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Big-Box Bullies Bust Benign Buyer Behavior: Wal-Mart, Get Your Hands Off My Receipt!

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BIG-BOX BULLIES BUST BENIGN BUYER BEHAVIOR: WAL-MART, GET YOUR HANDS OFF MY RECEIPT!

Victoria S. Salzmann*

TABLE OF CONTENTS

I. INTRODUCTION	1
II. CURRENT ANTI-THEFT PRACTICES.....	4
III. FALSE IMPRISONMENT	8
A. <i>Critical Stops</i>	9
1. Stop 1: Requesting a Receipt (Detention?)	9
2. Stop 2: Checking the Receipt (Consent?)	12
3. Stop 3: Detention upon Refusal (Right to Refuse?)	17
B. <i>Implied Consent—Notice of Intent to Search</i>	20
IV. IMPROPER RELIANCE ON SHOPKEEPER’S LICENSE	22
V. RISKS ASSOCIATED WITH BROAD ANTI-THEFT POLICIES.....	27
VI. POWER OF BIG-BOX STORES: THE WAL-MART CASE STUDY .	30
VII. CONCLUSION	41

I. INTRODUCTION

Imagine the following hypothetical. A customer enters a “big-box” store such as Wal-Mart and purchases a number of items.¹ At the register, the clerk hands the customer the receipt; he places it in his wallet, puts the wallet in his pocket, picks up his bag, and heads to the store exit. He is met at the door by a store employee who is asking to

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1. BOB ORTEGA, IN *SAM WE TRUST: THE UNTOLD STORY OF SAM WALTON AND HOW WAL-MART IS DEVOURING AMERICA* xv (1998). These stores are called “big-box” stores because they resemble gigantic large windowless boxes that provide little aesthetically either inside or outside. Their sole purpose is to house consumer goods for quick turn-over. Some examples are Wal-Mart, “K-Mart, Target, Toys ‘R’ Us, Home Depot, OfficeMax, Staples, CompUSA, Circuit City, Food Lion, Price Chopper, Barnes & Noble, Borders, Blockbuster Video, Rite-Aid, PetSmart, and many, many more.”

verify the receipt of every person leaving the store. The customer refuses, the employee calls security, and the customer is detained.² This hypothetical may end several different ways. One customer shows the receipt legitimizing his purchases and is permitted to leave. Another customer may do the same but vows never to undergo that indignity or delay again. Occasionally, the store's policy of demanding receipts ends with yet another customer being caught for shoplifting. Other times, the customer might further refuse and the store employees allow him to leave.

Now, imagine that the hypothetical customer has a name—Michael Righi—and the shopping excursion ends with Mr. Righi sitting in the county jail for failing to show his receipt.³ In this final instance, the stop likely will end in a false imprisonment lawsuit against the store for its unlawful detention of its customer.

This issue, though seemingly well-settled under the doctrines of false imprisonment and shopkeeper's license, has raised a huge public outcry. On July 17, 2008, a Google Internet search for the question "Can Wal-Mart demand to see my receipt?" resulted in over 500,000 hits.⁴ Many of those Internet links encouraged "civil disobedience" from both the store's policies and authoritative requests to prove the customer was not stealing.⁵ Most sites simply dealt with the annoyance of consumers forced to wait in one more line to prove up their purchases before they were permitted to leave. Others asserted a very real concern about the invasion of personal liberty.⁶ In the past, when

2. See, e.g., Dan Higgins, *Consumerist Documents Wal-Mart Receipt Checking Zealotry*, (June 10, 2008), available at <http://blogs.timesunion.com/advocate/?p=238> (numerous internet weblogs describe exactly this scenario); Dennis Rockstroh, *Receipt Checkpoints: Are They Necessary?*, (May 18, 2005), available at http://blogs.mercurynews.com/consumeractionline/2005/05/18/receipt_checkpo/ (noting that a call to a Wal-Mart manager following such an altercation got nowhere because the manager "could not change [Wal-Mart's] corporate policy"); Best Buy: "Sir we need to see your receipt" You: "Um, no you don't," <http://reddit.com/info/sx1y/comments> (last visited July 18, 2008); Receipt Checkers, Google Groups, <http://groups.google.com/> (search "Receipt Checkers"; then follow "Receipt Checkers" hyperlink) (last visited July 18, 2008).

3. Michael Righi, *Papers Please: Arrested at Circuit City*, Sept. 1, 2007 <http://www.michaelrighi.com/2007/09/01/arrested-at-circuit-city/> (last visited May 2, 2009).

4. Wal-Mart's receipt-checking policy is formally called "Asset Protection Exit Greeter Program" and was piloted in Las Vegas, Nevada. Senta Scarborough, *Police Say Wal-Mart Snubbed Efforts to Cut Shoplifting*, ARIZ. REPUBLIC (June 27, 2008).

5. See, e.g., Chad Everett, *Don't Back Down: Civil Disobedience at Wal-Mart*, (Nov. 14, 2006), http://jayseae.cxliv.org/2006/11/14/civil_disobedience_at_wal-mart.html (questioning whether a store like Wal-Mart has the economic power to mandate policy in contravention to known retail practices).

6. The impact of a forced detention and search is not limited to annoyance or indignation. One commentator noted that the vast majority of individuals surveyed after they had given consent to a search often felt very negatively about the encounter. Janice

corporations engaged in illegal activity or violated individual rights, the law, often through tort claims such as false imprisonment, had the force of stopping the intrusion on personal rights. But today, a new mechanism may be replacing the law as the means of social control.

This Article will show, at the very least, receipt-checking amounts to an illegal detention under settled tort law. More troubling, however, is the possibility that the big-box stores know the illegality of their receipt-checking practices but choose to ignore both customer loss and litigation risk in favor of a policy that reduces theft. The question is what incentive will stop companies from enforcing their illegal policies? Consumer buying power, not the law, is the mechanism that best protects individual rights. In other words, economic powers answer to the only threat they appreciate—economic force. And when it comes to the bottom line, any policy that delivers economically will trump all others.

Sam Walton, the frugal founder of the un-matched Wal-Mart empire, supposedly embraced the folksy door-greeter concept, not because it made customers feel welcome, but because it was one of the cheapest ways to deal with a consistent shoplifting problem.⁷ Retailers will take advantage of every shrinkage-reducing policy they can, but will they also deliberately break the law as a matter of policy if it improves the bottom line? Given the reality of receipt-checking, the answer is probably “yes.”

Through unparalleled economic power, big-box stores have the ability to ignore legal limitations. As long as consumers consent to unlawful policies to get a better price, these stores have no incentive to change. The only mechanism of change that will provide an incentive is consumer dissatisfaction. Litigation may not prevent unlawful detentions related to receipt-checking, but enough consumer complaints

Nadler, *No Need to Shout: Bus Sweeps and Psychology of Coercion*, 2002 SUP. CT. REV. 153, 211-13 (2002).

7. ORTEGA, *supra* note 1, at 202:

Take the company's door greeters, those aggressively friendly and often superannuated workers who stand at the entrance to every Wal-Mart store, saying hello to customers as they come in and asking if they need help finding something. By company lore, a store manager in Crowley, Louisiana, first came up with the idea. When Sam Walton visited the store in 1980, he was so enchanted with the notion that he decreed that all stores should have greeters, because it sent a warm, friendly message to shoppers. All this was essentially true. But—as shouldn't be surprising—there was a more bottom-line reason Walton loved the idea: The Crowley store had a major shoplifting problem; and the greeter kept an eye on people leaving to make sure they weren't walking out with anything they hadn't paid for. Dan McAllister, the manager, figured it would be less jarring to customers to be greeted by an old codger than by, say, a uniformed guard.

That was what Walton loved about the idea: It cut down on shoplifting. The warm-and-fuzzy image boost was just gravy.

just might. This single tort, and its inability to keep a Goliath like Wal-Mart in check is an example of how consumer power, instead of the law, has become the dominant check on personal rights intrusions.⁸

This Article will first explore the legality of store policies requiring patrons to show their receipts before they leave a store. While the general public expresses outrage at the new policies employed by the stores, one commentator noted that many stores are not even aware of the laws that govern their behavior toward their own patrons.⁹ Those stores, while decreasing their losses from theft, are not only alienating their honest customers, but they are also breaking the law. This Article will show why receipt-checking is an unlawful detention. Part II will investigate the history of false imprisonment and anti-theft practices. Part III will explore whether receipt-checking constitutes a detention for purposes of false imprisonment. Part IV will consider the applicability and inaccurate reliance on the shopkeeper's license statutes. Part V will discuss the dangers of such policies and why corporations should avoid receipt-checking.

The Article will also consider how these illegal policies end up having the force and effect of legitimate law when they are used by economic powers such as the big-box stores. Part VI will explore the phenomenon of the big-box store by analyzing Wal-Mart as a case study and considering whether economic power gives it the ability to ignore the law through the use of internal store policies alone.

II. CURRENT ANTI-THEFT PRACTICES

Shoplifting theft in the United States is no small portion of revenue losses. According to the 2006 National Retail Security Survey Annual Report (2006 National Report), an annual survey conducted by

8. This Article does not examine Wal-Mart's direct changing of the law through its own litigation practices. Instead, it considers how Wal-Mart's economic power results in a *de facto* disregard or change of the law. For a more complete discussion of how Wal-Mart's litigation practices shape the law, see Lea S. VanderVelde, *Wal-Mart as a Phenomenon in the Legal World: Matters of Scale, Scale Matters* 1-44 (UNIV. IOWA LEGAL STUD. RES. PAPER, Paper No. 05-36, 2006), available at <http://ssrn.com/abstract=876985>. Vandervelde considers how Wal-Mart shapes the legal landscape by being a "repeat player in the courts." Under her reasoning, "[r]epeat players could selectively shift their litigation resources to nudge the law in a favorable direction." *Id.* at 2. In 2006, her search of the public record showed Wal-Mart as a party in 3,034 reported cases, suggesting at least twice that many more were unreported. *Id.* at 6. Accordingly, Wal-Mart has become a significant repeat player.

9. Note, *The Merchant, the Shoplifter and the Law*, 55 MINN. L. REV. 825, 827 (1971) ("[M]ost merchants are not aware of the state laws affecting their rights to accuse, apprehend, and arrest suspected shoplifters.").

the University of Florida of 150 retail chains, including the “top 100,” retail theft cost merchants more than \$40.5 billion in 2006.¹⁰ The retailers responding to the survey reported that 1.57% of total annual sales were lost to theft.¹¹ Thirteen billion dollars of retail losses are attributable to shoplifting alone.¹² Those losses, in turn, are passed on to consumers who then suffer higher prices.¹³ The largest areas of retail theft included 47% of employee theft and 32% of theft committed by others.¹⁴ While employee theft generally represents a higher percentage of dollar losses, the number of shoplifting cases is much higher.¹⁵ Each shoplifting incident usually results in a smaller dollar loss, but even that trend is changing.¹⁶ The average loss per shoplifter is increasing over time.¹⁷ Commentators estimate that the losses contributable to shoplifting will soon outweigh those due to employee theft.¹⁸ Accordingly, stores have an interest in controlling their losses, and managing theft is a large portion of that goal.

Despite the numbers indicating a trend toward more shoplifting incidents and greater losses per occurrence, arrests and convictions of shoplifters are *decreasing*. In 2006, retailers reported an average of only 62.1 apprehensions for every \$100 million in sales.¹⁹ Enforcement actions have dropped even more precipitously. Shoplifting prosecutions are down to an average of only 18.1 for every \$100 million in sales.²⁰ Some stores have announced policies that they will prosecute even less. For example, Wal-Mart indicated it would not attempt to prosecute any case that resulted in less than \$25 of merchandise sto-

10. 2006 National Retail Security Survey Final Report, Security Research Project (Dept. of Criminology, Law, and Society, University of Florida), at 6 (2007) [hereinafter 2006 National Report].

11. *Id.* Interestingly, the percentage of theft has actually decreased since the late 1990s, perhaps showing that increases in theft deterrents are having a positive affect.

12. *Id.* at 9.

13. *Id.*

14. *Id.* This Article does not address the validity of searching employees, the largest source of inventory loss. At least as far as employee searches are concerned, the reasonableness of the search seems to hinge on whether the employee has a reasonable expectation of privacy. See, e.g., Victor Schachter, *Privacy in the Workplace*, 828 *PLI/PAT* 153, 217 (2005) (“Employee expectations of privacy represent the most effective way to avoid workplace search liability.”). Receipt-checking may be equally as efficient in deterring employee theft as it is deterring shoplifters.

15. 2006 National Report, *supra* note 10, at 26.

16. *Id.* at 28. The 2006 National Report indicated that the average shoplifting loss rose from an average of \$265.40 in 2003, to \$621.67 in 2004, to \$802.83 in 2005.

17. *Id.* at 7.

18. *Id.*

19. *Id.* at 26.

20. *Id.* at 28.

len.²¹ This reluctance to arrest and prosecute shoplifters in the face of increasing theft losses is probably a reflection of many competing interests. Merchants have long recognized the down-side to arresting and detaining suspected shoplifters—potential danger to employees, the cost of surveillance, and the loss of alienated customers who are mistakenly accused of the crime.²² Others let inventory control suffer because they do not understand their legal right to stop and detain suspected thieves.²³ Many merchants are fearful of false-arrest and false imprisonment claims made against them.²⁴ Thus, while theft increases, stores display a reluctance to increase shoplifting apprehensions. Instead, they are turning to deterrence mechanisms to reduce theft.

The best tool to avoid liability and deter consumer theft is a firm policy in place that complies with the law and anticipates shoplifter resistance.²⁵ However, the most efficient anti-theft policies capture thieves without invading the rights of innocent shoppers. The response to the balance between limiting theft and avoiding backlash from an overly aggressive anti-theft policy is to shift theft prevention away from arrest and prosecution after the crime has occurred toward an early-intervention-and-prevention program aimed at all shoppers before they decide to steal. The target of the security system has shifted from the *known* or *suspected* shoplifter to the *potential* shoplifter, which includes every customer in the store. Statistically, deterrent programs work. Several studies have noted that calling attention to theft through anti-shoplifting signs deterred it.²⁶ Accordingly, stores are becoming more aggressive in their front-end deterrent inventory-control practices.

21. *Id.*

22. Thomas Elkind & Alan D. Axelrod, Note, *Merchants' Responses to Shoplifting: An Empirical Study*, 28 STAN. L. REV. 589, 589 (1976).

23. *Id.* at 600.

24. *Id.*

25. Thomas Brad Bishop, *Excerpts From The Law of Shoplifting: A Guide for Lawyers and Merchants*, 19 CUMB. L. REV. 43, 62 (1989).

26. Ned Carter et al., *Shoplifting Reduction Through the Use of Specific Signs*, 2 J. ORGANIZATIONAL BEHAV. MGMT. 73, 84 (1979); Ned Carter & Bo Holmberg, *Theft Reduction in a Grocery Store Through Product Identification*, 13 J. ORGANIZATIONAL BEHAV. MGMT. 129, 135 (1992); M. Patrick McNees et al., *Shoplifting Prevention: Providing Information Through Signs*, 9 J. APPLIED BEHAV. ANALYSIS 399, 405 (1976); *But see* Sharlet D. Butterfield, *Examining the Effects of a Low-Cost Prompt to Reduce Retail Theft* (Dec. 2004) (unpublished M.A. thesis, University of Nevada Reno) (on file with author) (replicating past studies and finding there was no significant theft deterrence in most instances).

There are many types of loss prevention systems, and the firms surveyed for the 2006 National Report used several at a time.²⁷ As the focus of anti-theft programs shift from apprehension to prevention, the mechanisms employed by retailers tend to shift as well. In the 1950s-1970s, when stores targeted actual shoplifters, they hired plainclothes detectives to arrest individuals who stole.²⁸ Other similar systems ranged from the sole merchant watching customers carefully as they shopped in the corner store to elaborate surveillance systems involving hidden cameras, alarms, and undercover security to catch thieves in the act. Usually, the larger the store and the more valuable the inventory, the more sophisticated the security system. Today, stores create a strong police or guard presence that discourages theft before the illegal activity begins. As a result, the new mechanisms place an emphasis on hiring roaming security, door greeters, and receipt checkers to warn potential shoplifters that they are being watched. Twenty-two and a half percent of retailers who responded to the survey indicated they used door greeters or receipt checkers as a source for loss prevention.²⁹

While receipt checkers are valued for their high-profile deterrence, they provide a secondary cost to the business. The down-side to a policy such as receipt-checking is that it targets and impacts *all* shoppers rather than the few who are likely to be stealing. Receipt checking either deters or captures a wider group of shoplifters, which is a positive result. But it also creates the potential that more innocent customers become involved in detention and searches where they might not have before. Under a strong receipt-checking system, every customer will be detained long enough to at least ask for the receipt, and that receipt (and purchase) sometimes may be subject to search. Customers who refuse to comply with the policy may suffer additional

27. 2006 National Report, *supra* note 10, at 23. The following list details the types of loss prevention programs and the percentage of responding retailers who utilize each: Burglar alarm (95.4), digital recording system (86.1), live, visible CCTV (86.1), POS data mining software (69.5), armored car deposit pickups (69.5), check approval systems (62.3), remote CCTV video and audio (58.3), live, hidden CCTV (57.6), drop safes (55), security display fixtures (51.7), uniformed guards (50.7), cables, locks, and chains (45.7), acousto-magnetic, electronic security tags (45.7), mystery/honesty shopper (45), web-based case management/reporting (43.7), silent alarms (42.4), plain clothes store detective (39.1), shoplifting deterrence signs (37.7), observation mirrors (37.7), RF electronic security tags (35.8), ink/dye benefit denial tags (34.4), merchandise alarms (34.4), simulated, visible CCTV (29.1), POS exception-based CCTV interface (28.5), door greeter/receipt checker (22.5), timed entry safes (19.2), vendor/source acousto-magnetic tags (18.5), fitting room attendants (17.9), vendor/source RF tagging (14.6), microwave electronic security tags (14.6), observation booths (6), and RFID tags (4).

28. Elkind, *supra* note 22, at 596.

29. 2006 National Report, *supra* note 10, at 23.

extended detentions and searches based solely on their refusal. In the past, companies carefully balanced theft deterrence against the burden to the innocent shopper and often avoided policies and procedures that might have alienated their customers. For example, in a 1953 article published by the *Yale Law Journal*, the authors opined “[t]he merchant’s desire to maintain good public relations will probably serve as a practical restraint on arbitrary detention.”³⁰ Now, however, these policies and procedures are employed as a matter of course because they provide a significant deterrent effect. At the end of the day, it is the bottom line that matters, and if a few customers are lost by the offensive policies, the companies are prepared to take those losses in exchange for lower theft rates.³¹

III. FALSE IMPRISONMENT

While detaining a customer suspected of shoplifting may give rise to numerous potential causes of action, including false arrest,³² assault,³³ battery,³⁴ slander,³⁵ libel,³⁶ and malicious prosecution,³⁷ this Article focuses primarily on false imprisonment.³⁸ False imprisonment causes of action require a plaintiff to prove that another person has detained him against his will without authority of law.³⁹ That deten-

30. Note, *Shoplifting and The Law of Arrest: The Merchant’s Dilemma*, 62 *YALE L. J.* 788, 803 (1953).

31. CHARLES FISHMAN, *THE WAL-MART EFFECT: HOW THE WORLD’S MOST POWERFUL COMPANY REALLY WORKS—AND HOW IT’S TRANSFORMING THE AMERICAN ECONOMY* 203 (2006) (“Wal-Mart is relentless at measuring its own costs; it isn’t so interested in measuring its customers’ costs.”).

32. *BLACK’S LAW DICTIONARY* 116 (Deluxe 8th Ed. 2004) (“An arrest made without legal authority.”).

33. *Id.* at 122 (“The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact . . .”).

34. *Id.* at 162 (“The use of force against another, resulting in harmful or offensive contact.”).

35. *Id.* at 1421 (“A defamatory assertion expressed in a transitory form, esp. speech.”).

36. *Id.* at 934 (“A defamatory statement expressed in a fixed medium, esp. writing but also a picture, sign, or electronic broadcast.”).

37. *Id.* at 977 (“The institution of a criminal or civil proceeding for an improper purpose and without probable cause.”).

38. Discussion is limited in this Article to false imprisonment as the primary civil remedy for unlawful detentions by store employees. It does not explore the possibility of Fourth or Fifth Amendment violations. At least one court has noted, however, that § 1983 may give rise to a constitutional claim when the store employee is acting under the color of state law. *Romanski v. Detroit Entm’t*, 2005 Fed. App. 615, 618 (6th Cir. 2005). Accordingly, merchants should consider that their activities have implications beyond the discreet tort of false imprisonment discussed here.

39. See *Moore’s Inc. v. Garcia*, 604 S.W.2d 261, 263 (Tex. 1980).

tion must be to a fixed boundary, and there must be no reasonable means of escape.⁴⁰ Detention may be the result of coercion, physical barriers, or use of physical force.⁴¹ Furthermore, the detention need not be for an appreciable amount of time, nor cause physical harm.⁴² The elements of false imprisonment include intent to confine, confinement directly or indirectly resulting from the intent to confine, and awareness by the plaintiff of the confinement.⁴³ In short, the plaintiff must be trapped against his will. False imprisonment arises in shoplifting cases when plaintiffs are detained to investigate the shoplifting allegation.⁴⁴

Any shoplifting investigation opens the door for an unlawful detention claim. Actual shoplifters, even if originally lawfully detained to investigate a crime, may assert a claim if the shopkeeper exceeds the scope of the detention or detains in an unreasonable manner. In contrast, a receipt-checking policy may give rise to an unlawful detention claim the moment the request is made. These policies create several specific opportunities for detention problems. First, the mere request to see the receipt may qualify as an unreasonable detention in many circumstances. Second, the production of the receipt by the customer, either willingly or under pressure, takes time. Finally, a detention may result from a refusal to produce a receipt. The difference between these detentions and more traditional false-imprisonment claims is that they affect all customers, not just those suspected of theft. Accordingly, the potential harm and litigation risk increases. Therefore, each detention, and the liability it may impose, should be considered independently.

A. Critical Stops

1. Step 1: Requesting a Receipt (Detention?)

The first issue is whether the initial technical stop to make a receipt request qualifies as an unlawful detention that raises false im-

40. See *Harvey Co. v. Speight*, 344 S.E.2d 701, 813 (Ga. App. 1986).

41. *Id.*

42. *Id.*

43. RESTATEMENT (SECOND) OF TORTS § 35 at 52 (1965).

44. Shoplifting is defined as the willful taking of merchandise offered for sale without payment. BLACK'S, *supra* note 32, at 1412. "[L]arceny of goods from a store or other commercial establishment by willfully taking and concealing the merchandise with the intention of converting the goods to one's personal use without paying the purchase price." Some jurisdictions do not contain specific shoplifting statutes, but instead, criminalize shoplifting as a portion of the general theft statute.

prisonment on its own. As a general rule, the detention need not be for any appreciable amount of time to give rise to a claim.⁴⁵ Unlawful restraint is the stopping of the suspect's freedom of movement or action or an unlawful taking of his choice to leave.⁴⁶ Clearly, if a customer is physically stopped to search her bags or her person, a detention has taken place. In most cases, physical detention and physical search are easy to prove. But where the detention is only the time it takes to make the receipt request, the issue is less clear.

Courts have recognized that psychological or social pressures are often enough to effectuate non-consensual detentions.⁴⁷ When a store places employees at its doors and stops customers as they exit, many patrons may feel they are not entitled to leave until they at least hear what the employee has to say. The apparent authority of the store employee and the employee's location at the exit create a psychological pressure to stop and listen to the request, even if the customer decides not to honor it.⁴⁸

Some stores even have physical barriers that "herd" customers through a line and directly to the waiting employee. Given the fact that receipt-checking takes time, lines often form at these checkpoints and patrons are physically, psychologically, or socially forced to wait to hear the request before they receive implicit permission to leave. Each of these examples is a technical detention, no matter how brief. The issue is whether that detention, merely for the purpose of requesting a receipt, is unreasonable.

Many customers argue that they should not be stopped at all, or should not have to wait in line to show an employee proof of purchase.⁴⁹ For those customers, the period of time it takes to comply with the store policy is unreasonable, no matter how short in duration it may be. Some courts agree. In *West v. Wal-Mart Stores, Inc.*, the court held detention to make a shoplifting inquiry, without any corroborating evidence of shoplifting, was an unreasonable detention.⁵⁰ There, the plaintiffs tried to leave the store carrying a bag of dog food

45. *Harvey*, 344 S.E.2d at 813.

46. *Moore's Inc. v. Garcia*, 604 S.W. 2d 261, 263 (Tex. 1980); *Moore v. Pay'N Save Corp.*, 581 P.2d 159, 162 (Wash. App. 1978).

47. *Meadows v. Woolworth Co.*, 254 F. Supp. 907, 909 (ND Fla. 1966).

48. On principle, many customers who are aware of these store policies, including this author, regularly refuse to stop even for the period it takes to make the demand. Such behavior may then become the basis for a belief that a theft is taking place simply because all other customers are conforming to the initial detention.

49. *See West v. Wal-Mart Stores, Inc.*, 539 So. 2d 1258, 1261 (La. App. 1989).

50. *Id.*

too large to be placed in a sack.⁵¹ A manager stopped them and demanded to see their receipt.⁵² The inspection also included questioning check-out clerks who were near the door.⁵³ When the sale was verified, the manager apologized for the inconvenience.⁵⁴ The trial court determined that the stop was wholly inappropriate because the plaintiffs never displayed furtive appearance or suspicious conduct.⁵⁵ There was nothing irregular about the transaction or the position of the dog food, and it was not customary to place such a large item in a sack.⁵⁶ In short, the mere inquiry and the brief span of time the inquiry took amounted to false imprisonment because there was no reasonable suspicion to stop the shopper in the first place.⁵⁷ Such a holding seems to indicate that retailers are not entitled to stop and request a receipt unless some corroborating facts give rise to a belief that the person is shoplifting. Mere presence in the store, or making purchases in the store, is not enough to justify a detention of this type. In any jurisdiction following this principle, every receipt request made without actual suspicion of theft automatically gives rise to a false-imprisonment claim.

In response, corporations argue that merely asking for a receipt is not a detention on its face, so long as the store has no intention to detain if the customer declines. In *Mendoza v. K-Mart Inc.*, the Tenth Circuit held employees did not have the intent to detain, even though they stopped the customer to inquire about shoplifting, because the employee let the consumer walk away from the discussion.⁵⁸ Because the intent to detain is an element of false imprisonment, no cause of action accrued with the inquiry alone. Implicitly, the time it took to make the request did not amount to a detention. Likewise, in *Williams v. F.W. Woolworth Co.*, the Louisiana Supreme Court held that an employee who saw a customer drop loose candy into a bag did not detain

51. *Id.* at 1259-60.

52. *Id.*

53. *See supra* note 49 at 1260.

54. *Id.*

55. *West*, 539 So. 2d. at 1261.

56. *Id.*

57. *See also* *Cruse v. Highland Vill. Value Plus Pharmacy*, 374 N.E.2d 58, 60-61 (Ind. App. 1978) (holding that when a customer was detained to inquire about a piece of missing merchandise, there was an inference of unlawful detention even though she was immediately released when she stated she had no knowledge of the issue).

58. *Mendoza v. K-Mart, Inc.*, 587 F.2d 1052, 1058 (10th Cir. 1978); *see also* *Swetnam v. F.W. Woolworth Co.*, 318 P.2d 364, 366 (Ariz. 1957); *Tocker v. Great Atl. & Pac. Tea Co.*, 190 A.2d 822, 824 (D.C. 1963); *Bonkowski v. Arlan's Dept. Store*, 174 N.W.2d 765, 766-67 (Mich. 1970).

the individual by asking about the contents of the bag.⁵⁹ Again, the questions, and the time it took to ask them, were not detentions. Under this logic, asking customers to produce a receipt upon leaving the store, though annoying to the consumer, may not be a violation of any law, provided the employee does not intend to detain the customer if he refuses. But because courts are following the premise that “there is no harm in asking,” these holdings assume that a customer will be allowed to refuse the request. Thus, stores in these jurisdictions may carefully craft receipt-checking policies to get the deterrent effect as long as they have no intent to further detain.

Yet even if the store is entitled to initially stop the customer long enough to demand the receipt under the “no harm in asking” policy, the next step of the confrontation may give rise to a new false-imprisonment claim.

2. Stop 2: Checking the Receipt (Consent?)

Stop two involves the second detention (and initial search)—the time it takes for the shopper to find the receipt, produce it for the employee, and have the employee check it. Because the first detention was essentially a request for consent to search, the customer, even under the “no harm in asking” jurisdictions, should always retain the right to refuse that consent, or refuse to hand over the receipt. In fact, refusal of consent to search is a constitutionally-protected right when state actors are involved.⁶⁰ Courts have upheld a similar rule in private encounters. In the *Williams* case above, the Louisiana Supreme Court held the employee’s question concerning the contents of the suspect’s bag was lawful; however, the moment the plaintiff declined to answer or refused to consent to search the bag, legal justification for the detention ended.⁶¹ There was no harm in asking, but if the patron did not give consent to further investigation, the transaction had to

59. *Williams v. F.W. Woolworth Co.*, 242 So. 2d 16, 18 (La. 1970) (noting that the lack of detention only continued through the initial investigatory question, and the moment the customer stated she had purchased the candy, the court held the further detention was unlawful).

60. See *Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873, 881-82 (9th Cir. 2002); see also *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Florida v. Royer*, 460 U.S. 491, 497-98 (1983); *Schneekloth v. Bustamonte*, 412 U.S. 218, 235 (1973); Kenneth J. Melilli, *The Consequences of Refusing Consent to a Search or Seizure: The Unfortunate Constitutionalization of an Evidentiary Issue*, 75 S. CAL. L. REV. 901, 922 (2002) (suggesting that the right to refuse consent comes from evidentiary rules, not constitutional rights, but agreeing that a mere refusal to give consent cannot be introduced as a basis for probable cause or reasonable suspicion for a further search or detention).

61. *Williams*, 242 So. 2d at 18-19.

end. Accordingly, a security policy that allows the enforcing employee to demand the receipt, but then requires her to let the customer leave, protects the right to refuse consent. The key is the shopper's opportunity to exercise the right.

Generally, consensual detentions and searches do not raise false-imprisonment concerns because a key element of the cause of action—detention against the plaintiff's will—has been defeated.⁶² Nevertheless, consent hinges on voluntary participation by the accused. Under a "no harm in asking" policy, some shoplifters will be caught, even when they had the option to deny the request, because they freely give consent anyway. Guilty suspects often consent to a detention and search, thinking that if they do so, the retailer's suspicions will be allayed and the search will not actually take place.⁶³ Others may comply in the hope that returning the merchandise and expressing remorse will encourage the merchant to forgive the transgression and release them.⁶⁴

Similarly, non-guilty parties may freely give consent because they have nothing to hide, and they do not mind the minimal intrusion for the sake of inventory control. In fact, many web-log participants argue that they freely give consent because it reduces theft, which in turn helps keep retail prices low.⁶⁵ Regardless of the reason, once consent is freely given, the underlying unlawful detention is gone because the consenting customer is not being held against his will.⁶⁶ As in criminal law, consent cures the illegality of the detention. This concept

62. See e.g., *Gaffney v. Payless Drug Stores*, 492 P.2d 474, 475-76 (1972) (holding a shopper consented to her detention when she agreed to return to a store and show the store manager she had not stolen anything).

63. The phenomenon has been noted in the Fourth Amendment context. John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109 (2007) (labeling these consenters as "tactical optimists" and arguing they must reason: "If I say 'yes' then he won't be suspicious anymore because I am being so cooperative, and then maybe—just maybe—he won't really search me after all because I have made it clear by my consent that I must be above suspicion."); see also *People v. James*, 561 P.2d 1135, 1143 (Cal. 1997) ("[A defendant] may wish to appear cooperative in order to throw the police off the scent or at least lull them into conducting a superficial search . . .").

64. Bishop, *supra* note 25, at 63.

65. See, e.g., Dan Higgins, *Consumerist Documents Wal-Mart Receipt Checking Zealotry*, (June 10, 2008), <http://blogs.timesunion.com/advocate/?p=238>; Dennis Rockstroh, *Receipt Checkpoints: Are They Necessary?*, (May 18, 2005), available at http://blogs.mercurynews.com/consumeractionline/2005/05/18/receipt_checkpo/ (noting that a call to a Wal-Mart manager following such an altercation got nowhere because the manager "could not change [Wal-Mart's] corporate policy"); Best Buy: "Sir we need to see your receipt" You: "Um, no you don't," <http://reddit.com/info/sx1y/comments> (last visited July 18, 2008); Receipt Checkers, Google Groups, <http://groups.google.com/> (search "Receipt Checkers"; then follow "Receipt Checkers" hyperlink) (last visited July 18, 2008).

66. *Grayson Variety Store Inc. v. Shaffer*, 402 S.W.2d 424, 425 (Ky. 1966).

also distinguishes most warehouse store receipt checks (such as Costco or Sam's Club) where members sign a membership contract agreeing to consent to search each time they leave the store.⁶⁷

But like other areas of the law, if the suspect has no real choice to offer consent, the technical granting of it does not provide an effective bar to the false-imprisonment claim.⁶⁸ As discussed above in regard to brief detentions to request a receipt, when psychological or social pressures are high, retailers may effectuate non-consensual detentions to produce the receipt.⁶⁹ A policy of placing employees at the exit and stopping customers as they leave creates an atmosphere where patrons may feel they have no real choice but to hand over the receipt. The apparent authority of the store employee and the employee's location at the exit may create psychological pressure to comply with the demand.

For example, in *Zohn v. Menard, Inc.*, the Iowa Court of Appeals questioned the voluntariness of consent when the customer claimed he was told by store employees that "new store policy" required it.⁷⁰ The court also rejected the notion that the brevity of the search cured any harm.⁷¹ Commentators believe that apparent authority, even when coupled with a request for search instead of a demand, may lead the suspect to believe she has no real choice.⁷² Psychological studies support the theory and show that "[w]hat currently passes as voluntary consent . . . may actually be the product of an extensively documented but rarely discussed social phenomenon—the

67. When the legality of receipt-checking is raised, many point to "warehouse" type stores such as Costco or Sam's Club as evidence of an industry-accepted practice. Those stores should not, however, be confused with the typical retail store. Warehouse stores are not open to the general public, and are thus not considered public forums. They also require membership agreements. Those agreements contain express clauses indicating that entitlement to shop is predicated on consent to detain for long enough to show the receipt. See MEMBER BENEFITS & COSTCO SERVICES, November 2007, at 28-9 (on file with author) (For example, Costco's membership agreement states "[m]embership is subject to any and all rules adopted by Costco." The agreement further states under "general policies" that "[t]o ensure that all members are correctly charged for the merchandise purchased, all receipts and merchandise will be inspected as you leave the warehouse").

68. *Wilde v. Schwegmann Bros. Giant Supermks*, 160 So. 2d 839 (La. 1964).

69. *Meadows v. Woolworth Co.*, 254 F. Supp. 907 (N.D. Fla. 1966).

70. *Zohn v. Menard, Inc.*, 598 N.W.2d 323, 327 (Iowa App. 1999) ("We believe Foster's alleged submission to the employee's asserted authority to search Foster's bag raises a genuine issue of material fact concerning the involuntariness of the confinement.").

71. *Id.*

72. *Burkoff, supra* note 63, at 1114 (arguing that "most people do *not* have 'the right' to refuse a request of this sort"—the request is merely a formality (emphasis in original)); Tracey Maclin, *The Decline of the Right of Locomotion: The First Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1306 (1990) ("[V]ery few persons will have the moxie to assert their fourth amendment rights in the face of police authority . . .").

tendency of most people to reflexively obey authority figures.”⁷³ Accordingly, law enforcement departments are routinely encouraged to get consent searches where they would not be entitled to search otherwise.⁷⁴ Because courts rarely strike down consensual searches, the tactic allows police to search without meeting the warrant requirement.⁷⁵

Similarly, “obedience theorists” have shown that people tend to obey orders given by *anyone* with authority in the social order (teachers, ushers, experimenters), not just those with legal authority (police).⁷⁶ It follows that store customers who are told they must hand over a receipt before they leave the store will likewise feel the store employee has the authority to enforce the demand and that the customer has no real choice. That apparent authority is exacerbated when the employee threatens to call the police if the demand is not met. In effect, the store is using its authority to force the illegal detention while hiding behind the veil of consent.

Similarly, a customer may feel social pressure to consent to an illegal detention because he fears being accused of a crime or embarrassed in front of other customers. Some web-loggers discussing the issue online vehemently question those who do not voluntarily show their receipts as people who have something to hide.⁷⁷ That reaction is

73. Adrian J. Barrio, Note, *Rethinking Scheckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 215 (1997); Nadler, *supra* note 6, at 155-56 (reviewing studies and finding “[p]erceived coercion is determined by the speaker's authority and the speaker's language working together”); *see also* Burkoff, *supra* note 63, at 1119 (noting one survey of Florida drivers indicated a vast majority of students [90% or more] believed their cars would be searched regardless of whether they granted consent) (citing Benjamin Cole, *Voluntary Surrender of Constitutionally Guaranteed Rights: A Citizen's View of the 4th Amendment As It Is Applied to Vehicle Searches* (June 1, 2004) (unpublished undergraduate honors in psychology thesis, Florida State Univ.), available at <http://dscholarship.lib.fsu.edu/undergrad/10> (last visited July 18, 2008).

74. Barrio, *supra* note 73, at 221; Burkoff, *supra* note 63, at 1121; Nadler, *supra* note 6, at 153 (“Law enforcement agencies rely heavily on the consensual encounter technique to discover evidence of ordinary criminal wrongdoing”); *see also* WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 4 (4th ed. 2004).

75. Burkoff, *supra* note 63, at 1127-29 (arguing courts treat nonconsensual searches as consensual, underestimate the coercive impact of authoritative requests, and uphold consent simply because cases before it have done so); *see also* Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339, 340 n.5 (2006) (“[V]oluntariness is the test of valid consent to search, but . . . the Court has never struck down a consent as involuntary.”).

76. John Sabini & Maury Silver, *Dispositional vs. Situational Interpretations of Miligram's Obedience Experiments: "The Fundamental Attributional Error,"* 13(2) J. THEORY SOC. BEHAV. 147, 139 (1983).

77. *See, e.g.,* Higgins, *supra* note 2; *See* Rockstroh, *supra* note 2 (noting that a call to a Wal-Mart manager following such an altercation got nowhere because the manager “could

equally as likely to happen at the store, thus creating real social pressure to consent to the search.⁷⁸ Another customer may conform simply because those around him are doing so.⁷⁹ The “follow the leader” syndrome tends to make individuals comply, often without conscious thought.⁸⁰ “People are especially likely to comply with a request when it appears that other people like themselves have already done so.”⁸¹ This reaction is true even when it directly conflicts with a person’s own belief system.⁸² “Consensus equals correctness” has been proven to influence behaviors from littering at amusement parks, glancing at the sky, donating blood, or committing suicide.⁸³ Thus, here, seeing others hand over a receipt would create psychological pressure to likewise comply.

Similarly, those stores that have physical barriers that “herd” customers through a line and directly to the waiting employee create a physical pressure to consent to search where the receipt becomes the

not change [Wal-Mart’s] corporate policy”); Best Buy: “Sir we need to see your receipt” You: “Um, no you don’t,” <http://reddit.com/info/sx1y/comments> (last visited July 18, 2008); Receipt Checkers, Google Groups, <http://groups.google.com/> (search “Receipt Checkers”, then follow “Receipt Checkers” hyperlink) (last visited July 18, 2008).

78. *Id.* A second layer to that social pressure is a similar reaction from police who may eventually be called to further detain the suspected shoplifter. A frequent question asked by the responding officer is “If you had the receipt the whole time, why not just show it and avoid all this hassle?” *Id.*

79. Nadler, *supra* note 6, at 175 (“We follow the leader, we stop at red lights, and we comply with the police not because we make a deliberate or conscious choice to respond in a particular way, but rather because we mindlessly respond in a manner consistent with social roles.”); see also, e.g., Robert J. Wolosin et al., *Predictions of Own and Other’s Conformity*, 43 J. PERSONALITY 357, 358 (1975) (using subject’s estimation of the number of beeps to show how individuals inherently conform their behavior to those around them).

80. Interestingly, in a work-in-progress group meeting discussing this Article, one of the first comments was “Why wouldn’t a person hand over the receipt? It never occurred to me not to do so.”

81. Nadler, *supra* note 6, at 180 (citing Robert B. Cialdini & Melanie R. Trost, *Social Influence: Social Norms, Conformity, and Compliance*, in DANIEL T. GILBERT ET AL., EDS, 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 151, 172 (McGraw-Hill, 4th ed. 1998)).

82. See, e.g., Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31 (1955) (finding that in a study requesting individuals to compare a series of lines and pick two that were the same length, when doing so on their own, subjects guessed correctly 98% of the time, but when other subjects suggested a different answer, the accuracy fell to less than 25%. The results were attributed to conformance to social pressure).

83. Nadler, *supra* note 6, at 180 (citing Robert Cialdini et al., *A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior*, 24 ADVANCES IN EXP. SOC. PSYCHOL. 201 (1991); Stanley Milgram et al., *Note on the Drawing Power of Crowds of Different Sizes*, 31 J. PERSONALITY & SOC. PSYCH. 79 (1969); Peter H. Reingen, *Test of a List Procedure for Inducing Compliance with a Request to Donate Money*, 9 J. APPL. PSYCHOL. 110 (1982); David P. Phillips & Laura L. Cartersen, *Clustering of Teenage Suicides After Television Stories About Suicide*, 315 NEW ENG. J. MED. 685 (1986)).

ticket to leave. Studies have shown that close proximity results in greater compliance with a demand.⁸⁴ When people feel their personal space has been violated, their first instinct is often to flee.⁸⁵ In a situation where customers have been physically herded into a detention area and demanded to hand over their receipts, they may do so, against their will, to escape the uncomfortable proximity of the employee. This theory is supported by several of the accounts where employees attempted to physically restrain those declining customers from leaving.

Furthermore, when the demand is made immediately after the sale as the customer attempts to leave the store, time pressure may play a role in quick compliance. Studies have shown that individuals forced to immediately make a decision may not adequately consider all possibilities.⁸⁶ Accordingly, customers, particularly those who have never been confronted with the demand before, might comply simply because the request is immediate and they have not taken the time to adequately consider refusal. Each of these detentions, though appearing on their face to be consensual, may be physically, psychologically, or socially forced. As such, the policy defeats the voluntariness of consent and, thus, may give rise to a false-imprisonment claim.

3. Stop 3: Detention upon Refusal (Right to Refuse?)

Aside from psychological or social coercive pressure to give consent, some store policies go even further and prevent consumers the

84. Nadler, *supra* note 6, at 191-92 (discussing a 1976 study in which experimenters made requests for participation from across the room and in close proximity to the subjects. Those approached within their personal space had a significantly higher acceptance rate); See Robert A. Baron & Paul A. Bell, *Physical Distance and Helping: Some Unexpected Benefits of "Crowding In" on Others*, 6 J. APPL. SOC. PSYCHOL. 95 (1976). Other studies have produced similar results. See, e.g., David B. Buller, *Communication, Apprehension, and Reactions to Proxemic Violations*, 11 J. NONVERBAL BEHAV. 13 (1987) (finding students asked to sign a petition did so when their personal space was physically invaded); Robert C. Ernest & Ralph E. Cooper, "Hey Mister, Do You Have Any Change?" *Two Real World Studies of Proxemic Effects on Compliance With a Mundane Request*, 1 PERSONALITY & SOC. PSYCHOL. BULL. 158 (1974) (showing requests for change made on the street were more successful at close proximity).

85. Nadler, *supra* note 6, at 191-92 (citing ROBERT SOMMER, *PERSONAL SPACE: THE BEHAVIORAL BASIS OF DESIGN* 35 (Prentice-Hall, 1969)).

86. Nadler, *supra* note 6, at 195-96 (citing John W. Payne et al., *When Time is Money: Decision Behavior Under Opportunity-Cost Time Pressure*, 66 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 131 (1996); Jose H. Kerstholt, *The Effect of Time Pressure on Decision-Making Behavior in a Dynamic Task Environment*, 86 ACTA. PSYCHOLOGICA 89 (1994); Edward M. Bowden, *Accessing Relevant Information During Problem Solving: Time Constraints on Search in the Problem Space*, 13 MEMORY & COGNITION 280 (1985); Dan Zakay & Stuart Wooler, *Time Pressure, Training and Decision Effectiveness*, 27 ERGONOMICS 273 (1984)).

opportunity to refuse consent. Many stores physically detain the customer until the receipt is handed over. If the customer continues to refuse, those employees then call the police and turn the shopper over as a suspected shoplifter. This final detention (often an arrest) resembles the defenses in traditional false-imprisonment claims.

Michael Righi, a popular blogger, gave a personal account of his arrest following his refusal to show a receipt at a Circuit City store in Cleveland, Ohio.⁸⁷ Righi described how he purchased two items and attempted to leave.⁸⁸ As he approached the exit, a Circuit City employee tried to stop him and stated, “Sir, I need to examine your receipt.”⁸⁹ Righi continued to walk past him and responded, “No, thank you.”⁹⁰ As Righi explained, “I’ve always taken the stance that retail stores shouldn’t treat their loyal customers as criminals and that customers shouldn’t so willingly give up their rights along with their money.”⁹¹ The store employee and the store manager chased Righi outside the store and demanded that the manager “needed to examine [the] bag and receipt before letting [him] leave [the] parking lot.”⁹² Righi specifically asked if he was being accused of stealing, and the manager responded that he was not accusing Righi of anything, but was “allowed by law” to look through Righi’s bag when he left the store.⁹³ When Righi asked the manager to give him the name of the law that conferred that right, the manager did not respond.⁹⁴ The manager physically prevented Righi from closing his car door.⁹⁵ In response, Righi himself called the police to request assistance for his false imprisonment.⁹⁶

When the officer arrived on the scene and the situation was explained, instead of allowing Righi to leave, the officer asked him why he refused to show his receipt in the first place.⁹⁷ The officer stated Circuit City employees did have a right to inspect both receipts and bags as customers left the store.⁹⁸ At that point, the officer demanded

87. Michael Righi, *Papers Please: Arrested at Circuit City*, September 1, 2007, <http://www.michaelrighi.com/2007/09/01/arrested-at-circuit-city/> (last visited May 2, 2009).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Righi, *supra* note 87.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

both the receipt and Righi's driver's license.⁹⁹ Righi refused, and the officer placed him under arrest.¹⁰⁰ The Circuit City store manager confirmed Righi had stolen nothing.¹⁰¹ Righi was eventually charged with an unrelated obstruction-of-business charge, and those charges were later dropped.¹⁰²

The first liability issue in the occurrence is the implicit admission by the store employees that Righi was not suspected of shoplifting, the most common basis for detaining a customer. Instead, the employees stated that they had a right to inspect both the receipt and the bag simply because Righi was a store customer. Ohio law, however, required a store employee to have probable cause that a person had engaged in theft before the store could detain him.¹⁰³ There may have been no harm in asking to see the receipt, but the moment Righi refused, the employee had no legal basis to detain him.

More troubling, however, was the subsequent detention by the police officer. The officer clearly stated that the Circuit City employees had the right to demand the receipt. While the actions of the store employees may be dismissed as either following a bad policy or not clearly understanding the law, official police approval of the detention without any probable cause to justify the stop compounded the illegality. Police officers are not guilty of false imprisonment if they reasonably rely on a storeowner's assertion that theft may have taken place.¹⁰⁴ But when local law enforcement upholds illegal detentions, it

99. Righi, *supra* note 87.

100. *Id.*

101. *Id.*

102. Michael Righi, *Success*, <http://www.michaelrighi.com/2007/09/> (last visited July 18, 2008). Righi's story, though extreme, is not unique. On *Wal-Mart Watch*, a watchdog organization created to monitor Wal-Mart, a customer reported a similar incident. When the customer refused to stand in line and consent to show his receipt, he was followed to his car by security, he was accused of stealing items, and his license plate number was recorded and given to the police. He later was called by the police department, who assured him they would smooth things over with the store. *Wal-Mart Reports You to the Police for Not Allowing Them to Check Your Receipt*, http://walmartwatch.com/blog/archives/wal_mart_customer_service_nightmares_receipt_check (last visited June 24, 2008).

103. OHIO REV. CODE ANN. § 2935.041 (2003).

104. This Article does not attempt to explore the Fourth or Fifth Amendment implications of the detention once the police become involved. *Wal-Mart Stores Inc. v. Rodriguez*, 92 S.W.3d 502, 507 (Tex. 2002) (A store may have civil liability for requesting a police officer to arrest a suspect, but if the officer is not acting at the direction of the merchant and makes an arrest based on his own individualized assessment of probable cause, liability does not transfer to the merchant.); *Lusk v. Ira Watson Co.*, 408 S.E.2d 630, 633 (W. Va. 1991) (Merely giving the on-scene officers factual information about the encounter is not considered direction or request to arrest.)

does not cure the underlying illegality.¹⁰⁵

Such bootstrapping is impermissible in a criminal context—failure to give consent to an illegal detention cannot provide justification for further detention in a criminal case.¹⁰⁶ As the District of Columbia Circuit Court of Appeals pointed out, “[t]he constitutional right to withdraw one’s consent to a search would be of little value if the very fact of choosing to exercise that right could serve as any part of the basis for finding the reasonable suspicion that makes consent unnecessary.”¹⁰⁷ Similarly, the failure to give consent to search a receipt or a purchase should not allow businesses to conjure a legitimate basis for detention in the civil context. The justification for detention is a product of the stores’ own creative policies and not a valid measure of actual theft.

B. Implied Consent—Notice of Intent to Search

Some corporations claim that they are not liable for detentions or searches if they post a notice indicating that they intend to detain and search.¹⁰⁸ Those stores prominently display signs indicating that receipts must be given and that bags are subject to search. A customer agrees to such stops and searches when he or she enters the store. A few jurisdictions have supported the implied-consent theory, which conditions entry into the store on the customer’s consent to search.¹⁰⁹ The ability to search rests on two grounds: (1) implied consent to the

105. Scarborough, *supra* note 4. In at least one instance, the police have actually encouraged Wal-Mart to adopt the receipt-checking policy. *The Arizona Republic* reported that Mesa police had encouraged the corporation to expand its receipt-checking policy to Mesa stores to reduce the number of theft calls to the police department. While encouraging the store to request consent searches is probably no different from police departments’ concerted efforts to use consent searches in other areas, the implication of police support and encouragement is extremely troubling.

106. *United States v. Carter*, 985 F.2d 1095, 1097 (D.C. Cir. 1993).

107. *Id.* at 1097 (The denial of consent to search is a constitutional right.); *See Carey v. Nevada Gaming Control Board*, 279 F.3d 873, 881-82 (9th Cir. 2002); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 235 (1973).

108. Whether Title II of the Civil Rights Act of 1964 provides that free access must be given to all customers in a public place of accommodation is under debate. *See Anne-Marie G. Harris, Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1, 22-23 (2003).

109. *U.S. v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (finding implied consent of airline passengers to search before boarding airplanes); *Zohn v. Menard, Inc.*, 598 N.W.2d 323, 328-29 (Iowa 1999); *Lewis v. Dayton Hudson Corp.*, 339 N.W.2d 857,860 (Mich. App. 1983); *Gillett v. State*, 588 S.W.2d 361, 363-64 (Tex. Crim. App. 1979). *But see Stroeber v. Comm’n Veteran’s Auditorium*, 453 F. Supp. 926, 933 (S.D. Iowa 1977) (holding notice of a consent to search cannot cure constitutional violations).

posted intent to search, and (2) no reasonable expectation of privacy in light of the warning.

For the implied-consent cases, the issue becomes adequate notice. The mere posting of a sign is not enough—the corporation must show that the patron saw the sign to validate the implied consent.¹¹⁰ Importantly, however, even jurisdictions allowing notice detentions have held they raise false imprisonment claims in the absence of reasonable suspicion of theft.¹¹¹

Similarly, the reasonable expectation of privacy argument does not create a blanket rule to search customers just because a sign has been posted. While courts have recognized that shoppers who are detained for suspected shoplifting or other unlawful behavior do not automatically have a reasonable expectation of privacy in a store,¹¹² those courts have not stated that the absence of privacy expectations bar a false-imprisonment claim. Rather, the issue is usually whether the original search was permissible, and if it was, whether it then created facts to justify the shoplifting detention. In other words, because the courts held there was no expectation of privacy in, say, a dressing room, employees could watch patrons until they witnessed actual theft.

Similarly, if a store, particularly in an area that permits a no-harm-in-asking policy, asks for a receipt, is given consent, and then sees that customer was trying to leave with obviously unpaid-for merchandise, it may validly detain the shopper. Moreover, absent articulated facts of theft, further detention becomes unlawful and, some courts have rejected the reasonable expectation of privacy argument altogether.¹¹³

While the cases above suggest that such strict policies are illegal and do not protect the right to refuse consent, stores continue to

110. *Zohn*, 598 N.W.2d at 329 (“At the very least, the disputed existence of the plaintiff’s failure to notice the signage at the entry of the yard generates a fact question on the implied consent issue.”); see also *Edwards*, 498 F.2d at 499 (noting that airline passengers were warned “PASSENGERS AND BAGGAGE SUBJECT TO SEARCH”).

111. *Id.* at 329 (holding that regardless of the signage, the detention in the case did not meet the reasonable suspicion of theft requirement, and thus, violated the statutory provision granting shopkeeper’s license).

112. *Lewis v. Dayton Hudson Corp.*, 339 N.W.2d 857, 860 (Mich. App. 1983) (holding a plaintiff had no claim for invasion of privacy when watched in a dressing room because signs indicated surveillance was in place); *Gillett v. State*, 588 S.W.2d 361, 363 (Tex. 1979) (implicitly holding a customer consented to search when she shoplifted an item in a fitting room that had been clearly marked as under surveillance); see also *Edwards*, 498 F.2d at 500 (holding airline passengers had no reasonable expectation of privacy when boarding an airplane).

113. *Stroeber*, 453 F. Supp. at 934 (holding mere notice of intent to search does not cure constitutional violations).

rely on receipt-checking policies and prior notice of such policies by claiming shopkeeper's license as a bar to any potential liability.

IV. IMPROPER RELIANCE ON SHOPKEEPER'S LICENSE

Most states have recognized a detention that is lawfully exercised under the "shopkeeper's license" as a bar to litigation. Unlike consent, which defeats an element of the plaintiff's case, the shopkeeper's license is an affirmative defense to false imprisonment. These laws are often known as "shield laws" for they shield the merchant from civil liability, provided the merchant meets the minimum threshold for detaining the suspected shoplifter.¹¹⁴ Under this shopkeeper's license exception, a merchant who has a reason to believe a person has committed or is committing a theft may detain that person to investigate the supposed theft.¹¹⁵ The Second Restatement of Torts states:

One who reasonably believes that another has tortiously taken a chattel upon his premises, or has failed to make due cash payment for a chattel purchased or services rendered there, is privileged, without arresting the other, to detain him on the premises for the time necessary for a reasonable investigation of the facts.¹¹⁶

Notably, while the Second Restatement authorizes detention, it addresses only the reasonableness of the belief by the shopkeeper and not the legal standard that justifies the detention. Some jurisdictions have interpreted "reasonable" to mean reasonable suspicion of theft.¹¹⁷

114. Bishop, *supra* note 25, at 56.

115. See Rankin v. Venator Group Retail, Inc., 93 S.W.3d 814, 821 (Mo. Ct. App. E.D. 2002). The license to detain applies not only to individuals who are suspected of theft, but also individuals in the company of the suspected shoplifter who may be guilty of assisting; *and* Cervantez v. J.C. Penney Co., 595 P.2d 975, 981-82 (Cal. 1979).

116. RESTATEMENT (SECOND) OF TORTS § 120A at 202 (1965).

117. ARIZ. REV. STAT. § 13-1805 (2007) (reasonable cause of shoplifting); ARK. CODE ANN. § 5-36-116 (West 2009) (reasonable cause to believe shoplifting has occurred); GA. CODE ANN. § 51-7-60 (West 1958) (reasonable belief of shoplifting); HAW. REV. STAT. § 663-2 (2005) (reasonable grounds of larceny); IOWA CODE ANN. § 808.12 (West 1978) (reasonable grounds of property concealment); 720 ILL. COMP. STAT. § 5/16A-5 (West 2000) (reasonable grounds of retail theft); LA. CODE CRIM. PROC. ANN. Art. § 215 (2003) (reasonable grounds to believe theft occurred); MASS. GEN. LAWS ch. 231, § 94B (West 2000) (reasonable grounds to believe larceny occurred); MINN. STAT. ANN. § 629.366 (2003) (reasonable cause to believe theft occurred); MO. ANN. STAT. § 537.125 (2000) (reasonable cause of wrongful taking of property); MONT. CODE ANN. § 46-6-506 (1993) (reason to believe theft has occurred); NEV. REV. STAT. § 597.850 (2003) (reason to believe shoplifting has occurred); N.H. REV. STAT. ANN. § 627:8 (1973) (reasonable belief of unlawful taking); N.Y. GEN. BUS. LAW § 218 (2004) (reasonable grounds); N.D. CENT. CODE § 51-21-034 (1975) (reasonable belief of theft); OKLA. STAT. ANN. tit. 22, § 1343 (1967) (reasonable grounds or probable cause depending on the facts of the case); S.C. CODE ANN. § 16-13-140 (1976) (reasonable cause to believe shoplifting occurred); S.D. CODIFIED LAWS § 22-30A-19.2 (2005) (reasonable grounds of shoplifting);

Others have raised the bar to require the same minimum finding as a lawful arrest—probable cause.¹¹⁸ Finally, a small minority have set a requirement of actual knowledge of theft.¹¹⁹ The waters are muddied, however, when the statutory provision requires actual knowledge, probable cause, or reasonable suspicion, and then case law indicates there is no significant difference between any of the standards.¹²⁰

TEX. CIV. PRAC. & REM. CODE ANN. § 124.001 (2005) (reasonably believes property has been stolen); VT. STAT. ANN. tit. 13, § 2576 (1977) (reasonable cause to believe retail theft has been committed); WASH. REV. CODE ANN. § 4.24.220 (West 1988) (reasonable grounds of shoplifting or larceny); W. VA. CODE ANN. § 61-3A-4 (West 1981) (reasonable ground to believe shoplifting has occurred); WIS. STAT. ANN. § 943.50 (West 2005) (reasonable cause of retail theft);

118. ALA. CODE § 15-10-14 (1957) (requiring probable cause that goods have been unlawfully taken); ALASKA STAT. § 11.46.230 (1978); CAL. PENAL. CODE § 490.5 (West 1999) (probable cause needed to detain); COLO. REV. STAT. ANN. § 18-4-407 (West 2004) (probable cause needed to detain a person suspected of theft); DEL. CODE ANN. tit. 11 §840 (1999) (requiring probable cause that suspect has intentionally concealed unpurchased merchandise); D.C. CODE ANN. § 22-3213 (1982) (probable cause needed at time of arrest or detainment); FLA. STAT. § 812.015 (West 2007) (probable cause required to detain); IDAHO CODE ANN. § 18-4626 (2005) (probable cause required to detain suspected shoplifter); IND. CODE ANN. § 35-33-6-2 (West 2004) (requiring probable cause that theft occurred); KAN. STAT. ANN. §21-3424 (1995) (requiring probable cause that suspect has wrongfully taken merchandise); KY. REV. STAT. ANN. § 433.236 (West 2007) (probable cause required to detain suspect when officer believes goods have been unlawfully taken); ME. REV. STAT. ANN. tit. 17 § 3521 (2005) (requiring probable cause that suspect has unlawfully concealed merchandise); MD. CODE ANN., [CTS. & JUD. PROC.] § 5-402 (West 1997) (requiring probable cause that person committed crime of theft); MICH. COMP. LAWS ANN. § 600.2917 (1992) (requiring probable cause to believe larceny has been committed); MISS. CODE ANN. § 97-23-95 (1988) (probable cause needed to stop a person suspected of shoplifting); MO. REV. STAT. § 537.125 (2000) (requiring probable cause that merchandise has been wrongfully taken); NEB. REV. STAT. § 29-402.01 (1963) (probable cause needed to show merchandise was unlawfully taken); N.J. STAT. ANN. § 2C:20-11 (West 2006) (requiring probable cause that a person willfully concealed unpurchased merchandise); N.M. STAT. ANN. § 30-16-23 (West 1965) (requiring probable cause that a person has willfully taken merchandise without paying); N.C. GEN. STAT. ANN. § 14-72.1 (West 1997) (requiring probable cause showing merchandise was concealed); OHIO REV. CODE ANN. § 2935.041 (West 2003); OR. REV. STAT. § 131.655 (West 2005) (probable cause that person has committed theft); 18 PA. CONS. STAT. ANN. § 3929 (2007); TENN. CODE ANN. § 40-7-116 (West 1990) (probable cause that a person has committed theft); UTAH CODE ANN. § 76-6-603 (West 1979); VA. CODE ANN. § 18.2-105.1 (West 1976) (requiring probable cause that a person has shoplifted).

119. CONN. GEN. STAT. ANN. § 53a-119a (West 2007) (actual knowledge); R.I. GEN. LAWS § 11-41-21 (1985) (observes).

120. See, e.g., *Josey v. Filene's, Inc.*, 187 F. Supp. 2d 9, 14 (D. Conn. 2002) (holding the actual-knowledge statutory requirement is satisfied if the merchant reasonably suspects a customer is stealing); *Malvo v. J.C. Penney Co.*, 512 P.2d 575, 585 (Alaska 1973) (stating a stop was justified under the probable cause requirement when the shopkeeper had reasonable cause to detain); *Gortarez v. Smitty's Super Valu, Inc.*, 680 P.2d 807, 813 (Ariz. 1984) (“[R]easonable cause’ and ‘probable cause’ are equivalent.”); *Henry v. Shopper's World*, 490 A.2d 320, 322 (N.J. Super. 1985) (holding that a security guard who had reasonable cause to believe a coat had been stolen met the probable cause standard because he did not act unreasonably); *State v. McDaniel*, 337 N.E.2d 173, 181 (Ohio App. 1975) (noting that the standard is probable or reasonable cause); *Brown v. SCOA Indus., Inc.*, 741

Most shopkeeper's-license privileges are statutory and reflect a policy of allowing merchants to protect their property immediately rather than wait for authorities to verify suspicions. The right to detain the suspected thief arises from the common-law right to conduct a citizen's arrest.¹²¹ The common law recognized that citizens were capable of performing arrests because they were equally as capable as law enforcement of recognizing probable cause.¹²² Importantly, most jurisdictions do not require that the merchant or its employees actually witness a theft.¹²³ Instead, the facts need merely create the probable cause or reasonable suspicion that criminal activity is afoot.¹²⁴ Generally, the merchant has the burden to prove that probable cause or reasonable suspicion has been satisfied.¹²⁵

Furthermore, while merchants are entitled to make the detention if they have formed a belief that shoplifting has taken place, their rights are limited in duration and manner: the detention must be in a reasonable manner and only for a reasonable period of time.¹²⁶ Once again, the nature of the detention may give rise to a false imprisonment claim even where the initial detention did not.

The first standard, probable cause, is a fluid concept based on the totality of the circumstances.¹²⁷ Merchants in those jurisdictions that require probable cause must prove it was more likely than not the suspected thief was engaged in shoplifting.¹²⁸ In contrast, the more common standard, reasonable grounds, means something less than probable cause.¹²⁹ But regardless of the articulated standard, the crux

S.W.2d 916, 919 (Tenn. App. 1987) (holding that an employee who had a reasonable basis to believe a theft had taken place satisfied the probable cause standard); *Moore v. Pay'N Save Corp.*, 581 P.2d 159, 164 (Wash. App. 1978) (noting that satisfying reasonable grounds required a determination of whether probable cause that a theft had taken place existed).

121. *Guijosa v. Wal-Mart Stores, Inc.*, 6 P.3d 583, 591 (Wash. App. 2000).

122. *Gortarez v. Smitty's Super Valu, Inc.*, 680 P.2d 807 (Ariz. 1984) (summarizing the bases for citizen's arrests).

123. *Bishop*, *supra* note 25, at 56.

124. *Supra* notes 117-18.

125. *See, e.g.*, *Frison v. Delchamps Store No. 11*, 507 So. 2d 478, 480 (Ala. 1987) (noting that the question of whether probable cause existed should go to a jury); *Consol. Sales Co. v. Malone*, 530 S.W.2d 680, 682 (Ky. 1975). *But see, e.g.*, *Moore v. Target Stores, Inc.*, 571 P.2d 1236, 1239 (Okla. App. 1977) (holding the burden was on the customer to show by affirmative evidence that reasonable ground or probable cause did not exist).

126. *Walters v. J.C. Penny Co.*, 82 P.3d 578, 584-85 (Okla. 2003); *Dillard Dept. Stores, Inc. v. Silva*, 106 S.W.3d 789, 795 (Tex. Ct. App. 2003). At least one state, New Jersey, has held that it is the customer's burden to prove that the detention was for an unreasonable manner of time. *Cooke v. J.J. Newberry & Co.*, 232 A.2d 425, 429 (N.J. Super. 1967).

127. *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

128. *Bostic v. City of Chicago*, 981 F.2d 965, 968-69 (7th Cir. 1992).

129. *Wilson v. Wal-Mart Stores, Inc.*, 525 So. 2d 111, 114 (La. App. 1988).

of the shopkeeper's license privilege is that the belief is reasonable, and a merchant can only prove reasonableness when there are facts to support the suspicion.¹³⁰ Those facts do not need to rise to the level of actual knowledge—many states have turned to the reasonable belief language for the purpose of allowing shopkeeper *inferences* of theft.¹³¹ Nonetheless, those inferences must still be based on clearly articulated facts.¹³² Such facts may include wearing garments with tags still attached,¹³³ setting off security sensors,¹³⁴ leaving the store without paying for merchandise,¹³⁵ and attempting to return merchandise picked up in the store.¹³⁶ Absent these types of specific facts, however, shopkeepers cannot meet their burden of proof to invoke the shield.¹³⁷

As a general rule, the mere fact that a store has a history of shoplifting theft does not create probable cause for any one individual.¹³⁸ The facts must indicate *that particular suspect* is likely to be

130. See, e.g., *Malvo v. J.C. Penney Co.*, 512 P.2d 575 (Alaska 1973) (noting that evidence must establish that suspect's conduct as observed through its employees gave shopkeeper reasonable belief that suspect concealed merchandise that was not paid for).

131. See, e.g., *Gortarez v. Smitty's Super Valu, Inc.*, 680 P.2d 807, 813 (Ariz. 1984) (“[R]easonable cause clause was inserted in this section generally to cover those situations where no one actually saw the theft.”).

132. *Id.*; see also *Street v. Shoe Carnival, Inc.*, 660 N.E.2d 1054, 1056 (Ind. App. 1996) (“[F]acts found on reasonable inquiry would induce reasonably intelligent prudent person to believe that the accused has committed a crime.”); *Wilson*, 525 So. 2d at 114.

133. *Henry's v. Shopper's World*, 490 A.2d 320, 322 (N.J. Super. 1985) (holding that merchant had probable cause for detaining plaintiff when tag of clothing was attached to the garment plaintiff was wearing).

134. *Johnson v. Lord & Taylor*, 807 N.Y.S.2d 367, 367-68 (N.Y. App. Div. 2006) (holding that sensor alarm sounding when plaintiff exited the store gave the security guard a legitimate, nondiscriminatory reason to detain).

135. *Karkut v. Target Corp.*, 453 F. Supp. 2d 874, 879-80 (E.D. Pa. 2006) (holding that employees had probable cause to detain when suspect left the store without paying for merchandise).

136. *Brown v. SCOA Indus., Inc.*, 741 S.W.2d 916, 919 (Tenn. 1987) (holding that reasonable basis existed to believe minor had stolen cassette tape).

137. *J.C. Penney Co. v. Cox*, 148 So. 2d 679, 684 (Miss. 1963) (“The investigation should be based on more than mere conjecture or suspicion. It must be grounded on some definite information from some person that saw enough to justify [shopkeeper's belief] that a person was guilty of shoplifting.”); *Mullins v. Friend*, 449 S.E.2d 227, 231-32 (N.C. Ct. App. 1994) (holding that a clerk who heard a customer rustling paper but did not see illegal action did not meet the probable cause standard in the statute and, thus, could not invoke the protection); *State v. McDaniel*, 337 N.E.2d 173, 181 (Ohio Ct. App. 1975) (“[W]holesale observation of customers by invading their privacy cannot be justified, nor can such observation be properly predicated upon mere suspicion or hunch.”); see also *Jones v. Sears, Roebuck & Co.*, 459 F. 2d 584, 588 (6th Cir. 1972) (holding even a suspicion the consumer did not pay the appropriate price did not justify invoking a shopkeeper's privilege statute once the “sales slip had been rendered and paid for”).

138. *Pinkett v. Super Fresh Foods Mkts, Inc.*, Civ. A. No. 87-4573, 1988 WL 30952, at 6* (E.D. Penn. 1988); *Gonzales v. Harris*, 542 P.2d 842, 844 (Colo. 1975) (holding that presence of probable cause is a question of fact).

stealing, not just that something is missing and anyone in the store could have taken the item.¹³⁹ The belief must relate directly to the individual detained, and shopkeepers cannot cast a wide net over all customers in the hope of catching one guilty party. Similarly, stores cannot point to mere profiling, or statements that the plaintiff "looked like a thief" as the basis for invoking the privilege.¹⁴⁰ The typical characteristics of a shoplifter tend to vary drastically.¹⁴¹ Thus, without *particularized* facts to reasonably justify a stop, systematic detention of most or all customers may implicate false imprisonment. Because receipt-checking is not related to any fact of theft other than presence in the store, detention for failure to give consent does not create an adequate basis for invoking the privilege.

Before 1936, shopkeepers who invoked the privilege against an innocent person were barred from using the license as a shield.¹⁴² The purpose of the rule was to force shopkeepers to make their detention decisions carefully and only detain those who truly raised suspicion of possible theft. If such a rule or presumption were in place today, receipt-checking policies would give rise to tremendous litigation risks because a vast majority of detained customers produce a valid receipt. In part, to balance the interest between theft prevention and intrusion on personal rights, the shopkeeper's license reasonableness standard arose. Articulating facts to support probable cause or reasonable suspicion of theft ensures that unlawful detentions will be minimized, and reasonable mistakes about theft will be forgiven; however, the test requires individualized analysis of the situation on a case-by-case basis—something a receipt-checking policy does not provide. As such,

139. *Cruse v. Highland Village Value Plus Pharmacy*, 374 N.E.2d 58, 62 (Ind. App. 1978) ("[P]rotection of the Act was not extended unless there was probable cause to believe both that a theft occurred or was occurring on or about the mercantile establishment and that a specific person had committed or was committing the theft.").

140. *Mullins*, 449 S.E.2d at 232 (rejecting the security personnel's statement that, based on her experience, the plaintiff met the profile of a shoplifter and thus, established probable cause. Without the probable cause, the actions were not protected, even though the court deemed them reasonable).

141. Bishop, *supra* note 25, at 44-45 (citing Pyatt, *Shoplifting Stereotypes*, WASH. POST, Sept. 30, 1986 at C1, col 1.). Bishop points out that the typical shoplifter is "as likely to be a grandmother as a drug addict, a deacon in the church as a hardened criminal." In fact, most people arrested for shoplifting have no prior criminal record and also have a means of payment with them at the time of the arrest. *Id.* at 45. Additionally, racial profiling simply does not guarantee a decreased likelihood of loss prevention.

142. Bishop, *supra* note 25, at 67-68 (citing *Yancey v. Farmer*, 472 So. 2d 990, 991 (Ala. 1985)). Even as late as 1985, the Alabama Supreme Court held that a person exonerated may file a claim for false imprisonment and that the reasonableness of the detainer's belief did not justify trespass.

reliance on the privilege to justify receipt-checking detentions is inappropriate.

V. RISKS ASSOCIATED WITH BROAD ANTI-THEFT POLICIES

One commentator noted that while “retail trade journals are replete with articles about shoplifting security and shoplifting statistics[,] . . . [n]oticeably absent . . . is any detailed discussion of the legal aspects of the shoplifting problem.”¹⁴³ The cost of this lack of knowledge can be significant. Civil suits, including false imprisonment claims, filed by individuals wrongfully accused of shoplifting often have large jury verdicts.¹⁴⁴ Besides the costs of the verdicts, companies have to bear the cost of repeated litigation.

Another dangerous side effect of a receipt-checking policy is the potential for abuse by employees, effectively opening the store to respondeat superior claims. Some of the accounts related to receipt-checking show a disconnect between the actual store policy and its implementation. For example, when one Wal-Mart shopper was stopped and accused of stealing a bag full of merchandise when he refused to stand in line and allow the door greeter to search his bag, as the greeter was doing to all other patrons, he was later told by management that the actual policy only required a receipt check for unbagged items.¹⁴⁵ The employee either did not understand the policy, or the employee took the opportunity to exert unnecessary authority over the customers.

While receipt-checking on its face violates the law, the process may also open the door for further abuse. Consumer racial profiling, or CRP,¹⁴⁶ is often unquantifiable, subtle, and unchecked.¹⁴⁷ A policy allowing gatekeeper employees to stop and demand receipts is an ideal tool to violate the rights of minority customers.¹⁴⁸ Even without corpo-

143. Bishop, *supra* note 25, at 45.

144. *Id.*

145. Wal-Mart Reports You to the Police for Not Allowing Them to Check Your Receipt, http://walmartwatch.com/blog/archives/wal_mart_customer_service_nightmares_receipt_check (last visited March 15, 2009).

146. Harris, *supra* note 108, at 1; see also Joe R. Feagan, *The Continuing Significance of Race: Anti-black Discrimination in Public Places*, 56 AM. SOC. REV. 101, 111-12 (1991); Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 Mo. L. REV. 275, 299 (2001); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283, 1286-88 (1996).

147. Harris, *supra* note 108, at 5.

148. Kennedy, *supra* note 146, at 304. The company itself may have CRP as a stated or unstated portion of its receipt policy. For example, in a large retail chain, stores in lower-income neighborhoods or in areas with high percentages of particular ethnic groups might

rate endorsement, allowing individual employees to *enforce* receipt-checking policies creates large potential for abuse.¹⁴⁹ While social pressures often encourage minority consumers not to seek redress for such discrimination¹⁵⁰ because they feel a need to prove to white employees they are entitled to be shopping there,¹⁵¹ employee discrimination is still a legitimate litigation risk related to these policies. Gatekeeper employees who do not realize they are profiling certain groups may escalate a simple receipt request into an unlawful detention for a minority customer who may not have happened with a white customer.¹⁵²

Likewise, groups of people, such as non-English speakers and underage, elderly, or disabled persons, may become victims of unlawful detentions because they do not understand the request at the outset. Their inadvertent failure to give consent because of a language or understanding barrier, rather than proof of theft, may escalate to an unlawful detention as well.

have more rigid receipt-checking policies than stores in more affluent areas. Or, stores may direct their employees to check the receipts of only those people fitting a particular racial profile. Others may simply "quietly acquiesce in the treatment of blacks as unworthy shoppers."

149. See Kennedy, *supra* note 146, at 280 (noting "security guards, armed with assumptions about links among race, gender, age, and criminality, frequently feel justified in separating out African American shoppers for differential treatment"); see also JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 21, 41 (Beacon 1994) ("Another problem that black shoppers face, . . . is the common white assumption that they are likely shoplifters.");

150. See Claudine Columbres, *Targeting Retail Discrimination with Parens Patriae*, 36 COLUM. J.L. & SOC. PROBS. 209, 210-211 (2003); Harris, *supra* note 108, at 46-50; Kennedy, *supra* note 146, at 278-79 (noting that § 1981 of the Civil Rights Act of 1964 does not include retail stores on its enumerated list of places of accommodation); Kennedy, *supra* note 146, at 326-27; Loren Page Ambinder, Note, *Dispelling the Myth of Rationality: Racial Discrimination in Taxicab Service and the Efficacy of Litigation Under 42 U.S.C. § 1981*, 64 GEO. WASH. L. REV. 342, 364 (1996).

151. Harris, *supra* note 108, at 11-12:

Most blacks compensate by proving themselves worthy shoppers. . . . They dress up to go shopping in the hope that their appearance will convey the fact that they are both entitled to browse and capable of paying for any item that they put their hands on. Some folks flash their credit cards or engage the salesperson in conversation designed to reveal the shopper's class position or sophistication regarding the product. Others will buy expensive goods they do not really want just prove that they have been misjudged by a salesclerk.

Providing evidence of an actual purchase during a receipt check is a perfect opportunity to show-up that questioning employee.

152. Commentators recognize that some CPR is based on subconscious racism. Harris, *supra* note 108, at 10 ("Unwittingly, some retailers make assumptions about their black customers based on stereotypes relating to the propensity of African Americans to commit crimes and their inability to pay for goods.").

Furthermore, the Supreme Court of Wisconsin has held that loss prevention employees have a special duty to customers stemming from their authority to detain.¹⁵³ This duty involves an exercise of the utmost care. Accordingly, the stores themselves may be liable for negligent training merely because it is foreseeable that a loss-prevention employee could harm a customer in the course of his job.¹⁵⁴ Failure to provide that training is the store's breach of its duty to consumers.¹⁵⁵

Finally, and most pragmatically, retailers run a high risk of alienating their customers by using aggressive anti-theft tactics. The impact of a forced detention and search is not limited to annoyance or indignation. One commentator noted that the vast majority of individuals surveyed after they had given consent to a search often felt very negatively about the encounter.¹⁵⁶ In light of the numbers of people who consent to search, the issue should not be ignored. Personal resistance to the store policy and secondhand information about successful lawsuits against the policies hurt business. "A countersuit, if successful, can do more damage to a business than a battalion of shoplifters."¹⁵⁷ The media coverage and word of mouth can damage a business's reputation beyond repair, but the more immediate response of the stop-and-search policy is the loss of that particular customer who is turned off by the practice.

The outcry against receipt-checking policies is overwhelming—customers express disgust, hurt, offense, and embarrassment at implicitly being accused of theft. Many refuse to adhere to the policy out of spite, and some refuse to return to stores simply because such policies are implemented there. Michael Righi's blog generated \$5,197.23 dollars in donated legal fees during a seventeen-day period.¹⁵⁸ A search on the internet concerning the receipt issue generated over half-a-million hits. In an age of dwindling attention to customer service, another store policy created only to preserve the bottom line may end up creating the opposite effect.

Perhaps the easiest solution, a solution followed by some stores, is to abandon the receipt-checking policy and rely only on electronic sensors. New York courts have recognized that reasonable suspicion

153. *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233, 238 (Wis. 1998).

154. *Id.*

155. *Id.*

156. Nadler, *supra* note 6, at 211-13.

157. *Miller*, 580 N.W.2d at 238.

158. Michael Righi, *Success*, July 18, 2008, <http://www.michaelrighi.com/2007/09/>.

arising from an electronic sensor alarm is a valid basis for detention.¹⁵⁹ West Virginia even codified the protection when it relates to electronic sensors.¹⁶⁰

In reality, many stores will ignore the litigation and customer-loss risks for the purpose of using the policies to stop *employee* theft. Checking receipts is a good way to tell if employees have given merchandise to a customer without ringing it up or pricing it at a grossly reduced amount. In fact, that may be the very reason the policies were created in the first place—to capture employee, not customer, theft. Because employee theft grossly outweighs consumer theft, big-box stores may consider customer alienation and false imprisonment litigation an acceptable cost of stopping an internal problem. The issue is whether tort law has the power to curb the unlawful practice if the store chooses to continue it.

VI. POWER OF BIG-BOX STORES: THE WAL-MART CASE STUDY

It has been argued that a corporation's "only social responsibility is to increase its profits."¹⁶¹ Under this logic, corporations have no social responsibility to their employees, consumers, or other people they tangentially affect. Yet in a world where consumer consumption has literally exploded, the power of the retail industry to effect social change is unprecedented. In his book, *The Wal-Mart Effect*, Charles Fishman documents many of the numerous effects Wal-Mart has on the retail industry, our environment, our daily behavior, the global economy, and even our way of thought.¹⁶² This sort of impact raises the question of what kind of checks and balances truly reign in a corporation with unprecedented power? Using Wal-Mart and receipt-checking policies as an example, the likely answer is that absent its own self-restraint, only consumer pressure, not the law, has the power to stop unlawful corporate behavior.¹⁶³ According to the analysis

159. *Johnson v. Lord & Taylor*, 807 N.Y.S.2d 367, 367-68 (N.J. 2006) ("[D]etention had a legitimate, nondiscriminatory basis, the sensor's sounding."); see also *Ashcroft v. Mt. Sinai Med. Ctr.*, 588 N.E.2d 280, 283 (Ohio App. 1990).

160. W. VA. CODE ANN. § 61-3A-4a (West 2000) ("The activation of an anti-shoplifting or inventory control device as a result of a person exiting the establishment or a protected area within the establishment shall constitute reasonable cause.").

161. ORTEGA, *supra* note 1, at xvii (quoting corporate apologist Milton Freidman).

162. FISHMAN, *supra* note 31.

163. David Neumark et al., *The Effects of Wal-Mart on Local Labor Markets* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 11782, 2005) (Wal-Mart is the "largest corporation in the world, with total revenues of \$285 billion in 2005."); Thomas A. Hemphill, *Rejuvenating Wal-Mart's Reputation*, 48 BUSINESS HORIZONS 11, 11 (2005). Wal-Mart alone accounts for 8% of total retail sales in the United States, and over 140 million shoppers visit

above, detention of a customer for failure to show a receipt violates the law. Yet these policies are used throughout the nation with support from local law enforcement. The law is a reflection of society's morals, rules, and values.¹⁶⁴ Thus, as peoples' patterns of living change, the law follows. But when corporations flout the law, if the law has no power to curb the behavior, the reverse happens—the law yields to the interest of the company at the expense of the individual.

Many commentators have noted the tremendous economic power of a store like Wal-Mart. In terms of social costs, being the world's largest corporation allows it to change the very way we live our lives.¹⁶⁵ The powers of Wal-Mart are many: First, it is well documented that its entry into a market drives numerous competitors, particularly local smaller stores, out of business.¹⁶⁶ In fact, local merchants were the source of the first grassroots anti-Wal-Mart movements in the early 1980s.¹⁶⁷ "In the same decade that Wal-Mart has come to dominate the grocery business in the United States, thirty-one supermarket chains have sought bankruptcy protection; twenty-seven of them cite competition from Wal-Mart as a factor."¹⁶⁸ Empirical studies have noted the negative impact the homogenous store has on small town life, local profitability, consumer variety, and community growth.¹⁶⁹ Its economic power dictates which competitors will survive.

Wal-Mart each week. It employs 1.2 million people in the United States. *Id.* at 12. It "is the leading employer of minorities in the U.S." *Id.* at 13. It is also the largest grocery chain in the U.S., capturing 15% of the market share. *Id.* at 15. Needless to say, Wal-Mart as an economic power is undeniable.

164. Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1276 (2005) ("[The law] secures public order and protects against violence. . . . It promotes the achievement of collective moral goals . . .").

165. See Benedict Sheehy, *Corporations and Social Costs: The Wal-Mart Case Study*, 24 J.L. & COM. 1, 36 (2004) ("When Wal-Mart establishes a retail outlet, detrimental community effects can be expected. These effects include decreased community involvement, decreased community building efforts, decreased small business, decreased labor opportunities, and increased commercial vacancies.").

166. Hemphill, *supra* note 160, at 13 ("[F]or every new Supercenter Wal-Mart opens, two supermarkets . . . close."). One study in Los Angeles concluded the "arrival of big-box stores would result in a net loss of jobs and force other businesses to lower wages and/or reduce benefits." *Id.* at 15.

167. ORTEGA, *supra* note 1, at 167 ("It was the small business owners on town squares and main streets . . . who were the first to quail at the menace from the big box full of bargains."); see *id.* at 167-87 for a fuller discussion of the first anti-Wal-Mart campaigns.

168. FISHMAN, *supra* note 31, at 4; Patricia Callahan & Ann Zimmerman, *Wal-Mart Tops Grocery List with its Supercenter Format*, WALL ST. J., May 27, 2003, at B1.

169. See, e.g., Emek Basker, *Selling a Cheaper Mousetrap: Wal-Mart's Effect on Retail Prices*, 58 J. URBAN ECON. 203 (2005); Kenneth E. Stone, *Impact of the Wal-Mart Phenomenon on Rural Communities*, Increasing Understanding of Public Problems and

Second, Wal-Mart shapes the entire retail industry by forcing product manufacturers to change products and pricing to Wal-Mart's specifications.¹⁷⁰ It controls product size (to fit on its shelves), dictates manufacturing scheduling, demands conformance to its internal processing programs (UPC codes), and, most importantly, dictates price, always at the manufacturer's cost.¹⁷¹ These demands, in turn, influence the global community by driving manufacturing and employment opportunities out of the United States to countries where labor is less expensive.¹⁷² It directly and indirectly lowers prices of consumer goods in each new market it enters.¹⁷³ In fact, Wal-Mart has been credited with keeping the country's inflation rate down.¹⁷⁴ But those declining consumer prices come at a cost. Manufacturers, forced to comply with the lower prices, often move their facilities to overseas markets with cheaper labor.¹⁷⁵ That labor is often exploited, with ac-

Policies, FARM FOUND. (1997), available at <http://www.econ.iastate.edu/faculty/stone/>; Kenneth E. Stone, *The Effect of Wal-Mart Stores on Businesses in Host Towns and Surrounding Towns in Iowa*, Nov. 9, 1988, available at <http://www.econ.iastate.edu/faculty/stone/> (the first major study to chart the negative impact Wal-Mart had on a state's retail industry); see also FISHMAN, *supra* note 31, at 140-144, 153-156; VanderVelde, *supra* note 8, at 18-19. A few commentators disagree. See, e.g., Steven Malanga, *What Does War on Wal-Mart Mean?*, CITY J., Spring 2004, available at <http://www.city-journal.org/printable.php?id=1333> (arguing the "reactionary unions and their allies" are ignoring the greater benefit of increased jobs and decreased prices).

170. Hemphill, *supra* note 163, at 16 ("For Wal-Mart, price is the primary driver of its successful consumer business operations: consequently, reducing production costs is the mantra with which Wal-Mart's 21,000 suppliers are confronted: take-it-or-leave-it."); Sheehy, *supra* note 165, at 36 ("Wal-Mart requires its suppliers to drop prices annually by as much as 5% . . . , driv[ing] suppliers out of business . . . [and causing them] to cannibalize [them]sel[ves].").

171. Sheehy, *supra* note 165, at 36-37.

172. Hemphill, *supra* note 160, at 16 ("Wal-Mart critics point to the retailer's global pursuit of lower-cost goods as contributing to the accelerating loss of U.S. manufacturing jobs to China and other low-wage paying countries in Southeast Asia.").

173. Basker, *supra* note 166, at 28 (finding that Wal-Mart's effect on driving prices down is "economically large—1.5-3% in the short run, and four times as much in the long run—and is statistically significant"); Jerry Hausman & Ephraim Leibtag, *Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart 2-6*, 29 (Nat'l Bureau of Econ. Research, Working Paper No. 11809, 2005) ("Wal-Mart's entry into a new geographic market creates a direct price effect by offering a lower price option to consumers and an indirect price effect by causing traditional supermarkets to lower their prices because of increased competition.").

174. Ellen Israel Rosen, *The Wal-Mart Effect: The World Trade Organization and the Race to the Bottom*, 8 CHAP. L. REV. 261, 262 (2005); Anthony Bianco & Wendy Zellner, *Is Wal-Mart too Powerful?*, BUSINESSWEEK, Oct. 5, 2003, at 101.

175. Sheehy, *supra* note 165, at 43; see also FISHMAN, *supra* note 31, at 106 (noting that Wal-Mart's use of foreign cheap labor is inevitable given its push for lower and lower prices); Rosen, *supra* note 174, at 261 ("Wal-Mart's method of conducting business is not good for America, nor is it good for developing nations. Rather, it is likely that Wal-Mart's trade choices will actually lead to further extremes of wealth and poverty wherever the

counts of forced slave labor and child labor playing most often in the press.¹⁷⁶

Third, Wal-Mart directly changes the local retail labor market by reducing jobs and lowering the standard wage for all retail employees.¹⁷⁷ Competitors are forced to lower their employee wages and benefits to cover the loss of profits associated with Wal-Mart's price decreases.¹⁷⁸ Additionally, the push-down of labor standards influences the poverty rate. At least one study found that communities with Wal-Mart stores have seen greater increase (or slower and smaller decreases) of the poverty rate than communities without a Wal-Mart store.¹⁷⁹

Finally, Wal-Mart even grossly changes traffic patterns and environmental quality in new store locations.¹⁸⁰ It is changing the entire environmental landscape of many of its supplier countries.¹⁸¹ These local impacts are aside from the massive environmental resources devoted each year to packaging and transporting billions of dollars worth of consumer goods around the globe. In light of these impacts, does it

company does business."); see also *id.* at 265 (The World Trade Organization's elimination of quotas will further encourage companies seeking lower prices to move to countries that can produce greater volume for less money.).

176. ORTEGA, *supra* note 1, at 223-29, 318-45 (discussing Wal-Mart executive David Glass's disastrous interview with *Dateline NBC* where he was first confronted publicly with findings of human rights organizations that Wal-Mart exploited child, prison, and slave labor, and Kathie Lee Gifford's traumatic realization that her clothing line, supplied for Wal-Mart, used the same).

177. Neumark, *supra* note 163, at 28 (using a comprehensive empirical analysis to conclude that the opening of a new Wal-Mart store "reduce[s] retail employment by [an average] of 2.7 percent" and "retail earnings at the county level" by 1.5%).

178. Rosen, *supra* 174, at 278. Wal-Mart's employment practices not only affect the surrounding market, they are changing internally as well. For a full account of the shift from Sam Walton's "associate as partner" philosophy to an emphasis on the bottom line and viewing employees as another operating cost, see Irma Mathis, *Transforming Organizational Culture: The Case of Wal-Mart* (Dec. 2007) (unpublished M.S. thesis, University of Texas at San Antonio) (on file with author).

179. Stephan J. Goetz & Hema Swaminathan, *Wal-Mart and County-Wide Poverty* 12 (Dept. Agricultural Econ. & Rural Sociology, Penn State University, AERS Staff Paper No. 371, 2004).

180. Hemphill, *supra* note 160, at 15 (citing AL NORMAN, *SLAM DUNKING WAL-MART* (Norman 1999)). ("The National Trust for Historic Preservation placed Vermont on its list of the 10 most endangered places in 2004, warning that the state's small-town charm is threatened by Wal-Mart."). Environmental and land use issues accompanying a Wal-Mart store include changed air quality, threat to water quality, reduction of wildlife habitat, loss of open space, overdependence on automobiles, and deterioration of historic commercial centers.

181. FISHMAN, *supra* note 31, at 171. One good example is the negative environmental impact on Chile caused by its new role as salmon supplier for Wal-Mart. Because it is a developing country without sophisticated environmental protections or technology, its new salmon industry is polluting the land oceans significantly. *Id.* at 177-78.

also have the power to overcome the law through policy alone? Considering three areas in which Wal-Mart power has remained unchecked—impacts on state and federal spending programs, controlling consumer behavior, and ignoring the law in other contexts—the answer is probably “yes.”

First, Wal-Mart’s internal employment policies have a substantial impact on social services, such as state and federal health programs.¹⁸² One study investigating Wal-Mart’s affect on Medicaid expenditures noted that the corporation’s presence in a region caused Medicaid expenditures to go up.¹⁸³ Another study estimated that Wal-Mart caused California’s taxpayers more than \$86 million a year to supplement the corporation’s low wages and benefits.¹⁸⁴ In Georgia, 10,261 children in the state funded medical system had a parent working at Wal-Mart, compared with only 734 children in the next-highest represented company.¹⁸⁵ These statistics show that taxpayers become an “indirect public subsidy” bearing the cost of Wal-Mart’s labor force.¹⁸⁶ The *New York Times* uncovered an internal memo written by the executive vice-president of benefits to the Wal-Mart board of directors admitting that Wal-Mart “‘critics are correct in some of their observations. Specifically, our coverage is expensive for low income families, and Wal-Mart has a significant percentage of associates and children on public assistance.’”¹⁸⁷ The memo acknowledged that 46% of employee children were either uninsured or on Medicaid, and 5% of all Wal-Mart employees relied on Medicaid, compared to only 4% for

182. Hemphill, *supra* note 163, at 13. Only 70% of Wal-Mart’s employees qualify for health benefits, and only 38% of those eligible use it. “Wal-Mart spends 30% less per employee on healthcare than its competitors.” It “does not cover flu shots, child vaccinations, or contraceptives.” And, “new full-time employees wait for 6 months to be eligible for its health care plan and the company does not cover any health care benefits for retirees.” The net result of this healthcare gap means Wal-Mart costs are subsidized by state and community social services.

183. Michael J. Hicks, *Does Wal-Mart Cause an Increase in Anti-Poverty Program Expenditures?*, 2005 CTR. LABOR RES. & EDUC. 18, available at <http://www.globalinsight.com/publicDownload/genericContent/hicks-poverty.pdf> (Hicks hedges that other factors such as “bad poverty amelioration or labor market policy” may influence these results. Wal-Mart’s own internal, memorandum, however, gives credence to the company’s use of social services as a supplement to paying its employees adequate benefits.).

184. Arindrajit Dube & Ken Jacobs, *Hidden Cost of Wal-Mart Jobs*, BERKLEY LABOR CTR., at 8 (2005); Carol Zabin et al., *The Hidden Public Costs of Low-Wage Jobs in California*, THE NAT’L ECON DEVEL. & L. CTR., at 23-24 (2004).

185. FISHMAN, *supra* note 31, at 240.

186. Dube, *supra* note 184, at 8 (“Some Wal-Mart stores encourage employees to seek state assistance to subsidize the low incomes Wal-Mart pays.”); Sheehy, *supra* note 162, at 39 n.171 (citing Barbara Ehrenreich, *Wal-Mart Invades Earth*, N.Y. TIMES, July 25, 2004).

187. Steven Greenhouse & Michael Barbaro, *Wal-Mart Memo Suggests Ways to Cut Employee Benefit Costs*, N.Y. TIMES, Oct. 26, 2005, available at 2005 WLNR 1728937.

other employers.¹⁸⁸ Yet despite this obvious reliance on state and federal programs to subsidize Wal-Mart and increase company profits, the point of the memo was how to further reduce employee benefits and cut the costs of employment, including “discouraging unhealthy people from working at Wal-Mart” and voicing concern that more senior workers cost more in wages and benefits but did not increase productivity.¹⁸⁹ Wal-Mart has the power to make taxpayers foot the bill for its inadequate healthcare coverage, with nothing seeming to prevent it from doing so.

Second, it changes the way consumers act. Wal-Mart has the power to change general consumer behavior. In his book, *The Wal-Mart Effect*, Charles Fishman notes that the store has changed the way we think about shopping, from influencing our notions about quality, to resetting our expectations about pricing.¹⁹⁰ It dictates what we buy in multiple ways. It limits our choices so that we purchase what is supplied through the store.¹⁹¹ It even tricks us into believing we *need* certain products. One anecdote involved Wal-Mart’s manipulation of the pickle market.¹⁹² To prove its low prices, Wal-Mart forced one of its high-quality pickle manufacturers to supply a super-sized jar of pickles for less than \$3.¹⁹³ The manufacturer complied, and pickle sales increased.¹⁹⁴ Unfortunately, the pickle manufacturer, in an effort to meet the new demand, lowered quality, hurt its brand image, and eventually filed for bankruptcy.¹⁹⁵ But the irony was that the

188. *Id.*

189. *Id.* Two days before the memo story was published in *The New York Times*, one of its authors published another report indicating Wal-Mart intended to announce it was lowering its price of healthcare for its employees so more could take advantage of the program. Michael Barbaro, *Wal-Mart to Expand Health Plan for Workers*, N.Y. TIMES, Oct. 25, 2005, available at 2005 WLNR 17289375. He noted, however, that those changes might not prove to be a benefit to the workers because, while more would be eligible, the deductibles and employee’s contribution would increase as well. *Id.* (“Several health insurance specialists questioned whether the company, which is working to burnish its public image, was trying to quickly increase the number of workers who use its health insurance at the expense of the coverage’s quality.”).

190. FISHMAN, *supra* note 31, at 5 (“Wal-Mart has changed the lens through which we see the world.”).

191. Sheehy, *supra* note 165, at 41 (“Consumers are free to choose whatever they like, provided Wal-Mart has agreed to provide it.”).

192. *Id.* at 45-46.

193. FISHMAN, *supra* note 31, at 80; Charles Fishman, *The Wal-Mart You Don’t Know*, FAST COMPANY (Dec. 2003), at 68, available at <http://www.fastcompany.com/magazine/77/walmart.html>.

194. FISHMAN, *supra* note 31, at 80 (“It was an abundance of abundance. “They went through the roof.”).

195. *Id.* at 81 (“The gallon jar of pickles became what you might call a ‘devastating success’ for Vlasic. ‘Quickly it started cannibalizing our non-Wal-Mart business.’”); *see id.*

whole process was merely a marketing gimmick of limited value to the consumer—families could not eat a super-size jar of pickles and ended up throwing most of the reduced-cost items away.¹⁹⁶ Yet, because Wal-Mart priced the jar so low, consumers were fooled into believing they *needed* a gigantic jar of pickles.¹⁹⁷ Similarly, one Wal-Mart supplier recalled looking at inventory reports, noting that sales were outpacing population growth, “and wondering where the hell that stuff was going.”¹⁹⁸ The suppliers eventually came to the conclusion that the items (in that case underwear), were so cheap that people bought excess and simply stored the items in their houses.¹⁹⁹ In short, Wal-Mart has the power to manipulate our way of thinking and our behavior.

Even people who hate Wal-Mart continue to shop there because it has such a stronghold on our ability to afford goods. One study showed that of the four types of shoppers, which consist of champions (those who love Wal-Mart), enthusiasts (those who shop often and feel positively about it), conflicted (those who actively dislike the store because of its negative impacts), and rejecters (those who do not shop there), the conflicted group—shoppers that *actively dislike* Wal-Mart—are its second most-frequent customers and spent nearly as much money each week as its champions.²⁰⁰ Thus, even shoppers who dislike the store return week after week to take advantage of its low costs. The store’s stronghold on consumer shopping behavior is so great people shop there even when they would otherwise choose not to do so.

at 84 (“Right after the gallon was pulled out of the stores, in January 2001, Vlastic filed for bankruptcy.”). Vlastic was not the only casualty. “[O]f Wal-Mart’s top ten suppliers in 1994, four have sought bankruptcy.” Barry C. Lynn, *Breaking the Chain: The Antitrust Case Against Wal-Mart*, HARPER’S MAG., (July 2006), at 35, available at <http://www.harpers.org/archive/2006/07/081115>. The problem is the “collapsing profit margins of the firms caught in the Wal-Mart system.”

196. FISHMAN, *supra* note 31, at 81 (“[Consumers would] eat a quarter of a jar and throw the thing away when they got moldy. A family can’t eat them fast enough.”); *see also id.* at 81.

197. Sheehy, *supra* note 165, at 46. Buying an over-sized jar of pickles is just one tiny example of Wal-Mart’s power to influence consumer spending. According to Sheehy, while Wal-Mart’s mantra is effectively pushing over-consumption through under-pricing, the US faithfully follows by being the most over-weight population on the planet and consuming more goods per capita than any other nation. For a heated discussion of Sheehy’s conclusions, see Gordon Smith, *Wal-Mart’s Irresponsible Pickle Strategy*, Conglomerate Business Law Economics Society, Dec. 9, 2006 http://www.theconglomerate.org/2006/12wal_marts_irresp.html. While economists on the blog argue that Wal-Mart’s practices follow good economic principles, Sheehy argues that manipulating prices that result in waste implicates more than financial costs—it implicates social costs as well.

198. FISHMAN, *supra* note 31, at 70.

199. *Id.*

200. *Id.* at 220.

It logically follows that Wal-Mart could pressure its customers into granting consent to unlawful store receipt-checking policies because Wal-Mart states the practice is the trade-off for low prices. Consumers willingly comply because they are addicted to or reliant on the store, particularly in areas where there are no other shopping options. Wal-Mart's economic power essentially allows it to *force* consent. Because it is the biggest corporation in the world, it has the psychological power to force consumers to behave as it dictates. Thus, even when it does not explicitly break the law, it circumvents the law by forcing customers to give up their own valid causes of action. By modifying consumer behavior, Wal-Mart ensures false imprisonment law has no power to change its internal store policies.

Finally, Wal-Mart has a history of ignoring the law when it decreases company profits. Perhaps the best example of this practice is Wal-Mart's anti-union activity. Despite the tremendous influence of organized unions in the U.S. workforce, Wal-Mart has managed, through policy and illegal behavior, to prevent unions from infiltrating its U.S. employee base.²⁰¹ When one group of ten butchers in a single Wal-Mart store voted to join the United Food and Commercial Workers union, Wal-Mart responded by removing butcher departments from 180 of its supercenter stores—effectively stopping subsequent union attempts.²⁰² It also maintains a seventy-person anti-union response team that is employed to enter any store reporting union discussion and shut down such activity.²⁰³ In a similar vein, Wal-Mart has simply broken the law to oust union supporters from its stores. It has fired employees in retaliation for discussing unions,²⁰⁴ threatened to close entire stores and lay off all workers,²⁰⁵ transferred and demoted union sympathizers,²⁰⁶ and prevented the distribution of union information.²⁰⁷ The National Labor Relations Board found Wal-Mart “repeatedly broke the law” and has been identified more than 250 times as engaging in union-busting activities.²⁰⁸ One must presume

201. Hemphill, *supra* note 163, at 13; *see also* Hausman, *supra* note 170, at 2 n.5 (“Wal-Mart has no unions in the US. It has recently permitted unions in China. A Wal-Mart store in Quebec, Canada has been involved in a controversy over whether its workers will form a union.”).

202. *Id.* at 13.

203. Sheehy, *supra* note 165, at 39 (citing John Rausch, *The Cost of Cheap Goods*, CATH. HERALD, Nov. 20, 2003).

204. ORTEGA, *supra* note 1, at 87, 108.

205. *Id.* at 107.

206. *Id.* at 88.

207. *Id.* at 89.

208. Sheehy, *supra* note 162, at 13; *see also* ORTEGA, *supra* note 1, at 357 (noting that when an employee was illegally fired, the NLRB ordered Wal-Mart to “stop breaking the

the incredible resistance to union organization, at the expense of illegal anti-union activity, has been pursued to keep employee wages (a large cost of retail business) down. When union-busting laws get in the way, Wal-Mart simply ignores them. The law has no deterrent effect—to date, no union has infiltrated the 1.3 million U.S. Wal-Mart employees despite the recognition of Wal-Mart's illegal practices. But violating union regulations is only one example of how Wal-Mart shuns legal limitations to increase its profits.

Other alleged illegal activity is rampant: violating child-labor laws,²⁰⁹ failing to pay overtime and past-due wages,²¹⁰ forcing employees to work off the clock,²¹¹ engaging in anti-trust activities,²¹² paying for signature-gathering to influence referendum votes.²¹³ Other violations include employing illegal workers,²¹⁴ violating fair-trade laws by selling products below cost,²¹⁵ using predatory pricing to drive competitors out of business,²¹⁶ deceiving customers into believing they were getting a better price than at other stores.²¹⁷ Additionally, interfering

law, . . . [but] [u]nder the weak federal labor laws, this is about as tough an action as the board could take").

209. ORTEGA, *supra* note 1, at 223-29, 318-45 (discussing Wal-Mart executive David Glass's disastrous interview with *Dateline NBC* where he was first confronted publicly with child-labor violations, findings of human-rights organizations that Wal-Mart exploited child, prison, and slave labor, and Kathie Lee Gifford's traumatic realization that her clothing line, supplied for Wal-Mart, used the same).

210. *Id.* at 318-45, 351. ORTEGA, *supra* note 2. A group of 150 pharmacists sued Wal-Mart for unpaid overtime. Wal-Mart argued the pharmacists were salaried employees, and therefore ineligible for overtime pay. The pharmacists pointed out, however, that if a department was slow, they were forced to go home and their pay was docked for un-worked hours. Thus, they were considered hourly if they worked less than 40 hours, and salaried when they worked more.

211. FISHMAN, *supra* note 31, at 27, 47.

212. Lynn, *supra* note 195, at 30 (noting that while Wal-Mart is not a monopoly, which can demand unfair high prices, it is a monopsony, which can dictate price to suppliers who have no other retail outlet).

213. ORTEGA, *supra* note 1, at 173.

214. FISHMAN, *supra* note 31, at 48; *see also* Rosen, *supra* note 174, at 276 (citing Associated Press, *Wal-Mart Pays \$11M to Settle Illegal Immigrant Janitors Case*, USA TODAY, Mar. 18, 2005, available at http://yahoo.usatoday.com/money/industries/retail/2005-03-18-wal-mart-immigrants_x.htm?csp=1); Barbaro, *Wal-Mart to Pay \$11 Million*, WASH. POST, Mar. 19, 2005, available at <http://www.washingtonpost.com/ac2/wp-dyn/A48612-2005-Mar18?language=printer>; Steven Greenhouse, *Wal-Mart Raids by U.S. Aimed at Illegal Aliens*, N.Y. TIMES, Oct. 24, available at 2003 WLNR 5655166.

215. ORTEGA, *supra* note 1, at 174.

216. *Id.* at 266.

217. *Id.* at 268. Wal-Mart would use its buying clout to make suppliers give it special packaging that let it seem to be selling less when it wasn't. For example, Hills Brothers made special coffee cans for Wal-Mart that looked like the cans Hills sold elsewhere, but that held 5 ounces less coffee—letting Wal-Mart advertise a lower price for what looked like the same product but wasn't.

with contracts to squeeze competitors out of prime real-estate,²¹⁸ terminating employees for dating on their own time,²¹⁹ committing civil fraud against its own vendors,²²⁰ investigating employees through illegal electronic eavesdropping,²²¹ abusing discovery rules,²²² and engaging in “sweetheart” deals for family and friends²²³ have also taken place.

Wal-Mart is now the defendant in the largest class action lawsuit in history for its alleged gender discrimination against its 1.6 million current and former female employees.²²⁴ The chief complaint made by the plaintiffs was that, despite “‘thousands of discrimination complaints,’” the store was simply eating the litigation cost of its illegal personnel activities.²²⁵ In essence, “Wal-Mart considered itself sufficiently immune to the pressure of repeated claims that it did not feel the need to strategize for the rules.”²²⁶

Nevertheless, at least one of its illegal policies turned deadly, still with no true repercussions for the company: In 1992, an employee restocking shelves during the night shift collapsed with heart trouble.²²⁷ At that time, Wal-Mart policy required that night-shift employees be locked inside the store, with no means to escape, for the purpose of reducing employee theft.²²⁸ On this occasion, when the employee collapsed, paramedics were unable to respond until after the

218. *Id.* at 269.

219. *Id.* at 359.

220. *Id.* at 375.

221. *Desilets v. Wal-Mart Stores, Inc.*, 171 F.3d 711, 713 (1st Cir. 1999); VanderVelde, *supra* note 8, at 33.

222. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 720 (Tex. 2003) (disposing of evidence so an injured customer could not prove his prima facie case); *GTFM, Inc. v. Wal-Mart Stores, Inc.* No. 98-CIV-7724, 2000 WL 335558 (S.D.N.Y. Mar. 30, 2000) (failing to produce documents and hiding others in over-burdensome discovery responses); VanderVelde, *supra* note 8, at 36-37.

223. ORTEGA, *supra* note 1, at 235.

224. *Dukes v. Wal-Mart*, 474 F.3d 1214, 1222 (9th Cir. 2007), *vacated*, 2009 WL 365818 (9th Cir. 2009); *see also* LIZA FEATHERSTONE, *SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKER'S RIGHTS AT WAL-MART* (2004); FISHMAN, *supra* note 31, at 27; Rosen, *supra* note 174, at 278.

225. VanderVelde, *supra* note 8, at 28 (quoting Joseph M. Sellers, co-counsel for the Plaintiffs in a suit against Wal-Mart) (alteration in original).

226. *Id.* It is not just legal restraints Wal-Mart has outgrown. “[It] is increasingly beyond the control of market forces that capitalism relies on to enforce fair play. Wal-Mart isn’t subject to the market forces because it is creating them.”; *see* FISHMAN, *supra* note 31, at 236.

227. ORTEGA, *supra* note 1, at 363.

228. *Id.* The Wal-Mart spokeswoman argued at the time that the true policy purpose was employee safety, not reduction of theft. FISHMAN, *supra* note 31, at 266. But *The New York Times* reported that store managers admitted the policy was solely to reduce employee

police drove to a manager's home to get a key.²²⁹ The employee died.²³⁰ Wal-Mart, despite an investigation by the Federal Health and Safety Commission, suffered little consequence—a meager fine and a \$6,600 worker's compensation benefit to the family.²³¹ While the incident did prompt Wal-Mart to change its policy of involuntary lockdowns, it took an employee death to make it happen.

In light of such practices, it is probably safe to presume that Wal-Mart and other big-box stores have the power to shape consumer behavior as it relates to the unlawful practice of receipt-checking. The store can use its economic power to socially and psychologically pressure consumers into giving consent. If that does not work, it can break the law and simply force compliance. While it may not be able to discard the settled law of false imprisonment and shopkeeper's license on its face, as a practical matter, receipt-checking policies likely will continue until the stores decide economic benefits (not legal liability) fail to justify them.

Union-busting regulations and child-labor laws did not stop Wal-Mart's unprecedented and relentless use of the illegal practices, both here and abroad. Instead, only bad press, public backlash, and loss of sales prompted Wal-Mart to even acknowledge the latter issue.²³² Furthermore, the company has simply ignored the law.

Likewise, the tort of false imprisonment is not powerful enough to stop receipt-checking policies implemented by stores with large economic power. One commentator noted that "since the Reagan Administration, the only effective constraints on Wal-Mart have been set by investors and revenue flow."²³³ We, through our unprecedented spending at the store, have given it unprecedented power. The law simply is not powerful enough to stop it. Like the anti-union and monopoly strategies that have come before it, the power of individualized false imprisonment lawsuits are not enough to shift Wal-Mart from en-

theft. Steven Greenhouse, *Workers Assail Night Lock-ins by Wal-Mart*, N.Y. TIMES, (Jan. 18, 2004), available at 2004 NLNR 5815456.

229. ORTEGA, *supra* note 1, at 363.

230. *Id.*

231. *Id.*

232. ORTEGA, *supra* note 1, at 223-29, 318-45. Even then, its solution has been ineffective—it shifted responsibility for worker conditions to local factories, publically declared that it would no longer support such practices, and then turned a blind-eye to its continued use. *Id.*

233. Lynn, *supra* note 195, at 34.

gaging in its profitable activities.²³⁴ Instead, only consumer action, or voting with our dollars, can change its practices.

VII. CONCLUSION

Receipt-checking, though seemingly well-settled under doctrines of false imprisonment and shopkeeper's license, has become a rallying point for advocates claiming Goliath-like big-box stores are destroying personal liberties. Most troubling, however, is the possibility that the big-box stores know the illegality of their receipt-checking practices but choose to ignore any risk in favor of a policy that reduces theft. From a pragmatic perspective, they will only do so because the economic benefit outweighs the legal risks. Retailers will take advantage of every shrinkage-reducing policy they can, but they also deliberately break the law as a matter of policy if it improves the bottom line.

As long as consumers consent to unlawful policies so they can get a better price, these stores have no incentive to change. When consumers assert their rights, even to the extent of filing false imprisonment suits against the retailer, litigation costs are so low the store can write it off as a cost of doing business. Instead, the only mechanism of change that the big-box stores will bend to is consumer dissatisfaction. Litigation may not prevent unlawful detentions related to receipt-checking, but enough consumers complaining just might.

This single tort, and its inability to keep big-box stores in check, is an example of how consumer power, instead of the law, has become the dominant check on the intrusion on personal rights. Just as multiple commentators have noted the social costs we pay for the big-box stores' low prices, so too are we paying costs in terms of personal freedoms and the law. The un-checked result of our consumerism and social conformity is that consumers must simply hand over their receipts, or pay the price by just saying "No."

234. Sheehy, *supra* note 165, at 49 ("Wal-Mart is culpable neither in business terms, nor, except as identified in the actual, pending and potential lawsuits, in legal terms.").
