SELF-HELP AND THE RULES OF ENGAGEMENT

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THE CHOICE of legal remedies has been a central focus of economic analysis of law for several decades. And justly so; understanding why a legal entitlement should be in 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.

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 make use of non-necessary force, and bounty hunters who seek to apprehend a subject face similar restrictions. 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 to 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. An even more permissive rule allows victims of theft to attempt to recapture their property and to use reasonable force while doing so.

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*, 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."

Contrast this view to the treatment of secured goods under Article 9 of Uniform Commercial Code. Creditors have substantial leeway to retake property, even if it means trespassing on the debtor's land. Policymakers could apply *Berg*'s ready-made 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. But they do not.

INSTEAD, CREDITORS can go so far as to break into a 747 and fly it off the tarmac without resort to legal process. The prevention of violence plays little to no role in the analysis here, as there is an array of evidence that Article 9 repossessions can sometimes provoke strong reactions that can lead to significant injuries

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and even death. Moreover, the situations where 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—are precisely those situations where violence is most likely to arise.

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, the costs of violence, and the costs of the delay associated with required process. This formulation permits analysis of interactions between these elements. For example, while some prior analysis has identified the tradeoff between administrative costs and violence, the emphasis on mistakes has received little treatment despite its ability to further our understanding of what drives self-help rules and behavior.

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ONE OF THE CHIEF benefits of investing 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 and 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 to 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 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.

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 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—as may be 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 puts policymakers to the choice of permitting the use of force or prohibiting self-help altogether.

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