 329, 9 N.W.2d 560 (1943) (unsuccessful attempt to ditch).

19. Currier v. State, 157 Ind. 114, 60 N.E. 1023 (1901).

20. Selby v. State, 189 Ind. 459, 128 N.E. (1920); Johnson v. State, 148 Ind. 522, 47 N.E. 926 (1897).

21. Warnke v. State, 89 Ind. App. 683, 167 N.E. 138 (1929).

22. People v. Bradovich, 305 Mich. 329, 9 N.W.2d 560 (1943); People v. Baker, 365 Ill. 328, 6 N.E.2d 665 (1937); Boatright v. State, 121 Tenn. Crim. Rep. 578, 51 S.S.2d 311 (1932); People v. Lardner, 300 Ill. 264, 133 N.E. 375 (1921).

23. People v. Lardner, 300 Ill. 264, 133 N.E. 375 (1921) (concealing a comb in a coat and laying the coat aside); People v. Bradovich, 305 Mich. 329, 9N.W.2d 560 (1943) (putting on clothing and attempting to leave the floor).

24. See notes 7, 8, 9, *supra*. But in Indiana, the vast majority of stores polled had never been sued. The ones that had were the large chains. Merchant Survey.

25. RESTATEMENT, AGENCY § 245 (1933). Goodyear Tire & Rubber Co. v. Paddock, 219 Ind. 675, 40 N.E.2d 697 (1941). The test of the principal's liability is whether the agent when committing the tort was acting within the general scope of his employment. Dickson v. Waldron, 135 Ind. 507, 34 N.E. 506 (1893); Pennsylvania R.R. Co. v. Weddle, 100 Ind. 138 (1884); Evansville & Terre Haute R.R. Co. v. McKee, 99 Ind. 519 (1884); American Express Co. v. Patterson, 73 Ind. 430 (1881). It makes no difference if the act of the agent was willful and not directly authorized by the principal. *Ibid.* The protection of the owner's property is considered part of a store clerk's general duties. Dickson v. Waldron, 135 Ind. 507, 523, 34 N.E. 506, 511 (1893). The scope of employment is not limited to the store premises and therefore the store may be liable when a clerk stops a suspect outside the store. Montgomery Ward v. Fogle, 221 Ind. 597, 50 N.E.2d 871 (1943). L. S. Ayres v. Harmon, 56 Ind. App. 436, 104 N.E. 315 (1914).

understandably reluctant to face a jury possibly hostile to corporate defendants and empowered to weigh the nebulous factors of delay in business, mental anguish, and injuries to private repute in assessing damages. Therefore to avoid the risks of litigation inherent in a policy of apprehension and detention of suspected shoplifters, the stores' efforts are largely focused on methods of preventive self-help.[26] By conveniently placed mirrors, well arranged counters, and attentive clerks, the opportunities for theft are minimized.[27] Further, even where there has been a clear case of theft, a detention may generally be made only by those store personnel employed in a managerial or investigatory capacity, whether the apprehension is made within or without the store premises.[28]

Courts are inclined to consider any detention by a private citizen as an attempt on his part to exercise rights of a public nature in arrest,[29] in preference to the view that such a detention was an exercise of a factually similar privilege of defense or recaption of property.[30] This judicial attitude may have developed from recognition of narrowed powers of

26. Harness v. Steele, 159 Ind. 286, 64 N.E. 875 (1902). When malice is proved, or the action was taken in a willful or wanton manner or with a reckless disregard for the rights of the complaining party, exemplary damages may be had. *Ibid.*

27. Two way mirrors, peepholes, pattern counter arrangements, alarms, cameras, uniformed police and secured counters are common throughout larger stores, Merchants Survey; but there is no substitute for the preventive effect of an attentive clerk. Interview, Store Detective. For a particularly interesting discussion of preventive measures, see CHICAGO RETAIL MERCHANTS ASSOC., CLINIC ON SHOPLIFTING 15-19 (March 15, 1954). Preventive measures are taken by over 85% of the stores polled. These include drug, dept., sporting goods, jewelry, specialty and novelty stores. Programs ranging from formal class room work to on-the-job suggestions are utilized to instruct clerks in their duties upon arousal of suspicion, generally to summon a supervisor, and in methods of detection.

28. The restriction is attributable to the turnover of store personnel and the resulting lack of experience. Other restrictions take the form of dollar limits for which a suspect will be detained for arrest. One large chain will not have a customer arrested if the items taken were less than eight dollars in value. Letter from a chain store executive to the *Indiana Law Journal* on file in the office of the Indiana Law Journal.

29. "Arrest is the taking of a person into custody, that he may be held to answer for a public offense." IND. ANN. STAT. § 9-1004 (Burns 1956). An arrest is made by an actual restraint of the person, of by his submission to the custody of the officer, but the person shall be subject to no more restraint than is necessary for his arrest and detention. IND. ANN. STAT. § 9-1005 (Burns 1956). The privilege of arrest for a felony carries with it the privilege of using reasonable force, even to the point of deadly force if necessary to effect the arrest. Plummer v. State, 135 Ind. 308, 34 N.E. 968 (1893).

30. "One in possession of real or personal property is privileged to defend it by the use of force which reasonably appears to be necessary to prevent a threatened interference with the possession." PROSSER, TORTS § 21 (2nd ed. 1955) (defense of property); "If property is taken wrongfully, and the pursuit is fresh, the owner may use reasonable force to recover it which otherwise would amount to false imprisonment." *Id.* at 103. (reception of property); RESTATEMENT TORTS § 87 (1934) (defense); *id.* at §§ 100-111 (recaption). See also BRANSTON, *The Forcible Recaption of Chattels*, 28 L. Q. REV. 262 (1912); Notes, 46 ILL. L. REV. 887 (1951), 47 ILL. L. REV. 82 (1952).

private arrest resulting from the growth of municipal police forces[31] and a belief that the rights of the individual are best protected against the arbitrary exercise of government power by an early judicial evaluation of the necessity for initiating official action.[32] However, in certain instances, the law recognizes that necessity may make compliance with the preferred procedure either impracticable or impossible.[33] In most of such cases,[34] the officer is but a conduit to the liability which falls upon the informant.[35] But if the information is not offered as a charge of the crime, but merely as a basis upon which the officer can determine for himself whether to make the arrest or not, then the informant does not assume the responsibility for the arrest and the officer himself must supply proof of the reasonableness of the arrest.[36]

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31. At common-law the posse comitatus made up of the citizenry was the major means of initial arrest and apprehension. Subsequent to the organization of a municipal-type of police agency by Sir Robert Peel, which followed the success of certain private agencies, the powers of the private citizen to arrest for certain types of offenses (principally misdemeanors) diminished. The citizen is now expected to follow prescribed procedures for effecting a legitimate arrest. HALL, *Legal and Social Aspects of Arrest Without a Warrant,* 49 HARV. L. REV. 566 (1936).

32. "The value of personal liberty is too great to permit the detention of a suspected fugitive on the judgment of a ministerial or peace officer, and without a hearing judicial in nature." Simmons v. VanDyke, 138 Ind. 380, 384, 37 N.E. 973, 974 (1894).

33. IND. ANN. STAT. § 9-1001 (Burns 1956) (issuance of warrant ex summons).

34. These cases are generally those in which the delay necessitated by obtaining a warrant would allow the escape of a felon. As to the problem of arrest without a warrant generally, see PLOSCOWE, *Modern Law of Arrest,* 39 MINN. L. REV. 479 (1955); TRESOLINI, TAYLOR, BARNETT, *Arrest Without Warrant: Extent and Social Implications,* 46 J. CRIM. L. 187 (1955); HALL, *Legal and Social Aspects of Arrest Without Warrant,* 49 HARV. L. REV. 566 (1936).

35. "In a M.S. note of a case of *Williams* v. *Dawson,* referred to by counsel in *Hobbs* v. *Branscomb,* 3 Camp. 420, Mr. Justice Buller laid down the law, that 'if a peace officer of his own head takes a person into custody on suspicion, he must prove that there was such a crime committed; but that if he receives a person into custody, on a charge preferred by another of felony or breach of the peace, there he is to be considered as a mere conduit, and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable'." Doering v. State, 49 Ind. 56, 59 (1874). Accord, Venemon v. Jones, 118 Ind. 41, 20 N.E. 315 (1888); Black v. Marsh, 31 Ind. App. 53, 67 N.E. 201 (1903).

36. Peace officers ". . . may arrest and detain any person found violating any law of this state, until a legal warrant can be obtained." IND. ANN. STAT. § 9-1024 (Burns 1956). This statute permits the arrest of persons for misdemeanors, felonies, and breaches of the peace committed in the presence of a peace officer. McGregor v. State, 200 Ind. 496, 163 N.E. 596 (1928). An officer cannot arrest for a misdemeanor not committed in his presence; but can arrest for felonies on information which, under the circumstances, lends a reasonable belief (a) that a felony has been committed and (b) that the arrestee is the felon. Sisk v. State, 232 Ind. 214, 110 N.E.2d 627 (1952); McGregor v. State, 200 Ind. 496, 163 N.E. 596 (1928); Hanger v. State, 199 Ind. 727, 160 N.E. 499 (1928); Robinson v. State, 197 Ind. 144, 149 N.E. 891 (1925); Doering v. State, 49 Ind. 56 (1874). But even this power does not allow the arrest of a person on the mere suspicion of having committed a felony. Suter v. State, 227 Ind. 648, 88 N.E.2d 386 (1949). Further, an officer cannot justify an unreasonable delay in obtaining a warrant in order to investigate the case, Harness v. Steele, 159 Ind. 286, 64 N.E. 875 (1902); Matovina v. Hult, 125 Ind. App. 236, 123 N.E.2d 893 (1954), as prompt arraignment is required. IND. CONST. ART. I § 15.

In contrast to statutes supplementing the arrest powers of peace officers, powers granted to private citizens are a matter of common-law.[37] A private citizen may arrest if a felony in fact has been committed in his presence and he has a reasonable belief in the guilt of the suspect.[38] A private citizen who arrests an innocent person upon information supplied by another must prove that there was a felony committed, and that he held a reasonable belief as to the guilt of the suspect at the time of the arrest.[39] This proof is made to the satisfaction of a jury in a subsequent tort action testing the validity of the arrest.[40]

If a store is financially capable of employing agents vested with police powers by statute or municipal ordinance,[41] the broader arrest powers may be utilized to great advantage.[42] This type of protection is beyond the reach of all but the larger stores because of the high wage scale of competent protective agents.[43] The speed of the crime commonly renders resort to the normal procedures for obtaining warrants impossible.[44] Furthermore, having a policeman other than a store detective near at hand must be regarded as a fortuitous circumstance.[45] Due to the lack of recognition of any power aside from arrest by which a suspect may be detained the storeowner must assume the risks of exer-

37. Kennedy v. State, 107 Ind. 144, 6 N.E. 305 (1886); Hopewell v. State, 22 Ind. App. 489, 54 N.E. 127 (1898). More than merely possessing the power to arrest, a citizen bears the right and the duty to prevent the commission of a felony even to the extent of taking a life if necessary. Burns v. State, 192 Ind. 427, 136 N.E. 857 (1922).

38. Kennedy v. State, 107 Ind. 144, 6 N.E. 305 (1886).

39. Teagarden v. Graham, 31 Ind. 422 (1869) citing Holley v. Mix, 3 Wend. (N.Y.) 350 (1829); *c.f.* Doering v. State, 49 Ind. 56, (1874) (dicta approving the same case); Simmons v. VanDyke, 138 Ind. 380, 37 N.E. 973 (1894). These would seem to establish the proposition. *But see* Grand Rapids & Ind. Ry. Co. v. King, 41 Ind. App. 701, 707, 83 N.E. 778, 780 (1908) (dicta to the effect that the person arrested must be the felon).

40. Montgomery Ward v. Fogle, 221 Ind. 597, 50 N.E.2d 871 (1943); L. S. Ayres v. Harmon, 56 Ind. App. 436, 104 N.E. 315 (1944).

41. Watchmen and conductors under IND. ANN. STAT. § 9-1024 (Burns 1956); additional fire and police forces, IND. ANN. STAT. § 48-6108 (Burns 1950). Officers and members of metropolitan police forces shall have all the powers of peace officers except service of civil process. IND. ANN. STAT. § 48-6307. Merchant police may be appointed under IND. ANN. STAT. § 48-6312 (Burns 1950), and shall serve at the expense of the applicant for one year performing duties at the place designated by the commissioners.

42. This relieves the "proof of felony" requirement, but the employer is still liable for the tortious acts of the detective. Dickson v. Waldron, 135 Ind. 507, 34 N.E. 506 (1893); L. S. Ayres v. Harmon, 56 Ind. App. 436, 104 N.E. 315 (1914).

43. To this cost must be added that of bonding. IND. ANN. STAT. § 48-6314 (Burns 1950).

44. Out of 688 shoplifting incidents reported during the years 1954-1955, the reporting police departments effected 649 arrests. Of these arrests, 13 were made with a warrant. Police Survey.

45. Only two police departments in Indiana maintain permanent shoplifting details circulating in the shopping district—Evansville, Indianapolis. Police Survey. Several others do place a detail on this duty during the holiday shopping increase. *Ibid.*

cising his private arrest powers. Because of the policy of limiting the employees who may apprehend a suspect, rarely does the person who saw the taking make the arrest. Therefore, the store must generally assume the burden of showing that the person arrested was the thief.[46] Even if successful in such proof, stores so fear the adverse publicity inevitably attendant in a suit for false arrest that they tend to settle out of court for sums far in excess of reasonable damages.[47]

It has been estimated that nearly fifteen million dollars worth of goods is lost to shoplifters every year in the state of Indiana.[48] Only when the retailer's inventory shrinkage exceeds that of competitors is he forced to absorb the loss himself.[49] Therefore the loss in the main is

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46. Due to the necessities of modern merchandising and the tremendous volume of sales, a running inventory on each item for the most is impractical. Interview, Store Executive. It is patently difficult to prove the felonious intent necessarily associated with a taking to complete a felony without finding the article concealed about the suspect and proving that he took it. Some small specialty shops stocking more expensive items do keep running inventories and they would need prove only that something was stolen to justify a detention. Some attempt is made in apparel sections to note empty hangers, but shoplifters often take hangers and all. Interview, Store Detective.

47. As an example of this type of adverse publicity, South Bend Tribune, Oct. 13, 1955, § 3, p. 1, col. 4.

48. This estimate is made in full recognition of the futility of any hope for accuracy in a lump sum estimate. The method employed in the Questionnaire was to ask the polled stores to classify themselves into the categories of retail establishments used in compiling the U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, CENSUS OF BUSINESS, RETAIL TRADE, INDIANA (Series PR-1-14 Jan. 1956), and then answer the question: "What per cent of the gross sales (retail value) is your shoplifting loss?" Charts were then made of the answers from each store and the percentage for each store type was found by weighting each percentage given by the number of stores claiming that percentage loss. The percentage then attributed to the store type was multiplied by the total sales for that type of establishment in Indiana during the year 1954. *id.* at Table A, p. 3, #5. The products were then added. Such a procedure does not consider in weighting the percentage attributable to the store type the relative portion of the particular store's contribution to total sales made for that store type throughout Indiana. Therefore, whereas the percentage itself would be representative for the state, the estimated total loss would not. The returns from some store types were small in comparison to the numbers of establishments; but these types were those which suffered the least problem. The return "neglible" was assigned a weight of ⅛ of 1%. In toto, this estimate is felt to be conservative, but indieative of the dollar volume which can be assumed to be involved.

	Type	Average % Loss	Total Sales	Loss
I.	Food	½	$980,930,000.00	$4,904,650.00
II.	Hardware	½	432,212,000.00	2,156,060.00
III.	Gen'l Mer.	1.	488,865,000.00	4,888,650.00
IV.	Apparel, Acc.	¼	239,249,000.00	598,127.50
V.	Furn. Appl.	¼	224,021,000.00	560,052.50
VI.	Drug, Prop.	½	147,438,000.00	737,190.00
VII.	Other (Jewelry)	¼	391,162,000.00	977,905.00
			$2,903,877,000.00	$14,822,635.00

49. The writer has been unable to find any insurance company underwriting shoplifting loss alone. However, if the assured carries mercantile open stock burglary insurance, then it is possible in some cases to endorse the policy to cover open stock theft. From an insurance company's view, this is an extremely hazardous risk, and can be

passed on to the honest customer.[50] The reduction of the economic loss consequent from this situation is only one phase of the problem. A valid preventative measure must be directed at the source of the problem—the shoplifter himself.

The name shoplifter is descriptive of little but the locale of the crime and conveys nothing of the universal character of the participants. Still, an understanding of the drives behind the theft enables a rational classification to be made based upon the motive of the thief. Shoplifters stealing for resale through criminal marketing channels can be classed as professionals, in distinction from amateurs who steal for family use, personal use, or for juvenile prestige. In the parlance of the trade the professional class is divided into "heels," whose sole support is derived from shoplifting, and "boosters," whose major occupation is some other area of crime, or who are narcotics addicts or alcoholics.[51] In the same parlance amateurs are lumped together as "snitches," but can be more realistically dealt with as adults and juveniles.[52]

The heel is a member of an ancient criminal trade in which the basic modus operandi has remained unchanged since the early days of permanent mercantile establishments.[53] In the furtherance of a constant purpose of stealing articles of high value at a minimum of risk, many heels operate in groups of highly organized specialists.[54] Typically a decoy diverts the attention of the store agents by causing a disturbance

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underwritten on very few classes. Where it is written the cost is generally an additional 75% of the open stock burglary, safe burglary, and interior robbery rates. Mere disappearance is not a loss covered thereby. Neither is any shortage disclosed by an inventory covered, unless such shortage can reasonably be shown to have been occasionedby robbery, theft, or an attempt there at. Even then, an amount equal to the average shortage as revealed by the last five annual physical inventories, increased or decreased by the percentage of increase or decrease, if any, in the total gross sales for the 12 month period immediately preceding the discovery of the loss, as compared to the average annual sales for the period represented by the physical inventories, is deducted from the amount of determined loss. Letters from Insurance Underwriters on file in Office of the Indiana Law Journal.

50. Inventory shrinkage is the difference between the amount realized on the sale and the retail price. It includes short shipments, markdowns, etc. aside from theft loss. Therefore, it is quite difficult to assign a particular amount of the gross difference to shoplifting. NATIONAL RETAIL DRY GOODS ASSOCIATION, CONTROLLING SHORTAGES AND IMPROVING PROTECTION 46 (1953).

51. CAMERON, DEPARTMENT STORE SHOPLIFTING 26 (unpublished thesis in Indiana University Library 1953). This work was prepared on the basis of records, operations, interviews, and experiences gathered in a large Chicago department store. It was supplemented by court records and official statistics and submitted in partial satisfaction for the degree, Doctor of Philosophy at Indiana University. It is undoubtedly one of the most perceptive and intense studies of the specific field in existence.

52. *Ibid.*

53. In 1597 thieves were using the same basic diversionary techniques as are contemporarily utilized. JUDGES, THE ELIZABETHAN UNDERWORLD 170 (1930).

54. Interview, Police Chief; Store Detectives.

demanding immediate attention, while the other members of the team engage in a rapid wholesale theft of valuable merchandise. There are, of course, heels that prefer to work alone employing a variety of ruses to distract the clerk.[55] The habitat of the heel is generally in the larger urban areas where he is able to prey upon department stores and specialty shops stocking high value merchandise. There are indications however that certain groups make a circuit of the smaller towns in the Indianapolis and the Chicago marketing areas.[56]

With the increase in narcotics addiction in recent years, the booster has become more of a problem than formerly.[57] The addict at odds with the fantastically high daily cost of drugs may resort at time to shoplifting to supplement his income.[58] Alcoholics are quite likely to confine their thefts to liquor, as it is more readily available than drugs.[59] Prostitutes, pickpockets, and panderers complete the professional class by occasionally turning to this type of crime to supplement income.

Although professional thieves are not numerically significant and do not cause an overall loss comparable to that attributed to amateurs,[60] much of the larger stores' success in dealing with the problem seems to have been against the professional.[61] This success is largely a result of the

55. CAMERON, *op. cit. supra* note 51 at 28-32. For pictorial explanations of methods utilized by professionals and accomplished amatuers, *e.g.* booster skirts, false shopping bags, prestidigitation. See MINN. RETAIL FEDERATION, *op. cit. supra* note 15; NATIONAL RETAIL DRY GOODS ASSOCIATION, *op. cit. supra* note 50 at app. A.

56. Reports from the police in a 50 mile radius of Indianapolis indicate that professional rings operating ordinarily in that city make a semi-annual circuit of towns such as Bloomington, Richmond, Logansport, and Anderson. Generally, by the time the police get word from the merchants the thieves are out of town. Interviews, Police; Merchants. Police Survey.

57. It can no longer be denied that narcotics and shoplifting are inextricably intertwined. Although the survey indicates that only two Indiana cities have police chiefs convinced of this statement, these two cities are also the ones with the largest problems in connection with the professional thief. Police Survey.

58. With the average cost of the narcotics habit listed at $35 per day, there are instances where people earning over $200 per week must supplement their income by illegal activity. *Hearings Before the U.S. Senate Special Committee on Organized Crime,* 81st Cong. 2nd Sess., 82nd Cong., 1st Sess. pt. 14 at 281, 435, 453, *et seq.* (1951). For an excellent treatment, see Prosser, *The Narcotic Problem,* 1 U.C.L.A. L. REV. 405 (1954).

59. The theft of wine from grocery stores is the typical crime. Merchant Survey, Letters from Grocery Store operators to the *Indiana Law Journal* on file in the Office of the Indiana Law Journal.

60. Professional shoplifters are generally credited with only 10% of the thefts taking place. CAMERON, *op. cit. supra* note 51 at 42; NATIONAL RETAIL DRY GOODS ASSOC., *op. cit. supra* note 50 at 58. In Indiana, only in the apparel and accessory type establishment did professional thievery approach that attributed to amateur theft. But the loss from the individual professional theft is higher. While one professional was in prison, the inventory shrinkage in a suit department was reduced $4000 per year. CAMERON *op. cit. supra* note 51 at 42.

61. Detectives can be placed proximate to counters displaying high value merchandise, with confidence that this will be the target of professional forays. Such

competency of store detectives as a group and the cooperative exchange of information among them. A store detective who discovers that his store has been "hit" immediately relays information concerning the loss and a description of the suspect to the other stores in the area and the police. Running files are kept on each known professional and the thief is quickly identified by physical characteristics or by the methodology of the theft. The identification system is not, according to available information, organized on a nationwide basis, except through the facilities of police reporting and the private files of some large chains.[62]

If professionals were the only problem to be met, then penalties for shoplifting could be made so severe that shoplifting would cease to be profitable because of the risk. Today, shoplifters can be convicted and imprisoned for ten years under Indiana statutes.[63] Cost-conscious store owners, however, prosecute known professionals in courts of limited jurisdiction, where the accused is fined, sentenced as a misdemeanant, or released.[64] Such a professional soon returns to his trade, perpetuating the problem. Store detectives certainly have an immediate value in the store not only as an available arm of the law but as a preventive force.[65] Nevertheless, they are of equal value in court testifying as to crimes already committed. If merchants sincerely desire a lessening of professional shoplifting, the professional must be prosecuted in a court of general jurisdiction where he may be convicted for the felony committed. Admittedly prosecutions of this nature will require the store detective to spend days in court in which he will be absent from the store; but this time, in the long run, is well spent.[66] A policy of convicting the professional shoplifter for felonies could create an unbearable risk for professional operations in this state.

No classification of society by age, wealth, sex, locale, or environment excludes the amateur shoplifter. Children, matrons, professional men, businessmen, and workers skilled and unskilled commit the crime. Amateur thievery is not centralized in the large urban areas but is found

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prior planning is not possible with the amateur who does not concentrate on high value merchandise. Interviews, Store Detectives.

62. Interviews, Store Detective.

63. See note 2 *supra*.

64. Interviews, Store Executives; Store Detectives. It was said that 60 to 90 days was the normal duration of the incarceration if the offender was sentenced. *Ibid.*

65. This is borne out by the fact that stores often employ uniformed police despite the fact that the usual attire of a store detective is street clothes. Further, professionals have a high respect for the efficiency of some detectives and avoid their stores. Interviews, Store Detective.

66. A person convicted of three felonies is deemed a habitual criminal and is subject to life imprisonment. IND. ANN. STAT. § 9-2207 (Burns 1956).

throughout the state in every class of city and town.[67] The general public thinks of shoplifting as a woman's crime. But in fact, the type of store and the age of its normal clientele probably determine the predominate sex of the shoplifter.[68] The general merchandise group and apparel shops indicate a clear majority of women offenders; but the rest of the store types report that males definitely predominate as the source of their particular shoplifting problem.[69]

Shoplifters able to pay for goods that they steal are often tolerated by merchants because the utter senselessness of the theft seems to indicate mental instability.[70] Some medical authority credits kleptomania as possibly being a symptom of the criminal psychopath,[71] who does not ordinarily respond to psychiatric treatment and is for the most part incurable.[72] Fortunately, the criminal psychopath is quite rare in society and those psychopaths exhibiting their disturbances by kleptomania are rarer still.[73] Kleptomania may also be symptomatic of a neurotic impulse.[74] Such an impulse is the result of a mental condition that ordinarily does respond to psychiatric treatment.[75] Those persons suffering from psychoneurotic impulses are perhaps more numerous than psychopaths, but the most common "kleptomaniacs" are "normal" people who will not accept the responsibilities that community life imposes and steal for gain and thrills.[76] It is suggested that of the many shoplifters com-

67. 98% of the questionnaires returned indicated that articles had been stolen. 100% of the general merchandise group reported thefts, as did food stores. Only one druggist answered that he had escaped shoplifting. The vast majority of every store type considers the amateur, rather than the professional, as the predominate offender. Merchant Survey; see note 60 *supra.*

68. It is believed that age is the more critical factor, see note 81 *infra.*

69. Drugstores, hardware stores and furniture and appliance stores demonstrate the clearest preponderance of male offenders. Merchant Survey.

70. 30% of the stores indicated encounters with kleptomaniacs, and others seemed to believe that the difference between a kleptomaniac and a thief was the economic status of the suspect. Merchant Survey. "So ingrained is the belief that petty theft by adults is normally an index of poverty, that persons with any means whatever who steal articles of little value are regarded as victims of kleptomania." HALL, THEFT, LAW AND SOCIETY 308 (1st ed. 1935).

71. Wittels, *Kleptomania and Other Psychopathic Crimes,* 4 J. CRIM. PSYCH. 205 (1942).

72. "The real psychopath offers unfavorable, although not entirely hopeless, material for psychiatric treatment." GUTTMACHER, WEIHOFEN, PSYCHIATRY AND THE LAW 104 (1951).

73. As the result of examining 9,958 cases in the Psychiatric Clinic of the Ct. of Gen. Sessions, New York, between 1932 and 1936, 11.2% were diagnosed as psychopaths. Bomberg, Thompson, *Relation of Psychosis, Mental Defect and Personality to Crime,* 28 J. CRIM L. & C. 70 at 75 (1937).

74. GUTTMACHER, *op. cit. supra* note 72 at 56.

75. *Id.* at 105.

76. Of 873 women officially charged with shoplifting in the Chicago Municipal Court in the years 1948-1950, 57 were referred to the court psychiatric service. Of these, twelve were suspected psychotics and but one was afflicted with a compulsive neurosis. CAMERON, *op. cit. supra* note 51 at 118.

monly termed kleptomaniacs, only a few truly deserve the name. The rest should be considered legally responsible for their acts. For those few who suffer from a mental problem, the law provides for treatment.[77] For the vast majority, if the consequences of exposure are made clear, then recidivism can be expected to be low.[78] In any case, tolerance does not meet the problem.

Another prevalent misconception is seen in the belief that opulent displays of merchandise produce an immediate uncontrollable urge to steal. The use of diversionary techniques similar to those employed by professionals that require prior thought and planning, in some measure, disparages this idea. Further, shoplifters are often found with items that complement one ensemble, which would seem to indicate that they came to the store with the express purpose of stealing particular items. Therefore, though open counter arrangements loaded with articles facilitate the theft, it is doubted that they engender it.[79]

Juvenile theft is the most serious phase of the crime in Indiana. Losses attributed to this single source far exceed that of any other, adult, amateur or professional. Stores throughout the state report heavy losses in goods attractive to youthful values.[80] Mass forays conducted by chil-

77. If the defendant pleads insanity under IND. ANN. STAT. § 9-1701 (Burns 1956), then he shall be examined by two or three court appointed physicians. IND. ANN. STAT. § 9-1702 (Burns 1956). If the court or jury find the defendant not guilty on the ground of insanity, and if the court shall find that the defendant is insane, or if sane that recurrence of such an attack is highly probable, then the defendant shall be committed to Beatty Memorial Hospital. IND. ANN. STAT. § 9-1704a (Burns 1956).

78. The initial apprehension is directed toward securing evidence of the theft. The subsequent detention following the theft is directed toward convincing the amateur that he or she is a thief. Interviews, Store Detective. Amateurs think of shoplifting as something "naughty" rather than as a crime. If during the investigation, the amateur comes to the realization that exposure as a criminal is imminent, panic strikes as thoughts of how family and friends would react to the information come to his mind. CAMERON, *op. cit. supra* note 51 at 176. One reason for the small number of prosecutions of amateurs is the feeling in the trade that the amateur will not risk such an exposure again. Interview, Store Detective. In the sample used by Cameron, only 2% of the women and 6% of the men were ever detained more than once. *Id.* at 101.

79. Amateurs as well as professionals frequently use diversionary and concealment techniques that require prior planning and thought. Booster boxes, skirts, and teamwork are not the exclusive property of the professional. Women are frequently found in possession of complementary items from different stores. Merchant Survey. Interviews, Store Executive; Store Detective.

80. Apparel shops considered adults as the major problem. Two thirds of the other stores regarded juveniles as the major problem. Juvenile theft was repeatedly the subject of voluntary comment in the questionnaires. Drug stores are the hardest hit by juveniles and they are also the only category which fears loss of goodwill more than tort liability in dealing with suspects. See note 10 *supra*. Food stores of the self-service type are plagued with losses due to rampages of small unattended children. The value of the goods lost ranges from under $1.00 in Drug Stores to from $5.00-$10.00 in Appliance stores; but as in all amateur shoplifting it is not the value of the particular article, but the recurrence of the loss that hurts. The type of article stolen by juveniles generally corresponds to sex and age desires. *E.g.*, candy, lighters, billfolds, lipsticks,

dren in stores are frustrating to the storeowner, who fears the legal and social repercussions inherent in direct action.[81] Yet storeowners recognize that juvenile pilferage, though larcenous, is not motivated solely by the desire for gain. Rather it would seem to stem from an attempt on the part of the youth to establish his status in juvenile society.[82] While the thrill of accomplishing something for which there is a known penalty without incurring the reaction of the law can and is experienced at this age, the concept of private property and the necessity for its preservation is not easily comprehended by a child on the threshold of communal responsibility. Still for the sake of society these concepts must be taught at the earliest possible age.[83] The merchant who endeavors to deal with juvenile shoplifting by informing the parents of the offender often meets little cooperation. Parental attitudes ranging from rage to outright indifference frustrate the merchant's attempts to impress the child with communal responsibility.

It is manifest that presently in Indiana the mere statutory declaration condemning larceny as a punishable crime does not have enough of a prohibitory effect to offset the emasculating effect of the laws of arrest and tort liability in the specific context of shoplifting. Indeed, shoplifting has become for practical purposes an unenforceable crime. Perhaps it could be maintained that society merely wished to go on record as disapproving such acts and had no interest in enforcement; but consideration of the financial loss involved[84] and the effect on the youth of the community renders this position untenable.[85]

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cosmetics, costume jewelry, and minor clothing items. The boy is the major offender and his thefts have no doubt significantly affected the classification of shoplifters by sex, see note 69 *supra* and accompanying text.

81. As an illustrative case, one return came from a store located directly across from a High School in a small Indiana town. After finally apprehending one offender with the aid of the police, it was learned that 17 other boys had been habitually stealing from the same store. Merchant Survey.

82. Children often steal things which have no immediate value to them; but they are always in the company of other juveniles. Merchant Survey. This phenomena was also noted in CAMERON, *op. cit. supra* note 51 at 116. The quest for status is not merely limited to that of the child group but can be stirred by desires for fuller familial acceptance. NATIONAL RETAIL DRY GOODS ASSOC. *op. cit. supra* note 50 at 20. (lecture by Dr. Fabian Rouke). "Boys in a delinquency area are taught how to commit thefts of various kinds. The boy who moves into an area at, say, the age of ten years without previous experience in stealing has to learn many things in order to keep out of difficulty. The other boys will show him how to steal. . . ." SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 233 (5th ed. Cressy 1955).

83. "A boy who is reared in an area of high delinquency reaches criminal maturity at a very early age, perhaps by twelve or fourteen. He has reached criminal maturity because criminality has become an integrated part of his personality. . . ." SUTHERLAND, *op. cit. supra* note 82 at 219.

84. See note 48 *supra*.

85. Just as truancy may be an indication of the beginning of a delinquent career, so a delinquent career often is the training ground for adult crime. See SHAW, McKAY,

Any contemplated statutory solution must of necessity have as its primary purpose the preservation of individual rights in their present preferred position while still effectively coping with the specific need. Several attempts have been previously made to solve the particular problem engendered by shoplifting. The methods employed include broadening the powers of arrest, the creation of a new crime, and easing the evidentiary requirements for conviction of those accused of shoplifting. A statute that enlarges a citizen's powers of arrest disturbs the balance of individual liberty by clothing private persons with government power which does not always include the same tempering influence of reasonableness that is a checkrein in private actions.[86] The creation of particular crimes such as "wilful concealment of merchandise" would seem only to substitute new problems of proof for old.[87] The twisting of vagrancy statutes so as to include shoplifters within the definition of "vagrant" broadens the statutes beyond their justifiable limits.[88] To enact a statute which relies heavily upon presumptions operating against the accused and forces the accused to come forward with evidence of innocence rides a narrow line of constitutionality under the fourteenth amendment.[89]

Juvenile Delinquency and Urban Areas (1942). But "the study of concrete facts, notably the works of such criminologists as S. and E. Glueck, Grassberger, and Frey, reveals that, of the numbers of young delinquents *brought before a court*, a small percentage only (about 10%-20%) tends to prolong delinquency into adult years. That means that about 80%-90% of the juvenile delinquents *brought before a court* will not offend again, or at least will not retain their delinquent tendencies beyond the crisis of their juvenile adaption." (Emphasis added.) BOVET, PSYCHIATRIC ASPECTS OF JUVENILE DELINQUENCY 44 (United Nations World Health Organization Monograph Ser. No. 1, 1951).

86. Illinois recently attempted to enact a statute that broadened the powers of private arrest for a crime against private property. The proposed bill was vetoed on the basis of the Illinois Attorney General's finding that the ". . . statute authorized not only the arrest of innocent persons by private citizens, but also the right of search and seizure even to the point of maiming or killing. . . ." Veto message from Governor William C. Stratton to the 69th General Assembly of Illinois on H.B. 778 (1955). Copy on file in the office of The Indiana Law Journal.

87. Maine has enacted a statute making "willful concealment of merchandise" a misdemeanor. ME. REV. STAT. c. 132, § 10-A (1955 Supp.). Even though goods concealed upon the person constitute primie faciae evidence of willful concealment, the problems of proving intent and justifying the original apprehension would seem to remain the same.

88. E.g., A person known to be a pickpocket, thief, or confidence operator found loitering near a store or shop is a vagrant and punishable as such. UTAH CODE ANN. § 76-61-1 (1953). For variations, see IDAHO CODE ANN. § 18-7101 (1947); ILL. REV. STAT. c. 38 § 578 (1955); IOWA CODE c. 55 § 746.1 (1950); IND. ANN. STAT. § 10-4602 (Burns 1956); KY. REV. STAT. § 436.520 (1950); MICH. COMP. LAWS §§ 750.167, 750.168 (1948); MONT. REV. CODES ANN. § 94-35-248 (1947); PA. STAT. ANN. Tit. 18, § 4821 (1939). Another method is to pattern a Statute after 12 ANNE STAT. 1 c. 7 (1713) which punished larceny from a dwelling house as a distinct offense. Stores, shops, and warehouses are now generally included under this type of statute. *E.g.*, MICH. COMP. LAWS § 750.360 (1948).

89. A So. Carolina statute makes the finding of merchandise concealed upon the person primie faciae evidence of willful concealment. A person willfully taking posses-

Basically, statutes such as these embrace the notion that conduct such as wilful concealment and loitering is, in and of itself, so deleterious to society as to warrant proscription in its own right.[90]

The shoplifting situation in Indiana clearly does not warrant measures as stringent as these. If the present laws of arrest and larceny are not sufficient and have become intrinsically misadjusted to the social needs of the state, then those laws should be amended on their own merits and not for the purpose of indirectly attacking a particular problem such as shoplifting. Further, if juveniles are the focal point for a corrective statute, stiffer penalties and easy convictions would not normally be considered either desirable or effective.[91] Difficulties of proof of the crime are significant to the merchant only as obstacles to be hurdled in avoiding tort liability. It is suggested that no statute altering the present status of arrest or redefining the crime of larceny is feasible; but that legislative effort should be directed toward the juvenile problem and some alleviation of tort liability.

When property is taken from a store, a merchant's immediate interest is in regaining his property. His interest in punishment for the theft stems from a hope to deter future thefts. Therefore, when store-owners detain a suspected customer they are primarily forwarding a private interest rather than one of a public nature. If a private person without privilege detains another in the furtherance of a private interest, a false imprisonment results and not a false arrest. A false arrest only occurs when a detention is made under a supposed public authority which, in fact, does not exist. A false imprisonment is, of course, negated if the detention is made in the reasonable exercise of a private privilege.[92]

At common-law a property holder, such as a merchant or his employee, had two privileges in connection with the chattels in his possession: the privilege to recapture chattels wrongfully taken and the privilege to defend chattels in his possession from wrongful or felonious dis-

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sion of merchandise with an intention to conceal is guilty of the offense of shoplifting. So. CAR. ACTS 1956, No. 838. (effective Mar. 19, 1956). If common experience denies a rational connection between the fact proved and the ultimate fact to be presumed, an inference from one to the other is arbitrary and will not sustain a statutory presumption. Tot v. United States, 319 U. S. 465 (1943).

90. See HALL, PRINCIPLES OF CRIMINAL LAW, 213 (1947).

91. SUTHERLAND, *op. cit. supra* note 82 at 312.

92. *C.f.* The following explanation of the basis of these privileges. "He is allowed freedom of action because his own interests, or those of the public, require it, and social policy will best be served by permitting it. The boundaries of the privilege are marked out by current ideas of what will most effectively promote the general welfare." PROSSER, TORTS, § 16 at 79 (2d ed. 1955).

possession.[93] The privilege to recapture chattels could only be exercised on fresh pursuit, and the pursuer acted at his peril.[94] The privilege to defend possession from a wrongful or felonious dispossession, like the privilege of self-defense, was based upon the circumstances as they would appear to a reasonable man. Under the privilege of defense of possession, therefore, there is a narrow area in which a reasonable mistake can be made.[95] In the use of both privileges the necessity for the use of force was recognized but regulated under principles of reasonableness.

If the storeowner and his employees are to be allowed to make reasonable mistakes in detaining customers innocent of any taking, then the

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93. Branston, *The Forcible Reception of Chattels,* 28. L.Q. REV. 262, 263 (1912). The privilege to recapture owed its continued existence to the lengthy, cumberous court procedure that constituted the alternative to self redress at common law. *Id.* at 265. At first only a momentary dispossession justified action, but the concept of "fresh pursuit" today would seem to include "prompt and persistent efforts to recover the property." PROSSER, TORTS § 24 at 100 (2d ed. 1955).

94. PROSSER, TORTS, § 24 at 100 (2d ed. 1955). A narrower view prevails in Indiana. A storeowner or his agent may seize goods and take them into possession wherever found, provided he does not breach the peace or violate any other law. If he recaptures goods which do not belong to him, he will be a trespasser ab initio and liable to the person whose goods are wrongfully taken. Cleveland C.C. & St. L. Ry. Co. v. Moline Plow Co., 13 Ind. App. 225, 41 N.E. 480 (1895). Further, if a shoplifter without force takes goods and holds them peaceably though wrongfully, the owner of the property cannot exercise his right of recaption by means of violence on the person of the possessor; the remedy lies in a resort to law. Andre v. Johnson, 6 Blackf. (Ind.) 375 (1843); Singer Mch. Co. v. Phipps, 49 Ind. App. 116, 94 N.E. 793 (1911). Deadly force is never justified in the recapture of property. There is good authority for the proposition that reasonable force can be used where there has been a mere momentary interruption of possession and also where the pursuit was immediate and fresh. PROSSER, TORTS, § 24 at 100. This is justified on the basis that the distinction between the defense of possession and recaption at this point is narrow, (especially so in the case of shoplifting) and in the case of chattels a summary remedy is the only way to save the goods from loss or destruction, Branston, *supra* note 93 at 269-270, but a demand for the chattel must precede any use of force, *id.* at 271. See also, RESTATEMENT, TORTS, §§ 100-106 (1934). The right to use reasonable force to defend possession has always been a part of the common law. Branston, *supra* note 93 at 268. As an outgrowth of the law of self defense, it may be exercised on the basis of apparent necessity. PROSSER, *op. cit. supra* at § 21. Possession of personal property is sufficient to authorize the holder to protect such possession against a mere trespasser. Moorman v. Quick, 20 Ind. 67 (1863); Dedrick v. Brandt, 16 Ind. App. 264, 44 N.E. 1010 (1896). See RESTATEMENT TORTS. §§ 77, 87 (1934).

95. The definition of possession therefore would seem to be vital. If the possession of the store owner was concomitant with the store premises, then only action outside the store would be in the exercise of the privilege to recapture and at peril. *E.g.* Montgomery Ward v. Fogle, 221 Ind. 597, 50 N.E.2d 871 (1943) (apprehension outside the store). Logically it would seem that even mistaken action taken within the store, if reasonable and based on apparent necessity, would be a privileged defense of possession, but this is not the case. See Efroymson v. Smith, 29 Ind. App. 451, 63 N.E. 328 (1902) (apprehension within the store). Therefore, the conclusion follows that the possession of the store is ended when the customer picks up the article, and, from that point on the store must act, aside from arrest, under the privilege to recapture at the peril of detaining an innocent shopper. Comment, 46 ILL. L. REV. 887, 892 (1952). Theoretically, whether or not the thief took possession would determine if a larceny or merely an attempted larceny was committed. But see People v. Bradovich, 305 Mich. 329, 9 N.W.2d 560 (1943).

statutory creation of such a privilege should evolve from a recognition of the already existent privileges of defense and recaption of property and embody the best attributes of both.[96] To be effective such legislation must permit a storeowner who has reasonable grounds for suspecting that he is being dispossessed to examine a customer, but only if the examination is conducted in a reasonable manner and for a reasonable length of time.[97] Further, it should recognize that some force may necessarily be required to detain and strictly limit such force to the needs of the detention, prohibiting the use of deadly force.[98] Artificial definitions of the scope of the storeowner's possession must not be allowed to constrict the operation of the privilege to detain to the boundaries of the store premises. The opportunity to resort to normal legal procedure is just as infrequent when the apprehension is made within the store as when made without. The following statute is designed to meet these ends.

A BILL

for an ACT creating a privilege to detain suspected shoplifters.
Be it enacted by the General Assembly of Indiana;

Section 1. A merchant believing with probable cause that a wrongful taking has occurred, or is occurring, may detain the person arousing such belief for a rea-

96. California in Collyer v. Kress, 5 Cal. 2d 175, 54 Pac. 2d 20 (1936) gave recognition to such a right by holding that a storeowner may detain for a reasonable time in which to make a reasonable investigation in a reasonable manner when he has probable cause to believe that someone is stealing, or has stolen from him. Bettolo v. Safeway Stores, 11 Cal. App. 2d 430, 54 P.2d 24 (1936). Probable cause for the detention falls within the province of judicial determination, while reasonableness of the detention remains with the jury. Roberson v. J. C. Penny Co., 288 P.2d 275 (Cal. App. 1955). Note, 3 U.C.L.A. L. REV. 269 (1956).

97. California's forthright recognition of the privilege to detain through the use of reasonable force was the first of its nature, Collyer v. Kress, 5 Cal. 2d 175, 54 P.2d 20 (1936); but several jurisdictions recognize that probable cause will reduce damages. Hill v. Henry, 90 Ga. App. 93, 82 S.E.2d 35 (1954); Lewis v. Montgomery Ward and Co., 144 Kan. 656, 62 P.2d 875 (1936); Note, 15 J. KAN. B.A. 292 (1946). This had been foreshadowed by decisions to the effect that detentions to investigate were allowable. Jacques v. Child's Dining Hall Co., 244 Mass. 277, 142 N.E. 50 (1924). It is, however, questionable whether a detention in fact existed in that case because an exit was open to the customer. See also, Lester v. Albers Super Market, 94 Ohio App. 313, 114 N.E.2d 529 (1954) (no restraint). This meant that a detention was proper if consensual, which would be, in effect, no detention. Nevertheless the California position has been adopted by case law, Swafford v. Vermillion, 261 P.2d 187 (Okla. 1953); Kroger Grocery & Baking Co. v. Waller, 208 Ark. 1063, 189 S.W.2d 361 (1945); Teel v. May Dept. Store Co., 348 Mo. 696, 155 S.W.2d 74 (1941); and by statute, FLA. STAT. § 811.022 (1955). This statute was based upon one presented in Note, 62 YALE L.J. 788 (1953). Letter from David O. Tumin, Special Assistant Attorney General of Florida, to the *Indiana Law Journal*, Sept. 6, 1955, on file in the Office of the Indiana Law Journal.

98. See statute § 1 *infra*.

sonable time, in a reasonable manner. The detention shall be for the purpose of

a) regaining property, or
b) informing the appropriate public officials endowed with a peace officer's power of arrest, or
c) informing private persons interested in the welfare of the suspect.

Reasonable force, but not deadly force, may be used to detain.

Section 2. A merchant in informing the public official of the circumstantial basis for the detention shall be assumed to be placing information before the official, and there shall be a presumption against such information constituting a charge of crime.

Section 3. If, under all the circumstances, a reasonable man would not disbelieve the information provided by the merchant, then such information shall provide a reasonable basis for an arrest by a public official.

Section 4. The provisions of this act shall not apply to criminal prosecutions.

Section 5. Nothing in this act shall affect any cause of action which has accrued prior to the effective date of this act.

Section 6. Whereas an emergency exists for the immediate taking effect of this act, the same shall take effect from and after its passage.

This statute creates a privilege to detain which will permit a reasonable mistake in the detention of a customer, if under the circumstances, a reasonable man would have made the same mistake. In this it resembles privileges previously categorized as private.[99] The merchant need not fear an action for false arrest unless in informing the peace officer he explicitly makes a charge of crime. The privilege allows the storeowner to garner enough information in the course of the detention to enable an officer to determine whether or not an arrest should be made under all the circumstances. The merchant need fear an action for false imprisonment only if in detaining the suspect he abused his privilege. The merchant's action subsequent to the initial detention must be reasonable whether or not the suspect took the goods. The merchant's high

99. See note 30 *supra*.

valuation of customer goodwill may insure against irresponsible detentions, and the statute further restrains breaches of community standards by providing for a jury determination of probable cause and reasonableness.

CONCLUSION

Shoplifting and its concomitant social and economic effects upon the State of Indiana demand legislative treatment.[100] The scope of the change must afford room for differential treatment that can meet the hetrogeneous nature of the offenders. A private privilege to detain could be utilized to advantage by providing a means by which property can be protected and the processes of the law can be brought to bear on the problem. Innocence can still be adequately protected through the judicial and community standard of reason; but must not be to the stultifying extent that it is presently. The suggested statute provides a workable solution by eliminating tort liability for reasonable detaining action taken by a merchant better enabling both him and the community to reduce the causes and effects of this crime.

WATER RIGHTS IN INDIANA

Endowed with abundant rainfall and ample flowing water supply, Indiana has never faced a general water shortage.[1] In fact, the great

100. In construing IND. ANN. STAT. § 17-832 (Burns 1940) (limited damages recoverable from certain officials for false arrest), it was said, "Within the limits necessary for the preservation of our form of federal and state governments and the basic principles upon which they rest, the Constitutions of both state and nation must be construed to the end that public progress and development will not be stifled and that public problems, with their ever increasing complexity, may be met and solved to the best interests of the public generally." Scoopmire v. Taflinger, 114 Ind. App. 419, 428, 52 N.E.2d 728, 731 (1943).

1. "Being located in the more humid part of the midwest, Indiana is not faced with a problem of insufficient total quantity of water being available, but one of having the right amount available in the right place at the right time. Of the water that falls on Indiana as rain or snow, only about 30 per cent is available for use by man. The remainder is evaporated back into the atmosphere. Only a portion of the 30 per cent can be put to practical use, because unequal distribution throughout the year produces excessive quantities during some periods and deficient amounts during others. Nature attempts in a limited way to equalize the availability of water by storing great quantities in the ground during the periods of plenty and releasing them gradually throughout the year. However, the natural underground reservoirs are not uniformly distributed throughout the state, with the result that some areas are not as plentifully supplied as others. Increases in population, expansion of industry, and intensification of agriculture are continually placing a greater and greater demand on available water supplies. In the areas of inadequate natural storage, continued growth and development are being hampered and even stopped." INDIANA FLOOD CONTROL AND WATER RESOURCES COM-