SHOPLIFTING — Detention and Use of Force

By

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Each year shoplifting incidents cost retail merchants in the United States well over $10 billion in losses. For the many stores operating on narrow profit margins, those shoplifting losses can mean the difference between survival and bankruptcy.

Merchants sometimes use store detectives or security personnel in an effort to curb shoplifting losses, often with mixed results. Unfortunately, some merchants and their security personnel are untrained or under-trained in the proper handling of shoplifting incidents. In numerous cases the store’s employees take actions or make mistakes that lead to (increasingly) large legal liabilities for their employer, and sometimes for themselves.

In May 1999 the International Association of Professional Security Consultants (IAPSC) issued the first in a series of best practices dealing with various security issues. Part of that first best practice, titled Detaining Shoplifting Suspects, is reproduced here:

DETAINING SHOPLIFTING SUSPECTS

Definition: As used [herein], the term “security person(s)” is intended to include only store proprietors and managers, store plainclothes security agents sometimes called “detectives,” and uniformed security officers also called security guards (either proprietary or contract). The term does not include sales clerks, maintenance persons, or stockers; for examples. The term “security person(s)” is not intended to apply to off-duty public law enforcement or special police personnel unless they have been instructed by store management to follow the same procedures required of ordinary citizens, which procedures do not include police powers of arrest.

In almost all jurisdictions in the United States, merchants are legally empowered to detain shoplifting suspects for investigation and possible arrest and prosecution in the criminal justice system. This power is called “merchant’s privilege.”

a. The merchant’s privilege provides for detention of persons suspected of shoplifting only when probable cause or reasonable
cause exists to believe a person has committed theft. The best practice for establishing this probable cause (as compared to any legal standard) is the security person’s having met all the following **six steps:** (1) observe the customer approach the merchandise, (2) observe the customer select the merchandise, (3) observe the customer conceal (or otherwise carry away) the merchandise, (4) keep the customer under constant and uninterrupted observation, (5) see the customer fail to pay for the merchandise, and (6) detain the customer outside the store.

b. The merchant’s privilege permits detention for limited purposes which vary by state. Common among these limited purposes are: (1) ascertaining that stolen merchandise is possessed by the suspect, (2) identifying the suspect, (3) investigating the alleged theft, (4) recovering stolen merchandise, and (5) notifying the police of the offense. Some states permit limited searches of the suspect, some states limit the extent to which identity may be established; and the use of force which can legally be used is, if mentioned, always non-deadly. Many company or store policies further restrict permissible actions in dealing with shoplifting suspects; e.g., prohibiting pursuing suspects beyond company property.

In some circumstances shoplifting suspects are treated incorrectly by store management and security persons. Such treatment may cause results varying from simple mistakes to the violation of civil rights of suspects. If a best practice is not used, it is better not to detain a suspect than to risk the high cost of a civil liability suit. Two kinds of questionable detentions will illustrate this point. One kind applies to the customer who is truly an innocent party but whose conduct, for any number of reasons, led the security person to believe that a theft had occurred. People in this kind of detention are innocent victims of circumstance. The other kind applies to the customer who is not truly an innocent party, but for any number of reasons is not in possession of stolen merchandise when stopped by a security person.

Security persons usually do not actually “arrest” shoplifters, but simply detain them for police authorities. Exceptions arise to this practice in those states where private persons’ arrest powers exist concurrent with but separate from the “privilege” statutes discussed above. In these exceptional cases, security persons arrest after proof of the offense of theft.

Security persons cannot look into the minds of suspects. Security persons can only observe actions of suspects and completely and
accurately report such actions. It is up to a judge or trier of fact to determine intent to deprive a merchant permanently of a taken item.

Step number 6 [detaining the customer outside the store] exists to help the judge or trier of fact determine the intent of the customer because the cash registers inside a store are normally the last place a person would have to pay for an item before departing a store. Reports by security persons are normally detailed enough to include other observations which would tend to establish intent.

The International Association of Professional Security Consultants, Inc. (IAPSC) has examined the methods of detaining suspects recommended by security professionals and practiced by merchants throughout the United States. IAPSC sets forth below what it believes to be the best practices.

**BEST PRACTICES.**

1. **Practice.** Security persons using best practices detain a suspect only if they have personally seen the suspect approach the merchandise.

   **Rationale.** The suspect may have entered the store with the merchandise already in hand or otherwise on or about their person (say, in a shopping bag or purse).

2. **Practice.** Security persons using best practices detain a suspect only if they have personally observed the suspect select or take possession of, or conceal the merchandise.

   **Rationale.** Security persons trust their own eyes and do not rely on reports by others.

3. **Practice.** Security persons using best practices detain a suspect only if they have observed the suspect with the merchandise continually from the point of selection to the point where the suspect has gone beyond the last checkout station without paying for the item. If the surveillance has been broken, or if the person has gotten rid of the merchandise, the security person breaks off following for that offense, but may continue surveillance if it appears the suspect may commit theft again.

   **Rationale.** The suspect may have “ditched” the merchandise or concealed it. By continually observing the suspect, the security person can observe whether or not the suspect still has the
merchandise even if it has been concealed on the suspect's person.

4. **Practice.** Security persons using best practices detain a suspect outside the store after the suspect has passed the last checkout station and has failed to pay for an item of merchandise. At this point security persons using this best practice immediately investigate to verify or refute a suspect’s claim of innocence. Special care and consideration is exercised when merchandise is displayed for sale outside the store, such as garden supplies, sidewalk sales, etc., or which is displayed for sale inside the store, but beyond the last sales point.

**Rationale.** The security person does not do only what is required to meet the minimum requirements of theft laws. The actions of a suspect make it easier to prove intent to deprive the merchant of an item of merchandise. The farther from the actual taking a suspect is detained, the clearer the offense will appear to a judge or trier of fact. The security person is aware of suspects who might claim they were looking for a matching item or looking for someone to give an opinion on the merchandise before it is purchased. A suspect may, however, offer a logical explanation for actions that initially appeared to the security person to be acts of shoplifting, but which may require only a limited investigation to verify the suspect’s explanation.

5. **Practice.** Security persons using best practices normally do not “chase” suspects by running inside a store or in shopping centers that are occupied by customers. Exceptions occur when necessary, but only in such areas as parking lots, and then only when few people are in the area and it is unlikely a bystander could get hurt. Such foot pursuits never leave the property on which the store is located. If a suspect runs, the best practice is for the security person to make a mental note of the appearance of the suspect and the merchandise that appears to have been taken; then to make a written report for the store’s files.

**Rationale.** Running may create more problems than it solves. When a suspect runs and a security person chases that person by also running, clients and employees of the store and store employees are endangered more by the combination of two persons’ running, than by the suspect’s running alone. Handicapped clients may be knocked off their feet. Wheelchairs may be overturned. Store employees who may intervene to help may be injured by security persons in pursuit, or by running into
counters or display devices, or by slipping on polished floors. When clerks leave their posts, they leave their own merchandise exposed to theft. An exception to this best practice may exist when it is necessary to chase a suspect down in order to protect customers and store employees from ongoing violence by the suspect.

6. **Practice.** Security persons using best practices treat suspects equally and fairly regardless of a suspect’s race, color, creed, gender, or national origin.

**Rationale.** Anecdotal information suggests certain groups have been marked by some store management and security persons for more surveillance and/or more aggressive anti-shoplifting measures. Color, religious or national dress, gender, and “race” are alleged to have been used to identify persons in such groups. However, there is no scientific evidence regarding the validity of such “profiling,” and this practice is avoided by security persons using best practices. Suspicion of shoplifting depends upon observed actions, not appearance. All law-abiding persons have the right to be treated the same as any other person in the marketplace.

7. **Practice.** Security persons using best practices do not use weapons such as firearms, batons (“nightsticks”), or restraining devices such as thumb cuffs, “come-alongs,” mace, or pepper spray in order to apprehend or detain a shoplifting suspect. Stores using best practices occasionally permit the use of handcuffs by security persons whose training has included instruction in the proper use of handcuffs when necessary to prevent injury to customers or store personnel. Security persons using best practices use handcuffs only when a suspected shoplifter is physically threatening violence or otherwise resisting detention; or there is, in the good judgment of the security person, the risk of imminent serious harm absent their use.

**Rationale.** There is no merchandise of such value that it warrants a security person’s injuring a suspect or an innocent customer. Use of weapons and restraining devices except handcuffs should be left to on-duty public law enforcement officers. If it is not possible to get the suspect’s willing cooperation, it is better to let the suspect go free than to risk injuring a suspect or other customer. Risk avoidance is a factor considered in apprehending and detaining suspects. Because handcuffs are restraining devices, they can be painful if
improperly applied and can cause injury. Not all persons caught need restraining. Many people caught shoplifting are humiliated by the incident and are cooperative; hence, in such cases restraint is not necessary.

8. **Practice.** Security persons using best practices limit the use of force to “holding” or “restraining” to effect a detention. Security persons using best practices do not use actions such as striking, tackling, sitting on a suspect’s body, or any other action that might cause physical injury to the suspect.

**Rationale.** Use of force is subject to criticism, and assaultive use of force is typically unnecessary and unacceptable in the private sector. However, some holding or restraining may be necessary lest potential thieves learn that by simply resisting they may come and steal with impunity. Use of limited holding or restraining force is sometimes necessary to detain a suspect until police arrive, or to prevent a suspect from injuring security persons. Under no circumstances should the force applied be that which may result in injury or death to a suspect. No merchandise is of such value as to justify physical injury to a suspect. The better practice is to allow the suspect to depart the premises rather than to cause any injury by the use of force in detaining the suspect. Assuming the suspect can be identified, the merchant can file a complaint; then the public police have the option of apprehending the suspect at a later time.

In addition to the **Best Practices** listed above, which are the best and safest procedures to use in most circumstances, I also recommend that a minimum of two **trained** employees be utilized in every suspected shoplifter detainment, also referred to as a “stop.” The best rule of thumb is to use at least one more employee than there are suspected shoplifters. This is not only to ensure the safety of the security personnel, but also to ensure that there is at least one trained witness to what occurs and what is said, from the first moment of the “stop” until its conclusion.

Use of force is the area most likely to lead to lawsuits and to create a bad public image for merchants. In the heat of the moment, it is easy for security or loss prevention personnel to fall into the trap of wanting to catch the thief, and get the merchandise back at all costs! However, nothing is so valuable in the store as to risk injury to employees or to customers, or the risk of subsequent bad publicity, and the possibility of a lawsuit for using “excessive” or “unneeded” force.
Chasing a fleeing shoplifter, especially if he or she has already dropped the merchandise, is an invitation for someone to be injured and for a lawsuit against the store or employee. Punching, kicking, tackling and dragging are always inappropriate and their use should be prohibited by management. Caution and discretion are always the best approach in this area. Keep in mind also, if management authorizes the use of any more force than simple restraint, (e.g., the use of “come-along” holds, the use of pepper-spray, etc.), the officers should be trained in such tactics by a certified instructor, and that training must be documented. As one government agency frequently states about training, “If it isn't documented, it didn't occur.”

Likewise, only security personnel who have been trained and periodically re–trained in their use should be permitted to carry and use handcuffs. Handcuffs have sometimes been used as weapons, and, when improperly applied, they have led to serious injuries and, in some cases, deaths. Reasonable policy dictates that handcuffs are used only to restrain a shoplifter who has used force against the merchant or employee, or otherwise physically resisted detention, or once detained, has threatened force. Never handcuff a suspect to a fixed object such as a pole or desk; injury or claims of injury are sure to result, and there is little question later in a jurors mind that the individual was “imprisoned.” In every case for which handcuffs are used, their use must be reasonable and justifiable for that particular situation. Caution and discretion are extremely important when using or even displaying handcuffs.

Special care and restraint, especially in the areas of use of force, length of detention and the use of handcuffs, should also be exercised whenever dealing with juveniles, or the elderly, or those who are sick, injured, or physically or mentally handicapped. If someone is injured or sick, or even claims to be, don't guess! Immediately call for medical assistance! If the person has I.D., you can always pursue criminal charges later if you wish. If he or she doesn’t have I.D., call the police and tell them you have called for medical assistance for a sick or injured criminal suspect. They will usually speed up the police response, and responding officers can then secure and identify the suspect.

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