

# Washington Law Review

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Volume 34  
Number 3 *Washington Legislation—1959*

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9-1-1959

## Criminal Law

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### Recommended Citation

Arval A. Morris, *Washington Legislation, Criminal Law*, 34 Wash. L. Rev. & St. B.J. 308 (1959).  
Available at: <https://digitalcommons.law.uw.edu/wlr/vol34/iss3/5>

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act. Three different procedures, known as registration by notification, registration by co-ordination, and registration by qualification, are provided for. All of these are fundamentally patterned upon the philosophy of the Federal Securities Act of 1933 which requires disclosure of pertinent facts as a condition precedent to a public offering. The state does not purport to pass upon the merits of the securities, but rather to assure that all required relevant information is available to the investor.

Administration of the act is vested in the Director of Licenses who is to be assisted by an advisory committee to be appointed by the Director.

In addition to requiring disclosure, the act prohibits fraudulent and misleading practices, requires registration of brokers, dealers, salesmen, and investment advisers, and creates certain statutory civil remedies. The act also contains detailed provisions exempting certain securities and certain transactions from the scope of the law.

In view of the adoption of this detailed and technical act, it behooves members of the Bar who represent clients contemplating a "public offering of securities" to familiarize themselves with the provisions of the statute. By way of admonition, the phrase "public offering" is not susceptible of precise definition, but the federal courts in interpreting this phrase in the Federal Securities Act of 1933 have in marginal cases shown a distinct disposition to hold that the offering is "public" and, therefore, within the scope of the act. In case of doubt, it will be advisable to examine the federal interpretations before determining that an offering is not public and, consequently, not covered by the act.

J. GORDON GOSE

## CRIMINAL LAW

**Chapter 229—Washington's Anti-Shoplifting Statute.** The exact annual amount actually deprived this nation's store owners by shoplifters is, quite realistically, impossible to know. Yet, by almost any standard, estimates reveal that the dollar-value sums are staggering. One author concludes that the total national loss in 1948 was over \$246,106,000.00,<sup>1</sup> and a more conservative source estimates this nation's average annual shoplifting loss is somewhat in excess of \$100,000,000.00.<sup>2</sup> On the state level, it is reported that \$12,500,000.00 is taken

<sup>1</sup> Comment, 62 *YALE L. J.* 788 (1953) n. 5.

<sup>2</sup> *Wall Street Journal*, Oct. 31, 1956; cited in Comment, 19 *MD. L. REV.* 28 (1959) n. 3.

annually in Pennsylvania<sup>3</sup> and from \$2,000,000.00 to \$3,000,000.00 in Maryland.<sup>4</sup> Florida's legislature solemnly proclaimed in the preamble to its anti-shoplifting statute that its yearly loss was \$4,500,000.00.<sup>5</sup> Indiana's loss totals at \$15,000,000.00.<sup>6</sup> Washington has had a similar experience.<sup>7</sup>

In addition to the annual dollar-amounts of goods lost, shoplifting accounts for an increase in underworld activities such as "fences," etc.<sup>8</sup> But, since much shoplifting is done by this nation's housewives, juveniles, and other non-professionals because they cannot withstand enticings offered by alluring advertising or unguarded displays,<sup>9</sup> there is reason to believe that the multiplied secondary impact flowing from amateur shoplifting does not further pernicious criminal ramifications and carry overtones necessarily inherent in other types of theft.<sup>10</sup> Neither are neurotic kleptomaniacs<sup>11</sup> numerous nor do they offer serious problems having extended criminal consequences.<sup>12</sup> Apart from the amateurs, professional petty pilferers do present perplexing "hard core" crime problems. Their activity is intimately connected with organized crime, particularly narcotics, through the underworld network of planned thievery and modes of disposing of professional plunder.<sup>13</sup>

Though shoplifting easily qualifies under petit larceny statutes,<sup>14</sup> only an insignificant proportion of the total offenses known to shopkeepers is reported. For example, it is recorded that in 1951 the De-

<sup>3</sup> Comment, 61 DICK. L. REV. 255 (1957).

<sup>4</sup> Comment, 19 MD. L. REV. 28, 29 (1959).

<sup>5</sup> 22 FLA. STAT. ANN., § 811.022 (1958 Cum. P.P.).

<sup>6</sup> Note, 32 IND. L. J. 20 (1957) n. 48.

<sup>7</sup> See, Seattle Times, Sunday Magazine Section, April 5, 1959, where the estimate is \$1,000.00 per month per major market area.

<sup>8</sup> See, SUTHERLAND, THE PROFESSIONAL THIEF (1937), and JANDY & FLOCH, NARCOTIC ADDICTION AS A FACTOR IN PETIT LARCENY IN DETROIT 13 (1937).

<sup>9</sup> See, POLLAK, THE CRIMINALITY OF WOMEN (1950); SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 219, 233 (5th ed. Cressey 1955); GROSS, ADAM & ADAM, CRIMINAL INVESTIGATION 509 (3d ed. 1934); *Cracking Down on Shoplifters*, BUSINESS WEEK, Nov. 1, 1952, p. 58; ANDERSON, FURTHER STUDIES OF DELINQUENT PERSONALITIES IN PROCEEDINGS OF THE AM. PRISON ASSOCIATION 435-45 (1919).

<sup>10</sup> See, MACDONALD, CRIME IS A BUSINESS 220 (1939).

<sup>11</sup> DAVIDSON, FORENSIC PSYCHIATRY 326, 329 (1952); HENDERSON, PSYCHOPATHIC CONSTITUTION AND CRIMINAL BEHAVIOR IN MENTAL ABNORMALITY AND CRIME 118 (1944); *A Kleptomaniac's Mind*, ATLANTIC MONTHLY, July 1937, p. 43.

<sup>12</sup> Comment, 62 YALE L. J. 788 nn. 17, 22.

<sup>13</sup> See, ASS'N OF GRAND JURORS OF N. Y. COUNTY, CRIMINAL RECEIVERS IN THE UNITED STATES (1928); SUTHERLAND, PRINCIPLES OF CRIMINOLOGY (5th ed. Cressey, 1955); SUTHERLAND, THE PROFESSIONAL THIEF (1937). Professional petty thievery is linked closely to drug addiction, and many who are addicted steal in order to pay the exorbitant sales price of illicit drugs. See, *Hearings Before Committee on Ways and Means on H.R. 3490 and H.R. 348*, 82 Cong. 1st Sess. 41 (1951). The average addict's weekly needs cost anywhere from \$50 to \$250. See, 62 YALE L. J. 751 (1953) n. 48, and King, *The Narcotics Bureau and the Harrison Act*, 62 YALE L. J. 736 (1953).

<sup>14</sup> See, RCW 9.54.090 and RCW 9.54.010.

partment of Police in Detroit, Michigan, received reports of 428 cases of shoplifting while the protection service of a single Detroit department store detected over twice that number; likewise, only two cases of shoplifting were reported to the police of Worcester, Massachusetts, even though the city has a population of over 270,000.<sup>15</sup> An important reason for the shopkeeper's reluctance to apprehend petty thieves is found in the merchant's fear of liability for false imprisonment, false arrest, assault and battery, and slander.<sup>16</sup> Briefly, his dilemma<sup>17</sup> lies in a conflict between his desire to use profitable modern merchandising display and sales techniques, yet protect his goods from theft, *versus* his fear of possible tort or criminal prosecution which may be accompanied by a subsequent general loss of good will.<sup>18</sup>

To ease the merchant's dilemma for our shopkeepers, the Washington legislature created a new crime of shoplifting,<sup>19</sup> a gross misdemeanor. Since the legislature attached no fixed statutory punishment to the chapter, the new crime will carry a maximum penalty of county jail imprisonment for not more than one year, or a fine up to \$1,000.00, or both.<sup>20</sup> Section 2 allows peace officers, who are defined as duly appointed city, county or state law enforcement officers,<sup>21</sup> to arrest

<sup>15</sup> Comment, 62 YALE L. J. 788, 792 (1953). For a comparison of the disposition of shoplifting cases in sixty-five American cities during 1951 (including Everett, Yakima and Tacoma), see appendix at end of Comment cited herein.

<sup>16</sup> For an excellent discussion of legal doctrines circumscribing the protection and recapture of merchandise from shoplifters, see Comment, 46 ILL. L. REV. 887 (1952), completed in 47 Nw. U. L. REV. 82 (1952).

<sup>17</sup> Examples of the merchant's dilemma are Collyer v. S. H. Kress, 44 P.2d 638 (Cal. App. 1935), *rev'd* 5 Cal.2d 175, 54 P.2d 20 (1936), and Sennett v. Zimmerman, 50 Wn.2d 649, 314 P.2d 414 (1957). See also, Note, 32 IND. L. J. 20 (1957) and Comment, 61 DICK. L. REV. 255, 260-65 (1957).

<sup>18</sup> It would be the rare case in which there would be time sufficient to secure a warrant for the arrest of an unidentified shoplifter before he departed with his plunder. Also, if the merchant stops a suspect without intention of turning him over to the police or prosecuting him, he may "imprison" (perhaps falsely) rather than "arrest" the suspect. See, McGlone v. Landreth, 200 Okla. 425, 195 P.2d 268 (1948); Crews-Beggs Dry Goods Co. v. Bayle, 97 Colo. 568, 51 P.2d 1026 (1935).

<sup>19</sup> Wash. Sess. Laws 1959, c. 229 provides: "A person who willfully takes possession of any goods . . . of the value of less than seventy-five dollars offered for sale by any . . . store . . . without the consent of the seller, with the intention of converting such goods, . . . to his own use without having paid the purchase price thereof, is guilty of a gross misdemeanor of shoplifting." After Sennett v. Zimmerman, 50 Wn.2d 649, 314 P.2d 414 (1957), noted, 33 WASH. L. REV. 203 (1958) one wonders the need of this statute, even though it does go the additional step of immunizing arrests based upon a charge made.

<sup>20</sup> RCW 9.92.020.

<sup>21</sup> Per § 4 of the act. The immunity is granted only to peace officers, but since Sennett v. Zimmerman, 50 Wn.2d 649 (1957), presumably the appointment of municipally deputized store employees would carry "the same powers of arrest as are conferred upon police officers who are regularly employed by the city." *Id.* at 652. Other state statutes allow a reasonable detention of a suspect by the merchant without incurring civil or criminal liability. See CODE ALA. (1957 Supp.) c. 53, § 334; LAWS ARIZ. (1958, c. 8 (§§ 13-674-5); LAWS UTAH (1957), c. 166; see Comment, 19 MD. L. REV. 28, 33-37 (1959) for discussion.

upon a charge being made and without a warrant any person whom they have reasonable cause to believe has shoplifted or attempted to do so. In addition, by another section (and this is the reason the statute is important) reasonable cause is made a defense to both civil and criminal actions brought against a peace officer for false arrest, false imprisonment, or unlawful detention by a person suspected of shoplifting.

The statute raises many questions which cannot be fully canvassed here and I shall point out only a few. First, the torts of assault, battery, and slander are not specifically provided against by way of defense and these torts, especially assault and oftentimes battery, are many times included in false imprisonment or false arrest.<sup>22</sup> Similarly, it might be that publicly to charge one with having "taken" a thing under circumstances which show an intent to charge larceny is slanderous and actionable without proof of special damages.<sup>23</sup> These problems can be solved by stretching the "intent" of the legislature to cover them; yet, this is a penal statute which derogates against the common law and the rights of personal liberty and, therefore, should be strictly construed on these counts. Secondly, the legislature made no provision for the length of time a peace officer having reasonable cause might detain a suspect, but it probably would be a "reasonable" time. This label causes great confusion because that period of detention which is unreasonable varies.<sup>24</sup> Obviously, the problem of what constitutes "reasonable cause" is beset with difficulties: Is an honest but unfounded or mistaken belief reasonable cause?<sup>25</sup> Is reasonable cause synonymous with probable cause? Is its absence to be measured by knowledge or intent?<sup>26</sup> Is reasonable cause a question for the jury or does the jury resolve factual disputes only and determine the existence of the circumstances so the court may finally decide whether there was reasonable cause? Will any charge justify arrest or only a reasonable charge as determined by the peace officer?

Constitutional questions create even greater problems and their resolutions are equally unclear. To grant immunity from false arrest, false imprisonment, and unlawful detention might well be an infringe-

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<sup>22</sup> See, *Vandiveer v. Charters*, 110 Cal. App. 347, 294 Pac. 440 (1931); *Parrish v. Boysell Mfg. Co.*, 188 S.E. 817 (1937); Comment, 24 TENN. L. REV. 1177, 1181 (1957).

<sup>23</sup> 33 AM. JUR. *Libel and Slander* § 56. See *Little Stores v. Isenberg*, 26 Tenn. App. 357, 362, 172 S.W.2d 13 (1943).

<sup>24</sup> Compare *Collyer v. S. H. Kress*, 5 Cal.2d 175, 181, 54 P.2d 20 (1936) with *Jacques v. Childs Dining Hall Co.*, 244 Mass. 438, 138 N.E. 843 (1923).

<sup>25</sup> See, *Hurst v. Montgomery Ward & Co.*, 241 Mo. 73, 145 S.W.2d 992, 995 (1940).

<sup>26</sup> See, *Director General of Railroads v. Kastenbaum*, 263 U.S. 25 (1923).

ment on the rights of the person to be secure in his person as protected by the fourteenth amendment incorporating the fourth.<sup>27</sup> Washington's anti-shoplifting statute grants a peace officer, upon a charge being made and without a warrant, the right to arrest for a misdemeanor not committed in his presence. The rub comes in that the statute attempts to allow peace officers, without a warrant, to arrest for unseen misdemeanors which are not breaches of the peace thereby covering new areas not previously allowed under the common law.<sup>28</sup> Usually peace officers are allowed to arrest without a warrant for a misdemeanor only in cases of breaches of the peace,<sup>29</sup> and a few states go further in allowing arrests for misdemeanors committed in their presence.<sup>30</sup> In addition, the statute may have to meet other hurdles in fourteenth amendment and state constitutional guarantees, such as not being void as class legislation since it neither applies to all gross misdemeanors nor to all situations of a similar nature.<sup>31</sup>

The merchant, by this statute, has much to allay his fears about prosecutions for false arrests because it grants a specific defense to his deputized employee who can arrest upon a charge being made. In addition, he or his deputized employee can still take advantage of the many existing flaws in the remedies for illegal arrest. For example, personal suits against peace officers are many times fruitless because of their financial condition; municipalities are seldom liable because of the governmental-proprietary distinction, and many exceptions are made to the rule of respondeat superior.

Two significant questions appear in any appraisal of this statute for they are intrinsic to any changes in the law of arrest.<sup>32</sup> Briefly stated, the legislature must consider (1) all alternative techniques and

<sup>27</sup> See, e.g., *Giacona v. State*, 298 S.W.2d 587 (Tex. Crim. App. 1957); Comment, 19 Mb. L. Rev. 28, 35 (1959); Comment, 24 TENN. L. Rev. 1177, 1184 (1957). This is also the position of the American Civil Liberties Union.

<sup>28</sup> See, RESTATEMENT, TORTS § 121, comment *e* (1934); Annot., 1 ALR 575 (1918); *In re Kellam*, 55 Kan. 700, 41 Pac. 960 (1895). *Giacona v. State*, 298 S.W.2d 587 (Tex. Crim. App. 1957) said that "[T]he arrest of a person upon pure supposition or belief is in violation of both state and federal constitutional guarantees of freedom from unreasonable arrests." See, Machen, *Arrest Without A Warrant In Misdemeanor Cases*, 33 N.C. L. Rev. 17 (1954).

<sup>29</sup> Shoplifting has never been deemed a breach of the peace. Comment, 46 ILL. L. Rev. 887, 895 (1952) n. 19.

<sup>30</sup> See, ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 14-23 (1947) and *Mitchell v. Hughes*, 104 Wash. 231, 176 Pac. 26 (1918); see also, *State v. Gibbons*, 118 Wash. 171, 203 Pac. 390 (1922); *Tacoma v. Houston*, 27 Wn.2d 215, 177 P.2d 886 (1947); Note, 33 WASH. L. REV. 205 (1958) n. 18. But, in addition, Washington holds that a peace officer is entitled to make an arrest without a warrant when he has reasonable cause to believe that a crime is being committed in his presence. *Sennett v. Zimmerman*, 50 Wn.2d 649, 314 P.2d 414 (1957).

<sup>31</sup> To RCW 9.54.090 for example.

<sup>32</sup> ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 47 (1947).

methods of making arrests and arrange them according to their order of efficiency and effectiveness, and (2) from this array it must select those which it will allow peace officers to use because those selected methods are in keeping with the higher goals to which our society is dedicated. The first function easily can be performed on the grounds of efficiency, merely selecting means to a single end, but the second is tougher because it poses considerations of ends as well as means. Detection and arrest of suspected persons are not the sole ends of government, and efficient police practices can easily be incompatible with other overriding ends of society. The legislature has tried to protect merchants from the difficult, risky, and expensive job of adequately detecting shoplifting. In doing so, it may have created a trap for the unwary and unwise peace officer who, on a moment's notice, must determine whether he has reasonable cause and a constitutional right to arrest without a warrant. From the consumer's viewpoint, shopping might become likened to a poker game in that you move your hands from sight at your peril. When the liberty and good names of our responsible citizens hang in the balance, more care and deliberation should be reflected by the legislative product.

ARVAL A. MORRIS

## ELECTIONS

**Judicial Elections—Primaries and General Elections.** The problem presented is whether section 1 of chapter 247, Session Laws of 1959, relating to school district primary elections, and hereinafter referred to as Laws 1959, repeals Wash. Sess. Laws 1955, c. 101 (RCW 29.21.180), relating to procedure when no primary election in certain offices, and hereinafter referred to as Laws 1955. Section 1 of Laws 1955, in turn, is said to have "repealed" some provisions of Wash. Sess. Laws 1927, c. 155, covering the nomination and election of judges, now appearing in RCW chapter 29.21 (particularly RCW 29.21.070), and hereinafter referred to as Laws 1927, and also Wash. Sess. Laws 1933, c. 85, covering the nomination and election of justices of the peace, also now appearing in RCW chapter 29.21 (particularly RCW 29.21.070), and hereinafter referred to as Laws 1933. The question is also raised whether such repeal of a "repealing act" will revive the provisions of the earlier acts. It is this writer's opinion that Laws 1955 is not a repealing act, but is an act supplementary to