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SHOPLIFTING LAW: CONSTITUTIONAL RAMIFICATIONS OF MERCHANT DETENTION STATUTES

Private police in the United States outnumber public police two to one. Although they have substantially the same responsibilities as public law enforcement authorities, most private police are subject to tort liability which the public police are able to avoid. However, there have been developments in the law that give retail merchants' police the same insulation from tort liability that public police enjoy without subjecting the former to the constitutional restraints upon the latter. The purpose of this comment is to explore this anomaly in the law and to offer a solution that will enable retail police to perform their necessary duties without creating a special "super-police" status.

I. THE SCOPE OF THE PROBLEM

"Security" has become an essential part of large-scale retail merchandising operations. Losses arising from shoplifting and internal "inventory shrinkage" increased last year to a record $3.5 billion, and arrests soared to a record 267,000. The responsibility for surveillance and investigation of any criminal activity which occurs on the store premises rests squarely on the shoulders of the merchants' security forces.

The merchants' uniformed and "plain clothes" detectives are frequently armed, and they use highly sophisticated equipment in their criminal investigations. For the most part, they are thoroughly familiar with police methods of apprehension, search, interrogation and arrest. Often the security detective or officer is a retired policeman or has extensive training in police methods.

4. Based on 1971 data from National Retail Merchants Association as reported in the Long Island Press, Nov. 20, 1972, at 8, col. 5.
5. 1971 UNIFORM CRIME REPORTS 113.
6. Interview with the director of a combined stores protection agency, Oct. 5, 1972 at New York, N.Y. (name withheld by request).
8. Hellerman, One in Ten Shoppers is a Shoplifter, NEW YORK TIMES MAGAZINE, Mar. 15, 1970, at 34.
A shoplifting investigation begins with the "suspicion" or actual observation of an attempted theft. Suspicion may be aroused in many ways. A customer carrying an open shopping bag, holding a brief case, or wearing an oversized overcoat may arouse the suspicion of a store detective or sales clerk. "Suspicion" is often triggered by such subjective factors as the general appearance and mannerisms of the suspect, or by the personal prejudices of the security officer. A close, intensive observation of the suspect follows.

If suspicion grows into "reasonable grounds" to believe a theft is taking place, the detective then approaches the suspect as the latter leaves the establishment. The detective usually questions the suspect about the contents of shopping bags, pockets or handbags. The suspect is asked to accompany the detective to an interrogation room, ostensibly to "clear up the matter." Here search, interrogation, mugshots and fingerprinting take place.

The suspect is "required" to sign a release of liability if investigation reveals innocence, or a confession and release form if investigation has led to a criminal proceeding.


Retail security police also apprehend persons suspected of possession of counterfeit money, Wolin v. Abraham & Strauss, 64 Misc.2d 982, 316 N.Y.S.2d 377 (Sup. Ct. N.Y. County 1970), and stolen credit cards, United States v. Bolden, 461 F.2d 998 (8th Cir. 1972) (per curiam).

11. Id. at 870-71. In Tota v. Alexander's, 63 Misc. 2d 908, 909, 314 N.Y.S.2d 93, 94, aff'd mem., 58 App. Div. 2d 892, 330 N.Y.S.2d 295 (1st Dept. 1972), the detective became suspicious because Ms. Tota was wearing a "bizarre colored outfit." But see Browning v. Pay-Less Self Service Shoes, Inc., 373 S.W.2d 71, 75 (Tex. Civ. App. 1963). The question is academic, of course, if the suspect is guilty.

12. Most shoplifter detention statutes, discussed infra Section III, used the words "reasonable grounds" to believe that a theft is taking place. Reasonable grounds and probable cause have been held to be virtually equivalent, with an objective (whether a reasonable man could suspect that a theft is taking place) being applied. Coblyn v. Kennedy's, Inc., ___ Mass. ___, ___, 268 N.E.2d 860, 862 (1971); cf. People v. Morfield, 41 Misc. 2d 935, 936, 246 N.Y.S.2d 451, 452 (Crim. Ct. Bronx Co. 1964).

13. In People v. Santiago, 53 Misc. 2d 264, 267, 278 N.Y.S.2d 260, 263 (Rockland County Ct. 1967), the Court held that neither consent nor a search warrant is necessary to conduct such a search. The New York Court of Appeals has further held that evidence of an unrelated crime is admissible in a criminal proceeding regardless of the validity of the underlying shoplifting charge. People v. Horman, 22 N.Y.2d 378, 299 N.E.2d 625, 292 N.Y.S.2d 874 (1968), cert. denied, 393 U.S. 1057 (1969). But cf. United States v. Brown, 294 A.2d 499 (D.C. App. 1972) where suppression of evidence of another crime was granted because the defendant lacked scienter to commit the underlying offense—failure to pay a cab fare.

14. CURTIS, supra note 10, at 440; interview, supra note 6.
15. CURTIS, supra note 10, at 450; interview, supra note 6.
tion points to guilt. Frequently, the suspect is required to set out the facts in his or her own handwriting. If the evidence suggests that the suspect possesses unpaid-for merchandise (regardless of intent) the merchants' security police are faced with the options of accepting restitution of the goods and releasing the party, or of turning him or her over to the police for prosecution. Invariably, if the cost of the merchandise exceeds the store's "no prosecution limit," a formal arrest ensues.

The courts have held that, absent special patrolman status, merchant security detectives are private persons, despite the fact that their demeanor and activities are similar to those of the "official" police. Since constitutional safeguards do not extend to the actions of private citizens, store detectives are under no duty to respect the int-

16. Record on Appeal at 173, Jacques v. Sears, Roebuck & Co., 30 N.Y.S.2d 466, 285 N.E.2d 871, 334 N.Y.2d 632 (1972). "[I]f a confession is obtained promptly the suspect should either be released (if a mistake was made) or arrested." W.T. GRANT OPERATION MANUAL ON SHOPLIFTING, quoted in Peak v. W.T. Grant Co., 409 S.W.2d 58, 61 (Mo. 1966). The following is a "confession form" obtained from a major department store chain, with the name of the chain and its location omitted.

Date
Time
I, (name), of (address) do hereby, state declare:
1. That on the ___ day of ___, 19__, between __ M. and ___ M. I entered the premises of X DEPT. STORE at CITY, STATE and removed the following articles without any intention of paying for them:
2. I hereby release and forever discharge said X DEPT. STORE and its agents from any claims for damages because of this investigation.
3. Permission is hereby granted for X DEPT. STORE to search me, my premises and my automobile.
4. No promises have been made to me and this statement is made voluntarily, without threat, force or duress, to make the truth known.

Signed _______________________
Witnesses:

19. Interview, supra note 6.
22. This result arises from a strong line of cases that holds the government alone to a standard of care in safeguarding constitutional rights. The United States Supreme Court in Burdeau v. McDowell, 256 U.S. 465, 475 (1921) held that the 4th Amendment protections against unlawful searches and seizures "was not intended to be a limitation upon other than governmental agencies." If the interest involved is purely private, then the suspect is not entitled to constitutional protection. If the interest is public, then the suspect is guaranteed constitutional protection. The question is whether or not a governmental agency is the conduit through which a person is deprived of his rights. With respect to merchant police activities, this test is clearly inadequate.
individual's constitutional rights. This policy is based on the rationale that a suspect has a remedy in tort. It is submitted that the suspect has no real tort remedy, and that a policy based upon the premise that such a remedy does exist is inherently defective.

II. TORT LIABILITY

Under common law standards the merchant was strictly liable in tort for his "honest" mistakes in the apprehension and prosecution of shoplifters. If the suspect was found to be innocent, he had an action for false imprisonment or false arrest against the merchant. The California Supreme Court modified this common law doctrine in 1936 by holding that a merchant could, without liability, detain a suspect for the purpose of investigation of the alleged theft. If the detention was reasonable and based on probable cause, the merchant was immune from civil liability for false imprisonment.

Following California's lead, forty-four other states and the District of Columbia have either codified an investigation privilege or have recognized it by judicial decision. The scope of the tort im-


27. "No question of false arrest is involved in the case. . . . We are here concerned only with the right of the defendant store to detain the plaintiff for purpose of investigating. . . ." Id. at 179-80, 54 P.2d at 23. 

28. See appendix. Michigan's statute does not provide an absolute defense but merely mitigates damages. In Arkansas, Pennsylvania, and South Dakota the suspect apparently must have the goods in his possession in order for the merchant to invoke the statutory privilege. Montana and Nevada statutes allow the merchant to "request" a suspect to remain. Rhode Island only grants a detention power to police. Vermont only permits a merchant to request patrons to keep merchandise in full view. These statutes have been attacked on constitutional grounds. Note, 25 La. L. Rev. 956, 963 (1965). Courts have been reluctant to reach these important questions. See, e.g., Wilde v. Schwegmann Bros. Giant Supermarkets, Inc., 160 So. 2d 859 (La. Ct. App. 1964).

One or two states have already repealed their antishoplifting legislation. They found it was being abused by merchants at the cost of innocent citizens. . . . It is the contention of many retail security men that if a store operated its retail security properly this type of special legislation would not be needed.

29. Curtis, supra note 10, at 144.
Comments

Community ranges from investigation of ownership of the goods, through detention, interrogation, search and seizure, to actual arrest. The statutes protect only merchants and their agents; other "private police" are not protected.29

Under the umbrella of "reasonable grounds" some outlandish practices have been developed and condoned. In a civil suit30 following the dismissal of a criminal action, Ms. Freeman, a 63 year old plaintiff, testified that she went to Montgomery Ward with her daughter and her young grandchild to exchange some zippers which she had purchased previously. The salesclerk informed her that an exchange could not be made without a salescheck. When Ms. Freeman then purchased another zipper, the salesclerk became suspicious. The clerk testified that, "It was strange for a customer to purchase something she did not want." She thought Ms. Freeman had taken some extra zippers, and she notified the management. The store manager met Ms. Freeman at the exit door, pushed her face against the glass, and asked her if she had taken some zippers. The plaintiff then returned "voluntarily" to the store office and was catapulted into a chair. Police were called and Ms. Freeman was taken to the station house, where she was fingerprinted and "booked." She was subsequently acquitted of the shoplifting charge in police court.31

Ms. Freeman won damages of $12,000. The judgment of the district court was reversed on appeal and a new trial ordered. The Fourth Circuit held that, under Virginia law,32 there could be no recovery if the defendant merchant has reasonable grounds to believe that the plaintiff customer was committing larceny and if the defendant's conduct was reasonable.33

Although the Fourth Circuit never reached the issue of which party bears the burden of proof of reasonableness, at least one other jurisdiction has placed it on the plaintiff,34 and others apparently do, sub silentio. The effect of this placement is to hold the merchant to a standard of care in his detention and arrest procedures that few plain-

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31. Id. at 722.
tiffs could prove unreasonable. Merchants have been known to physically accost, forcibly search, "coerce" confessions, and libel and slander with nearly complete immunity from tort liability based upon the reasonableness standard.

III. THE DETENTION PRIVILEGE

All of the merchant detention statutes permit the retailer to detain a person suspected of shoplifting. Although most of the statutes do not specifically authorize an arrest, more often than not the detention culminates in one. It is one thing to question a person on the suspicion that a crime has been committed and quite another to arrest a suspect for a crime known to have been committed. The statutes, therefore, require an extremely broad construction to include the arrest privilege.

The Second Circuit, in the case of United States v. Vita, distinguished arrest from detention on the ground that the detainee in a detention situation has the ability to exculpate himself from the alleged criminal act.

Detention for a short and reasonable period in order to question is not an arrest. . . . [T]he line between detention and arrest is a thin one but a necessary one if there is to be any effective enforcement of the criminal law. For it not only aids the police but also protects those who are readily able to exculpate themselves from being arrested and having charges preferred against them before their explanations are considered.

Following this reasoning, the New York Court of Appeals has held

37. See Hellerman, supra note 8.
39. See appendix.
40. An arrest is the taking of an individual into custody in order that he be made to answer a criminal charge before a court of law. Foote, Safeguards in the Law of Arrest, 52 NW. U.L. REV. 16, 37 (1957).
42. It is also in the detectives' interest to have the suspect arrested since many stores pay a bonus for exceeding a fixed arrest quota. Bonkowski v. Arlan's Department Store, 395 Mich. 90, 100-106, 174 N.W.2d 765, 769 (1970).
43. 294 F.2d 524 (2d Cir. 1961), cert. denied, 399 U.S. 823 (1962).
44. Id. at 530.
that the evidence on which detention is based need not be of the same “degree or conclusiveness” as that required to effect an arrest.46

Thus, until recently, New York adhered to the Second Circuit's arrest-detention distinction. But, in Jacques v. Sears Roebuck & Co.,47 the Court of Appeals appears to have abandoned the distinction. The plaintiff, a three-fingered carpenter, had paid $30.00 for several items of merchandise, but failed to pay $1.90 for ten reflectorized letters. A Sears store detective spotted the “crime” taking place and arrested Jacques at his car. After searching the suspect and inducing him to sign a confession and release the store detective had Jacques booked for petit larceny by the Syracuse police. The criminal charge was dismissed for lack of proof of intent.

Jacques then instituted a civil suit against Sears which was subsequently dismissed. On appeal, he argued that because detention is not synonymous with arrest Sears was liable for false arrest, although immune from liability for the detention. The Court of Appeals disagreed, determining that the legislature had created immunity both for detention and for arrest. However, the court also indicated that the terms “detention” and “arrest” are interchangeable, except where “the [statutory] language appears to restrict detention to a limited restraint.”48 (emphasis added)

The general rule is that a private arrest is invalid unless the person arrested has in fact committed the crime for which the arrest was made. In effect section 218 [the merchant detention statute] carves out an exception for merchants detaining or arresting shoplifters.49

Apparently, the Court of Appeals ignored the wording of the statute, its legislative history, and the court’s own prior decisions in coming to this conclusion. In fact, the statute as construed by the Court of Appeals raised serious constitutional questions. The statute specifically limits the “restraint” to detention “for the purpose of investigating or questioning as to the ownership of merchandise.”50 The “detention” must be for a reasonable time, defined as “the time necessary to permit the person detained to make a statement, or refuse

to make a statement and the time necessary to examine . . . the records . . . relative to the ownership of the merchandise.”

Clearly, the “reasonable time,” and therefore the immunity, had passed after Jacques signed the confession and release, since the investigation was over at the time. At that point the statute was no longer in effect. The validity of Jacques’ arrest should therefore have been measured by the standards applicable under the New York State citizens arrest statute.

For an arrest to be valid under the citizens arrest statute it must be for a crime actually committed. Although Jacques was found innocent of the shoplifting charge, and therefore the arrest was invalid, the Court of Appeals denied him relief. An ordinary private citizen would have been liable in tort, but Sears, the merchant, was not, and for Henry Jacques there was no remedy.

The legislative history supports the proposition that the merchant detention statute does not encompass an arrest made by the merchants’ private policemen. The Governor’s Memoranda approving General Business Law §§ 217-218 states:

this bill will provide a defense in certain actions based upon a detention . . . it is to be noted that this bill does not authorize a merchant or peace officer to take any action against a suspected thief which would not be justified under our present laws relating to arrest. (emphasis added)

Both the legislative history of the statute and prior decisions dealing with the distinctions between detention and arrest recognize that the standard of “reasonableness” for arrest is applicable only to public law enforcement agencies, and that private citizens acting in that capacity should be held to a higher standard, defined as “guilt of the accused.” The police are subject to constitutional sanctions against

51. Id.
55. 1960 New York Legislative Annual 568. Also see Assemblyman Campbell’s memorandum, id. at 146: “Non-compliance [with the comprehensive and explicit language of this bill] renders the merchant or employer liable to such legal action without the help of the defense which this bill provides.”
abuse of power. The private citizen is checked from abuse of privilege by liability in tort. The result of the Jacques case is that in New York, a leading jurisdiction, the innocent citizen is without any remedy for an illegal arrest made by a store security officer or detective. Thus, there are some "private" police who enjoy "public" police privileges without the attendant public responsibilities.

IV. THE SEARCH PRIVILEGE

The merchants' immunity from liability and their arrest privileges are augmented by the failure of the courts to apply any exclusionary rule to evidence or confessions obtained during the course of a "detention" by private persons.

An exclusionary rule is, at best, a secondary remedy. Its purpose is to deter—"to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it." It is precisely because all police tend to mold their investigatory practices to constitutional standards in order to secure convictions that courts have invoked constitutional restraints on police conduct.

Private police, like public police, have a genuine interest in obtaining convictions. Their investigations also focus on the general public. Although the merchants' primary interest is in recovering stolen goods, they, too, have a strong interest in seeking criminal sanctions. The merchants would like to see the professional shoplifter incarcerated. He would like to deter thrill seekers and teenagers from the temptation of shoplifting. In those few states without a detention statute or judicial recognition of the privilege, the merchant, by securing a conviction, will insulate himself from tort liability.

In the case of store detectives, the courts have consistently held that exclusionary rules do not apply. This has led to particularly appalling practices. For example, in People v. Randazzo Victoria Randazzo selected several articles of clothing from the racks of a Los

Angeles department store. She carried them into a dressing room. The room was closed on three sides by partitions and on the fourth side by a curtain. While the defendant was in the dressing room, a store detective entered an adjacent dressing room, assumed a prone position, and, looking beneath the partition between the two dressing rooms, observed the defendant trying on clothes. As the detective watched, the defendant placed an article of clothing in her handbag. She was arrested by the merchant's security police while leaving the building.

At the defendant's criminal trial the "observant" detective was permitted to testify. She stated that this method of observation had been frequently used in the past despite the fact that the store detectives had no objective reason to suspect that the customer intended to shoplift. The detective testified that many convictions had been obtained, prior to this case, on evidence discovered in the same manner. The District Court of Appeal held that such evidence was admissible since the detective was a private person and private persons are not required to respect the constitutional rights of others.

The rationale for not invoking the exclusionary rule in private search and seizure cases has been the availability of the tort remedy. However, as already indicated, this remedy is illusory in shoplifting cases.

The ramifications of the court's holding are frightening. A person may be the victim of an illegal search and never know it. Very sophisticated surveillance and search equipment that can count the change in a person's pocket, photograph him, and scan him for chemical detectors on merchandise tags that positively identify stolen merchandise is in use today. If this type of search were made by governmental authorities, the evidence of the search would be inadmissible in a criminal prosecution. Yet the courts claim that the merchant does not have a sufficient interest in criminal prosecutions to clothe his actions with the color of state law which would make constitutional restrictions applicable to the merchant's actions.

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65. Id.
66. Id. See Note, 37 S. CAL. L. REV. 609 (1964) for an excellent discussion of this matter in light of Randazzo.
This rationale is unsupported by the facts. Not only do merchants have a sufficient interest, but they are responsible for a large number of arrests and prosecutions each year.\textsuperscript{70} The conclusion is obvious; they are effectively police without police responsibilities.

V. THE INTERROGATION PRIVILEGE

Not only do courts fail to invoke exclusionary rules in cases where there has been an illegal search by “private police,” they also refuse to exclude any evidence obtained during the interrogation of a suspect. The merchant is not required to advise the suspect of his constitutional rights.\textsuperscript{71} Again the rationale for this is that the merchant is a private citizen to whom constitutional restraints do not apply and who “is not trained in police methods, and would not have the faintest notion concerning the matter of advising suspects of rights.”\textsuperscript{72} This argument has little merit in fact since most store detectives are retired policemen or go through rigorous training,\textsuperscript{73} and are thoroughly familiar with the fine points of sophisticated interrogation techniques.\textsuperscript{74}

Since \textit{Miranda v. Arizona},\textsuperscript{75} at least sixteen jurisdictions have held \textit{Miranda} inapplicable to private security guards whose distinct function and purpose is to apprehend shoplifters.\textsuperscript{76} The theme unifying these cases is that the private security guard is exempt from both the letter and the thrust of \textit{Miranda}.\textsuperscript{77}

A leading case is \textit{People v. Frank}.\textsuperscript{78} Anita Frank was an employee of a department store. She was forcibly detained on mere “suspicion” and interrogated by six security detectives. During the interrogation,

\textsuperscript{70} Thirty-nine stores which are members of New York City’s Stores Mutual Protection Association reported nearly 10,000 apprehensions in 1959. S. Curtis, \textit{Modern Retail Security} 779-82 (1960).

\textsuperscript{71} \textit{E.g.}, State v. Masters, 261 Iowa 366, 154 N.W.2d 133 (1967); People v. Frank, 52 Misc. 2d 266, 275 N.Y.S.2d 570 (Sup. Ct. N.Y. Co. 1966); State v. Bolan, 27 Ohio St. 2d 15, 271 N.E.2d 839 (1971). \textit{But see} Pratt v. State, 9 Md. App. 220, 263 A.2d 247 (1970) where \textit{Miranda} warnings were held to be mandated as the detective was a “special patrolman” by statute.

\textsuperscript{72} Hood v. Commonwealth, 448 S.W.2d 388, 391 (Ky. 1969).

\textsuperscript{73} Interview, supra note 6.

\textsuperscript{74} Curtis, supra note 10, at 292. Macy’s uses a bright yellow room for interrogation since it makes it difficult for suspect not to confess. Hellerman, supra note 8 at 53. Accord, Rogers, \textit{Detection and Prevention of Business Losses} 10 (1962).

\textsuperscript{75} 384 U.S. 496 (1966).

\textsuperscript{76} Comment, \textit{Miranda Warnings in other than Police Custodial Interrogations}, 21 Clev. St. L. Rev. 135, 139 (1972).

\textsuperscript{77} Id.; Note, \textit{Admissibility of Confessions or Admissions of Accused Obtained During Custodial Interrogation by Non-Police Personnel: Are the Miranda Warnings Required?}, 40 Miss. L.J. 139 (1968).

\textsuperscript{78} 52 Misc. 2d 266, 275 N.Y.S.2d 570 (Sup. Ct. N.Y. Co. 1966).
Ms. Frank made certain inculpatory statements without the benefit of *Miranda* warnings. The defendant contended that those statements were inadmissible because, under *Miranda*, no suspect may be permitted to make incriminating statements without being informed of her rights. The court rejected this contention and held:79

... the security guards herein were under no duty to warn the defendant prior to obtaining any statements from her, and consequently, there is no issue presented warranting a hearing (concerning the admissibility of the incriminating statements) under the guidelines found in *Miranda v. Arizona*.

The tone of the *Frank* decision indicates a narrow interpretation of *Miranda*, an interpretation that fails to acknowledge the far reaching consequences of the police duties of private store detectives.

Six months later the Syracuse City Court decided the case of *People v. Williams*.80 This court, on similar facts, "reluctantly" followed the *Frank* rationale:81

It seems ludicrous to say that a District Attorney in prosecuting a Defendant cannot use evidence obtained by a policeman in derogation of a Defendant's constitutional rights, but can use this same evidence obtained by a private person in derogation of a Defendant's constitutional rights which in turn is handed over to a policeman who then hands it over to a District Attorney. ... As this court stated previously it must follow the law as it is and not as this court believes it should be.

Perhaps the most confusing recent case dealing with the interrogation privilege of privately employed store detectives is *United States v. Bolden*.82 The defendant was convicted in the United States District Court of possession of stolen credit cards. Bolden argued on appeal that he was entitled to a new trial, on the ground that he was not given the *Miranda* warning by the security guards. The 8th Circuit held:83

... such warnings are only required when there is a "custodial interrogation" which is defined by the Supreme Court as ...
questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona* 384 U.S. 436. . . . Security Officer Cope was not a “law enforcement official” acting in a situation where the warnings would be necessary. (emphasis added)

The conclusion that questioning by a “security officer” is not a “custodial interrogation” because the detective is not a law enforcement official is at least a curious fiction. The merchant in the *Bolden* case was in no jeopardy of losing his goods. Although the detective knew that Bolden had no merchandise in his possession when he was apprehended, the detective was aware that Bolden had a stolen credit card. The primary interest the security officer had was to protect the public by arresting Bolden for possession of a stolen credit card. The officer knew that any statements Bolden made could and most likely would be used against him in prosecution resulting from Bolden’s possession of the stolen credit card. Furthermore, the detention privilege in Missouri extends only to investigation of shoplifting.84

*Miranda,* essentially, is a recognition that the Bill of Rights protects people by tempering the inherent effects of custodial interrogation. This spirit would demand that, when an arrest and interrogation is conducted by a member of an organization whose function and purpose is the prevention of crime and the apprehension of criminals, the wall between public and private interest should crumble.85

VI. CIVIL RIGHTS LIABILITY

Primarily because the merchant detention statutes and the cases recognizing the detention privilege have foreclosed tort liability for any “reasonable” errors a merchant has made in the detention or the apprehension of a suspected shoplifter, some injured parties seek relief under the federal civil rights statutes.86 In these cases plaintiff is required to establish both jurisdiction87 and duty by alleging that the merchant’s security detectives have acted under apparent authori-


zation of state law, and that, as a result of their actions, the plaintiff is denied equal protection and due process of law. The courts have uniformly held that the merchant was acting in a private capacity, and not vested with requisite authority of state law under the detention statutes. The effect is that any person wrongfully detained, illegally arrested, physically restrained, coerced to confess, or forcibly searched is denied the civil rights remedy under the judicial construction of the merchant detention statutes.

A recent example is *Weyandt v. Mason's Stores, Inc.* Plaintiff, while a customer in defendant's establishment, was suspected of shoplifting. She was approached by the store manager and "escorted" to a private office where she was confined, slapped and beaten, physically restrained from leaving, and denied permission to contact her attorney. She refused to sign a confession, and was then stripped and forcibly searched. The search proved fruitless. She was taken to a justice of the peace and arraigned on the charges of aiding and abetting shoplifting. Subsequent charges against her were later dismissed.

Plaintiff alleged, in her civil rights action, that she was deprived of her constitutional rights under "color of law." The court held that the plaintiff failed to state a claim under the federal civil rights act and that her appropriate redress was through tort action in the state courts. The basis for this decision was that the defendant store had no connection with state officers and that the defendant detectives were not attempting to influence, obstruct, or interfere with the law.

There seems to be an inherent constitutional weakness in the proposition that there are groups, whose function is the apprehension of criminals, who have no significant legal restraints. How closely allied to "government" must a person or group be to be considered

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88. *But see Weyandt v. Mason's Stores, Inc.*, 279 F. Supp. 283, 287 (W.D. Pa. 1968) (dicta), where the court notes that the statute merely authorizes "detention," not an "arrest." It appears that when the detention statute authorizes an arrest and the merchant is immune by statute from tort liability for reasonable errors, requisite jurisdiction for civil rights action under 42 U.S.C. § 1983 may be found. *Warren v. Cummings*, 303 F. Supp. 803, 807 (W.D. Colo. 1969) (dicta); *See Hill v. Toll*, 320 F. Supp. 185, 187 (E.D. Pa. 1970). Thus, in jurisdictions which grant an arrest privilege, e.g., New York, New Jersey, a Civil Rights remedy should be available. However, no such cases have been found.


92. *Id.* at 290.

93. *Id.* at 290.

94. *Id.*
sufficiently "official" to require adherence to the constitutional requirements of due process of law? The Supreme Court has held private persons to a constitutional standard when their activities take on governmental characteristics.\(^5\)

It is a common practice in this country for private watchmen or guards to be vested with the powers of policemen, sheriffs, or peace officers to protect the private property of their private employers. And when they are performing their police functions, they are acting as public officers and assume all the powers and liabilities attaching thereto.\(^6\)

The key to responsibility is the vesting of police power in private individuals. Power can be vested in many ways. One is to officially clothe the "private" police with the "color of law."\(^7\) Another is to officially \emph{ignore} the conduct of the merchant by permitting him unbridled discretion to detain and arrest. In the first instance, constitutional requirements, limitations, and liabilities attach to the power. In the second, lack of regulation vests power by failing to restrict the conduct of the "private" police and failing to hold them civilly responsible for their actions.

The criteria to determine whether or not a person has acted under the color of law are that the actor must act with the authority of law,\(^8\) and his conduct must make it clear that he is asserting the authority granted him and not acting in the role of a private person.\(^9\)

For example, the New York City Administrative Code\(^1\) allows any corporation doing business in the City to obtain police status for its employees upon application. Doing business is the sole criterion. There are no special training or qualifying requirements for the corporate personnel. Members of the corporation's security force are simply sworn in by a City official and granted all the privileges of policemen. Presumably, the "peace officer" has no more knowledge of the law after he is granted police privileges than he had before, when he was held to be a private party without sufficient knowledge


\(^9\) Id. at 184.

\(^1\) Administrative Code of City of New York, § 434a-7.0 (1971).
of the law to be required to safeguard a suspect's constitutional rights.\textsuperscript{101}

Obtaining police status in this way has some major drawbacks for the retail corporation, and the private citizen, as well. Along with the privileges go the responsibilities. The merchant must observe the restrictions on police conduct as set forth by the Supreme Court.\textsuperscript{102} He can no longer coerce confessions, engage in unlawful searches and seizures, or improperly interrogate a suspect without advising him of his \textit{Miranda} rights. Furthermore, the merchant corporation exposes itself and its agents to liability under the federal civil rights statutes.\textsuperscript{103} Very few merchants have taken advantage of these sections of the law.\textsuperscript{104} Fortunately for the merchants, these "privileges" are not regulations since, in effect, they remove many of the useful investigatory tools and expose the retail corporation to a liability from which it is presently insulated.

How does a private citizen know if a security guard has been made a peace officer or if he has been granted special police status by statute? Clearly, he cannot know. When a person is being interrogated or searched by someone he believes is a private security guard, he has no criteria against which to judge the legal obligations of the interrogator. The suspect knows that he is believed to have committed a crime. The suspect knows that crimes carry criminal penalties. The suspect does not know that \textit{Miranda v. Arizona},\textsuperscript{105} \textit{Escobedo v. Illinois},\textsuperscript{106} due process of law or the Fourth, Fifth, or Fourteenth Amendments do not protect him when he is detained by merchant police.

\textbf{CONCLUSION}

By judicial decision and statute a "super-police" force has been created. The merchant detective has the same privileges as public law enforcement agents without the same restraints to neutralize the effect of a violation of constitutionally protected rights. The merchant detective is treated as a private citizen for purposes of defining his constitutional liabilities and yet he is granted tort immunity as though he were a public law enforcement agent.

This apparent contradiction can be reconciled by either of two

\textsuperscript{101} Hood v. Commonwealth, 448 S.W.2d 388, 391 (Ky. 1969).
\textsuperscript{104} Interview, \textit{supra} note 6.
\textsuperscript{105} 384 U.S. 436 (1966).
\textsuperscript{106} 378 U.S. 478 (1964).
methods. The store detectives can be made subject to police constitutional limitations and subsequent civil rights liabilities or they can be made liable in tort for their errors. The constitutional limitations are the better solution to the problem.

The police activity on the part of merchants can best be characterized as an extreme self-help measure. The losses from individual shoplifting offenses are generally very small. It is the immensity of the aggregate loss that forces the merchant to use extreme measures to protect his business. The merchant feels that his very existence is threatened. Public law enforcement agencies are not equipped to patrol and protect retail establishments on a regular basis. At best, they can be helpful only when the act has been committed and the perpetrator is in the custody of the merchant.

Thus, the merchant needs some extraordinary privileges in order to protect his property; since these are police privileges, it is logical to apply police limitations. The overzealous detective striving to meet his arrest quotas would be deterred if his cases were thrown out of court because of constitutional infractions. This would be reinforced if he were to find less in his pay envelope. In addition, the merchant would still be able to recover stolen merchandise and retain tort immunity for reasonable errors regardless of the outcome of a criminal prosecution.

It is time for the courts and legislatures to recognize the need to define the role of private merchant police. As the Supreme Court observed:

Conduct that is formally “private” may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. . . . [W]hen private individuals or groups are endowed by the State with powers of functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.108

107. I have discussed this problem with District Attorneys in six states . . . and found every one of them supported the belief that the Supreme Court ruling[s] . . . (citations omitted) [are] an interpretation of the rights of ALL citizens and therefore is directed just as much at so-called “private police” as at public law enforcement. . . . As a consultant to the National Crime Commission I have had opportunity to discuss this situation with men connected with the commission and they also can see no reason for assuming the Supreme Court guidelines do not apply equally to private and public law enforcement personnel.


I. Anti-Shoplifting statutes and cases:

Maine: no statute, no cases on point.
II. State laws permitting the appointment of special patrolmen. (Note: this list does not include municipal ordinances which provide for similar appointments.)

Maryland: MD. ANN. CODE art. 41, § 60-70 (1971).
Virginia: VA. CODE ANN. § 15.1-143.1 to 153 (1964), as amended