Self-Help and the Rules of Engagement

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Self-help is a ubiquitous, yet understudied, concept. To the degree it has been examined, both courts and commentators have cited the prospect of violence as the central motivation for the law's limitations on the ability to exercise self-help rights. But the literature lacks a theoretical framework for self-help that can evaluate this motivation to curb violence in concert with the other variables that matter in debates over self-help. This Article fills this gap and, in so doing, shows that the common citation to the potential for violence does not play the central role that courts and commentators have assigned to it. Rather, the rules and their structure reflect the goal of funneling mistake-prone cases to state authorities for resolution. Where legal rights are clear, the law often permits self-help even at the expense of some violence. If the use of self-help can lead to these undesirable effects, the law will often seek to minimize this harm by calibrating appropriate rules of engagement instead of prohibiting the use of self-help altogether. This central claim—that forcing investments in accuracy drives much of the law of self-help—harmonizes the theory of self-help with the different ways it has been implemented and restricted. By so doing, this Article helps to clarify the dynamics of the law of self-help, while also suggesting that one of the most important roles that mandatory process plays in private law is to facilitate coordination and prevent the waste of resources in close cases.

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Introduction

The choice of legal remedies has been a central focus of economic analysis of law for several decades.[1] And justly so: why a legal entitlement should take the form of a liability rule, a property rule, or related variants of these rules, is a question that courts often face. But an antecedent question—whether a legal remedy is the exclusive remedy available—has received far less attention in the scholarly literature.[2] This is the problem of whether to permit self-help and, like legal remedies, this method of vindicating an entitlement comes in different variants.

At the polar ends of the self-help spectrum are complete freedom to vindicate a legal right or privilege and a complete prohibition on the ability to act without engaging legal process. The law never allows complete freedom to use self-help as even the most permissive of the existing rules puts limits on behavior. Those responding to a deadly threat cannot use non-necessary force, and bounty hunters who seek to apprehend a subject face similar restrictions.[3] Many areas of law, however, completely forbid the use of self-help. A victim of an accident may not take the property of the tortfeasor without a court order, and a party who is subject to a nuisance cannot trespass to remove the source of offense. When the law does permit some form of self-help, it tends to gravitate toward two salient points along this spectrum. Perhaps most famously, creditors may repossess collateral without resort to court process as long as they do not create a breach of the peace during the repossession.[4] An even more permissive rule allows victims of theft to attempt to recapture their property and to use reasonable force while doing so.[5]

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1. The seminal article in this genre is, of course, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). For an updated assessment that discusses the related literature and further analyzes the problem, see James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440 (1995). Other important papers in this vein include Gideon Parchomovsky & Abraham Bell, *Pliability Rules*, 101 MICH. L. REV. 1 (2002); and A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075 (1980).

2. For a discussion of the existing work on the theory of self-help, see *infra* notes 25, 26 and 73.

3. *See infra* notes 12, 98 & 108.

4. *See* U.C.C. § 9-609(b)(2) (2003).

5. *See infra* notes 100-105.

This Article seeks to understand the puzzles posed by this existing patchwork of rules by developing a framework for the analysis of self-help. Perhaps the most confounding of these puzzles is the different treatment of the repossession of personal property and real property. If a commercial tenant fails to pay rent, a landlord in most states cannot use self-help repossession. In *Berg v. Wiley*,[6] the Minnesota Supreme Court abrogated the common-law rule that permitted the use of self-help and, in so doing, explained the prevailing rationale for this rule: "[T]here is no cause to sanction such potentially disruptive self-help where adequate and speedy means are provided for removing a tenant peacefully through judicial process."[7]

Contrast this view with the treatment of secured goods under Article 9 of the Uniform Commercial Code.[8] Creditors have substantial leeway to retake property, even if it means trespassing on the debtor's land.[9] Policymakers could apply *Berg*'s readymade piece of reasoning to this situation—repossessions are fraught with the risk of violence and, because quick judicial proceedings are available, self-help should be prohibited in these circumstances. However, this is not the case. Instead, creditors can go so far as to break into a Boeing 747 and fly it off the tarmac without resort to legal process.[10] The prevention of violence plays little or no role in the analysis here; indeed, there is an array of evidence that Article 9 repossessions can sometimes provoke strong reactions that can lead to significant injuries and even death.[11] Moreover, the situations in which the law sometimes permits the use of violent self-help—such as the retrieval of stolen property and the use of bounty hunters to seek out those who have skipped out on bail[12]—are precisely those situations where violence is most likely to arise.

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6. 264 N.W.2d 145 (Minn. 1978).

7. *Id.* at 151.

8. U.C.C. § 9-609(b) (2003).

9. See *id.* ("A secured party may [take possession of collateral]: (1) pursuant to judicial process; or (2) without judicial process, if it proceeds without breach of the peace.") The statute does not define the parameters of the phrase "breach of the peace." Courts, however, have generally held that trespass, standing alone, does not constitute breach of the peace. *See, e.g.*, Rogers v. Allis-Chalmers Credit Corp., 679 F.2d 138 (8th Cir. 1982); Madden v. Deere Credit Serv., Inc., 598 So. 2d 860 (Ala. 1992); Gregory v. First Nat'l Bank of Or., 406 P.2d 156 (Or. 1965); Salisbury Livestock v. Colo. Cent. Credit Union, 793 P.2d 470 (Wyo. 1990).

10. *See* Stephen Joiner, *Grab the Airplane and Go*, AIR & SPACE MAG., May 10, 2010, at 36 (describing the adventures of an aircraft repossesor).

11. *See, e.g.*, *Violence Between Repo Men, Car Owners Rising*, MSNBC (Feb. 27, 2009), http://www.msnbc.msn.com/id/29427734/ns/us_news-life; *Violence Spurs Calls To Rein in the Repo Man*, NAT'L PUB. RADIO (Mar. 14, 2010), http://www.npr.org/templates/story/story.php?storyId=124654374.

12. *See* Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement From Bail Jumping*, 47 J.L. & ECON. 93, 97 (2004) (noting that "[b]ail enforcement agents . . . have the right to break into a defendant's home without a warrant, make arrests *using all necessary force including deadly force if needed*, temporarily imprison defendants, and pursue and return a defendant across state lines without the necessity of entering into an extradition process") (emphasis added) (citing Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 742 (1996)).

If the claim that the prevention of violence should be a driving factor in this area of law is not correct, what other concerns can account for these rules? The framework developed here argues that self-help rules take into account not only the costs of violence, but also the administrative costs associated with mandatory process, the costs of mistakes, and the costs of the delay associated with required process. This formulation permits analysis of interactions among these elements. For example, while some prior analysis has identified the tradeoff between administrative costs and violence,[13] the emphasis on mistakes has received little treatment despite its ability to further our understanding of what drives self-help rules and behavior. One of the chief benefits of investing in administrative costs is the ability of this investment to increase the accuracy of judicial process. It follows that this sort of investment will be of most use when the underlying rights are not clear; this logic can provide a rationale for forcing investments in accuracy through a prohibition on self-help.

The connection between the clarity of the underlying rights and administrative costs can provide insight into the different repossession rights that apply to personal and real property. The contracts between creditors and debtors that govern personal property tend to be rather straightforward because they impose few duties on the creditor. This makes breach a straightforward affair; if the debtor misses payments, this is a default. Alternatively, the leases that govern real property involve a series of reciprocal duties. Landlords have repair and maintenance duties that a chattel property creditor typically does not have. These duties complicate any assertion of a breach; a tenant who has not paid rent may have legitimate counterclaims involving the landlord's failure to repair and maintain the premises. Given the difficulty of unwinding a mistaken repossession, it makes sense that the law funnels these disputes into court.

A formulation that takes into account the interaction between administrative costs and delay, in addition to violence, can also help to understand what motivates the choice between violence-minimizing rules, such as the breach-of-the-peace standard, and rules that expressly permit the use of force. It often takes little work by a debtor to create a breach of the peace—in some jurisdictions a repossession attempt can be defeated by as little as a verbal protest.[14] A debtor who is aware of the breach-of-the-peace standard, and who would not otherwise respond to a repossession attempt with violence, can strategically defeat repossession through a verbal protest or through feigned violence.

This strategic dynamic means that the breach-of-the-peace standard entails a tradeoff between the amount of violence that occurs and the increased costs of administrative process and of delay that are necessary to deal with strategic

13. *See infra* Part I.A-B.

14. *See* Robert M. Lloyd, *Lender Liability for Wrongful Repossession*, 114 BANKING L.J. 612, 626 (1997) ("In most jurisdictions, even verbal resistance is enough to turn an otherwise peaceful repossession into a wrongful one . . . .").

debtors. But to act strategically a debtor needs to know the prevailing rule, which may not often be the case. This facet of self-help may explain some of the different rules that we observe. If debtors do not know the standard that governs repossessions, the breach-of-the-peace standard may help to minimize the amount of violence that occurs without a substantial drop in the effectiveness of self-help. In contrast, if the targets of self-help are knowledgeable about the underlying standards—a plausible assumption for commercial tenants—a breach-of-the-peace standard may not be effective because those targets can act strategically to circumvent self-help attempts. This forces policymakers to choose between permitting the use of force and prohibiting self-help altogether.

To more completely analyze the puzzles posed by self-help, this Article proceeds as follows. Part I develops a framework that identifies the tradeoffs posed by different approaches to self-help. This analysis helps to show how administrative costs, and the accuracy they provide, interact with self-help's traditional concern with violence. In addition to providing a simple model of the variables associated with self-help and the rules of engagement, this Part also discusses some hybrid approaches to self-help that would unbundle the verification and enforcement functions that state process can provide.[15] Requiring only that a court verify a claim may make sense when a claimant is likely to make inaccurate uses of self-help; but where that use of self-help is unlikely to produce violence, the state may not need to provide the enforcement function. Alternatively, obligating a party to use state enforcement, but not state verification, may be desirable when accuracy is not an issue, but violence is. This latter approach may, of course, face due process constraints, although courts have finessed this question in some contexts.[16]

Part II focuses on two problems in the heart of the law of self-help. The first is the treatment of real and personal property in the context of contractual breach. As a general rule, landlords may not use self-help when a commercial tenant breaches a lease and, instead, must use court process to effect the eviction.[17] A creditor may, however, use self-help to repossess a secured good when the debtor breaches the contract.[18] The framework suggests some reasons for this divide. The analysis shows that, even if they have the right to use self-

15. Unbundling refers to separating functions that sometimes come packaged together. In this example, legal process typically involves two functions: verification of a claim and the subsequent enforcement of that claim. Arguments for unbundling often point out that bundled functions do not necessarily need to go together, and such analyses try to show that benefits flow from separating the functions. *See, e.g.*, Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008) (arguing that partially unbundling the functions of a political executive—for example, by allowing the direct election of some cabinet officials—may provide results superior to a unitary executive who has the authority to appoint all cabinet members).

16. *See infra* Part I.D.

17. An important caveat to my analysis is that I treat residential evictions as a unique category because of their ability to produce substantial societal externalities. *See infra* Part I.

18. *See infra* Part II.A.

help, claimants may not use it. The reason why creditors may not use self-help is that it is not always successful; failed attempts can be costly to creditors by delaying the eventual repossession and by potentially hurting creditors in the process. If claimants prefer to go straight to court, a rule that permits self-help will not change any choices that the claimants make.

The breach-of-the-peace standard further complicates the question of when creditors will use self-help. If commercial tenants know the rules and can strategically stage breaches of the peace, commercial landlords may not bother attempting self-help evictions even if they are allowed to do so. Alternatively, debtors may not be as aware of the breach-of-the-peace standard and, thus, this rule—which attempts to minimize violence relative to rules that permit force—may be effective in the context of personal property. If this is the case, the rule in the real property domain is irrelevant; landlords will not use self-help, no matter the rule. But the rule matters in the context of personal property because the breach-of-the-peace standard allows the effective use of self-help. Part II also explores some alternative explanations that center on the differing requirements of accuracy across real and personal property.

The second problem turns to the retaking of stolen property. Many jurisdictions allow defendants to assert a claim-of-right to defend against robbery and burglary prosecutions.[19] This rule means that those who have their property stolen may use self-help to retrieve it without being subject to criminal liability. Moreover, they may use force to do it. The law provides a similar rule of engagement in tort, but sharply circumscribes that right to those who maintain constant pursuit of the thief.[20] This doctrinal structure poses two questions. The first is why rules governing the same behavior provide different standards in tort law and criminal law. The framework suggests that the accuracy that state process provides may provide the key to the difference. The second question is why the law permits the use of force in the self-help context, but not in the context of the contractual problems analyzed at the beginning of Part II.

Part III marshals support for the importance of accuracy in the analysis of self-help by looking to non-confrontational situations in contract law. Contract law often provides parties with a choice between seeking their own remedy and seeking one in court. The primary limitation on this choice occurs when the rights under the contract are not clear. In this situation, as Mark Gergen has argued, the law generally provides incentives for parties to perform and then sort out their rights in court.[21] These self-help rights, however, generally strive to avoid confrontation between the parties when a sum of money is at issue. When the breach is clear, a breached-against party may exercise a form of self-

19. *See infra* Part II.B.1

20. *See infra* Part II.B.2.

21. *See* Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U. L. REV. 1397 (2009) (reviewing the ability to use self-help in response to breaches of contract).

help by withholding performance or, in some cases, refusing to mitigate damages. But these situations do not involve confrontations in the sense that the breached-against party does not need to wrest anything physically away from the breaching party.

The only contractual situations in which the law encourages confrontational self-help are the repossession situations discussed in Part II.A. In these situations, the amount of the damages is relatively clear and is capped in the sense that the claimant is unlikely to do more than seize the collateral or retake the premises.[22] The principle that appears to underlie this approach is a fear of parties assessing their own damages. This concern is muted when the object of confrontation is a specific piece of property and, accordingly, the law allows at least limited uses of confrontational self-help in these circumstances.[23] This observation helps to unify the law of self-help in contract across the confrontational and non-confrontational contexts and, again, shows the primacy of clear legal rights as a driving force self-help law. Part IV concludes.

I. Framework for Self-Help

Because self-help can describe a sweeping range of rules and behaviors, it is helpful to begin by narrowing the concept to a useful scope. One attempt to define self-help calls it "legally permissible conduct that individuals undertake absent the compulsion of law and without the assistance of a government official in efforts to prevent or remedy a legal wrong."[24] Richard Epstein takes issue with this definition because the phrase "legally permissible" encompasses too much behavior to be analytically useful, as it describes ubiquitous responses to potential harm such as walking in lighted areas after dark and

22. *See infra* Part II.A.

23. These circumstances include the Article 9 repossessions addressed in Part II.A, as well as some other contractual situations that I do not address in detail. For example, most states allow the owners of storage facilities to exercise self-help when a lessee defaults. They exercise this right by selling the contents of the storage space to cover the deficiency and return the remainder to the lessee. In this situation, the damages are capped by the amount of goods in the storage space and, moreover, the damages are easy to calculate. Storage facility lien rights are codified in many states. *See, e.g.*, ALA. CODE §§ 8-15-33 to -34 (2011); ARIZ. REV. STAT. §§ 33-1703 to -1704 (2011); ARK. CODE ANN. §§ 18-16-402 to -409 (2010); CAL. BUS. & PROF. CODE §§ 21702-21702.5 (2010); COLO. REV. STAT. §§ 38-21.5-102 to -103 (2010); CONN. GEN. STAT. §§ 42-160 to -168 (2010); DEL. CODE ANN. tit. 25, §§ 4903-4904 (2010); D.C. CODE §§ 40-403 to -404 (2011); FLA. STAT. §§ 83.805-83.806 (2011); GA. CODE ANN. § 10-4-212 to -213 (2011); N.Y. LIEN LAW § 182 (Consol. 2011); N.D. CENT. CODE §§ 35-33-02 to -08 (2011); OKLA. STAT. ANN. tit. 42, §§ 193-197.1 (2010); OR. REV. STAT. §§ 87.687-87.692 (2009); 73 PA. STAT. ANN. §§ 1904-1915 (2010); R.I. GEN. LAWS §§ 34-42-3 to -4 (2011); S.C. CODE ANN. §§ 39-20-30 to -45 (2010); S.D. CODIFIED LAWS §§ 44-14-1 to -3 (2010); TENN. CODE ANN. §§ 66-31-104 to-105 (2010); UTAH CODE ANN. §§ 38-8-2 to -4 (2011); VA. CODE ANN. §§ 55-418 to -419 (2010); W. VA. CODE ANN. § 38-14-1 to -5 (2011).

24. Douglas Ivor Brandon et al., Special Project, *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 850 (1984).

sewing nametags into clothing.[25] Catherine Sharkey minimizes this problem by helpfully parsing the concept into two kinds of self-help. One type is "the conventional conception of self-help as a privilege to do something that would otherwise be legally actionable in order to prevent or cure a legal wrong",[26] and the other covers the broader scope of "prophylactic measures that one might take to protect one's property that do not infringe upon anyone else's legal rights."[27] The former type of conventional self-help is the focus of the analysis here because it describes a meaningful choice that law sometimes provides, and sometimes denies, citizens.

It is beneficial, however, to expand the scope slightly beyond Sharkey's definition for the purposes of this Article. The term "legally actionable" implies a right to go to court in lieu of using self-help. The choice that the law sometimes presents between preventing or curing a legal wrong on one's own and enlisting the state does not always require a court. Using the state to evict a tenant requires a court order before the sheriff can effect an eviction,[28] but requesting police assistance in the retrieval of stolen property does not, and in at least some cases, the police can assist in repossessions without court process.[29] It is also helpful to delineate the two functions embedded in state process. The first is verification—an evaluation whether the claimant has a right to the remedy sought—and the second is enforcement—the use of an agent of the state to obtain the sought-after remedy. Accordingly, the framework here addresses situations where someone has the right or privilege to do something that could also be done though an agent of the state once a court or other state entity has verified the claim.

Having defined the concept, it is also important to define the scope of the analysis. Much of the commentary, and hostility, to the use of self-help has focused on the residential context.[30] There are strong reasons for prohibiting the use of self-help in this context, not the least of which is that putting tenants on

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25. *See* Richard A. Epstein, *The Theory and Practice of Self-Help*, 1 J.L. ECON. & POL. 1, 2-3 (2005).

26. Catherine M. Sharkey, *Trespass Torts and Self-Help for an Electronic Age*, 44 TUL. L. REV. 677, 683 (2009).

27. *Id.*

28. *See infra* Part II (discussing how the law limits the use of self-help in the context of repossession of real property).

29. *See* Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (5th Cir. 1980). In *Menchaca*, the repossessors summoned police officers after the debtor, Menchaca, resisted their attempts to take his car. An officer at the scene informed the debtor that "repossession was a civil matter and that the only reason the police were there was to quiet a reported disturbance." *Id.* at 510. The debtor alleged, but all the officers denied, that one officer also said she was going to arrest the debtor if he didn't give the repossessors the keys. *Id.* at 511-12. Even though such action by the officers went beyond mere presence, the Fifth Circuit ruled it did not constitute state action vis-à-vis the repossession. *Id.* at 513; *see also* Barrett v. Harwood, 189 F.3d 297, 302-03 (2d Cir. 1999) (same); Jones v. Gutschenritter, 909 F.2d 1208, 1213-14 (8th Cir. 1990) (same).

30. *See, e.g.*, Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 379-83; (2006); Mary B. Spector, *Tenant's Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135 (2000).

the street with little warning can strain social safety nets in a way that exceeds any benefit that can come with quicker evictions.[31] Given these broader externalities, I exclude the residential context from the analysis, and instead focus on those areas where the chief potential externality derives solely from the violence that self-help can produce. For example, commercial evictions, while they usually mean the lamentable death of business, are far less likely to impose the broader societal externalities associated with residential evictions because the commercial versions do not typically place people into the social safety net. The same can also be said of the other areas I analyze, such as stolen property and repossessions of personal property.[32]

A. The Decision To Use Self-Help

To identify the tradeoffs that the decision to use self-help entails, this Section develops a simple model of the choices that self-help presents. This basic model attempts to capture the decisions that a creditor and a debtor can make once the creditor believes that a debtor has defaulted on a payment obligation. The goal of the simple model initially is to identify the motivations that factor into creditor behavior. The model then turns to the potential disconnect between creditor motivations and those that might be more broadly desirable to society. By pinning down these results and tradeoffs, the model aims to explain the existing rules and some of the puzzles they present.[33]

The basic model uses three variables to capture the important parts of the creditor's self-help decision. The first is the value of the repossessed good at different points in time. The ability to use self-help presumably conveys a benefit to those who use it, and at least part of this benefit comes from a quicker return of the underlying asset to productive use.[34] By avoiding the delay that comes with court process, a creditor can sell the repossessed good

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31. *See* Lewinsohn-Zamir, *supra* note 30, at 382 ("The goal of restrictions on eviction is to prevent the grave, negative effects on people's welfare caused by *immediate* eviction.") (emphasis added); *see also* Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on Freedom To Contract*, 24 J. LEGAL STUD. 283 (1995) (justifying unconscionability and usury laws on the basis that eliminating these doctrines would put a strain on social safety nets that would exceed the costs associated with the higher prices that unconscionability and usury laws impose).

32. One could argue that repossession of chattel property can pose some of these risks. For example, vehicle repossession may make it difficult for people to get to their jobs and lead to termination, which could throw people into the social safety net. This outcome is certainly possible, but the risk appears less dire than in the residential context, if only because the causal chain is longer in the context of chattel property.

33. Because the model seeks to understand the existing rules, it is descriptive rather than normative. There is a danger with this descriptive view because this approach makes the implicit assumption that the existing rules are in place because they are desirable. But this is not always the case. Rules can sometimes be a reflection of interest politics rather than of wise or efficient policy decisions. *See* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (suggesting that the process of drafting uniform laws, such as the Uniform Commercial Code, is driven by interest groups rather than by efficiency).

34. *See* Epstein, *supra* note 25, at 28-29.

more quickly, and a landlord can re-let property sooner. As the benefit from the redeployment of the asset increases, one should expect creditors to favor the use of self-help. The time value of the asset implies that failed self-help attempts can be costly. The creditor will have lost time while trying to use self-help and will still need to go to court to gain possession of the asset. This phenomenon means that, even when creditors have the right to use self-help, they may not use it because the cost associated with failed attempts will make it more attractive to go straight to court.

The second variable is the harm caused by violence. The potential for violence that self-help creates is, of course, often cited as the motivating rationale for the prohibitions on the practice. Much of the prior analysis suggests that self-help situations can lead to violence, and since that would be an undesirable outcome, they should be avoided.[35] Understanding what this means requires exploring a subtlety associated with potentially violent self-help. If the creditor who exercises self-help is the only victim of any resulting violence, the prospect of violence serves as a deterrent to using self-help even if the law permits its use.[36] Creditors can be expected to be wary of self-help if there is a significant chance that they would be injured during the attempt. But to the degree that the violence gets externalized to others—such as to the target of self-help or third parties—violence will not deter creditors and other potential users of self-help.[37]

The last variable is the administrative cost associated with state process. This administrative cost can be viewed as an investment in accuracy.[38] As the amount of resources devoted to the judicial process increase, we can expect that process to produce more accurate results. State intervention runs across a spectrum of investment in this type of process. If a victim of theft calls the police to investigate the alleged crime, the amount of confirmation and investigation that the authorities conduct before using force against an alleged

35. *See, e.g.*, Sharkey, *supra* note 26, at 683 ("The law seems on solid, uncontroversial ground in discouraging self-help where it would lead to violence or a breach of peace.").

36. There are various ways that the cost of violence could be internalized to the creditor. The most obvious is that the creditor is the target of the violence and thus directly experiences its negative effects. The cost of the violence could also be internalized through the imposition of criminal or civil fines or damages as a result of the violence. For example, while commercial law may allow the use of self-help in the sense of prohibiting a contractual claim by the debtor, the law could criminalize this sort of violence or make a creditor liable in tort for assault and battery. In this situation the creditor is likely to internalize the cost of the expected fines or damages in making the decision whether to use self-help.

37. Another important point is that the effect of violence needs to be a relative inquiry; violence will not be eliminated by requiring state actors to do the work that creditors and landlords would otherwise do. While it is a reasonable assumption that the incidence of violence will be lower when state actors perform evictions and repossessions—this may be due to having more resources as well as to the expressive power that state actors wield—the measure that should concern the policy analyst is the relative difference between the violence that occurs when private and public actors attempt the same action.

38. There is a long line of research on the relationship between accuracy and the cost of legal process. *See, e.g.*, Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1 (1994).

thief may be minimal. Alternatively, a full-blown trial before the state can mean the use of intensive resources before the state authorizes a remedy. And, of course, there are intermediate options that the state sometimes provides. A prominent example here is an unlawful detainer action, which provides an accelerated process for confirming a violation of a lease and expedites the eviction process with the aid of the state.[39] The expedited process has the benefits of decreasing the idle time of the underlying asset and diminishing the potential for violence, but this comes at the expense of the diminished accuracy that a quicker proceeding entails.[40] The essential tradeoff with regards to the administrative cost is whether the gains in accuracy warrant the costs of obtaining that accuracy.[41]

The model uses a three-stage process to capture the self-help decision. In the first stage, which occurs after an alleged default, the creditor chooses whether to use self-help or to go immediately to court. If the self-help attempt is successful, the creditor receives the benefit associated with redeployment of the asset immediately—call this E_1. When creditors choose to go directly to court, the creditor must pay an administrative fee and wait for a state agent to repossess the good during the second stage—in which case the payoff is the gain of getting the good in the second period, E_2, minus the administrative fee associated with court, A. For those creditors who have tried and failed to use self-help, they pay the administrative cost in the second stage and the state agent repossesses the good in the third stage. The payoff here is the gain from getting the good in the third period, E_3, minus the administrative cost, A, and the harm associated with violence, H. Figure 1 below illustrates this choice.

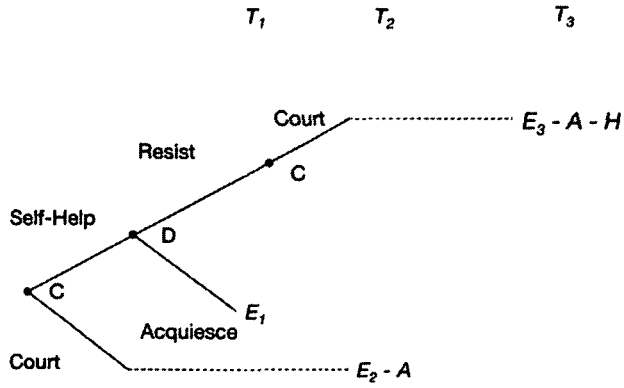
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39. *See* Epstein, *supra* note 25, at 28.

40. The model assumes that the creditor pays the costs associated with administrative process, but this does not need to be the case. Potential approaches would be for each party to pay their own costs or to use a loser-pays system, which would allocate the administrative cost to the non-prevailing party. Alternatively, the state could subsidize some of the cost associated with the process, although this system could lead to overuse of process. *See* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive To Use the Legal System*, 26 J. LEGAL STUD. 575, 591-92 (1997). In discussing the effect state action can have on the volume of suits, Shavell states that if we want "to encourage suit for certain types of low magnitude harms . . . one could envision the adoption of subsidies . . . to stimulate legal action." *Id.* at 591. This type of policy response already exists in our society. For example, Shavell notes the use of legal aid programs that "have been employed to subsidize litigation . . . to spur certain types of litigation." *Id.* at 592.

41. There has been at least one attempt to estimate the extra administrative costs associated with a prohibition on self-help on the assumption this mandatory rule will increase the cost of credit to debtors. *See* Robert W. Johnson, *Denial of Self-Help Repossession*, 47 S. CAL. L. REV. 82 (1974) (presenting data that purport to show that a mandatory rule can dramatically increase the cost of automobile lending). The author, however, does not appear to take into account the potential gains from the increase in accuracy that may accompany mandatory legal process.

Figure 1: Creditor's Choices Regarding Use of Self-Help



This structure clarifies the tradeoffs that a creditor faces when making the self-help decision.[42] Choosing self-help in the first stage provides the potential benefit of quicker access to the good without having to pay administrative costs balanced against the potential for violence, having to pay the administrative costs in the second stage, and having to wait until the third period to obtain the good. Going directly to court in the first period means that the creditor incurs the certain benefit of obtaining the good in the second period as well as the certain administrative cost of going to court. The potential for violence should factor into the creditor's decision. There is, of course, some uncertainty about this prospect and the creditor must assign a probability that the debtor will respond with violence if confronted.[43] Assuming that the creditor can make accurate assessments, on average, of the propensity of debtors to be violent, a rule that permits the use of self-help should align the incentives of the creditor with the goals of societal welfare. When the prospect of violence is low, which means that self-help is likely to be successful, the creditor can save the administrative burden of going to court by using self-help. Conversely, if the chance of violence is high and the administrative cost is not too burdensome, a creditor will prefer to go to court even if the law permits self-help.

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42. One can use the notation suggested in the text to clarify the tradeoffs. Let E_1, E_2, and E_3 represent the value of the creditor regaining possession of a good in periods one, two, and three, respectively. The value of time implies that $E_1 > E_2 > E_3$. For convenience, I denote the difference between E_1 and E_2 as ΔE_{12} and the difference between E_1 and E_3 as ΔE_{13}. Let H be the harm that occurs from violence and let A be the administrative cost of going to court. If there are q percent non-violent debtors and $(1 - q)$ percent violent debtors, the creditor will use self-help whenever: $qE_1 + (1 - q)(\Delta E_{13} - H - A) > E_2 - A$. Solving for q provides the indifference point $q^* = (\Delta E_{23} + H)/(\Delta E_{13} + H + A)$. It is straightforward to see that as H decreases a creditor will prefer self-help and as A increases a creditor will tend towards self-help.

43. The basis for this assumption is that creditors, and others similarly contemplating the use of self-help, will have some experience with assessing the likelihood of violence. The creditor will probably not be able to predict whether a specific debtor is likely to be violent, but the creditor should have a sense of the average propensity to respond violently in the entire population of debtors.

This picture is, of course, too rosy because the creditor's incentives will sometimes diverge from those of society at large. The assumption that a creditor will internalize the cost of violence may be a source of this potential disconnect. Indeed, the concern that the use of self-help will lead to breaches of the peace suggests that the spillover violence can and does occur when people use self-help.[44] This sort of violence can be external to the person using the self-help. For example, the creditor could be the one using violence against the debtor and, as long as these actions do not result in punishment, the creditor is unlikely to take this harm into account.[45] Likewise, third-party violence can arise as a consequence of self-help. Repossessing a car in the middle of the night when few people are around likely poses a lower risk of violence when compared to doing so in the middle of the day when many more people may be present to object—perhaps violently—to a repossession attempt.[46] One of the disadvantages of a rule that authorizes force is that it does not incentivize taking sufficient precaution when choosing the time and place of the self-help attempt.

If we assume that a creditor will not internalize the cost of the violence, a mismatch between the creditor's incentives and societal incentives becomes evident.[47] The creditor will not take the likelihood of violence into account in deciding whether to use self-help and, consequently, will use self-help at a

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44. *See, e.g.*, Hatfield v. Gracen, 567 P.2d 546, 548 (Or. 1977) (involving a defendant attempting to recapture stolen property who wounded an innocent bystander above the eye with stray bullets).

45. In 2009, a sixty-seven-year-old man was shot and killed by someone attempting to repossess his car at 2:30 a.m. *See* Jay Reeves, *Deadly Violence Revs Up with Repossessions*, CHI. TRIB., Mar. 1, 2009, § 1, at 10; *see also* Maria Cramer, *Repo Men, Interrupted: Brothers Arrested After Allegedly Taking Their Job Too Far*, BOS. GLOBE, May 23, 2007, http://www.boston.com/news/local/massachusetts/articles/2007/05/23/repo_men_interrupted (concerning repo brothers facing charges of assault and battery with a dangerous weapon during attempted repossession).

46. Some states require a repossessor to take precautions to avoid any breach of the peace. *See, e.g.*, Gen. Fin. Corp. v. Smith, 505 So.2d 1045, 1048 (Ala. 1987) ("By implication, a secured party is under a duty to take those precautions which are necessary at the time to avoid a breach of the peace."); Nichols v. Metro. Bank, 435 N.W.2d 637, 640 (Minn. 1989) (noting that "[t]he conditional nature of the secured party's self-help remedies and the language of [the self-help repossession statute] indicate that a secured party must ensure there is no risk of harm to the debtor and others if the secured party chooses to repossess the collateral by self-help methods"); MBank El Paso, N.A. v. Sanchez, 836 S.W.2d 151, 153 (Tex. 1992) (noting that former "section 9-503 of the U.C.C. imposes a duty on secured creditors pursuing nonjudicial repossession to take precautions for public safety"); Rand v. Porsche Fin. Servs., 167 P.3d 111, 120 (Ariz. Ct. App. 2007) (holding that Arizona's self-help repossession statute, based on U.C.C. § 9-609, "impose[s] the specific safeguard that a creditor not breach the peace if that creditor elects to forgo judicial process when repossessing collateral"); Sammons v. Broward Bank, 599 So.2d 1018, 1020 (Fla. Dist. Ct. App. 1992) ("The duty to repossess property in a peaceable manner is specifically imposed on a 'secured party' by the uniform commercial code. . . .").

47. Creditors may use agents to repossess goods and this approach allows for externalization of a sort because the creditor will not be the target of any potential violence. It is not clear, however, that societal welfare turns on the use of an agent as opposed to creditors acting on their own. As long as the creditor-principal and repossessor-agent jointly internalize all the expected benefits and harms associated with repossession, we should expect the parties to only use self-help when it produces a net benefit.

higher rate than if the cost of self-help were internalized. In this situation, the creditor will only go directly to court when self-help is unlikely to be successful and the delay caused by waiting from the second period to the third period to repossess the good imposes a significant cost. This may, for example, be the case if an attempt to use self-help antagonizes the debtor in a way that causes the debtor to move or destroy the good in between the second and third periods. When creditors do not internalize the costs of violence, a rule that prohibits the use of self-help may be preferable to a rule that permits it because it will prevent the externalized violence from occurring. This will not always be the case, however. Where the incidence of violence is relatively low, it may be worth enduring the cost of that violence in order to avoid the administrative and delay costs associated with the requirement that creditors take all debtors to court.

A second reason that the incentives of the creditor may diverge from those of broader society is that the creditor does not have to pay some or all of the costs of mistakes. This is a problem that has, thus far, received little attention in the literature on self-help law. Nevertheless, it is a concern because a creditor may mistakenly use self-help, and there is a cost to correcting those mistakes. The use of court process should, all other things being equal, reduce the likelihood of these mistakes. Indeed, this is an underappreciated aspect of prohibitions on self-help; these restrictions force creditors (and other potential users of self-help) to make investments in accuracy that they might not otherwise make. These forced investments can prevent the costs of mistakes that creditors might not otherwise be motivated to make. This aspect of the self-help decision suggests that when a group of claims is particularly prone to mistakes, prohibitions, or limitations, self-help rights may be appropriate.

B. The Breach-of-the-Peace Standard

Policymakers have choices available to them that go beyond the binary choice between a blanket prohibition on self-help and the unrestrained ability for people to seek out their own remedies. The breach-of-the-peace standard is an intermediate option that not only permits some degree of self-help, but also requires a user of self-help to withdraw from the attempt once the potential for violence materializes. This standard is a common one; it applies to repossessions under Article 9, and it is the common-law rule governing commercial evictions.[48] This is also the implicit rule in any situation where

48. *See* U.C.C. § 9-609 (2003). In *Berg v. Wiley*, 264 N.W.2d 145 (Minn. 1978), the Minnesota Supreme Court stated the breach-of-the-peace common-law rule:

> [A] landlord may rightfully use self-help to retake leased premises from a tenant in possession without incurring liability for wrongful eviction provided two conditions are met: (1) The landlord is legally entitled to possession, such as where a tenant holds over after the lease term or where a tenant breaches a lease containing a reentry clause; and (2) the landlord's means of reentry are peaceable. Under the common-law rule, a tenant who is evicted by his landlord

self-help has not been prohibited, but where the use of force has not been authorized. Thus, the ability to set off damages in contract and the ability to respond to criticism through additional speech[49] can both be viewed as instances of the breach-of-the-peace standard. Nonetheless, unlike express breach-of-the-peace standards, these implicit rules do not authorize otherwise illegal conduct, such as trespass.

The analysis in the previous Section proceeded on the assumption that the targets of self-help could be violent or non-violent. Assume, for the moment, that the debtors in the model act sincerely in the sense that the governing rule has no effect on their behavior—they either respond violently or not based on their preference for doing so.[50] In this case, the breach-of-the-peace standard can produce less violence than a more permissive self-help rule, insofar as creditors do not fully internalize the costs of violence and are able to withdraw from self-help attempts once the potential for that violence materializes. As long as the law imposes a significant punishment for attempting self-help that causes a breach of the peace, creditors will be able to reap the benefits of self-help when used against non-violent creditors and avoid the harm that could occur in interactions with violent debtors because they will withdraw from these attempts.

But the governing rule can be expected to affect the behavior of some self-help targets. The breach-of-the-peace standard makes it difficult for a creditor to make a credible threat to use force, provided that the debtor is aware of the relevant law. When a debtor knows that the prospect of a breach of the peace can stymie an attempt at repossession, that debtor can create volatile circumstances, even though that debtor would acquiesce if the creditor credibly threatened the use of force to repossess the good. This possibility of strategic-debtor behavior means that—insofar as debtors can and do act strategically—the breach-of-the-peace standard creates costs relative to a more permissive regime. These costs derive from the need to use judicial process on the subset

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> may recover damages for wrongful eviction where the landlord either had no right to possession or where the means used to remove the tenant were forcible, or both.

Id. at 149 (citation omitted). The court went on to state that, via a reading of the common law, the law disfavors the use of self-help where it is likely to result in breaches of the peace. *Id.* at 150. Some courts follow a similar common-law rule. *See, e.g.*, Brown v. State Cent. Bank, 459 F. Supp. 2d 837 (S.D. Iowa 2006); Greelish v. Wood, 914 A.2d 1211 (N.H. 2006); Smith v. Reeder, 21 Or. 541 (1892) (establishing the common-law rule as followed in Oregon); Deroshia v. Union Terminal Piers, 391 N.W.2d 458 (Mich. Ct. App. 1986).

49. Douglas Lichtman, *How the Law Responds to Self-Help*, 1 J.L. ECON. & POL'Y 215 (2005); *see also* Kenneth Dam, *Self-Help in the Digital Jungle*, 28 J. LEGAL STUD. 393 (1999) (addressing the use of speech in cyberspace as a means of self-help).

50. For a survey of violent incidents that have occurred during repossessions, see JOHN W. VAN ALST & RICK JURGENS, NAT'L CONSUMER LAW CTR., REPO MADNESS: HOW AUTOMOBILE REPOSSESSIONS ENDANGER OWNERS, AGENTS, AND THE PUBLIC (2010), *available at* http://www.thenewspaper.com/rlc/docs/2010/repomadness.pdf.

of debtors against whom self-help would be effective but for their strategic behavior.

This possibility suggests that debtors vary on two dimensions: their inclination to respond to self-help with violence and their inclination to act strategically. Acting strategically requires both the knowledge that the breach-of-the-peace standard governs the rule and a willingness to stage violence to avoid repossession. This simplified characterization of self-help situations means that there can be four types of debtors: those who are non-violent and non-strategic, those who are non-violent and strategic, those who are violent and non-strategic, and those who are violent and strategic.[51]

Assuming that the costs of violence get fully externalized, the rules of engagement will produce different results from these four types of debtors. Under a permissive rule that allows a creditor to use force during self-help attempts—thus making violence a credible threat—the strategic element of debtor behavior is of no consequence. The creditor will simply decide whether to use self-help based on an assessment of the likelihood that the debtor will react with violence. When the strategic, non-violent debtor stages a potential breach of the peace, the creditor will call the bluff by proceeding with the attempt to use self-help. The potentially unnecessary costs associated with this rule are the same as they are under this rule when the only dichotomy is violent and non-violent, namely, the costs of violence and the opportunity costs associated with the delay in repossessing goods. A complete prohibition on self-help will also render the strategic element moot. Under this rule, the creditor would need to bring all four types of debtors directly to court and this would implicate the familiar tradeoff between the avoided costs of violence and the administrative costs to effectuate repossessions against debtors who would acquiesce to a self-help attempt.

The strategic dynamic matters, however, for the breach-of-the-peace standard. In this situation, the strategic debtor can avoid a self-help attempt by staging violence. In particular, the non-violent, strategic debtor—against whom forceful self-help would be effective—will be able to thwart repossession. The desirability of this rule can turn on how large a percentage of the targets of self-help fall into this category. When that category is large, the breach-of-the-peace standard may produce higher social costs relative to a more permissive regime because it requires creditors to use judicial process to effect repossessions when a credible threat of force would allow self-help to be successful. Indeed, the utility of the breach-of-the-peace standard depends on the absence of strategic debtors. If all non-violent debtors were strategic, the breach-of-the-peace

51. One can use this assumption to update the notation. Let p be the proportion of non-strategic debtors, which implies $(1 - p)$ strategic debtors. The creditor will be indifferent between going to court and using self-help under the breach-of-the-peace standard when $[pq]^*$, the expected likelihood that a debtor is non-violent and non-strategic, is equal to $\Delta E_{23} / (\Delta E_{13} + A)$.

standard would be no different than a complete prohibition because creditors would never use self-help.

These dynamics suggest the tradeoffs that matter for choosing among self-help regimes that are permissive (rules that permit self-help with some degree of force), prohibitive (rules that prohibit the use of self-help altogether), and intermediate (rules that allow self-help without the use of force). If creditors internalize the costs of some amount of violence, a permissive regime may not be all that harmful even when there are a high number of violently inclined debtors because creditors will avoid the use of self-help. Problems may arise, however, if the costs of violence get externalized and a permissive regime provides incentives for creditors to engage in self-help. Under these conditions, a contextual regime, such as the breach-of-the-peace standard, is generally preferable because it avoids the externalized violence that a permissive regime tolerates, while allowing for limited use of self-help. But the potential for strategic behavior may make a contextual regime inferior when a significant portion of non-violent debtors acts strategically. The choice between a contextual regime and a permissive regime is reducible to a tradeoff between the unnecessary administrative and delay costs under a contextual regime and the externalized costs of violence under a permissive regime.

Under the assumptions of the model, there is little or no advantage from a prohibition on self-help. When the proportion of violent debtors is high, there are appropriate concerns about a permissive self-help regime because it can result in violence. But using the breach-of-the-peace standard should always be superior to a prohibition because it allows a creditor to choose between going to court directly and using self-help. When the proportion of violent debtors is high, one should expect creditors to eschew self-help because it is unlikely to be effective. There may, however, be some justifications for a prohibition, or at least some reasons for indifference. If creditors are inclined to go to court due to the high incidence of either violence or strategic behavior, there is no difference between a prohibition and the breach-of-the-peace standard. Both rules produce the same result and, consequently, a prohibition does not result in any social loss or inefficiency. Alternatively, the model may be incorrect in assuming that, under the breach-of-the-peace standard, a creditor can withdraw before any violence materializes.[52] It may be that just showing up to attempt a repossession is sufficient to trigger violent reactions. To the degree that this effect occurs, it would justify a prohibition of the breach-of-the-peace standard.

52. *See* Aisling Swift, *Man Claims Self Defense After Hitting Repo Man with a Bat*, NAPLES NEWS (Fla.), Feb. 14, 2010, http://www.naplesnews.com/news/2010/feb/14/man-claims-self-defense-after-hitting-repo-man-bat.

C. *Administrative Costs and Accuracy*

Shavell has developed two points that bear on the role of administrative costs in the use of self-help. First, he has shown that subsidization of legal administrative costs can lead to overconsumption of legal services. This intuitive result has led some scholars to justify these subsidies on the basis of the positive externalities that they produce. For example, by allowing published precedent that gives both public and private actors the opportunity to better order their affairs, litigants can produce benefits for third-parties.[53] Second, Shavell, along with Kaplow, has written a series of papers on the interaction of accuracy and administrative costs. In general, accuracy has been presumed desirable because it incentivizes parties to make better investment decisions.[54] This accuracy, however, is costly and it is generally desirable to cap an additional marginal investment in accuracy at the point where it equals the expected marginal precaution benefit.[55]

Both these points have implications for self-help. Given that the potential for breaches of the peace provide a significant rationale for prohibiting self-help, subsidizing the cost of court may be warranted because it can prevent the negative externalities that come with private violence. There are several avenues for offering these subsidies. One is to lower the amount that the party seeking the remedy has to pay in order to gain access to court. Another is to devote more resources to cases that are especially likely to generate the negative externalities associated with self-help. This policy mechanism can produce quicker outcomes relative to those cases that do not receive extra resources and this may be one justification for the expedited process that applies to evictions.[56]

The payoff from a higher degree of accuracy is the reduction in costs from having fewer mistakes to unwind. If a repossession agent seizes the wrong car through self-help, it will be costly to return it and to seize the correct vehicle. A creditor's incentive to invest in accuracy may, however, diverge from the broader societal interest in accuracy. Take, for example, a disputed lease term. A landlord may disagree with a tenant who holds back rent on the basis that the property needs some repairs to be habitable. If landlords can attempt self-help repossession, and do not fully internalize the costs of mistakes, landlords will be quick to use self-help in close cases because they need not pay all the costs associated with unwinding the mistaken use of self-help. There is also good

53. *See, e.g.*, Shavell, *supra* note 40, at 595-96; *see also* Ehud Kamar, *Shareholder Litigation Under Indeterminate Corporate Law*, 66 U. CHI. L. REV. 887 (1999) (applying Shavell's argument in the context of corporate law).

54. *See* Kaplow & Shavell, *supra* note 38, at 2-3.

55. *But see* Scott A. Baker & Anup Malani, *Does Accuracy Improve the Information Value of Trials?* (Nat'l Bureau of Econ. Research, Working Paper No. 17036, 2011), *available at* http://www.nber.org/papers/w17036.pdf.

56. *See* Epstein, *supra* note 25, at 28.

reason to believe that landlords will not fully internalize the cost of the harm from the mistaken use of self-help because capturing the damages associated with a wrongful eviction can be quite difficult.

To make this concept more concrete, imagine that a landlord uses self-help to evict a retailer and, after several months of litigation, the retailer establishes that the eviction was improper. To internalize properly the cost of the harm the landlord would, at a minimum, need to compensate the retailer for lost profits, lost goodwill, the costs of rehiring employees, and the costs of repairing supplier relationships. These types of costs can be quite difficult to measure and, insofar as landlords do not have to pay them, one can expect them to be more aggressive than society would prefer when it comes to self-help.

In these cases, obligating an investment in accuracy could be desirable. We should thus expect the case to be weaker for self-help when the legal entitlements are unclear because requiring parties to go to court in these instances increases the return from having a third party make a neutral call on the dispute. This concern allows for some refinement of the analysis developed above.[57] Prior to incorporating accuracy concerns, the relevant variables were the benefits provided by self-help as contrasted with the delay associated with court process, the cost of any such process, and the harm associated with violence. The discussion of accuracy introduces another term to this formulation: the expected cost of a mistake given the investment in administrative costs. In other words, the likely cost associated with correcting mistakes is a function of the administrative cost. As that cost increases, the cost associated with mistakes should decrease. Where the investment provides a high return in terms of decreased mistake, the case for compelling that investment by a creditor becomes stronger.

D. Unbundling the Role of the State

To this point, the analytical discussion has bundled two state roles in the provision of remedies: verification and enforcement. These two functions

57. As an aside, there may also be a value to having a third party decide a dispute even if the process is not all that accurate. Richard McAdams has argued that the law can play a coordinating function by providing a focal point that parties can use as a basis for their behavior. *See* Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory and Law*, 82 S. CAL. L. REV. 209, 234 (2009); *see also* Richard H. McAdams & Janice Nadler, *Testing the Focal Point Theory of Legal Compliance: The Effect of Third Party Expression in an Experimental Hawk/Dove Game*, 2 J. EMPIRICAL LEGAL STUD. 87 (2005) (providing experimental evidence that messages that highlight an equilibrium can produce that outcome even when subjects have conflicting interests). In the context of self-help, parties may disagree strongly over whether there has been a breach of the agreement that gives rise to self-help and this disagreement may contribute to the violence that self-help attempts can produce. The parties may also disagree over the amount of the proper remedy. This is unlikely to occur when a claim involves a specific physical item, such as a car, but where a claim is for money damages, the parties could easily disagree over the proper amount, even if they agree that a breach has taken place. In these contested cases, there may be value to a judge, or other state actor, making a call on who is correct because it serves as a neutrally-determined focal point. This focal point could mitigate the tension and make it easier to obtain non-violent resolutions.

typically go together; in most scenarios, a court verifies a claimant's right to a remedy and a law enforcement agency, such as the police or the sheriff, obtains the remedy for the claimant. But there is no compelling reason for why the law should require claimants to make use of both of these functions when it places limitations on the use of self-help. For example, the law could permit self-help, but only once a court has certified that the claimant does, in fact, have the right to the sought-after remedy. Likewise, the law could permit a claimant to use law enforcement to obtain a remedy without state verification of the claim.

Both of these unbundled approaches to remedies may appear in practice. In situations in which the law requires state verification for a remedy, it is not clear whether the law enforcement becomes necessary to obtain the remedy. For example, once a court has rendered a judgment—say, that eviction is proper or that a damages award of a given amount is appropriate—the losing party may agree to take the required action without being forced by the state to do so. A firm that cares about its reputation may vigorously fight an allegation of contract breach, but once a decision has been rendered, it will pay the claim without the aid of law enforcement to avoid a potentially adverse effect on their reputation that could come from defying a court order.[58] Alternatively, the state may only play an enforcement role in helping obtain a remedy. An example here might be the retrieval of stolen property, where an alleged thief's possession of the stolen property can be sufficient verification for the police to return that property to the original owner. Likewise, in some self-defense scenarios, either the police or the person under threat may have the privilege to use force. When the police act in these scenarios, they bypass, or at least minimize, the verification role that courts often play.

The analytical framework of the model suggests the situations in which unbundling the verification and enforcement scenarios may be desirable. Mandating that a claimant use the state to verify a claim makes the most sense where the private benefits of an accurate interpretation of the underlying claim diverge from the social benefits of accurate interpretation. Imagine, for example, a dispute between a landlord and a tenant over an alleged failure to make some repairs to the property. The tenant withholds part of the rent on the basis that doing so is justified to pay the cost of the repair. The landlord disagrees with that interpretation and seeks to evict the tenant on the grounds of default.[59] If self-help were permitted, the landlord could try and evict the tenant

58. *See* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1738 (2001) (noting that "reputational sanctions are usually sufficient to induce merchants to promptly comply with arbitration decisions unless they are bankrupt or in severe financial distress"); David Charney, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 411 (1990) ("Compared to obtaining a judicial levy on the breaching party's assets, sanction by reputational expulsion is cheap, swift, and sure.").

59. Where the tenant remains in possession and the landlord sues for possession for unpaid rent, the implied warranty of habitability may be asserted as a defense. *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979), sets forth the standard for a tenant's right to withhold rent:

because the benefit to the landlord of getting a new tenant could be substantial. But it is not clear that this approach is desirable from a societal perspective because the tenant may have a valid claim for withholding the rent. To vindicate this claim the tenant would need to go to court, thus obviating the savings from self-help. It may, accordingly, make sense to require parties in this situation to go to court to verify the claim because it eliminates the prospect of violence and delay that come with failed or unbeneficial attempts at self-help. Where the prospect of violence is minimal, it may be appropriate to unbundle the verification function from the enforcement function. That is, the state could allow the claimant to obtain the remedy on his or her own once a court has issued a judgment.

The enforcement role of the state seems to be directed at minimizing the violence that can come from self-help. State enforcement appears better able to deter the potential targets of self-help from reacting violently. As discussed earlier, the reasons for this greater deterrent effect may be that the state can use force against potentially violent debtors; and there may also be an expressive effect of the law that mutes violent reactions to state agents relative to private enforcers.[60] Assuming that this stronger deterrent effect exists, it may be desirable to unbundle the enforcement function from the verification function when the chief concern is violence rather than inaccurate interpretation of claims by private parties. For example, when default is not in dispute in the repossession context but there is a prospect for violence during the repossession, the ideal policy solution may be to allow the state enforcement of the claim without courts playing a verification role. This approach would save the administrative costs associated with court while minimizing the violence that self-help can bring.

Unbundling enforcement from verification does, however, face a substantial legal barrier. Due process requirements often prohibit the state from using its enforcement function without providing notice and a hearing. The Supreme Court has elaborated the contours of the due process requirements in the context of commercial self-help. In *Fuentes v. Shevin*,[61] which is the high-

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> If the landlord totally breached the implied warranty of habitability, the tenant's obligation to pay rent would be abated in full. . . . If the landlord had not breached the warranty at all, no part of the tenant's obligation to pay rent would be abated . . . If there had been a partial breach of the warranty, the obligation to pay rent would be abated in part only.

Id. at 907. Some states have codified the right of a tenant to withhold rent under the implied warranty of habitability doctrine. *See, e.g.*, Covington v. McKeiver, 88 Misc. 2d 1000, 1000 (N.Y. App. Term 1976) ("In a proceeding for nonpayment of rent in which tenant raised a defense of breach of the implied warranty of habitability, it was found that tenant justifiably withheld payment of rent because of the condition of the premises. Since tenant was not in default, it [is] improper to award judgment of possession to landlord." (citing REAL PROPERTY ACTIONS AND PROCEEDINGS LAW § 711, at 2)).

60. *See supra* note 37.

61. 407 U.S. 67 (1972); *see also* Robert E. Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807, 819 (calling *Fuentes* the "high-water mark" of procedural due process).

water mark in this line of cases, the Court held that an adversarial hearing was required before any deprivation of any possessory interest that an individual had in a tangible piece of property.[62] The Court retreated from this expansive proposition two years later in *Mitchell v. W. T. Grant Co.*,[63] in which it held that a Louisiana sequestration procedure did not violate the Due Process Clause even though it allowed a creditor to seize property after a default in the absence of an adversarial hearing before the seizure.[64] The Court's analysis has focused on the balancing the benefits of self-help—principally the quick seizure and the ability to limit destruction of the property[65]—against the relative accuracy benefits of adversarial hearings.[66] The Court found that Louisiana's procedure satisfied the requirements of due process because the ex parte approach it used minimized the risk of error. But an important reason why the Court believed the procedure provided sufficient protection was the active involvement of a judge, rather than mere court functionaries, in issuing the sequestration order.

This analysis of unbundling suggests two conclusions about the prevailing approach to due process requirements. First, unbundling the enforcement function from the verification function is not possible in some situations under the *Mitchell* standard because in order to use a state agent to effect a repossession or recapture, the requirements of due process specify that there must be some judicial involvement. This requirement only appears to be relaxed when expedient circumstances—such as a suspect getting caught red-handed with a stolen item—allow return of property without a hearing. To the degree that claimants must pay an administrative cost to use state process, the increase in those costs that comes with the mandatory bundling of verification and enforcement will shift marginal claimants away from court and towards self-help, if they have that choice. Note, however, that some courts have finessed these claims by arguing that a police officer may be present during a repossession in the absence of a court order, as long as the police officer does not actively assist with the repossession.[67]

Second, when courts have analyzed these due process requirements, they have appeared to focus far more on the tradeoff between accuracy and the benefits of quick repossession than on the role that state agents can play in minimizing violence.[68] The model suggests that there may be benefits to disaggregating the goals of verification and enforcement when courts think

62. *Fuentes*, 407 U.S. at 67.

63. 416 U.S. 600 (1974).

64. *Id.* at 619.

65. *Id.* at 625 (Powell, J., concurring) ("As to the creditor, there is the obvious risk that a defaulting debtor may conceal, destroy, or further encumber the goods and thus deprive the creditor of his security.").

66. *Id.* ("Against [the creditor's concern] must be balanced the debtor's real interest in uninterrupted possession of the goods, especially if the sequestration proves to be unjustified.").

67. *See infra* Part II.A.

68. *See* Mitchell v. W. T. Grant Co., 416 U.S. 600, 625 (1974); Fuentes v. Shevin, 407 U.S. 67, 83 (1972).

about the precise contours of due process requirements. The procedural requirements under the present framework do not depend on the character of the state enforcement that a claimant wishes to use. But they could. If there are systematic circumstances where the use of self-help is highly likely to produce externalized costs of violence but the accuracy of claims is rarely in dispute, it may make sense to relax the degree of process that is necessary to obtain the state enforcement that can minimize the violence. Alternatively, when potential self-help situations would benefit from both enhanced accuracy and state enforcement, the procedural requirements could be increased.

II. Self-Help Applied

The framework developed above focuses on the roles violence and strategic behavior may play in justifying the self-help permissions that the law allows. This Part applies the framework to two issues that have traditionally been central to debates on the scope of self-help rights and privileges. The first issue contrasts the repossession regime of Article 9—where self-help has consistently enjoyed legal protection—to the modern approach to eviction, which strongly disfavors the use of self-help in both the residential and commercial contexts. Are there reasons that can justify the differential treatment of real and personal property in what is, more or less, the same context? This Part applies the framework to explore whether this distinction has a defensible justification or whether there may be a rationale for harmonizing the regimes. The second issue is the right to reclaim stolen property. After clarifying the misperception that one may only use force to reclaim stolen property during a "hot pursuit," this Part discusses self-help rights in criminal law and tort law when it comes to retrieving stolen property.

A. Personal and Real Property

The divide between the ability to repossess real and personal property is, at least superficially, the most anomalous division in the law of self-help. Both circumstances present the same problem: an owner wishes to repossess property due to an alleged default. As a general matter, the law permits this approach in the context of personal property with some restrictions. The owner (or the owner's agent) may not use violence, but may trespass as long as the owner does not forcibly enter the premises and has not been told to leave by the debtor.[69] This permissive regime stands in contrast to the far more restrictive rules for real property in both the residential and commercial contexts. The common law rule allowed landlords to evict a tenant in default provided the landlord had specified that privilege in the lease and as long as the eviction did

69. *See supra* note 9.

not cause a breach of the peace.[70] Nearly every American jurisdiction has eliminated the ability to exercise this privilege by statute or by court ruling in the residential domain[71] and most states have done likewise in the commercial context.[72] This Section works through this division by first discussing previous scholarship on the question before turning to the application of the framework developed above to this problem.

Prominent property scholars have addressed some aspects of this disparity, although not in the context of an attempt to explain or justify the split treatment. Henry E. Smith notes the division while making an argument that the decision to permit self-help presents a very close call.[73] Richard Epstein offers a normative take on the real property restrictions by doubting the basis for court rulings on the topic.[74] He contends that the concern about violence amounts to "empirical hunches"[75] that may not justify a blanket restriction on the ability to circumvent courts to evict a tenant.[76] Though Epstein does not say so expressly, permitting this approach would harmonize the rules in the context of real and personal property. Lior Strahilevitz observes that efficient tenant gossip networks may be able to police inappropriate landlord lockouts in a way that could may justify the liberalization landlord self-help rules.[77] Like Epstein's suggestion, Strahilevitz's recommendation to allow more self-help as long as

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70. Brandon, *supra* note 24, at 938 ("The common law right of distraint allowed landlords to utilize self-help and seize a tenant's personal property as security for payment of overdue rent.") (citing GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1305, at 493 (repl. 1981)); *see also* Wilder v. House, 48 Ill. 279, 280 (1868) (holding that a landlord has "no right to resort to force"); Berg v. Wiley, 264 N.W.2d 145, 149 (Minn. 1978) (prohibiting a commercial landlord from using self-help to oust a tenant); Rich v. Keyser, 54 Pa. 86, 86 (Pa. 1867) (holding that a landlord may retake property if "done without breach of the peace").

71. All states have created eviction procedures designed to afford tenants notice and an opportunity to appear before a judge. *See* RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 14.1 (1977).

72. As of 2006, only twelve states have recognized the common law right for commercial landlords to use peaceable self-help (Alabama, Alaska, Arizona, Georgia, Hawaii, Maryland, Mississippi, New Jersey, New York, Ohio, Texas, and Wisconsin). Eighteen states (Arkansas, California, Connecticut, Delaware, Florida, Illinois, Louisiana, Maine, Michigan, Minnesota, Nebraska, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Tennessee, and Washington) and the District of Columbia prohibit commercial landlords from using self-help in all circumstances and an additional seven states only allow the use of self-help when property has been abandoned or similarly limited circumstances (Idaho, Massachusetts, Missouri, Montana, North Dakota, Virginia, and West Virginia). The remaining thirteen states have no statute or reported cases that recognizes the common law privilege to use self-help (Colorado, Indiana, Iowa, Kansas, Kentucky, Nevada, New Hampshire, Oregon, South Carolina, South Dakota, Utah, Vermont, and Wyoming), but given the strong trend towards prohibiting the exercise of this privilege, a commercial landlord would be ill-advised to use self-help in these states. *See* Adam Leitman Bailey & John M. Desiderio, *The Availability of Self-Help Evictions to Commercial Landlords*, ADAM LEITMAN BAILEY, P.C. (Jan. 2006), http://www.alblawfirm.com/siteFiles/News/6734D5574D161D7BAE11A8CBFE7F94CF.pdf.

73. Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69 (2005).

74. Epstein, *supra* note 25, at 28.

75. *Id.*

76. *Id.*

77. Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 973 (2005).

gossip networks function well would align the self-help regimes across real property and personal property.

Epstein's analysis is most directly relevant to the framework developed in Part I because it considers the likelihood of violence as a key variable that determines the rule.[78] His suspicion of courts' reasoning on this front[79] suggests a belief that, in the landlord-tenant context, the propensity of self-help evictions to lead to violence does not justify blanket restriction on the practice. Put in terms of the model, the likelihood of a tenant reacting violently does not rise to the level that would justify foregoing the savings self-help evictions provide. Insofar as Epstein correctly describes the likelihood of violence, this argument would support harmonizing the self-help rights and privileges with regard to personal and real property as long as the propensity for violence in the context of self-help repossessions is also sufficiently low to warrant a self-help rule. Epstein also suggests, in a way that is largely consistent with the model, that if courts and legislatures prohibit self-help, they should also streamline the administrative process associated with using the courts.[80] It follows from the simple model that lowering administrative costs can create conditions where a prohibition on self-help can be an efficient outcome, but in situations in which the likelihood of violence is low, an obligation to go to court will add to social costs unnecessarily.

Supposing that the propensity for violence is low in both the real and personal property contexts, the argument for harmonization that Epstein hints at has support. But the model suggests a few reasons for the divide. For example, the mobility of secured assets, such as cars, boats, and planes, may provide one explanation for the split treatment.[81] The law may be more lenient in its approach to self-help in the context of personal property because there is a more acute danger that, once a debtor knows that a creditor wishes to repossess property, the debtor will try to hide the asset. In terms of the model, this ability to make it more difficult to find the property can increase the difference in the benefit from the use of self-help and the benefit from the use of judicial process. For example, once a debtor receives notice that a creditor wishes to repossess a secured yacht, the debtor could move the vessel from its dock in one state to a dock in another state. If a creditor gets a court order in the state where the yacht was originally docked, that creditor would have to endure the expense and delay that are necessary to have that order enforced the state where

78. Epstein, *supra* note 25, at 28 ("[S]elf-help could not be exercised in the face of determined resistance; if that happened, the assistance of a sheriff was required.").

79. *Id.*

80. Epstein contends that streamlining can occur by limiting "defenses to a narrow class of issues, such as whether the tenant has not paid the rent." *Id.* He then asks, "[i]f this procedure is executed in a quick and effective manner, then why not require it?" *Id.*

81. *Cf.* Heywood Fleisig, *The Economics of Collateral and of Collateral Reform*, *in* SECURED TRANSACTIONS REFORM AND ACCESS TO CREDIT 81, 90 (Frederique Dahan & John Simpson eds., 2008) (arguing that the ability to repossess movable assets is an essential part of supplying credit for those goods).

the debtor has currently docked the boat. To the degree the ability to use self-help can eliminate the added costs associated with use of judicial process, there may be a rationale for permitting self-help in the context of mobile personal property over fixed real property.

But there can be a difference in the benefits accorded by self-help in the real property context versus the benefits of using judicial process to effect evictions. Tenants sometimes respond to eviction notices by stripping fixtures and otherwise devaluing the property.[82] While this conduct probably occurs more often in residential situations, it can also happen in the commercial context.[83] Insofar as the expected benefit associated with judicial process is also diminished in the personal property context, mobility loses force as a rationale for allowing self-help with respect to personal property, but not real property.

Another alternative is that the rule that governs evictions is irrelevant because landlords would not use self-help even if they had the right to do so. This possibility follows from different assumptions about the ability and willingness of debtors and tenants to respond strategically to the breach-of-the-peace standard. One might speculate that tenants have more awareness of the rules governing self-help than debtors do. While this may not be true of residential tenants, it is plausible for commercial tenants, who are often small business owners or larger companies with some knowledge of the laws that govern their commercial endeavors.[84] These commercial tenants may be able to thwart self-help attempts through staged aggression,[85] while some of the debtors, being unaware of the contours of self-help law, will acquiesce when confronted with a repossession attempt if they are not inclined to react with violence. The simple model developed above shows that, to the degree that a high percentage of potential self-help targets is aware of breach-of-the-peace standards and is willing to use that knowledge to undermine self-help, it is

82. Under these circumstances, most states' statutes allow the landlord to sue a tenant for the willful and malicious destruction of residential rental property. *See, e.g.*, MINN. STAT. § 504B.165(a) (2010).

83. Some insurance policies explicitly do not cover instances of vandalism, which is defined as the willful and malicious destruction of property. *See, e.g.*, Certain Underwriters at Lloyds, London v. Law, 570 F.3d 574 (5th Cir. 2009); Sharplin v. Cas. Reciprocal Exch., 628 So. 2d 217 (La. Ct. App. 1993). Such policies have the effect of excluding coverage when there has been third-party vandalism or theft and where the damage is the direct result of the commercial tenant's actions.

84. Commercial buyers are often considered to be more sophisticated and knowledgeable than residential buyers. *See* Coldwell Banker Whiteside Assocs. v. Ryan Equity Partners, Ltd., 181 S.W.3d 879, 886 (Tex. App. 2006) (noting that a real-estate investor is presumed to know the law affecting the property); *see also* Seaco Ins. Co. v. Barbosa, 761 N.E.2d 946, 950 (Mass. 2002) (explaining that "[c]ommercial tenants tend to be more sophisticated about the terms of their leases"); Muro v. Superior Court, 229 Cal. Rptr. 383, 388 (Ct. App. 1986) (noting that, relative to residential tenants, commercial tenants tend to be more sophisticated, have more bargaining power, and negotiate the terms of their leases).

85. For those jurisdictions where a verbal protest is sufficient to stop a self-help attempt, the target of self-help does not need to take the somewhat deceptive approach of staging aggression. A savvy manager can simply state an objection to the self-help attempt, which would be sufficient to require the repossessor to withdraw.

irrelevant whether landlords and creditors may exercise self-help because they will not use it. Instead, the landlords will proceed directly to court to effect an eviction or repossession. To put it another way, it would not change outcomes if policymakers harmonized the law in these two areas by allowing commercial landlords to use self-help.[86]

An alternative explanation draws on a potentially problematic assumption in the model. The analysis of the breach-of-the-peace rule assumes that, once a creditor or landlord begins a self-help attempt, the tenant or debtor will either threaten violence (either sincerely or insincerely) or capitulate to the request to give up the property. Another possibility is that the debtor/tenant could respond immediately with violence without providing the creditor/landlord a chance to retreat. If this response tends to occur, it could justify a prophylactic prohibition on self-help in order to avoid the externalized violence that could occur even during passive attempts at self-help. To the degree that this type of response is more likely in real property situations as opposed to personal property, this disparity could justify the use of the prophylactic rule to prevent self-help evictions but permit repossessions of personal property.

One wonders, however, whether this sort of differentiation exists. Certainly, in residential situations, a landlord who attempts to evict through self-help can expect resistance, and the landlord may not have the ability to retreat once the situation becomes volatile.[87] But this sort of violent reaction seems less plausible for commercial landlords who seek to evict their commercial tenants. And it seems that an effort to evict a commercial tenant who is in default would be less likely to result in immediate violence than an attempt to repossess the car that a debtor uses to get to work or the tools that a debtor uses in a trade. Insofar as these suppositions are correct, the propensity for quick violence to ensue from attempts at self-help evictions and repossessions may justify a prohibition on the use of self-help. But this tendency does not appear to supply a basis for differential treatment of real and personal property, particularly when the analysis remains confined to the distinction between commercial real property and the repossession of personal property.

Another basis for differentiating the two spheres is the degree of accuracy needed to solve each problem. To the degree that default is the central problem, the administrative burden of evaluating that claim is low: the tenant or debtor has either paid or has not paid the money due. But a claim of default may invite

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86. To the degree the rule is irrelevant, it provides an additional explanation for Henry Smith's view that the law struggles to delineate property rights when possession of property—and thus information about that property—has been divided between a landlord and tenant or a creditor and a debtor. *See* Smith, *supra* note 73.

87. *See, e.g.*, Tim Richardson, *Landlord Beaten After Man Told To Leave Property*, LAS VEGAS SUN, May 3, 2009, http://www.lasvegassun.com/news/2009/may/03/landlord-beaten-after-man-told-leave-property.

counterclaims that require more resources to evaluate properly.[88] If there is a difference in the types of counterclaims that repossession and eviction cases pose, that difference could warrant different approaches to the self-help regime. Suppose, not implausibly, that the counterclaims that a tenant can file will tend to have more merit than those that a debtor in possession of a secured good may have. The tenant's claims could involve close questions about habitability and related issues while the lessee of a used piece of construction equipment that has been sold "as is" can be expected to have fewer viable claims.[89] In this circumstance, there may be higher returns to requiring administrative process for the real property claims than for the personal property claims.

But, for this facet of the problem to matter, there must be an incentive for the creditor or landlord to use self-help when the better solution would be to go straight to court. If there is a viable penalty for repossessing an item when there are legitimate counterclaims, which could involve a suit by the debtor that carries a threat of the creditor paying for the debtor's legal costs and, perhaps, punitive damages, the creditor will not use self-help even if it is permissible to do so. To the degree that landlords are inclined to evict tenants who have valid counterclaims, and insofar as tenants face difficulty vindicating those claims after the eviction, this possibility may justify the requirement that landlords go to court to effect an eviction. But for this claim to withstand scrutiny, it must also be the case that some *ex post* sanction against the landlord for the wrongful use of self-help is insufficient to deter the use of self-help. Otherwise, the decision by the landlord—to go directly to court—will be the same under any regime.

Finally, it may be worth considering how unbundling verification and enforcement may work in the context of real and personal property. The model suggests that utilizing the verification function without the enforcement function makes sense when accuracy is a concern, but violence is not. It also suggests that utilizing enforcement without verification is appropriate when violence poses a risk, but courts will do little to improve the accuracy of claims. As the language from courts and commentators shows, the primary concern

88. To be sure, even the simple existence of default can be prone to mistakes as shown by the recent difficulties with foreclosure. The high rate of foreclosures appears to have increased the number of mistakes that banks make in determining which homeowners are in default and that has resulted in some wrongful foreclosures. *See* Andrew Martin & Motoko Rich, *Homeowners Facing Foreclosure Demand Recourse*, N.Y. TIMES, Oct. 27, 2010, http://www.nytimes.com/2010/10/28/business/28victims.html?pagewanted=all. Though this residential problem is outside the scope of the analysis here, the analysis here suggests that, insofar as mistakes are a problem that have not been fully appreciated, the limited process associated with non-judicial foreclosure may be undesirable.

89. A seller of goods often uses the "as is" language to negate not only all implied warranties, but also all express warranties. U.C.C. § 2-316 cmt. 7 (2003) ("['As is'] in ordinary commercial usage [is] understood to mean that the buyer takes the entire risk as to the quality of the goods involved."); *see also* Borg-Warner Leasing v. Doyle Elec. Co., 733 F.2d 833, 837 (11th Cir. 1984) ("[The lessor] rented the computer 'as is' [to the lessee] and disclaimed all warranties, express and implied. Thus, [the lessee] remained obligated to pay rent even though the computer failed to operate properly.").

with the repossession of property is violence.[90] If this correctly captures the problem, and if accuracy is not a substantial concern, it may be desirable to unbundle the enforcement function in some of these cases. Indeed, there is some evidence that creditors do this when attempting to repossess secured goods by having police present during repossession even absent of a court order.[91] Some courts have frowned on this practice for the due process reasons discussed above,[92] while others have finessed the issue by holding that when police are trying to maintain order rather than actively assisting with the seizure, the repossession does not require due process.[93]

The cases that do not impose due process requirements when a police officer is present seem to permit an end around the breach-of-the-peace restriction; creditors can use self-help and rely on the law enforcement officer to deter or minimize violent reactions. The legal analysis in these cases leaves something to be desired because of the unsatisfying and unpredictable line-drawing that courts have to do to determine when a law enforcement officer becomes actively involved in the repossession. There can be little doubt that the mere presence of police allows some repossessions to occur that would otherwise be stymied by the breach-of-the-peace requirement.[94] Nevertheless,

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90. *See* Morris v. First Nat'l Bank & Trust Co. of Ravenna, 254 N.E.2d 683, 684 (Ohio 1970) ("Breach of the peace, as that term is used . . . includes an act which is likely to produce violence, which reasonably tends to provoke or excite others to break the peace and which is not performed under judicial process.") (internal citation omitted); *see also* MBank El Paso, N.A. v. Sanchez, 836 S.W.2d 151, 152 (Tex. 1992) (recognizing that "[t]he rule imposing liability on secured parties for breaches of the peace is based on longstanding policy concerns regarding the exercise of force or violence"); Tri-State Refreshments, Inc. v. Nitke, 246 N.Y.S.2d 79, 83 (Sup. Ct. 1964) (summarizing the underlying purpose of summary process as preventing "landlords from taking the law into their own hands and ejecting tenants by violence").

91. *See supra* Part I.

92. *See* Waisner v. Jones, 755 P.2d 598 (N.M. 1988) (finding that the mere presence of law enforcement during a repossession attempt constituted sufficient state action to trigger due process requirements).

93. *See* Barrett v. Harwood, 189 F.3d 297 (2d Cir. 1999) (finding that repossession did not amount to state action even where the debtor struck the creditor and the police officer threatened the debtor with arrest).

94. Indeed, courts have found that the mere presence of a law enforcement officer, who says and does nothing, can nevertheless invalidate the self-help repossession. In *Walker v. Walthall*, 588 P.2d 863 (Ariz. Ct. App. 1978), the repossessor, assisted by a uniformed police officer, went to the debtor's home and obtained verbal consent to take an automobile. *Id.* at 865. The police officer said and did nothing. *Id.* The creditor contended he had asked the police to be present to prevent anticipated violence. *Id.* The court held:

> In the instant action we believe the presence of the deputy sheriff and its accompanying intimidation is the same kind of conduct condemned [in *Stone Machinery Company v. Kessler*, 463 P.2d 651 (Wash. Ct. App. 1970)]. The fact that the deputy did not say anything is not significant. Nor is it required that the possessor . . . actually indicate resistance, either verbally or physically to the uniformed and armed officer . . . . We believe . . . that the introduction of law enforcement officers into the area of self-help repossession, regardless of their degree of participation or nonparticipation in the actual events, would constitute state action, thereby invalidating a repossession without a proper notice and hearing.

there is something to be said for this approach, at least in the cases where the accuracy of the claim is not in dispute. This unbundled enforcement should increase the number of effective evictions while still minimizing the administrative costs associated with the repossessions. But the unpredictability of the current approach is a barrier to realizing these potential benefits, and there is an argument for altering the standard. Instead of pinning the due process requirement to a murky action/inaction inquiry, the accuracy gain that due process is likely to provide could be used as one determinant of whether to allow a police presence without formal proceedings. To be sure, assessing the accuracy gain would be fraught with line drawing problems as well, but in the clear cases—where a debtor does not contest the default—the creditor would be able to bring along law enforcement without worrying whether a court would deem that involvement to be state action. It may also be appropriate to restrict the scope of this type of change to personal property if indeed the accuracy concerns here are not as acute as they are in the real property context.

B. Retaking Stolen and Other Wrongfully-Possessed Property

People have limited privileges to exercise self-help when their property has been stolen or is otherwise in the possession of someone else.[95] Allowing theft victims to retrieve their property can convey significant benefits because the police may be unable or unwilling to invest in investigation and retrieval.[96] But situations involving theft and retrieval—perhaps even more than evictions

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Id. at 865-66. For courts following the decision in *Walker*, emphasis is placed on the impact that uniformed law enforcement officers might have in intimidating debtors who might otherwise contest the repossession. *See* Fleming-Dudley v. Legal Investigations, Inc., No. 05 C 4648, 2007 U.S. Dist. LEXIS 21653, at *6 (N.D. Ill. Mar. 22, 2007) (stating that the "presence of the official, without more, is sufficient to chill the legitimate exercise of the defaulting party's rights"); *In re* MacLeod, 118 B.R. 1, 3 (Bankr. D.N.H. 1990) (noting that any presence of an officer, regardless of the officer's degree of participation in the actual repossession, "override[s] the debtor's right to object" and, as a result, is a breach of the peace).

95. It is a general principle "that one who is or believes he is injured or deprived of what he is lawfully entitled to must apply to the state for help. Self-help [in the stolen property context] is in conflict with the very idea of the social order." Lee v. Kramer, No. CIV S-08-1710 MCE CHS P, 2010 U.S. Dist. LEXIS 119517, at *62 (E.D. Cal. Nov. 10, 2010) (citing Daluiso v. Boone, 455 P.2d 811 (1969)); *see also* People v. Green, 841 N.E.2d 289, 293 (N.Y. 2005) (disapproving on policy grounds an owner's use of self-help to recover stolen property).

96. The possibility of police departments not having the resources to fully investigate crimes such as theft is real given today's economic climate. Police departments across the country are facing budget cuts. *See e.g.*, Melissa Hayes, *Jersey City Police Face $8 Million Cut, Seek Union Concessions*, JERSEY J. (N.J.), Oct. 28, 2010, http://www.nj.com/hudson/index.ssf/2010/10/jersey_city_police_face_8_mill.html; Kevin Johnson, *Police Training Halts as Agencies Face Budget Cuts*, USA TODAY, Oct. 4, 2010, http://www.usatoday.com/news/nation/2010-10-04-cop-training_N.htm; Bobby White, *California Cities Cut Police Budgets*, WALL ST. J., Oct. 31, 2008, http://online.wsj.com/article/SB122540831980086085.html; Stephanie Simon, *Police, Fire Departments Face Budget Axe*, SAN ANTONIO POLICE OFFICERS ASS'N (Feb. 21, 2010), http://www.sapoa.org/content.php?42-Police-Fire-Departments-Face-Budget-Axe.

and repossessions—have an air of violence.[97] An attempt to retake stolen property can get out of hand quickly, especially if the victim of theft has correctly identified the perpetrator or the victim incorrectly accuses someone of theft. The model developed above pinpoints the tradeoff between administrative savings and violence. This Section uses this framework to disentangle the rules in this area and to ascertain how and whether they achieve desirable outcomes.

It is helpful to begin by limiting the analysis to a workable scope. Nearly any defense of person or property can, in theory, qualify as the type of self-help discussed in this Article. An individual who is under immediate threat has the option to respond with roughly the same degree of force that a state actor, such as a police officer, could use in the same situation.[98] But people in this situation rarely, if ever, face the choice between responding with their own force or deferring to a state actor. The reason they do not have this choice is because the exigency of the circumstances usually means that the police cannot respond to the threat in time. Rather, the choice between whether to attempt to recapture a stolen item on one's own or to rely on law enforcement typically occurs after the thief has fled; it is this choice that fits most directly with the model developed above.

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97. This is especially so because of the increased likelihood of injury to a third party. *See e.g.*, Hatfield v. Gracen, 567 P.2d 546 (Or. 1977) (discussing a third party injured in an attempt to recapture stolen property).

98. Police officers may use force when making an arrest but there must be a reasonable justification. U.S. CONST. amend. IV; *see also* Ference v. Township of Hamilton, 538 F. Supp. 2d 785, 803-05 (D.N.J. 2008) (explaining the framework for evaluating the reasonableness of the use of force by law enforcement officers). To determine whether an officer's use of force is excessive, courts consider the facts and circumstances of each particular case and consider the severity of the crime, and whether the suspect poses an immediate threat to the safety of the officers or others. McNeil v. City of Easton, 694 F. Supp. 2d 375 (E.D. Pa. 2010). Thus, officers may raise a qualified immunity defense when it comes to excessive force claims. Torres v. Village of Sleepy Hollow, 379 F. Supp. 2d 478 (S.D.N.Y. 2005). In *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), the Supreme Court stated:

> The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory Constitutional rights of which a reasonable person would have known". . . . The protection of qualified immunity applies regardless of whether the government officials' error is "a mistake of law, a mistake of fact, or mistake based on mixed question of law and fact."

Id. (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)). Although the qualified immunity privileges grant law enforcement officers rights substantially greater than those afforded private citizens, a private citizen may generally use force that is reasonable under the circumstances. *See* Patel v. State, 620 S.E.2d 343, 346 (Ga. 2005); State v. Smith, 775 A.2d 313, 321 (Conn. App. Ct. 2001). The determination of reasonableness is left to the jury. People v. Hampton, 487 N.W.2d 834, 846 (Mich. Ct. App. 1992). In some states, a citizen's right to use force may be limited to cases where the suspect has committed the offense in the citizen's presence. People v. Joyce, 68 P.3d 521, 523 (Colo. App. 2002).

C. *The Background Doctrine*

Before applying the model, it is useful to provide a discussion of the background rules in order to brush away some common misperceptions about the law in this area. Commentators sometimes describe the retrieval of stolen property as permissible as long as one is in "hot pursuit" of the thief.[99] This standard provides a thumbnail sketch of what tort law allows, but criminal law often takes a different approach. As the comments to the *Restatement (Second) of Torts* explain:

> The prompt action which will justify the use of force to retake the chattel is frequently referred to in the decisions as "fresh pursuit."... It had its origin in the days of the hue and cry after a thief who had not yet got away, and the original theory appears to have been that the owner could be regarded in a sense as still defending his original possession, or the other could be regarded as still engaged in the commission of the crime. For that reason, immediate and continuous action was required.
>
> Such a limitation may have been appropriate when the fastest means of escape was the back of a horse, but some liberalization of the rule is obviously necessary in the days of the automobile, the railroad train, and the airplane. For that reason the term "fresh pursuit" is avoided in this Section. It is necessary only that the actor discover without unreasonable delay the fact of his dispossession, and that he act promptly and, within reason, continuously to recover the chattel.[100]

This principle produces the rather odd result that, through continual pursuit of a stolen chattel, it can be retaken with force even if a significant amount of time has elapsed and even if the victim of the theft does not know the identity of the person who stole the good. As one illustration provides: "*A* takes *B*'s car, which is parked on the street. *B* returns five minutes later, and makes every effort to discover who has taken it and where it has been taken. He continues his efforts for a week without success, at the end of which time he discovers that *A* has taken it."[101] In this case *B* may retake the car with force. If *B* were to learn of *A*'s identity after a week but had not been in constant pursuit of the thief, *B* would not, according to the *Restatement*, be entitled to use force to recapture the property. Nevertheless, at some point, the privilege to use force ceases:

> There is a period of time, depending on the circumstances of the particular case, at the expiration of which the actor's discovery of his dispossession ceases to be timely and the privilege of recaption no longer exists. The public interest in the preservation of the peace requires that one who no matter how innocently and unavoidably has permitted another to

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99. *See, e.g.*, Gregory A. Diamond, Note, *To Have but Not To Hold: Can "Resistance Against Kidnapping" Justify Lethal Self-Defense Against Incapacitated Batters*, 102 COLUM. L. REV. 729, 749 n.109 (2002) ("For an act of theft, however, there is no imminent threat after an object has been taken. Thus, while one may violate another's rights in hot pursuit, for example by tackling a thief and restraining him, if *not* in hot pursuit one could not justifiably break into his house and restrain him until he returned the stolen object.").

100. RESTATEMENT (SECOND) OF TORTS § 103 cmt. b (1979).

101. *Id.*

> remain in long continued and undisturbed possession of his chattel shall be required to assert his possessory rights by bringing an action rather than by self-help.[102]

The rules in the criminal sphere in American jurisdictions differ between two more extreme positions. A victim of theft who seeks to retake the property through the use of force is, of course, at risk of prosecution for robbery—the taking of the property of another through force or threat of force.[103] The claim of right defense allows a defendant to negate the *mens rea* element of robbery, which requires that one intend to take the property of another.[104] Unlike the relatively harmonious approach in tort where all jurisdictions permit limited self-help, jurisdictions either permit the claim-of-right defense in perpetuity or they do not permit it at all. It appears, however, that the majority of jurisdictions does allow the claim-of-right defense.[105]

D. Puzzles Posed by the Recapture of Stolen Property

The simple model developed above can help to analyze two puzzles that arise from the structure of the rules in this area. The first, which remains internal to the problem of recapturing stolen or wrongfully possessed property, is understanding the different treatment that the problem receives in tort law and in criminal law. The second puzzle stems from a comparison of this problem to the pseudo-contractual problems addressed in Section II.A. These two areas of the law differ starkly in the rules of engagement they provide when they allow the use of self-help. The pseudo-contractual cases of eviction and repossession prohibit the use of force through the breach-of-the-peace standard while the recapture cases permit the use of force, at least under some circumstances. A natural question is why the law tolerates this difference, and the model suggests some reasons why this might be so.

The internal question hinges on why the majority of jurisdictions provides a broad right to retake stolen property with force, while the rule remains

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102. *Id.* cmt. c.

103. *See* State v. Mejia, 662 A.2d 308, 321 (N.J. 1995) (rejecting the claim of right defense to robbery); State v. Malcolm, No. A-3186-04T4, 2007 WL 1468611, at *8 (N.J. Super. Ct. App. Div. May 22, 2007) (holding that the "defendant's legal argument that he did not commit the crime of robbery because he was reclaiming his own property is contrary to the law of this State").

104. *See* People v. Tufunga, 987 P.2d 168, 169 (Cal. 1999) ("At common law, a claim of right was recognized as a defense to larceny because it was deemed to negate the *animus furandi*, or intent to steal, of that offense."); *see also* State v. Hicks, 683 P.2d 186 (Wash. 1984) (same); State v. Larsen, 596 P.2d 1089, 1090 (Wash. 1979) ("Where self-help is used to recover specific property, it is a defense to a charge of robbery that a claim of title is made in good faith.").

105. See Thomas v. State, 584 So. 2d 1022, 1023 (Fla. Dist. Ct. App. 1991), which states that:

> It appears that most jurisdictions recognize the common law rule that a forcible taking of property under a bona fide claim of right is not robbery where the taker has a good faith belief that he is the owner of the property or is entitled to immediate possession, because this belief negates the taker's intent to steal or commit larceny.

circumscribed in the tort context to those who constantly pursue a thief.[106] These rules mean that, in a majority of jurisdictions, someone who has not committed a crime can be liable in tort for the use of self-help. This situation could occur when the victim of theft uses self-help while the sustained pursuit privilege no longer applies. Imagine, for example, that *B* knows the identity of a thief, *A*, who stole *B*'s car, but *B* has been too busy to maintain constant pursuit. Nevertheless, *B* wishes to use self-help to retrieve the car. Under the tort standard, *B* would not be privileged to use self-help and would thus be liable to *A* for any injuries caused while trying to retake the car. In at least some jurisdictions, however, *B* would not be subject to criminal penalties for this use of force because the claim-of-right defense would be a viable shield to a successful prosecution.

The framework developed above can help to examine whether there is a rationale for the differential treatment in tort and criminal law. The model asks the question whether it would be desirable to force people to use state process rather than self-help. In the context of recapturing property, the state process would likely mean that *B* would alert the police of the theft who may, at their discretion, investigate the claim, arrest *A*, and return the goods to the owner. Less realistically, *B* could also sue *A* for trespass to chattels and attempt to get damages or an order to return the car. The model sets up the tradeoffs between the relative benefits of self-help and state process, the likely harm from violence, and the administrative cost of going to court.

The relative benefits of using self-help in this context may be substantial because someone like *B* may be the only actor who has a feasible opportunity to retake the property. If the law obligated *B* to refrain from using self-help and to, instead, use state process, there is a substantial chance that *A* would be able to escape detection. But the law does not appear to prioritize the relative benefits rationale. If it did, the law would permit self-help in the immediate aftermath of a theft but would require that *B* delegate the recovery to the police once enough time has passed that *B* has no advantage in recovery over the police. Neither the tort rules nor the criminal rules require this approach. If *B* has been in constant pursuit of *A*, *B* is under no obligation to call the police once *A* has been located. Instead, *B* has the choice between using self-help and alerting the police.

With respect to violence, the framework suggests that, as the propensity for externalized harm increases, it becomes more desirable to prohibit the use of self-help. In the context of retaking stolen property, there may be variation in the likelihood of violence at different points in times. One possibility is that

106. There is, of course, a question that is internal to the criminal treatment of the issue: Why do jurisdictions differ so starkly on this point? While it can be perilous to infer much from differences in rules across jurisdictions, the sharp divergence suggests that the question whether to provide a right to self-help is a close one. Alternatively, these differences could be a function of different preferences across jurisdictions for private violence.

victims of theft are more likely to react violently during the theft or immediately thereafter.[107] Indeed, some of the literature on self-defense suggests that violent responses to attack are natural and unavoidable, such that it would have little deterrence value to prohibit the use of force in self-defense.[108] If it is the case that the use of self-help immediately after the theft is more likely to produce violence, the rules in both criminal law and tort law do not appear to be concerned with this possibility. The majority criminal rule allows the retaking of property with force regardless of the time frame involved, as long as the user of self-help honestly believes the claim of right. The tort rule permits the use of force when *B* immediately pursues *A* in an attempt to retrieve the property. Insofar as *B* is likely to be more violent in the aftermath of the crime, both rules permit or encourage this immediate use of force. This suggests that preventing breaches of the peace is not a driving rationale of these rules.

An alternative assumption is that the type of people who engage in sustained pursuits of thieves is more likely to be violent. This is, of course, speculative—this inclination could have little to do with a propensity to be violent. Nevertheless, if those who are inclined to pursue those who steal their goods are likely to retake their property with force, both tort and criminal law indulge this violence. Tort does this by granting the privilege to use self-help to those who are in constant pursuit of a thief and the majority criminal rule allows this approach through the lack of any temporal or contextual restraint on asserting a claim of right. Thus again, the rules do not appear calibrated to minimize the amount of violence that occurs.

The interaction of administrative costs and accuracy may, however, provide something of a rationale for the difference between the tort regime and the criminal regime. The model suggests that, as the administrative costs associated with state process rise, it makes sense to allow self-help in order to avoid them.[109] The model also implies that forbidding self-help can be desirable when non-state actors are particularly prone to making mistaken claims that can be corrected through investing in the accuracy that state process can provide. In the context of stolen property, there are significant differences between the tort

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107. *Cf.* Shalom H. Schwartz & Avi Gottlieb, *Bystander Reactions to a Violent Theft: Crime in Jerusalem*, 34 J. PERSONALITY & SOC. PSYCHOL. 1188 (1976) (showing that the response of bystanders to violent theft depends on the number of other bystanders and the reactions of those bystanders).

108. This line of thought goes at least as far back as Blackstone who defended killing in self-defense as "excusable from the great universal principle of self-preservation which prompts every man to save his own life preferably to that of another . . . ." 4 WILLIAM BLACKSTONE, COMMENTARIES ch. XIV; *see also* Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871, 882 (1976) (making a more modern version of this argument).

109. *See supra* Part I. As noted earlier, administrative costs are likely to be high when disputes are particularly unclear. Those who seek to vindicate a right will be especially partial to self-help in these situations because they will be able to avoid these high administrative costs. This incentive provides further support for prohibitions on self-help when cases are close.

process and the criminal process in terms of administrative cost.[110] A tort claim would proceed through the civil system, which tends to be slow, but should come with an associated increase in accuracy.[111] The police, in contrast, may be more prone to mistakes because the investigation does not provide adversarial inquiry, but it will tend to be quicker and less expensive.[112]

This contrast in accuracy may suggest a rationale for the differences between the tort rules and criminal rules. The constant-pursuit requirement in tort may be a proxy for accuracy. As long as *B* can show a sufficient investment in pursuit to provide some guarantee that *A* did, in fact, take *B*'s goods, *B* has the privilege to use self-help. However, if *B* wavers in his search, which may introduce the possibility that *B* will be mistaken about who took *B*'s property, the tort system will, accordingly, subject *B* to liability for any harm that results.[113] In contrast, the police may not have a substantial advantage in discerning the accuracy of the claim that *A* took *B*'s property because a police officer that comes into contact with *B* cannot do the type of investigation that a tort suit would provide. Given that there may not be a substantial accuracy difference between self-help and state process in this context, this may provide a rationale for why some jurisdictions will not hold *A* criminally liable for attempting to retake property from *B*.

The external analysis centers on a comparison between the recapture of stolen property and the retaking of property after a contractual default. The chief difference between the law that governs these two situations is the ability of private citizens to sometimes use force in the former context, but never in the latter situation. The authorization to use force should, of course, provide a stronger deterrent than a more restrictive approach, provided that the potential targets of that violence know that the law permits its use. In the stolen property context, this additional deterrence should reduce both the willingness of thieves to steal in the first instance and it should make it easier for those attempting to recapture stolen property to do so. Were the use of force permitted in the contractual context, one would expect that it would improve the success rate of repossession and may even improve repayment rates because the prospect of avoiding repossession through staged aggression has been extinguished. Under the current legal framework, many jurisdictions reap the benefit of this

110. Not only are there differences in the overall cost associated with the civil and criminal processes, but the costs also tend to be allocated in different ways. In the criminal context, the state shoulders the burden of any investigation and recovery while the state and the parties split the cost in the civil context. All other things being equal, the greater subsidy in the criminal context should lead to greater use of this option relative to civil process.

111. This claim is a version of Kaplow and Shavell's work on accuracy. As one invests more in process, one can expect a higher degree of accuracy. *See* Kaplow & Shavell, *supra* note 38, at 3. And, in their model, authorities should invest in process until the marginal cost of that process equals the marginal benefit in accuracy produced by that investment.

112. *Id.*

113. RESTATEMENT (SECOND) OF TORTS § 103 cmt. b (1979).

deterrent in the criminal context[114] but have declined to utilize this deterrent in the pseudo-contractual cases.

The framework developed in Part I suggested that the potential for externalized violence and the extent of knowledge about the underlying rules are central considerations in the policy choice of whether to permit the use of force. To the degree that allowing creditors to use force can result in violence that the creditor does not experience or get penalized for, these negative externalities may justify foregoing the benefits that come with deterrence. The differential treatment between the use of force to remedy contractual default and stolen property could be warranted if the externalities from violence are high in the context of repossessions, but are low when retrieving stolen property. It is difficult to see why this would be so. The likely circumstances of confrontation in both contexts appear to differ in their propensity for creating spillover violence. In both cases, there is a chance that the target of self-help will be recalcitrant and may actively resist an attempt to retake.

There could, however, be a rationale that focuses on the ability to minimize violence by choosing the best time and place to attempt to retake. Knowing that a breach of the peace will defeat a self-help attempt gives the debtor an incentive to choose a venue that minimizes the prospect of violence. Someone attempting to recapture stolen property may not have that choice because, in contrast to a creditor, he is unlikely to have access to detailed information about the thief that will allow for nuanced choices about where and when to attempt recapture. Prohibiting the use of force in the context of stolen property may effectively mean that victims of theft will not use self-help because it is highly unlikely that they will be able to do so in a way that is both successful and minimizes the chance of violence. Insofar as creditors can make choices that allow for effective repossession without breaches of the peace, this possibility may account for the differential treatment in the two areas.

Another potential explanation centers on the role that knowledge of the relevant law plays in the use of force. In the contractual setting, the repossessor is often an experienced commercial actor who has a sufficient incentive to learn the governing rules and abide by them.[115] The targets of repossession may not know the rules, but as discussed above, this may allow for the breach-of-the-peace standard to be effective because a mistaken belief that creditors may lawfully use force may facilitate peaceful repossessions. In the context of stolen property, neither party may be aware of the rules on force. This is, perhaps, even more likely for the victims of theft because they may have little experience with having something stolen. The potential lack of knowledge of the rules may make it more difficult to control outcomes because behavior will not be responsive to these rules. This feature may account for the split law in

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114. *See* Danielle R. Newton, Comment, *What's Right with a Claim-of-Right?*, 33 U.S.F. L. REV. 673, 685-87 (1999) (summarizing the treatment of the claim-of-right defense across jurisdictions).

115. *See supra* Part II.A (discussing the likely knowledge that repeat players have).

this area, in contrast to the relative harmony in the rules for repossessions. In this case, law has little effect on behavior so the reasons for permitting or not permitting force may not be overly compelling. In contrast, because creditors can respond to the rules, the case for the optimal rule maybe more clear in the contractual context.

III. Non-Confrontational Self-Help in Contract

Scholars have identified the close relationship between contract and the use of self-help.[116] The central rights that have been analyzed in this context are the choices that the law provides to a party when a counterparty breaches an agreement.[117] A breached-against party often has the choice to withhold promised performance—a type of self-help—or the party can perform and seek damages in court. This choice mirrors the decision analyzed in the previous Parts: Parties can either take actions on their own to validate a legal right or they can seek a remedy in court. In most of these situations, however, contract law does not invite or authorize confrontation outside of the repossession contexts discussed earlier. This restriction on confrontation means that allowing this sort of self-help does not touch on the primary rationale for prohibitions on self-help cited by courts and commentators—the minimization of violence and disorder. A natural question is why contract law permits self-help repossession, but prevents other types of confrontation.

The types of confrontation that contract law prohibits include prohibitions on any efforts to seek damages from a breaching counter-party. These prohibitions remain in place even when it is absolutely clear that a breach has occurred. It may be obvious enough why the law does not permit this sort of self-help; an attempt to wrest money damages or, perhaps, an in-kind transfer from a party may spur violence. This specter of violence could, however, be minimized through the use of a breach-of-the-peace standard. Yet contract law, outside the context of repossession, does not allow people to seek out a remedy as long as they do not cause a breach of the peace.

The analysis of the right to retrieve stolen property shows a similar approach—in both the criminal and tort contexts, the breach-of-the-peace standard does not exist as a mechanism to settle claims. The Part above suggested that that the reason that some states authorize force to retrieve property is that self-help would not be effective without that threat. The same

116. *See* Gergen, *supra* note 21; Celia R. Taylor, *Self-Help in Contract Law: An Exploration and Proposal*, 33 WAKE FOREST L. REV. 839, 842 (1988) (arguing that "self-help plays a vital role in contract law").

117. As discussed below, contract law usually requires a showing of a material breach before permitting a party to withhold performance. But, in at least one instance—that of perfect tender—the law authorizes a buyer to refuse goods (a form of non-confrontational self-help) when a seller breaches in any way. The buyer, however, also has the option of accepting the goods and seeking damages in court. *See* U.C.C. § 2-601 (2003).

mechanism may be at work with the absence of that rule in contract. An attempt to remedy a contract or a tort claim by taking an amount of property that equals the claim is likely to meet resistance. This is probably even more true of an attempt to obtain money, which in almost all cases will require confrontation and will require consent. The question is why, in these types of actions, the law prohibits this kind of confrontation. This Part uses the scholarship on this question to show that, as with the confrontational types of self-help addressed above, accuracy plays a primary role in whether the law permits the use of self-help. After reviewing this scholarship, this Part examines accuracy's pull on the law of self-help in both the confrontational and non-confrontational settings.

A. Scholarship on Self-Help in Contract

Other analyses of self-help in contract have focused on the right to refrain from performing as a response to breach. Defining this response as self-help is a more expansive notion of the concept than has been used in this Article because it does not involve the transfer of goods or assets that repossession or taking back stolen property does. The lack of a transfer takes away much of the threat of confrontation and, with it, the threat of violence. With the element of disorder removed from the policy calculus, analysis of this problem has focused on the administrative savings that withholding performance can have relative to a rule that would require a party to perform and go to court to seek a remedy. A discussion of the scholarship on this point helps to clarify how the law makes the tradeoff between administrative costs and accuracy and it hints at some of the reasons why contract does not encourage confrontation outside the realm of repossession.

Mark Gergen has written the most in-depth treatment of this question. His article, *A Theory of Self-Help Remedies in Contract*, focuses on the non-repossession self-help rights that contract does, and does not, provide.[118] Though he does not structure the discussion in these terms, Gergen sets out a framework showing the ability of courts to make accurate determinations lies at the heart of self-help in contract. He shows that when breach is clear, courts are willing to let parties withhold performance in situations where it would be difficult to assess the amount of damages. Gergen identifies mitigation as an area that that applies this approach. He uses the famous case *Parker v. Twentieth Century-Fox Film Corp.*[119] to illustrate how this principal operates. Shirley MacClaine had a contract to play a role in *Bloomer Girl*, a planned musical about the antebellum South that would touch on issues of racial and gender conflict. The studio cancelled *Bloomer Girl* and offered MacClaine a lead role in the western *Big Country, Big Man* as a substitute. MacClaine

118. *See* Gergen, *supra* note 21.
119. 474 P.2d 689 (Cal. 1970).

refused the role and sued the studio for compensation under the contract. The California Supreme Court held that MacClaine did not need to take the substitute role as a way to mitigate the studio's damages.[120]

The case has the qualities that Gergen identifies as inclining a court to favor self-help. There is no doubt about breach in the case; the studio contracted with MacClaine for a role in a movie and the studio then scrapped the movie. And the amount of damages that MacClaine would have suffered had she been required to mitigate would be very difficult, if not impossible, to determine.[121] Gergen shows this approach carries beyond the ability of a defendant to refuse an offer of substitute performance. It also applies in the context of a defendant allowing to complete performance when a plaintiff breaches and,[122] most importantly for the purposes of this Article, it applies in the context of withholding performance when damages may be an inadequate substitute.

Gergen uses the cases on material breach to show that a party can withhold performance when breach is clear. To illustrate the point, he uses the case of *Colonial Dodge, Inc. v. Miller*.[123] Miller had purchased a car that included the option of extra-wide tires and, after the car had been delivered and driven, he discovered that there was no spare extra-wide tire. The dealer could not immediately supply a replacement and, rather than suing for damages, Miller demanded that the dealer pick the car up from his house. The dealer refused; Miller responded by withholding payment; and the dealer sued. The case eventually made its way to the Michigan Supreme Court, which held in favor of Miller. As Gergen argues, this case shows the same pattern as that observed in *Parker*. Breach is clear—the dealer had failed to deliver all of the promised extra-wide tires—and the harm to Miller would be difficult to measure—the psychological cost of being temporarily without a spare tire. In these circumstances, with some caveats,[124] contract law permits a party to exercise self-help through withholding performance.

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120. As Gergen notes, Victor Goldberg has argued that the trial court had a better interpretation of the contract. *See* Gergen, *supra* note 21, at 1401 (citing Victor P. Goldberg, *Bloomer Girl Revisited or How To Frame an Unmade Picture*, 1998 WIS. L. REV. 1051, 1052-53). The trial court treated the agreement as an option contract and simply enforced it without touching on the duty to mitigate. The California Supreme Court ignored that option and, instead, treated the question as one of mitigation.

121. *See id.* at 1403.

122. Gergen argues that the case most often used to illustrate this problem, *Rockingham County v. Luten Bridge, Co.*, 35 F.2d 301 (4th Cir. 1929), can be misleading if looked at in isolation because the rule it applies—that a plaintiff will not be compensated for work that occurs after the defendant makes a request to cease performance—is the exception rather than the rule. *See* Gergen, *supra* note 21, at 1406-09. A more complete view of the cases, Gergen asserts, shows that a plaintiff can continue performance and receive the contract price in situations where the defendant's breach is clear and it would be difficult to measure the plaintiff's damages. *Id.*

123. Gergen, *supra* note 21 (citing Colonial Dodge, Inc. v. Miller, 362 N.W.2d 704 (Mich. 1984)).

124. One caveat applies to this specific line of cases. Gergen points to the counter example of *Plante v. Jacobs*, where a contractor misplaced a wall in a way that did not diminish the market value of

The law, however, does not encourage people to take this approach when breach is unclear, or so Gergen argues. He begins this discussion with an examination of disputed payments. The combination of the rules on voluntary payment and on accord and satisfaction means that, in order for a party to withhold a disputed payment, both parties must agree that the payment is not final.[125] This structure makes it quite difficult for a party to withhold final performance as a strategy because a party will have to breach a contract in a material way to do so. The larger doctrine on material breach creates the same incentives.[126] When there is a dispute over the meaning of an agreement—unlike the situations in *Parker* and in *Miller*—a party who wants to respond by withholding performance will typically have to breach the agreement in a material way. A material breach often has severe consequences—such as potentially having to compensate the Millers of the world—and, accordingly, the doctrine creates incentives to perform rather than to withhold.[127]

B. Do These Principles Apply More Broadly?

The point of reviewing Gergen's approach is not to scrutinize his synthesis of the doctrine. Rather, the goal is to examine how the concrete principles he extracts map onto the principles examined in this Article. Gergen's scope covers contract rights that, for the most part, do not involve confrontation; he expressly disclaims any analysis of repossession.[128] His analysis dovetails nicely with the scope of this Article, which covers repossession in the context of contract, as well as similar remedies in tort and criminal law. For clarity, I will refer to the type of self-help that Gergen addresses as non-confrontational self-help; I will call the type that I address confrontational self-help; and I will use self-help to refer generically to the combined concepts.

Gergen observes two broad patterns. The first is an ability to use non-confrontational self-help when breach is clear, even if withholding performance creates substantial losses for the breaching party. The second is a

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the property. *Id.* at 1414-16 (citing 103 N.W.2d 296 (Wis. 1960)). The owner, Jacobs, did not see fit to repair the wall, but did withhold the balance of the contract price. The court held in favor of the contractor by applying the rule of substantial performance. Gergen reconciles this outcome with his position that remedies are not about avoiding economic waste by showing that courts will give the cost of completion to a party like Jacobs when they do complete the work, without an inquiry into the reasonableness of the decision. *Id.* at 1416-17.

Another of Gergen's caveats concerns some other areas of law where these principles do not apply. He identifies some similar circumstances in tort and in property where courts award the lesser of market value and replacement value without regard to whether a party has replaced the asset. *Id.* at 1418-19.

125. *See id.* at 1423-24.

126. *See id.* at 1427-29.

127. Gergen notes that one cannot reduce the rules to the proposition that obligates "parties to a contract with uncertain performance terms to cooperate when relevant rights are uncertain and the gains from cooperation are large." *Id.* at 1429.

128. *Id.* at 1398 n.1.

discouragement of the ability to use this type of self-help when it is not clear what a contract obligates a party to do. Put into the framework developed above, this approach mirrors the concerns about accuracy that accompany confrontational self-help. In cases where breach is clear, allowing a party to use confrontational self-help diminishes the prospect that additional process will produce more accurate results. All else being equal, these situations suggest permitting some degree of confrontation when breach is clear. As the comparison of personal and real property showed, this may be a driving rationale for the difference in the ability of parties to use self-help in these two contexts.[129] If the repossession of personal property like cars and boats tends to involve clear breaches of the contract (that is, there are unlikely to be viable counter-claims), the concerns about accuracy are not at their height. If, as may plausibly be the case, repossession of real property involves rights that are less clear—perhaps because landlords often have more extensive duties under a lease than a creditor does under its typical contract—this lack of certainty may be a justification for limiting the use of confrontational self-help in this context.

This focus on the clarity of the breach suggests a connection with regard to whether the law permits confrontational and non-confrontational self-help. There is, however, another piece to the pattern that Gergen observes in the non-confrontational context. He makes the argument that, where breach is clear, contract law will tolerate a large loss for the breaching party when the non-breaching party experiences damages that are difficult to assess. This element of uncertainty about damages does not appear to play as central a role in the law's treatment of confrontational self-help. The damages in these confrontational contexts are not nearly as difficult to calculate because the remedy sought is typically the return of a fixed, physical asset. By retaking possession of an asset, a creditor, or similar party, gets the full subjective value of the good, thus eliminating the difficult measurement problems that come with assessing damages. In this way, confrontational self-help provides a sort of specific performance.

The ability to provide accurate compensation through a type of specific performance eliminates much of the hand wringing that comes with the assessment of money damages. Gergen's analysis shows that, in the non-confrontational context, courts sometimes struggle with whether to allow self-help when difficult-to-ascertain damages brush up into conflict with relatively large damage awards. They need not have that concern in the confrontational context, because courts are not faced with the prospect of fixing a monetary amount to an inchoate harm. With this issue put to the side, the remaining concern is the clarity of the underlying legal rights. This is the thread that unites the law's treatment of self-help in the confrontational and non-confrontational contexts. Courts and policymakers are quite willing to let

129. *See supra* Part II.A.

people take matters into their own hands when it is clear that another party has breached an agreement or otherwise violated another's legal rights. They will insert themselves into disputes, however, when other concerns become amplified. Courts and policymakers will tolerate significant levels of violence—as seen in the repossession and stolen property contexts—and significant economic losses for breaching parties—as the non-confrontational contracts cases show—before they will intervene.

This observation about the role that clarity of legal rights plays in the structure of self-help has significant consequences for our understanding of the role of courts. Their willingness to let parties sort remedies out when rights are clear suggests that a primary role for courts is to make calls on close questions. That is, a major function for courts in private law is to play a coordinating role when rights are unclear. In these situations, courts can provide an answer, and if need be, they can back it up with the enforcement power of the state. By refereeing these disputes, courts can prevent the potential waste that would come with intransigent parties trying to sort these rights out on their own. But where the rights are clear, courts grant wide latitude for parties to sort these questions out.

Conclusion

The questions of whether and how to permit self-help permeate the structure of private law, yet these concepts have not been analyzed in systematic detail. This Article has begun this process by clarifying the underlying tradeoffs that come with the different flavors of self-help that the law provides. This analysis shows that while some previously identified variables—such as administrative burdens and externalized violence—play a role in explaining the patchwork of self-help rules, they cannot account for all of the observed variation in the rules. By considering the interplay between the knowledge of legal actors and the rules of engagement, this Article helps to solve the puzzle that self-help poses. It does so by showing that the clarity of the underlying rights, and thus the ease of making accurate assessments about those rights, is central to our understanding of when the law permits parties to take matters into their own hands. Self-help can, importantly and parsimoniously, be understood as a mechanism to force investments in accuracy.