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THE REPO CODE: A STUDY OF ADJUSTMENT TO UNCERTAINTY IN COMMERCIAL LAW

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I never broke into a car, never hotwired a car, kid. I never broke into a trunk. 'Thou shall not cause harm to any vehicle nor the personal contents thereof nor through inaction let that vehicle or the personal contents thereof come to harm.' It's what I call the Repo Code, kid. And don't forget it. Etch it in your brain. Not many people got a code to live by anymore. . . . See, an ordinary person spends his life avoiding tense situations. Repo man spends his life getting into tense situations.¹

INTRODUCTION

Real repo men (and the occasional repo woman) do not have a code to live by. Like its uniform law antecedents, the Uniform Commercial Code ("UCC" or "Code") is silent about what constitutes a "breach of the peace"² in a self-help repossession³ and unclear about what the debtor's remedy is if a breach occurs.⁴ The Code thus relies upon expensive case-by-case litigation under vague, admonitory language as the means to regulate the activities of "recovery specialists," as some of the repo men now style themselves.

Karl Llewellyn conceived of the UCC as a "case law code."⁵ According to Grant Gilmore's memories from his eight years' service on the drafting staff, Llewellyn's goal was to draft a code that "abolished the past without attempting to control the future," leaving the courts to adjust the law to

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1. REPO MAN, (Universal 1984) (speech by Bud, played by Harry Dean Stanton).

2. See U.C.C. § 9-503 (1995).

3. Article 9 draftsman Grant Gilmore stated that the formulation "without breach of the peace" in UCC section 9-503 "merely copies the substance of the analogous provisions in the Uniform Conditional Sales Act and the Uniform Trust Receipts Act . . ." 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.1, at 1212 (1965).

4. See *infra* Part IV.

5. GRANT GILMORE, THE AGES OF AMERICAN LAW 85 (1977).

changing commercial conditions.⁶ This conception was most fully realized in Article 2, with its many open-ended provisions, but there are also traces of it in Article 9.⁷ Section 9-503, with its authorization of self-help repossessions that can be achieved without a “breach of the peace,” is one instance of an open-ended standard.⁸ Another is Section 9-504(3),⁹ calling for a “commercially reasonable” disposition of collateral.¹⁰ It is not an accident that the case-law code approach survived in the Article 9 sections protecting debtors on default, with these sections working least well in consumer and small business transactions. Gilmore noted that the practicing lawyers who participated in drafting the original UCC insisted on a tighter drafting style than Llewellyn wanted and, to a large extent, they were successful in Article 9.¹¹ Given their practice experience, primarily representing creditors, those lawyers felt less keenly about the need for certainty where debtors’ rights were at stake.

It is conventionally thought that certainty is justice in the commercial field.¹² Give commercial parties a clear legal rule, so this thinking goes, and they can make their plans secure in the knowledge that the courts will not upset their expectations. This kind of plea is frequently accepted in the UCC drafting process. A recent example is the revised definition of a security interest in Article 1, which provides subsection upon subsection of gloss in an attempt to increase predictability for parties concerned about whether they will be considered secured parties or lessors.¹³ Elegance in drafting has been sacrificed on the altar of greater commercial predictability.

This Article challenges the conventional wisdom about the routine importance of certainty in commercial law through the exploration of one

6. *Id.* at 85, 140 n.38.

7. *Id.* at 141 n.38 (noting that the open-ended style is more prevalent in Article 2 than in Article 9).

8. U.C.C. § 9-503 (1995).

9. *Id.* § 9-504(3).

10. See generally Donald J. Rapson, *Deficient Treatment of Deficiency Claims: Gilmore Would Have Repented*, 75 WASH. U. L.Q. 491 (1997).

11. GILMORE, *supra* note 5, at 85, 140 n.38.

12. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 7 (3d ed., student ed. 1988) (describing the ethos that prevailed in the 1950s when the Uniform Commercial Code was promulgated and “that continues to prevail today in many quarters” as including the view that the Code should generally use “precise text” to “greatly reduce uncertainty, enhance predictability, and diminish the volume of legal disputes”).

13. See U.C.C. § 1-201(37) & cmt. 37 (1995) (revised in 1987, 1 U.L.A. supp. 24-25 (Supp. 1996)). Although the revised section adds many examples, it states no standard for other types of cases, leaving the courts to look to “the facts of each case.” U.C.C. § 1-201(37) (1995)).

example—the law of self-help repossession. Although large, repeat commercial players and their lawyers may prefer a code that provides “answers,”¹⁴ we see in the repossession example that a case-law code can work well enough for financial institutions, which are able to cope with uncertainty through planning. On the other hand, “little guys”—consumers and repossession businesses—do not have the same ability to create their own certainty.¹⁵ Part I of this Article explores and critiques Llewellyn’s jurisprudential answer to the problem of legal uncertainty. Llewellyn quite rightly dismissed the idea that rule-bound, deductive decisionmaking is possible as a means to achieve legal certainty. Instead, he believed that the best hope of some degree of predictability can be found in a law rooted in the social norms of those it governs.¹⁶ The biggest limitation of his approach, however, is its insufficient sensitivity to the sometimes prohibitive expense of litigation under a case-law code, particularly in disputes involving a consumer or a small business with a claim or defense for a small dollar amount.

Part II focuses on the repossession example, describing interrelated developments in the case law and commercial practice. Institutional secured lenders have adjusted to legal uncertainty by using insured independent contractors to insulate themselves from breach of the peace liability, thus delegating the management and the monitoring of the risk to insurers. It turns out that the lack of specificity in the law is most troublesome for the consumer, sole proprietor, or other small business subjected to a breach of the peace. Litigation under the vague “breach of the peace” provision, with no specific remedy in the Code, is unlikely even to pay for itself in most instances, making it infeasible as a practical matter. Uncertainty can also be hard on repossession businesses caught between pressure to maximize collections while avoiding a bad record of claims of breach of the peace that could result in a cutoff of the insurance that many lenders now require before they will retain a reposessor.

In Parts III and IV, this Article critiques the current state of breach-of-the-peace law and advocates efforts to increase certainty for debtors and

14. Peter A. Alces, *Roll Over, Llewellyn?*, 26 LOY. L.A. L. REV. 543, 545 (1993) (quoting a letter from Donald Rapson, general counsel for The CIT Group and a member of both the UCC’s permanent editorial board and the drafting committee for Revised Article 9, in which Rapson praises Article 9 for generally “anticipating the issues and furnishing answers” but notes that Part 5 fails to provide answers).

15. See *infra* notes 49-57, 83 and accompanying text.

16. See *infra* notes 38-39 and accompanying text.

repossessors by defining breach of the peace and the remedy for it with greater specificity. Preferably, this should be accomplished by amending Article 9, although judicial sensitivity to the need for specificity in this area would be a second-best solution. Effective enforcement against breaches of the peace, necessary to provide deterrence, requires specific rules and enhanced remedies. With a recent boom in high-risk, high-interest “second-chance” or “subprime” lending, repossession is being used more, increasing the importance of deterring risky repossession practices.¹⁷ Until there is statutory reform, courts should explicitly take into account how the lack of specificity in repossession law undermines legal redress for consumers and other small debtors. Courts should attempt to compensate for this problem by stating rule-like holdings and by fashioning remedies worth pursuing by consumers and other small debtors. The effort to reform repossession law depends not only on development of statutory or case-law rules, but also on educating decisionmakers (UCC drafters or judges deciding cases) about the difficulties of making use of vague statutory formulations in small transactions.

I. THE LIMITS OF LLEWELLYN’S SOLUTION TO THE PROBLEM OF LEGAL UNCERTAINTY

Throughout the twentieth century, American legal scholars have struggled with the problem of legal uncertainty. Near the end of the nineteenth century, Oliver Wendell Holmes wrote that judges draw the common law from “considerations of what is expedient for the community,” indeed from “public policy.”¹⁸ The recognition of this deep well of legal source material, and of the necessity that human agency is necessary to apply it, undermined

17. Saul Hansell, *A Surge in Second-Chance Finance*, N.Y. TIMES, Mar. 17, 1996, § 3, at 1, 10-11 (reporting significant increases in lending to persons with a repossession or bankruptcy in their credit histories and describing the business of a used car dealer who repossesses from 24% of its customers); Robyn Meredith, *Will Ford Become The New Repo Man?*, N.Y. TIMES, Dec. 15, 1996, § 3, at 1 (reporting on Ford Motor Credit Co.’s ambitious plan to expand into the subprime auto-finance market, with a new division called Fairlane, providing loans at 18-22% interest to borrowers with records of not paying back their loans, including those who have had cars repossessed or who have filed in bankruptcy, and discussing the need for ruthlessness in repossessing cars to make money in this market), available in LEXIS, News Library, Nyt File. In automobile lending generally, default and repossession are much lower. See *Delinquencies Increase Marginally*, CREDIT RISK MGMT. REP., Mar. 27, 1995 (reporting delinquency rates nationally of 1.46% for direct automobile loans and 1.65% for indirect automobile loans), available in 1995 WL 7499948.

18. OLIVER WENDELL HOLMES, THE COMMON LAW 31-32 (Mark DeWolfe Howe ed., 1963) (1881).

confidence that any one could say what “the law” is.¹⁹ As a Supreme Court Justice, Holmes made the famous, unflinching declaration: “I recognize without hesitation that judges must and do legislate,” although “only interstitially.”²⁰ Even as cautious a jurist as Benjamin Cardozo picked up this theme, writing that legal uncertainty is inevitable because of “fissures” in the law,²¹ and because of difficulties in applying the law or determining the applicable principle.²² According to Gilmore, Cardozo’s admission that judges must make law caused “a furor” and was viewed as “the legal equivalent of hard-core pornography” in 1921 when *The Nature of the Judicial Process* was published.²³ By the mid-1930s, however, this message was old hat, at least in some circles. As a result, Lon Fuller could find it praiseworthy that Llewellyn did not “follow the example of those realists who attempt to ridicule this problem [of legal uncertainty] out of existence.”²⁴ Fuller also mocked Jerome Frank’s “implication . . . that for the person free from psychic repression legal uncertainty, far from being a source of concern, is really a source of delight.”²⁵

The problem of legal uncertainty has never gone away, and the debate has come again to the fore in recent exchanges between critical scholars and advocates of a “plain meaning” approach to legal interpretation.²⁶ The title of Antonin Scalia’s 1989 Oliver Wendell Holmes, Jr. lecture at Harvard could be used as a bumper-sticker summation of one side of the debate: “The Rule

19. Mark DeWolfe Howe, *Introduction* to HOLMES, *supra* note 18, at xviii. Howe describes Holmes’s jurisprudential thought as follows:

He found it impossible, in the first place, to accept the thesis of Austin that law may always be identified as the command of the sovereign. He saw the forces which operate upon the judicial process as so many and so multiform that Austin’s simplistic analysis of law seemed descriptively inaccurate and scientifically untrue. If the law in the final analysis is made by the decisions of judges, and those decisions are the consequence of many operating forces—customs, statutes, precedents, and public opinion—it becomes virtually impossible for the lawyer to say what the law on a particular matter “is.” The best that he usually can do is make a more or less informed and discerning prediction of how the matter in issue will be resolved through the judicial process.

Id.

20. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

21. Cardozo said these “fissures” are typically wider in the common law than in statutes. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 71 (1921).

22. *Id.* at 163-67.

23. GILMORE, *supra* note 5, at 77.

24. Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 431 (1934).

25. *Id.* at 433 (discussing JEROME FRANK, *LAW AND THE MODERN MIND* 17-18 (1930)).

26. For a recent exploration of the problem, see Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

of Law as a Law of Rules.”²⁷ On the other side, Pierre Schlag earlier argued convincingly that rules do not necessarily increase certainty more than standards because no legal directive can control the context to which it applies.²⁸ One can assimilate Schlag’s point, however, and still think rules may help a particular group, such as consumer debtors. It is, of course, not just the rules themselves that do the trick; in the process of promoting the formulation of rules, successful reformers will likely have to inform decisionmakers (here, Code drafters or judges) about the context to which the law applies. To put this in Llewellyn’s vocabulary, reformers must provide a basis for “situation sense” that decisionmakers may not have from first-hand experience (for example, the difficulties consumers have in pursuing legal claims against businesses). There are plausible reasons to think it does make some difference how law is formulated, particularly if the process of formulating the law—whether by UCC drafting committee or judges deciding cases—helps create an appreciation of the context to which the legal formulation applies and thus encourages attorneys that judges will be receptive to claims.

Llewellyn labored mightily to reconcile legal realism with the need and desire for certainty. He first did this early in his career in a lucid synthesis written for a German audience and only recently translated into English.²⁹ The brilliance of this work can hardly be overstated; it is Llewellyn at his best. He dismissed the possibility of legal certainty through deductive application of existing rules: “for the cases which occasion difficulties, this kind of legal certainty never has existed and never will exist . . . to strive for this kind of certainty is a waste of time”³⁰ He precisely identified the nature of routine judicial discretion: judges have leeway in the selection and characterization of the significant facts³¹ and leeway in the selection and application of rules.³² He even argued that it was a misnomer to speak of “applying” a rule because “one *expands* a rule or *contracts* it. One can only

27. Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. CHI. L. REV. 1175 (1989)

28. Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 406-07 (1985).

29. KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* (Paul Gewirtz ed. & Michael Ansaldi trans., 1989) [hereinafter LLEWELLYN, *CASE LAW SYSTEM*]. This is a translation of a book published in German in 1933, based on lectures given in Leipzig in 1928-29. Paul Gewirtz, *Introduction to LLEWELLYN, CASE LAW SYSTEM*, *supra*, at ix-x. Late in his career, Llewellyn covered much of the same ground, with more qualifications. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

30. LLEWELLYN, *CASE LAW SYSTEM*, *supra* note 29, § 52.

31. *Id.* § 42, at 52-54.

32. *Id.* §§ 52-54.

'apply' a rule *after* first freely choosing either to include the instant case within it or to exclude the case from it."³³

Despite his attack on the possibility of deductive decisionmaking and his exploration of the nature of judicial discretion, Llewellyn nonetheless pursued a rescue mission for the ideal of legal certainty. He found predictability and thus a measure of certainty in "the operating technique" of lawyers and judges.³⁴ Llewellyn believed that the judge is constrained by his socialization in society and in the legal profession.³⁵ A trained lawyer or judge with a certain degree of life experience has a predictable reaction to a fact situation, a "sense of justice" in the individual case.³⁶ Thus, lawyers can develop some ability to predict what courts will do; legal certainty for lawyers is "a matter of sociology,"³⁷ rather than logic. Ultimately, Llewellyn believed that the most important form of legal certainty is "legal certainty for laymen,"³⁸ which he said could only be provided by a legal system in which the results of lawsuits accord with laymen's real-life norms.³⁹ He thought it was the responsibility of judges to reformulate legal rules to "keep up with the corresponding change in the real-life situation."⁴⁰

The central point of Llewellyn's analysis of the problem of legal certainty was this: he argued that greater conscious understanding of the true nature of the judicial process was the best means to achieve a higher degree of certainty. About deductive decisionmaking, he stated that "the idea that it exists is the leading cause of the actual legal uncertainty among lawyers."⁴¹ Rather than chasing an illusion, he thought lawyers should hone their situation-sense and judges should stay attuned to laymen's norms.

Llewellyn's ideal judge was Benjamin Cardozo.⁴² Although Holmes and Cardozo both understood that judges cannot merely find the law and must

33. *Id.* § 52.

34. *Id.* § 55.

35. *Id.* § 55, at 78.

36. *Id.* § 56, at 79-80.

37. *Id.* § 57, at 81-82. In *The Common Law Tradition*, *supra* note 29, at 216, Llewellyn said the ideal should not be "certainty" at all, but "reasonable regularity of decision," making for "reckonable" work.

38. LLEWELLYN, *CASE LAW SYSTEM*, *supra* note 29, § 58, at 82.

39. *Id.* at 83.

40. *Id.*

41. *Id.* § 57, at 81.

42. Llewellyn dedicated *The Case Law System in America*, to Cardozo and to a German judge, retired Chief Justice of the Reichsgericht Walter Simons, "who have added new honor to the high tradition of which they are a part." *Id.*

interstitially make it, in one famous pair of cases they diverged in their views of what sort of judicial legislation is most efficacious.⁴³ Holmes expressed a taste for clear rules, whereas Cardozo loved the nuances of case-law decisionmaking and preferred standards as a means to encourage attention to the context of the particular controversy.⁴⁴ In his efforts to write a case-law code, Llewellyn sided with Cardozo. He believed a UCC of standards would better allow judges to do the job of adapting the law to real-life norms.

While there are strengths in Llewellyn's approach, such as flexibility and dynamism, it has limits that one can see clearly in the breach of the peace example. One can find indications that Llewellyn understood these limits. In a section of *The Case Law System in America* entitled "Desirable Interaction of Precedent and Statute," he found "incomparable value" in case law's ability to "continuously reform the law in light of the concrete needs of individual cases."⁴⁵ Llewellyn thought it important for case law to experiment concerning ways to address new developments, but once a body of cases makes the full implications of a problem known, he believed:

This is the time for a statute to step in. At the development's start, both the insight and experience necessary to create a statute are lacking. A statute passed under such circumstances is a far greater misfortune than any misstep taken by a case law court. But if enough cases are available, if enough experience has been amassed to make an incisive diagnosis possible, a statute can move much more directly and efficiently toward its real goal than the pure tradition-bound case law method. . . . Optimally, a statute will create a new goal and a new means to achieve it, but never the ultimate particularized solution which is finally achieved . . . only through judicial decision. (Or

43. *Baltimore & Ohio R.R. Co. v. Goodman*, 275 U.S. 66 (1927); *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934). Both Scalia, *supra* note 27, at 1187-88, and Schlag, *supra* note 28, at 379, discuss this pair of cases.

44. Compare *Baltimore & Ohio R.R.*, 275 U.S. 66 (Holmes, J.) (the driver at an unguarded railroad crossing has a duty to stop and look) with *Pokora*, 292 U.S. 98 (Cardozo, J.) (the driver must act with reasonable caution, which may or may not require that the driver stop and look). Cardozo urged

caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without.

Pokora, 292 U.S. at 105. Despite his admiration for rules, Justice Scalia gives Cardozo the last word in his article, closing with a quote from *Pokora*. Scalia, *supra* note 27, at 1188.

45. LLEWELLYN, *CASE LAW SYSTEM*, *supra* note 29, § 47, at 66.

through something fundamentally similar, administrative regulation.)

....

Should the task facing the court be simple and not very broad in scope a complete solution can be effectuated entirely within the framework of case law methodology For a problem as enormous as consumer protection, however, this is not possible.⁴⁶

Here Llewellyn acknowledges the indirection and inefficiency of case law and ties that point directly to the task of consumer protection. The clear implication of Llewellyn's writings is that statutes and administrative regulation can better define the goals and methods of consumer protection, at least after some experience of a particular problem has been gained.

In general, Llewellyn thought laymen's legal certainty depended on lawsuit results that accord with real-life norms. But what if experience shows, as it has for most types of consumer disputes, that certain lawsuits are rarely brought and as a practical matter are frequently impossible to bring under a case-law code? The result is that the legal system cannot implement laymen's norms. Although he alluded to the problem of consumer protection, Llewellyn paid insufficient attention to the larger problem with the flexibility of case law, whether under common law or under a case-law code: that law is not free.⁴⁷ Individualized justice is a prohibitively expensive proposition for small transactions.

Llewellyn also underplayed the possibility that lawyers' and judges' "situation sense," derived from their professional socialization, may inherently favor powerful interests such as financial institutions. Llewellyn believed that judges who fully appreciate their ability and responsibility to conform the law to real-life norms are more likely to achieve "liberation from unconscious prejudices of class, caste, etc."⁴⁸ Whether Llewellyn's sanguinity is justified is highly debatable. Consumer and other small debtors' recourse to law is easily discouraged by a combination of the expense of litigation under vague provisions and by lawyers' doubts that judges will be receptive to even valid claims.

Later generations of realists have taken up these problems of law in

46. *Id.* at 67-68 (footnotes omitted).

47. 1 STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 264 (1995) ("Law is not free" is the heading in this casebook for a note concerning the cost of legal representation.).

48. LLEWELLYN, *CASE LAW SYSTEM*, *supra* note 29, § 63, at 95 n.5.

action.⁴⁹ More than seventy years after Llewellyn identified consumer protection as an “enormous” problem, intractable under case-law methodology, experience provides overwhelming support for the use of specific rules and enhanced remedies, including public enforcement, in the consumer context. The secured creditor’s remedy of self-help repossession is most often used in consumer transactions, primarily in car loans. It is also used in a similar context—small business loans. Both consumer and small business debtors are frequently unrepresented by counsel on a regular basis. By contrast, a sizeable business debtor, with routine access to legal advice, is much better positioned to discourage repossession. Such a debtor will be able to inform its lender that a repossession will precipitate the filing of a Chapter 11 bankruptcy, in which the debtor in possession can force return of the collateral under the Bankruptcy Code’s turnover provision.⁵⁰ Thus, in practice, repossession is essentially a secured creditor’s remedy for consumer and small business defaults. It is therefore appropriate to look at section 9-503 from the consumer protection perspective. Consumer protection appropriately also applies to what I call “quasi consumers”—sole proprietorships and small businesses without the sophistication and resources to use legal counsel regularly.⁵¹

An approach based on “the total context of the fact situation” means that cases are easily distinguishable and have little precedential value.⁵² The first principle for drafting consumer protection legislation is the need for specific requirements that maximize effectiveness in several ways.⁵³ The most important benefit of specificity is that it produces a high degree of voluntary compliance by businesses. As Professor William Whitford has explained: “[I]f legislation directs merchants to do something particular, many will do it, almost regardless of the provisions for sanctioning violations. Compliance will result from such motives as a general belief in law abidingness and a fear

49. See, e.g., Jean Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 WIS. L. REV. 1405; Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970); William C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018.

50. See 11 U.S.C. § 542 (1994); *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983) (property seized but not yet sold before the filing of a bankruptcy petition is property of the estate, which is subject to turnover).

51. Jean Braucher, *Politics and Principle in the Drafting of UCC Consumer Protection Provisions*, 29 UCC L.J. 68, 78 (1996).

52. Leff, *supra* note 49, at 356-59 (quoting at page 356 John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 33 (1969)).

53. Whitford, *supra* note 49, at 1019-23.

of bad publicity.”⁵⁴

In addition, specificity makes consumer protection provisions more promising as a basis of litigation.⁵⁵ For example, a lawyer considering representing a debtor whose garage had been broken into by a repo man would be happier to find a statutory provision prohibiting repossession from within “any locked or unlocked residence, garage or commercial building” without “contemporaneous permission of the debtor,” to a vague provision barring a “breach of the peace.” Even if there is a reported decision under the vague formulation in favor of a debtor and involving similar facts, this would not be as encouraging as the more specific statutory provision because of the possibility that a factual variation could be used to distinguish a case-law precedent.

Along with specificity concerning what actions are prohibited, a remedy that provides a prize worth the trouble and expense of pursuing a lawsuit is necessary to make consumer protection provisions usable in litigation. A compensatory remedy is not enough in disputes over small dollar amounts. As will be discussed further in Part IV, many breaches of the peace do not cause out-of-pocket loss, and the dignitary injury is hard to measure, making representation of a debtor often look like a long shot to a lawyer. Although many courts have said that in theory punitive damages are available for breach of the peace, they also have been cautious about finding the requisite “nasty” intent to uphold them.⁵⁶ The vagueness of the peacefulness requirement seems to contribute to this reluctance. Courts do not want to penalize creditors who step over a line that only becomes visible in later litigation.⁵⁷ The combination of a vague “peacefulness” requirement and the lack of a clear, meaningful remedy has made it hard for debtors to challenge heavy-handed repossession methods. These problems are exacerbated because lawyers will justifiably anticipate difficulty in persuading a judge or jury to award substantial damages to a “deadbeat.”

In some settings, vague standards may make those subject to them stay far from the line of questionable behavior. This is likely to be true where those

54. *Id.* at 1022.

55. Braucher, *supra* note 49, at 1405, 1408.

56. *See infra* note 227.

57. *See* Whitford, *supra* note 49, at 1036 (arguing that punitive damages may only be appropriate where the substantive obligation is stated with specificity, because of the pressure on defendants to offer small settlements of dubious claims to eliminate the risk of large punitive awards if they lose in litigation).

with claims have the resources to litigate and where the damages that might be recovered are substantial. But in the typical repossession context, creditors know that debtors will not have ready access to lawyers, particularly for borderline claims, and that large damage awards are rare. A rational actor looking at this situation would see little risk in going right up to, and even over, the line of what a court would likely consider to be acceptable behavior. Because consumers have difficulty finding lawyers for such cases, the gains in property recovered in borderline repossessions probably exceed the costs in liability resulting from the occasional legal actions. Creditors can also settle lawsuits where the facts are particularly bad (also avoiding the creation of new, unfavorable precedent). From the perspectives of voluntary compliance by creditors and usefulness to consumers in litigation, UCC section 9-503 is a near-perfect example of how *not* to draft a consumer protection statute, ranking with another infinitely flexible UCC provision, that of unconscionability (UCC section 2-302).

Parts III and IV will explore in more detail the difficulty of using the case law of breach of the peace on behalf of consumers and small businesses and will suggest ways to improve the law, preferably through statutory amendment. First, it is necessary to explain some interrelated developments in law and commercial practice, the subject of Part II.

II. INTERRELATED DEVELOPMENTS IN REPOSSESSION PRACTICE AND LAW

Three interrelated developments have occurred recently in repossession practice and the governing law. First, there has been a growth in secured parties' use of independent contractors to carry out repossessions.⁵⁸ Second, the courts, in a series of recent cases, have consistently held that lenders are liable for breaches of the peace by their independent contractors.⁵⁹ Finally, lenders have responded to this legal development by increasingly insisting that their independent contractors obtain liability insurance coverage for most breaches of the peace.⁶⁰

In all debt collection, lenders have a choice between doing the work in-

58. Telephone Interview with Huey Mayronne, then Executive Director, American Recovery Association, Inc. (Mar. 1993) [hereinafter cited as Mayronne Interview]; Telephone Interview with his successor, Cathy Rodi (Feb. 1997) [hereinafter Rodi Interview].

59. See *infra* notes 68-69 and accompanying text.

60. Mayronne Interview, *supra* note 58; see also *infra* note 76.

house or contracting it out to independent contractors. The considerations that affect this choice include the relative impact on the lender's reputation, the relative costs, and the differences in the legal treatment of in-house versus outside debt collection. Reputational concerns (which also can be seen as a cost, but a difficult one to measure) favor use of independent contractors, because the lender need not be directly associated with the unpleasant techniques often used in debt collection. The other relative cost questions include: Is there a difference in the success rate of these two types of collection? What are the costs of training, paying, and supervising a staff of debt collectors versus the costs of contracting with independent debt collectors (including their fees and the transaction costs of dealing with them)? As for differences in legal treatment, the Federal Fair Debt Collection Practices Act applies to independent debt collectors, including attorneys, but not to lenders collecting their own debts in their own names.⁶¹ One might expect this difference to favor in-house collection, but the premise behind the choice in the federal statute to regulate only independent debt collectors seems to be that reputational concerns will restrain overly heavy-handed practices by creditors collecting in their own names.

In collection through repossession, the same types of considerations are at work in a creditor's choice between in-house and independent contractor services as in debt collection generally. Reputational concerns favor use of independent contractors to carry out repossessions, even more strongly than in other methods of debt collection. Grabbing property is about as unpleasant as legal techniques can get (knee-breaking is worse, but illegal).⁶² In addition, according to an industry trade group, cost factors other than reputation have favored use of independent contractors.⁶³ Some national creditors experimented with the use of employees to conduct repossessions and found that the costs of training (especially concerning variations in breach-of-the-peace law from state to state), paying, supervising, and deploying in-house repo men exceeded the costs of using independent contractors.⁶⁴ As a result,

61. 15 U.S.C. § 1692a(6)(F) (1994). Some state statutes regulate in-house debt collection. See CAL. CIV. CODE § 1788.2(C) (West 1985 & Supp. 1996) (in California Fair Debt Collection Act, definition of debt collector includes creditor collecting on its own behalf).

62. The Fair Debt Collection Practices Act prohibits independent collection agents from using such procedures as midnight dunning calls, communications with neighbors or employers to embarrass the debtor, threats of violence, profanity, and publication of "deadbeats" lists. 15 U.S.C. §§ 1692c(a)(1), (b), 1692d(1)-(3) (1994).

63. Mayronne Interview, *supra* note 58; Rodi Interview, *supra* note 58.

64. Mayronne Interview, *supra* note 58; Rodi Interview, *supra* note 58.

the independent repossession sector has grown. Repossession businesses can specialize in relatively cheap expert services. With the growth of national creditors, there has been a growth in large local repossession businesses that have the capital to meet the standards and pay the dues of a national trade organization, which prepares an annual directory of its members (cutting down transaction costs to national lenders trying to find them).⁶⁵

Repossession businesses have been making efforts at achieving greater respectability. For example, a promotional video produced by the American Recovery Association (“ARA”) contrasts a good and a bad repossession.⁶⁶ In the good repossession scene, a courteous, clean-cut reposessor in a button-down shirt, carrying a clipboard, locates the debtor’s car during the day at a parking lot outside the debtor’s place of employment. When the debtor shows up while the repossession is in progress, the reposessor calms him down with his efficient demeanor, shows the debtor paperwork, and gives him a card with a telephone number to call for information before towing the car away. The bad repossession involves a nighttime operation by thug-like men in leather jackets, who get into a shouting match with the debtors. One debtor threatens a repo man with a baseball bat, and the repo man responds by brandishing a long metal wrench. The video encourages lenders to use ARA members to ensure use of “professional” repossession practices.

An interesting and significant development in legal treatment has followed on the heels of the increasing use of independent contractors. Section 9-503 of the UCC authorizes a secured party, upon the debtor’s default, to repossess by self-help if this can be done without a breach of peace. By negative implication, the secured party is liable for breaching the peace. But what if an independent contractor breaches the peace? Is the lender still liable, or only the independent contractor? Until ten years ago, the few reported cases all held or said in dicta that a lender is not liable for breach of the peace by an independent contractor.⁶⁷ Beginning in 1987, in a total of twelve cases, the

65. Mayronne Interview, *supra* note 58; Rodi Interview, *supra* note 58.

66. Videotape: The Repossession Process from Start to Finish—A Lender’s Survival Guide to Repossession in the 90’s (American Recovery Ass’n., Inc.) [hereinafter Repossession Process Videotape].

67. See *Dietrich v. Trust Co. Bank of Augusta*, 346 S.E.2d 107 (Ga. Ct. App. 1986) (affirming summary judgment in favor of a creditor who hired an independent contractor to carry out a repossession); *Kouba v. East Joliet Bank*, 481 N.E.2d 325 (Ill. App. Ct. 1985) (holding that summary judgment for a bank was proper when its independent contractors breached the peace by grabbing the debtor by the neck and throwing her to the ground before taking her truck); *Dixon v. Ford Motor Credit Co.*, 391 N.E.2d 493 (Ill. App. Ct. 1979) (finding no breach of the peace, but the court said in dicta that even if a breach of peace had occurred, the creditor would not be liable because the

courts have consistently held that the lender is liable for a breach of the peace by an independent contractor.⁶⁸ The courts have characterized section 9-503 as recognizing a nondelegable duty to avoid breaches of the peace.⁶⁹ In view of the overwhelming weight of authority on this point, this rule should now be codified in section 9-503 in the interest of uniformity and to save the expense of further litigation on this question.

The most remarkable recent development in repossession practice concerns the reaction of lenders to their potential liability for breaches of the peace by independent contractors. One of the reasons for lenders to use independent contractors is to avoid the costs of supervising employees. But with lenders liable for independent contractors' breaches of the peace, they now have reason to monitor them. Another reason to use independent contractors is to carry out repossessions at locations remote from the lender's base of operations. With some lenders serving a national market and all serving a mobile population, it is common for them to use geographically remote independent contractors, making supervision difficult. Insurance has been lenders' solution to dealing with the difficult-to-monitor risk of liability for breaches of the peace by independent contractors, particularly when repossessions must be done at a distance from lenders' operations. Lenders are increasingly refusing to use independent contractors who do not have insurance to cover liability for breaches of the peace.

This is a nontraditional form of insurance. Insurance against intentional tort liability is not the standard practice of insurance companies.⁷⁰ A breach of

repossessor was an independent contractor); *Leighty v. American Can Credit Union*, No. 44496, 1982 WL 2574 (Ohio Ct. App. Dec. 9, 1982) (same). *But see Witucke v. Presque Isle Bank*, 243 N.W.2d 907 (Mich. Ct. App. 1976) (holding that a bank can be held liable for negligence in selecting a repossession agency, and also holding that a settlement in which the debtor released the repo agency from liability for breach of the peace did not release the bank from its own duty of care in selection of the reposessor).

68. See *Clark v. Associates Commercial Corp.*, 877 F. Supp. 1439 (D. Kan. 1994); *General Fin. Corp. v. Smith*, 505 So. 2d 1045 (Ala. 1987); *Nixon v. Haplin*, 620 So. 2d 796 (Fla. Dist. Ct. App. 1993); *Sammons v. Broward Bank*, 599 So. 2d 1018 (Fla. Dist. Ct. App. 1992); *Fulton v. Anchor Sav. Bank*, 452 S.E.2d 208 (Ga. Ct. App. 1994); *Massengill v. Indiana Nat'l Bank*, 550 N.E.2d 97 (Ind. Ct. App. 1990); *Nichols v. Metropolitan Bank*, 435 N.W.2d 637 (Minn. Ct. App. 1989); *Hester v. Bandy*, 627 So. 2d 833 (Miss. 1993); *Robinson v. Citicorp Nat'l Servs., Inc.*, 921 S.W.2d 52 (Mo. Ct. App. 1996); *Mauro v. General Motors Acceptance Corp.*, 626 N.Y.S.2d 374 (N.Y. Sup. Ct. 1995); *McCall v. Owens*, 820 S.W.2d 748 (Tenn. Ct. App. 1991); *MBank El Paso, v. Sanchez*, 836 S.W.2d 151 (Tex. 1992).

69. See *Clark*, 877 F. Supp. at 1446-47; *General Fin.*, 505 So. 2d at 1047-48; *Nixon*, 620 So. 2d at 798; *Sammons*, 599 So. 2d at 1020-21; *Fulton*, 452 S.E.2d at 214; *Nichols*, 435 N.W.2d at 640-41.

70. See ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* 518-19 (2d ed. 1988) (discussing case

the peace is an invasion of the victim's dignitary interest in personal security.⁷¹ Tort theories such as assault and battery, which protect personal security, are typically used in disputes between intimates or at least social acquaintances.⁷² These theories developed in an age when tort law was most concerned with moral judgment and the condemnation of wrongful acts.⁷³ Deterrence through punishment was more the goal than compensation.⁷⁴ Insurance, on the other hand, goes hand in hand with a modern focus in tort law on accidents among strangers and remedies directed to compensation.⁷⁵ Breaches of the peace in self-help repossession involve assaults or near-assaults among strangers while in the course of business and thus straddle the different ages of tort theory and the different aims of tort remedies.

Insurers are attuned to the unorthodoxy of insuring in such a field. An insurance company that writes policies for breach of the peace liability covers "reasonable, ordinary and customary exposures in the conduct of a business;" the idea is to insure against "ordinary" breaches of the peace in which the reposessor had no intent to break the law (for example, when repo men continue to repossess after the debtor expresses mild objection, with no force used by either side) but not for "willful and wanton" acts (such as using weapons or manhandling a debtor).⁷⁶ In essence, the policy tries to distinguish

law holding that it is against public policy to insure against liability arising from an insured's willful wrong); 9 MARK S. RHODES, *COUCH ON INSURANCE* 2D § 39:15 (Rev. ed. 1985).

71. See *infra* Parts IV.A., .C.

72. Richard L. Abel, *A Critique of Torts*, 37 *UCLA L. REV.* 785, 786-88 (1990).

73. *Id.* at 791.

74. See Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 *U. KAN. L. REV.* 115, 135-36 (1993) (discussing the greater willingness to award damages for mental or emotional injuries in intentional tort cases than in negligence cases as based on greater gravity of the defendant's conduct).

75. Abel, *supra* note 72, at 787, 796.

76. Telephone Interviews with Buck Young, an insurance agent with Midstate Insurance Co. in Columbia, Tennessee (Mar. 1993 & Feb. 1997) (Young developed such a policy for Cigna Insurance Co.) [hereinafter Young Interviews]. Young said the number of businesses insured under the breach of the peace policy he developed increased from about 12 in 1993 to 200 early in 1997, with the increase driven by the mandate of lenders, who can become additional named insureds under the policy. He said there are other insurers who provide this type of insurance as well.

The Cigna policy Young developed provides for \$1 million worth of liability coverage for breach of the peace. The premium is based on the number of employees an insured has, as well as the actuarial risk for the state where the business is located. In a state with a low risk of liability, Young said, a business with two repossessors paid, as of February 1997, about \$1600 for repossession insurance for a year (with the cost about double that in a high risk state). The same business paid about \$1200 for \$100,000 in yearly insurance coverage for the property it holds as a bailee after a repossession and prior to disposition of the collateral.

The exclusion from the insurance coverage of intentional law-breaking is a bow to case law holding that it is against public policy to insure against liability arising from an insured's willful wrong. See *supra* note 70.

the not-so-bad breaches, which are covered, from the reprehensible and uncovered breaches, where the repo men had to have known that they were breaking the law. As a result, lenders who use insured independent contractors still face some risk for unusually offensive breaches of the peace, which are not covered. However, in cases involving willful and wanton breaches by independent contractors, lenders may be able to avoid punitive damages on the theory that they should not be punished for outrageous behavior by their independent contractors which they neither condoned nor could reasonably have foreseen.⁷⁷

Insurance spreads the lenders' risk and also means insurers take on the role of monitoring repossession agencies. A bad claims history can be grounds for raising rates or cutting off future insurance coverage entirely.⁷⁸ Repossession agencies whose rates are increased sufficiently or whose insurance is terminated will not be able to compete successfully for lenders' business.

The existence of insurance reveals that lenders who use employees or uninsured independent contractors to conduct repossessions can be seen as self-insuring. As Gilmore has said, "the rich and powerful . . . are in a position to look after themselves and to act, so to say, as their own self-insurers."⁷⁹ Lenders can choose to spread the risk of breach-of-the-peace liability through a pooling of risk with other lenders or to spread the risk only over their own transactions. Lenders who self-insure have incentives to take cost-effective precautions against breaches of the peace by their own employees or by the uninsured independent contractors they use.

Insurance can be an efficient system for spreading and controlling the risk of liability for breaches of the peace. An insurer is well placed to monitor a reposessor's abusive practices because it has ready access to an insured's claims history. A lender, especially a remote one, could have difficulty discovering the nature and frequency of bad practices used by an independent repossession business with which it contracted from time to time. Insurance

77. *See, e.g.,* *General Fin. Corp. v. Smith*, 505 So. 2d 1045, 1049 (Ala. 1987) (Torbert, C.J., concurring specially) (saying creditor should only be liable for "compensatory damages that result from an independent contractor's non-peaceful repossession unless the plaintiff can prove that the creditor authorized, participated in, or ratified the independent contractor's acts.") *But see* *Clark v. Associates Commercial Corp.*, 877 F. Supp. 1439, 1451 (D. Kan. 1994) (punitive damages can be awarded against a creditor for an independent contractor's act "to motivate [the creditor] to take precautions to prevent future violent repossessions.").

78. *Young Interviews*, *supra* note 76.

79. GRANT GILMORE, *THE DEATH OF CONTRACT* 95 (1974).

also makes repossession more likely to be able to survive an isolated instance of breach-of-the-peace liability. If uninsured, a repossession business could be put out of business by one significant judgment. An insured firm stands a better chance of continuing its operations after a successful claim paid by its insurer. But insurance works to deter abuses because repeated claims could result in termination of insurance or insurance costs too high to permit the business to remain competitive, thus putting a repossession out of business and ending its ability to perpetrate further breaches of the peace.

Of course, this policing system only works if the law creates sufficient likelihood of success in litigation that insurers will settle debtors' valid claims. Uncertainty in the law about what conduct breaches the peace and about what the remedy is for a breach, discussed in Parts III and IV below, undercuts this system by making litigation infeasible, resulting in too little deterrence.

III. THE FAILURE OF CASE LAW TO CREATE SUFFICIENT PREDICTABILITY ABOUT WHAT CONSTITUTES A BREACH OF THE PEACE

A. *Risk of Violence: "An Adventure in Abstractions"*

After more than thirty years' experience under the UCC, one might expect that the case law concerning breach of the peace and the remedy for it would have developed into a body of doctrine that could be stated as a set of reasonably predictable rules. In fact, the case law is spotty. Many jurisdictions have few or no reported cases. In 1991, for example, a Tennessee appellate court complained of a "dearth of Tennessee authority" concerning the meaning of breach of the peace and noted that there was only one reported case, which was twenty years old and involved very different facts from the case before the court.⁸⁰ Holdings, of course, are limited by their sometimes idiosyncratic facts. Rationales concerning what constitutes a breach of the peace can be and are limited or expanded from case to case. Finally, there is even less case law on measurement of the remedy for breach of the peace, an issue which will be discussed in Part IV.

Even expanding the search for case law to a fifty-year period, 1945-1995,

80. *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 28 (Tenn. Ct. App. 1991). Actually, there were two old Tennessee cases, but one was not officially reported. The one not cited by the court was *Owens v. First American National Bank*, 6 U.C.C. Rep. Serv. (CBC) 427 (Tenn. Ct. App. 1968) (not officially reported).

and including pre-Code cases, one finds that only fifteen states have at least one reported civil case by the state's highest court addressing breach of the peace in a repossession. Counting federal cases that apply state law, lower state court decisions, and criminal cases that touch on whether a civil breach of the peace also occurred, twenty-nine states have either only one reported case, or none at all, addressing breach-of-the-peace issues. In fourteen jurisdictions, including the District of Columbia, there were no state or federal reported cases in that period. The case law for 1945-1995 is listed in an Appendix to this Article. The small number of reported cases is striking when one considers that in recent years there have been an estimated half-a-million to a million repossessions a year, depending on the health of the economy and the amount of lending to high-risk borrowers.⁸¹ Recently, repossessions have increased because of the expansion of the "second-chance" or "subprime" credit market.⁸² One possible explanation for the small number of reported cases is that there is little problem with breaches of the peace, or that valid claims are quickly settled. However, studies of law in action concerning other sorts of consumer claims suggest a more likely reason—the lack of reported cases is a reflection of little litigation, primarily because lawyers perceive too little probability of significant recovery to be willing to pursue breach-of-the-peace claims.⁸³ A useful perspective from which to view the body of breach-of-the-peace cases is that of a lawyer considering whether to represent a debtor on a contingent fee basis. From this perspective, the case law is very discouraging. Even when debtors "win" in reported cases, they often do not get substantial damages but rather a remand for trial or an affirmation of a small judgment. The law cannot deter breaches of the peace when legal redress is not feasible as a practical matter.

81. Mayronne Interview, *supra* note 58 (noting that he could only estimate the number of repossessions per year because there is no government count or private tally of the total number); see also *Repossession Process Videotape*, *supra* note 66 (stating that there are at least half a million repossessions per year).

82. Rodi Interview, *supra* note 58 (subprime lending increases demand for repossessions); Hansell, *supra* note 17, Meredith, *supra* note 17.

83. See Braucher, *supra* note 49, at 1455-57 (summarizing a number of empirical research studies' findings that consumers rarely approach lawyers after perceiving a consumer product problem and when they do, lawyers often avoid undertaking representation for economic and attitudinal reasons); Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 504-05 (1993) (bankruptcy is a usable consumer remedy in comparison to other consumer remedies). Bankruptcy is usable because it predictably offers relief from debts far exceeding the cost of hiring a lawyer to file. Legal services are available at affordable rates because consumer bankruptcy is usually an administrative action not requiring factual showings other than the filing of schedules of assets, debts, income, and expenses. *Id.*

The UCC's compromise position of self-help repossession embraces uncertainty, which makes consumer litigation unlikely. The central tension in regulation of repossessions is between vindicating the secured party's property interest and protecting the personal security of those who may be present, including debtors, bystanders, and the repo men themselves. The UCC manages this tension by recognizing a secured party's right to repossess by self-help but only allowing peaceful use of this remedy. The object, at least on the surface, is to minimize invasions of personal security, while protecting the return on investment to secured lenders (and thus indirectly keeping down the cost of secured credit).

The UCC's compromise to competing interests inevitably reduces predictability. Greater certainty might be achieved by prohibiting all self-help repossession,⁸⁴ in the interests of greater personal security but at the cost of taking away one advantage of having a security interest.⁸⁵ Alternatively, the law could concern itself less with personal security and emphasize the secured party's property interest by authorizing any repossession that does not involve inflicting violent injury on persons or property.⁸⁶

Most courts, however, say that *risk* of violence is enough to constitute a breach of the peace.⁸⁷ Because *all* self-help repossessions risk violence to some extent, what the courts really mean is that the risk of violence cannot be *too great*. This creates the necessity of case-by-case line-drawing. Because the use of a flexible standard inhibits consumer debtors' access to legal redress, the law in action gives more weight to the lender's property interest than to personal security, despite the courts' professed concern with balancing these interests.

The lurking risk of violence is illustrated by the following story, unfortunately a true one. Tommy Morris, a fifty-four-year-old repo man and

84. See LA. CODE CIV. PROC. ANN. art. 3541(1) (West Supp. 1997) (providing for a secured party to obtain a writ of attachment); see also Act of June 22, 1989, No. 137, sec. 20, 1989 La. Acts. 527, 601 (intent to retain pre-existing law). In Wisconsin, merchants can only repossess by self-help if they first obtain a judgment. WIS. STAT. ANN. § 425.206(1)(b) (West 1988).

85. Even without a right of self-help repossession, a perfected security interest remains valuable because it gives the creditor priority in bankruptcy. Secured parties also can use summary procedures for obtaining a judgment, such as replevin actions, after which they have the right to levy upon property with the aid of a sheriff or other law officer.

86. See *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 28 (Tenn. Ct. App. 1991) (rejecting the test of *Harris Truck & Trailer Sales v. Foote*, 436 S.W.2d 460, 464 (Tenn. Ct. App. 1968), that a breach of the peace "must involve some violence, or at least threat of violence.").

87. *Davenport* goes so far as to say that acts of public indecorum that offend tranquility and good order are enough to constitute a breach of the peace. *Id.* at 28-29.

father of four, used common techniques when he went to the home of Jerry Casey, Jr. to repossess Casey's 1988 Ford pickup truck at approximately 3:30 a.m. on February 25, 1994.⁸⁸ Morris, with twenty-one years of experience, could attach a vehicle to his wrecker in as little as seven seconds, and presumably he hoped to take the car from the Houston street without being noticed.⁸⁹ Had he succeeded, most courts would see this as an easy case of peaceful repossession—a nighttime repossession from the street or from a driveway is typically thought not to pose too great a risk of violence.⁹⁰

Debtor Casey, however, was awake with stomach problems in the wee hours that morning and saw Morris, outside his home, preparing to tow the truck with a wrecker.⁹¹ He fetched his .30-30 telescopic rifle, aimed, and fatally shot Morris twice in the chest.⁹² Casey, who had fallen three days behind on his \$11.80 weekly payment, told police that he thought Morris was a thief.⁹³ The use of a weekly payment schedule suggests high-risk credit, where repossession is most commonly used, and this conclusion also is supported by the fact that two years earlier, a different reposessor had towed away another vehicle Casey had purchased (but on that occasion Casey was a few months in arrears).⁹⁴

A nonuniform state statute dating to horse rustling days allows Texans to kill thieves and intruders at night to protect property.⁹⁵ Police referred to this statute to explain why they did not arrest Casey.⁹⁶ Harris County District Attorney Johnny B. Holmes, Jr. said the crucial question was whether a grand

88. Sam Howe Verhovek, *In Killing of Repo Man, Law Shields the Killer*, N.Y. TIMES, Mar. 8, 1994, at A16.

89. *Id.*; Eric Hanson, *Repo Man's Wife Wants Charge Filed; Lack of Response Still Being Probed*, HOUS. CHRON., Feb. 27, 1994, at A1.

90. *Wade v. Ford Motor Credit Co.*, 668 P.2d 183 (Kan. Ct. App. 1983) (uninterrupted nighttime repossession from a driveway was not a breach of the peace, even though in an earlier attempted repossession from the debtor's driveway, she had threatened to use her gun if the repo man ever returned); *see also, e.g., Butler v. Ford Motor Credit Co.*, 829 F.2d 568 (5th Cir. 1987) (repossession of a truck at 2 a.m. from the debtor's driveway was not a breach of the peace where no one saw or confronted the repossessors); *Oaklawn Bank v. Baldwin*, 709 S.W.2d 91 (Ark. 1986) (repossession from a driveway at 4 a.m. was not a breach of the peace); *Census Fed. Credit Union v. Wann*, 403 N.E.2d 348 (Ind. Ct. App. 1980) (there was no breach of the peace when creditor's agents repossessed a car from the parking lot of debtor's apartment building at 12:20 a.m.).

91. Jo Ann Zuniga & John Makeig, *Truck Owner Nobilled in Slaying of Repo Man*, HOUS. CHRON., Mar. 26, 1994, at A1.

92. *Id.*; Hanson, *supra* note 89.

93. Zuniga & Makeig, *supra* note 91.

94. *Id.*

95. TEX. PENAL CODE ANN. §§ 9.41-.42 (West 1994).

96. Verhovek, *supra* note 88.

jury would believe Casey thought the repo man was an auto thief.⁹⁷ If so, the killing was not criminal homicide in Texas. Holmes explained the thinking behind this Texas statute: “Do you have to sit still when a guy’s driving off with your car? No, I don’t think so. I think you ought to be able to use deadly force.”⁹⁸ The grand jury deliberated an hour and a half before deciding not to indict Casey, apparently believing that he thought the repo man was a thief.⁹⁹ “Praise the Lord,” exclaimed Casey after the grand jury’s decision.¹⁰⁰

The unusual part of this story is that the repo man died, and the truly extraordinary part is that under Texas law, the debtor got away with the fatal shooting, even though he conceded he was not acting in self-defense.¹⁰¹ Texas has a long history as a debtor’s haven,¹⁰² and this incident shows that the tradition continues. Nationally, one or two repo men a year are killed by armed debtors, according to an industry spokesman.¹⁰³ Our law treats this as part of the price of cheaper auto loans.

Gilmore seems to have been resigned to an “underworld,” as he called it, of seamy repossessions, particularly in consumer transactions.¹⁰⁴ He also enjoyed the madcap comedic element that is an inevitable part of self-help repossession, as indicated by this now politically incorrect hypothetical from his treatise: “And if the housewife, who is invariably pregnant and subject to miscarriages, sits on the sofa, stove, washing machine or television set and

97. *Id.*

98. *Id.*

99. Zuniga & Makeig, *supra* note 91.

100. *Id.*

101. Verhovek, *supra* note 88. For a case involving nonfatal shootings of two repo men, see *Johnson v. State*, No. C8-88-264, 1988 WL 47815 (Minn. Ct. App. May 17, 1988) (debtor shot and wounded two repo men during an attempted late night repossession from the debtor’s driveway and was found guilty of assault and not guilty of attempted murder). For a case saying that a debtor is not justified in using deadly force against a trespassing reposessor, see *Ohio v. Levre*, No. 94APA09-1376, 1995 WL 258959 (Ohio Ct. App. May 4, 1995).

102. Joseph McKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle*, 86 S.W. HIST. L.Q. 364, 393 (1983), quoted in ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 155-57 (3d ed. 1996).

103. Mayronne Interview, *supra* note 58; see also Verhovek, *supra* note 88 (attributing to the American Recovery Association the information that one or two repo men are killed a year and that four were killed in 1990).

104. 2 GILMORE, *supra* note 3, § 44.1, at 1212. Gilmore wrote, “In the underworld of consumer finance . . . repossession is a knockdown, drag-out battle waged on both sides with cunning guile and a complete disregard for the rules of fair play.” *Id.*

refuses to move, the finance company man will make a serious mistake if he dumps the lady or carries her screaming into the front yard.”¹⁰⁵

Reported cases may not necessarily be representative of actual repossession disputes. In fact, Gilmore described them as “worthless as accounts of what is actually going on in the world.”¹⁰⁶ But the recent cases do indicate the *range* of things that can go wrong, and the cases show that Gilmore’s capsule “underworld” description is still applicable. The recent cases present images of slapstick hilarity and high jinks as good or better than Gilmore’s example: a debtor towed “at a high rate of speed” in her car to a locked repossession yard patrolled by a loose guard dog and left in her car there;¹⁰⁷ repo men in a wrecker running over a debtor’s foot and knocking him over in their haste to tow his car;¹⁰⁸ and a debtor attempting to prevent a repossession by attaching herself to the rear of her truck, holding onto bungee straps and bumping up and down “like a Bugs Bunny cartoon” before falling to the ground.¹⁰⁹ An incident from the newspapers, not the court reporters, is even better: the repossession of a car with an eight-day-old baby strapped into a car seat (his father had left him there while he went into a bank).¹¹⁰

Because of the small amount of case law in most jurisdictions, the odds are high that for any particular case that arises, there will be no binding authority involving similar facts.¹¹¹ Precedent typically will provide only a general prohibition on repossessions that create an unacceptable risk of violence. The persuasive authority from other states may be conflicting or slightly different in its facts. In a follow-up story on the death of repo man Tommy Morris, a *Houston Chronicle* reporter summed up what he had learned about the law as follows: “Seeking a definition for ‘breach of the peace’ soon becomes an adventure in abstractions.”¹¹²

105. *Id.* at 1213.

106. GILMORE, *supra* note 5, at 88.

107. MBank El Paso v. Sanchez, 836 S.W.2d 151, 152 (Tex. 1992).

108. McCall v. Owens, 820 S.W.2d 748, 750 (Tenn. Ct. App. 1991).

109. State v. Trackwell, 458 N.W.2d 181, 182 (Neb. 1990).

110. Cindy Eberting, *Dealership Repossesses Baby with Car, Father Left his Infant Son in the Back Seat While He Went into a Bank*, KAN. CITY STAR, Sept. 29, 1995, at C1, available in 1995 WL 4173038.

111. See, e.g., Davenport v. Chrysler Credit Corp., 818 S.W.2d 23, 28 (Tenn. Ct. App. 1991) (discussing a dearth of Tennessee authority on the meaning of UCC section 9-503).

112. John Makeig, *Repo Man’s Death Ignites Rights Debate; Conflicting Property Claims Collide Fatally*, HOUS. CHRON., Mar. 2, 1994, at A17.

B. A Typology of Cases

One can try to find some order in the breach-of-the-peace cases by typing them. Four categories seem to emerge. First, some cases seem to be easy ones, at least until one adds an odd factual detail. Courts are likely to find an easy case of breach of the peace when a repossession occurs inside a residence without contemporaneous authorization, even if no one is home and no confrontation occurs.¹¹³ There is too great a risk of violence if the repossessioners are surprised while inside a home performing a repossession. On the other hand, uninterrupted repossessions from a street¹¹⁴ or driveway¹¹⁵ are usually seen as easy cases of no breach, although these cases do involve some risk of an interruption and confrontation.

However, a prudent lawyer should not too complacently rely on the notion of easy as opposed to hard cases because one can imagine factual variations that would call into question a previous court decision's general reasoning. For example, a *New York Times* story about a surge in the high-risk credit industry described a midnight repossession of a car from a driveway, right next to a big picture window through which the repo man could see the debtor and another man watching television.¹¹⁶ A court might find a breach of the peace on these facts, even if it treated most repossessions from a driveway as permissible.¹¹⁷ Perhaps having two men awake next to a window through which they could have seen the repossession makes a confrontation too likely, so that the case should be moved from the category of an "easy case" to that of a "difficult case."

There are three types of cases that have troubled the courts. Most of the case law can be organized into three categories: (1) those involving an interrupted repossession, particularly by the debtor; (2) a repossession in which the repossessioner encountered no one, but either used force to enter private property or entered a location where there was too great a risk of a

113. *Matthews v. Ohio Bell Tel. Co.*, No. 43079, 1982 WL 6592 (Ohio Ct. App. Oct. 15, 1982) (per curiam); *Kimble v. Universal TV Rental, Inc.*, 417 N.E.2d 597 (Ohio, Franklin County Mun. Ct. 1980); *General Elec. Credit Corp. v. Timbrook*, 291 S.E.2d 383 (W. Va. 1982).

114. *Ash v. Peoples Bank of Greensboro*, 500 So. 2d 5 (Ala. 1986) (no breach of the peace where repo man knocked on the debtor's door while debtor was home, although debtor did not answer, and where repo man then took possession of vehicle parked on the street).

115. See cases cited *supra* note 90.

116. *Hansell*, *supra* note 17, at A11.

117. In *Wade v. Ford Motor Credit Co.*, 668 P.2d 183, 184 (Kan. Ct. App. 1983), the court reasoned that in a 2 a.m. repossession from a driveway "in all likelihood no confrontation would materialize."

surprise interruption (this second category can be called trespass cases, as a shorthand label); and (3) a repossession where the reposessor or lender used trickery to gain possession.

1. Interrupted Repossessions

The repossession in which Tommy Morris died is unusual in its fatal conclusion,¹¹⁸ but it is not far removed from the first of the three troublesome categories—the run-of-the-mill confrontation due to an interruption. A more ordinary denouement is for the debtor to come rushing out, yelling¹¹⁹ or perhaps even waving a weapon,¹²⁰ but not actually using it. Although repo men try to act when no one is present, tense situations¹²¹ are inevitable in their business because repossessions are sometimes detected and interrupted in progress by the debtor or someone else. Nonlethal confrontations are thus a common part of the price of self-help repossession. The case law concerning breach of the peace gives at least lip service to trying to reduce the danger of these confrontations. A number of cases say that it is a breach of the peace for a reposessor to continue if a confrontation occurs and the debtor clearly objects rather than acquiesces.¹²²

The legal expectation when the debtor objects is that the reposessor must leave without completing the repossession. The creditor can then try to repossess again another day¹²³ or resort to judicial process. Oddly, it may

118. *Supra* note 103 and accompanying text.

119. *Williams v. Ford Motor Credit Co.*, 674 F.2d 717, 718 (8th Cir. 1982).

120. *Mauro v. General Motors Acceptance Corp.*, 626 N.Y.S.2d 374, 375 (N.Y. Sup. Ct. 1995) (wife carried an unloaded shotgun and husband two knives in the course of a struggle with repo men).

121. *See* text accompanying *supra* note 1.

122. *See, e.g., Fulton v. Anchor Sav. Bank*, 452 S.E.2d 208, 213 (Ga. Ct. App. 1994) (court held that the “unequivocal oral protest” of the debtor eliminated the creditor’s right to proceed with a repossession); *Hollibush v. Ford Motor Credit Co.*, 508 N.W.2d 449, 451-52 (Wis. Ct. App. 1993) (where debtor’s fiancé said to the repo man, “You are not going to take the Bronco,” it was a breach of the peace for the repo man to leave with the car even though no actual violence occurred, reasoning that an objection is a precursor to violence); *cf. Williams*, 674 F.2d at 718 (where debtor initially “hollered” at the repo men but then told them that she was trying to bring payments current and that she had personal effects in the car, it was not a breach of the peace to tow her car when she made no further complaint); *Owens v. First Am. Nat’l Bank*, 6 U.C.C. Rep. Serv. (CBC) 427 (Tenn. Ct. App. 1968) (holding that there was no breach of the peace when creditor asked for the car and the debtor said, “Well, I never argue with no white man, because they always know right.”). *But see Chrysler Credit Corp. v. Koontz*, 661 N.E.2d 1171 (Ill. App. Ct. 1996) (holding that there was no breach of the peace where debtor rushed outside in his underwear and hollered, “Don’t take it,” as reposessor took car from debtor’s front yard).

123. *See, e.g., Wade v. Ford Motor Credit Co.*, 668 P.2d 183, 189 (Kan. Ct. App. 1983) (finding no breach of the peace in a second, uninterrupted repossession raid even though at a first attempt the

seem, the case law sides with a debtor who fails to acquiesce, requiring the repo man to retreat. Why not say the reposessor can proceed to make use of self-help repossession despite protests, and the debtor will be in the wrong if he or she resorts to violence?

There are at least three possible explanations. One is that while the law does not approve of the debtor's resistance, courts see too great a risk of violence. As the Wisconsin Court of Appeals put it in *Hollibush v. Ford Motor Credit Co.*, "a verbal objection to a repossession is the precursor to violence" and "it should not be necessary for the debtor to resort to violence to provide the breach of the peace necessary to defeat a self-help repossession."¹²⁴ The law imposes the obligation to withdraw on the party in a better position to react coolly—the one who has not been surprised and who is just doing a job (although some repo men seem to consider their job a calling). The debtor, on the other hand, may be confused, angry, or frightened.¹²⁵ To prevent violence, the law should require an objection to be in words in order for it to obligate the reposessor to leave. Any defensive or offensive gesture of a debtor should constitute an objection. Therefore, the UCC's breach of the peace section should explicitly provide that it is a breach of the peace to proceed over a debtor's objection in words *or conduct*.

A second explanation of the case law requiring retreat upon objection is that, when judged by case results rather than reasoning, the law does not really demand that the repo man withdraw. Courts sometimes use one of the discretionary judicial methods Llewellyn identified, leeway in characterization of the facts,¹²⁶ to find debtor acquiescence in a repossession instead of an objection. Two interesting examples of this phenomenon are *Williams v. Ford Motor Credit Co.*¹²⁷ and *Owens v. First American National Bank.*¹²⁸

In *Williams*, the U.S. Court of Appeals for the Eighth Circuit affirmed the

debtor threatened violence).

124. *Hollibush*, 558 N.W.2d at 455. Despite the court's strong language stating that an objection defeats a self-help repossession, it went on to say that punitive damages should not be awarded because "the only thing the agent did was to take the vehicle after being told not to do so." *Id.*

125. See Deborah Thredy, "Breach of the Peace" in *Self-Help Repossession: Adopting a Gendered Perspective*, 7 COM. DAMAGES REP. 245 (1992) (arguing that a "reasonable woman" standard should be applied in cases in which a woman is the debtor and intimidation or the threat of violence is in issue in a self-help repossession, in order to avoid rewarding hot-headed, violent debtor responses).

126. LLEWELLYN, CASE LAW SYSTEM, *supra* note 29, § 42, at 52-54.

127. 674 F.2d 717 (8th Cir. 1982).

128. 6 U.C.C. Rep. Serv. (CBC) 427 (Tenn. Ct. App. 1968).

trial court's judgment notwithstanding the verdict, entered on the motion of Ford Motor Credit Company.¹²⁹ The result was to negate a jury award of \$5000 to the debtor (hardly enough to explain the debtor's willingness and ability to take two appeals to the Eighth Circuit).¹³⁰ According to the facts recited by the Eighth Circuit, Williams initially "hollered" at the two repo men who showed up outside her home at 4:30 a.m., but did not clearly object because she then discussed with the repo men her efforts to bring her account current and the fact that she had property in the car.¹³¹

In *Owens*, the plaintiff argued that the trial court erred in giving an instruction that a breach of the peace "requires personal violence either actually inflicted or immediately threatened."¹³² The Tennessee Court of Appeals called this dubious instruction "substantially . . . correct,"¹³³ but then proceeded to undercut it by analyzing the breach-of-the-peace issue in terms of whether Owens had withdrawn his assent to the taking of his automobile upon default (which the court said he had given in the original contract by language requiring the buyer to make the collateral available to the seller upon default).¹³⁴

The court quoted this testimony of the plaintiff in its opinion:

Q. Did you agree to let him [the reposessor] have the car?

A. No, sir, I talked to him for not to take the car from me because I had to [sic] no way of getting to the doctor and back. I pleaded with him. And he talked and talked, and he talked, and a little more he talked, and a little louder he got, and the people that was in the dining room, they was beginning to look out and see what was going on.

129. 674 F.2d at 718.

130. *Id.* at 719 (recounting this extraordinary procedural history after the jury's modest verdict of \$5000). The defendant moved for judgment notwithstanding the verdict, but the district court, on Williams' motion, ordered a nonsuit without prejudice to refile in state court. *Id.* On defendant's appeal, the Eighth Circuit reversed and remanded with directions to the district court to rule on the motion for judgment notwithstanding the verdict. After the district court entered judgment notwithstanding the verdict, the further appeal followed. Thus, after two trips to the Eighth Circuit, the debtor failed to keep her \$5000 verdict, and the case made bad law for debtors. *Id.*

131. *Id.* at 718-19.

132. *Owens*, 6 U.C.C. Rep. Serv. (CBC) at 433.

133. *Id.* This approach, requiring actual violence or at least threats of violence as opposed to risk of violence, is not used in recent breach-of-the-peace cases.

134. *Id.* at 434; see *infra* note 285 and accompanying text (questioning a finding of assent based on form contract language).

Q. Well, did you have some guests there that night for dinner?

A. Yes, sir

. . . .

Q. They heard what was going on?

A. Yes, sir, they heard. After I pleaded with him not to take the car, well, the keys was laying on the coffee table. He picked the keys up off the coffee table and said, 'Mr. Owens, if you don't have the money I'll have to take the car in.' So I told him, I said, 'Well, I never argue with no white man, because they always know right.'¹³⁵

The court concluded that there was no breach of the peace in these circumstances because the debtor had not withdrawn the assent to self-help repossession in the event of default given in the contract.¹³⁶ It chose not to find a withdrawal of assent in the debtor's pleading and refusal to argue with a white man's long and increasingly loud talk.¹³⁷

Both Williams, a woman, and Owens, presumably a black man, could be seen as debtors who had learned to express their objections, particularly to those with more power, with deference. Rather than stating demands, they made requests. They did not make the "unequivocal"¹³⁸ protests the courts often require before they will find a breach of the peace. It is doubtful that judges who expect debtors to make such protests are achieving "liberation from unconscious prejudices of class, caste, etc.," to use Llewellyn's phrase.¹³⁹ An approach based on a distinction between "clear objection" and "acquiescence" leaves plenty of judicial discretion in the characterization of facts, thereby disfavoring people unfamiliar with their rights or not in the habit of asserting them clearly. To treat such people equally with those who aggressively assert their prerogatives, the law should treat a *request* that repossessioners cease their work as sufficient to require them to do so. This is actually still a compromise position in that the law could require that if debtors appear during a repossession, their signed permission must be given before repossessioners could lawfully continue. The "request" test, however,

135. *Id.* at 429

136. *Id.* at 433-34.

137. *Id.* at 429.

138. *See* *Fulton v. Anchor Sav. Bank*, 452 S.E.2d 208, 213 (Ga. Ct. App. 1994).

139. *See supra* note 48 and accompanying text (quoting LLEWELLYN, *CASE LAW SYSTEM, supra* note 29, § 63, at 95 n.5).

would protect some debtors who would lose under current case law. It would also save them from a strategic conflict. Under the current approach requiring unequivocal protest or clear objection, the debtor will be under pressure to show a strenuous assertion of rights, perhaps even that the debtor seemed on the verge of violence. But this sort of showing will make the debtor appear unsympathetic to the trier of fact.

Another way that courts can undermine the idea of requiring reposseors to retreat from confrontations in which debtors express objections is by limiting damages,¹⁴⁰ a topic discussed fully in Part IV. Courts thus hand out a tongue-lashing, which has little or no deterrent effect. From a law-in-action perspective, one is compelled to observe that a lender who repossesses over a debtor's objection stands a good chance of avoiding liability. Repo men can deny that a "clear objection" was made, and it will often be only the debtor's word against theirs. Even if the debtor establishes that she objected, there still may be no damages awarded.

A common element in confrontation cases is that, in addition to the breach-of-the-peace question, there is an issue of whether there was a default.¹⁴¹ Without a default, there is no right to repossess, even peacefully. This justifies debtors in thinking they are defending rightful possession or even in believing that the repo men are thieves. This important aspect of the context of self-help repossession helps to explain, in a light favorable to

140. A good example is *Fulton*, in which the debtor made "an unequivocal oral protest," thus raising a triable issue of fact concerning breach of the peace to overturn a summary judgment against her, but the court said that punitive damages and damages for intentional infliction of emotional distress could not be awarded to her because the circumstances did not involve aggravation, outrage, egregiousness, or severity. 452 S.E.2d at 218. The repossession occurred at 5 a.m., and the three reposseors refused to leave despite plaintiff's protest; after the plaintiff called the police, a police officer directed her to turn her car keys over to one of the repo men. *Id.* at 211-12. The case seems to have involved a situation where the debtor was not in default, *see* text accompanying *infra* notes 143-45, and the lender directed that the debtor's car be returned to her five days after the repossession, when it realized the loan had already been paid in full. *Fulton*, 452 S.E.2d at 212. Thus, without punitive or emotional distress damages, the debtor's recovery for breach of the peace was unlikely to be significant.

141. In addition to *Fulton*, other examples exist. *See* *Ford Motor Credit Co. v. Byrd*, 351 So. 2d 557, 558-59 (Ala. 1977) (debtor took his car to a dealership at an agent's request to discuss whether there was an arrearage and brought along his receipts, and the car was repossessed while he was inside); *Riley State Bank v. Spillman*, 750 P.2d 1024, 1026-27 (Kan. 1988) (the debtors argued that the security agreement had been altered by the bank's practice of allowing a ten-day grace period and never objecting or penalizing the debtors for making a previous payment within that grace period and accepting without objection two payments made 11 and 16 days late, respectively); *Hester v. Bandy*, 627 So. 2d 833 (Miss. 1993) (debtors claimed they were told that if they mailed a payment, their car would not be repossessed; in this context, the husband attempted to physically resist a 3 a.m. repossession from his driveway).

debtors, the risk of violence they entail. Wisconsin law seems to have recognized this by requiring a merchant secured party or lessor to obtain a judgment, which means establishing default, before using self-help repossession.¹⁴²

Thus, a third explanation for the case law requiring retreat is that repossession often occurs when a debtor has a plausible claim that there has been no default because of a misunderstanding, modification, or waiver. Where the creditor has no right to repossess because the debtor is not in default, the debtor is in the best position to assert a breach of the peace in a confrontation case, because a debtor's clear objection is understandable and will not make the debtor look unreasonable to the trier of fact. In *Fulton v. Anchor Savings Bank*,¹⁴³ for example, the creditor sent repo men to the debtor's home to repossess her car because she had not responded to a form notice sent out to confirm insurance coverage. The debtor, who had insurance, maintained that she had never received the form because it was sent to an old address, even though she had given the bank her new address on several occasions.¹⁴⁴ The appellate court reversed a summary judgment for the creditor and repossessors, finding material issues of fact concerning whether there had been a default and whether a breach of the peace had occurred, given plaintiff's evidence that the repo men did not withdraw despite the debtor's protest.¹⁴⁵ This is a typical case-law "victory" for a debtor. After an appeal, she won the chance to prove complex facts upon remand. But because the court said punitive and emotional distress damages were not justified by outrageous circumstances, and because the debtor's car was returned to her five days after the repossession, it seems that while ultimate victory would free her from having to pay for insurance procured by the lender, she would be unlikely to recover substantial damages for breach of the peace.¹⁴⁶

In his treatise on personal property security, Gilmore described waiver as "a brooding omnipresence" and repossession as a last resort, particularly in consumer finance.¹⁴⁷ The lender is likely to "overlook a delinquent payment

142. WIS. STAT. ANN. § 425-206(1)(b) (West 1988).

143. 452 S.E.2d 208 (Ga. Ct. App. 1994).

144. *Id.* at 210-11.

145. *Id.* at 211.

146. *See supra* note 140.

147. 2 GILMORE, *supra* note 3, §§ 43.4, 44.1, at 1194, 1214.

or two or three, to accept partial payments and late payments”¹⁴⁸ There may be a contract clause saying that such acts do not constitute waiver, but “the courts pay little attention to clauses which appear to say that meaningful acts are meaningless and that the secured party can blow hot or cold as he chooses.”¹⁴⁹

Even if default is clear, the debtor may be surprised by a repossession. Repossessions are much less common than defaults. For example, in 1993 there were sixteen defaults per thousand direct loans made by banks to finance automobile purchases.¹⁵⁰ In the same year, there was less than one repossession per thousand such loans,¹⁵¹ meaning that about five percent of defaults resulted in a repossession. Many lenders do not routinely repossess when only one payment is late, and as a result debtors may not realize that lenders have a legal right to do so. Creditors’ actual practices are more forgiving than their legal rights permit them to be. As a consequence, debtors often do not expect a repossession and think either that the repo men are thieves or that they are in the wrong to repossess without notice.

Thus, a good reason for the law to require repossessioners to retreat upon objection is that debtors may not realize that repossession can occur without notice and for a brief delinquency on one payment. Keeping in mind Llewellyn’s view that the most important form of legal certainty is that the law follow laymen’s norms,¹⁵² the biggest defect with repossession law is arguably that it sometimes gives secured parties a right to repossess on any default. Laymen have a basis—in their own experiences and those of their friends, relatives, and co-workers—to believe that repossession will not occur until there has been a significant period of default and several communications from the lender. To the extent that courts liberally find waivers of default, they help to make the law accord with laymen’s experience and norms. The difference between form contracts’ definition of what constitutes a default and laymen’s understandings, based on experience, helps to explain why repossessions often come as a surprise, increasing the risk of violence when they are interrupted in progress.

An interesting variation on the interruption and confrontation cases is

148. *Id.* § 44.1, at 1214.

149. *Id.*

150. U.S. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 522 tbl.800 (114th ed. 1994) (1.58%).

151. *Id.* (.83 per 1000 loans outstanding, or .083%).

152. See *supra* notes 38-39 and accompanying text.

when the reposessor brings along a sheriff or other law officer. Law officers who act without benefit of a writ of execution or attachment or other legal process have no authority to make or assist in repossessions. They are likely, however, to escape liability under the doctrine of qualified immunity.¹⁵³ Called upon to address the issue of the lender's liability in these circumstances, five courts have held that use of law enforcement personnel in a self-help repossession makes it unlawful and thus a breach of the peace.¹⁵⁴ In the process, they have complicated the question of what the rationale is for the requirement of retreat from a confrontation.

The presence of law officers tends to reduce the risk of violence from an interruption and also to keep debtors from voicing clear objections. However, courts have referred to the presence of law officers as use of "intimidation,"¹⁵⁵ which can "squench" debtors' objections, allowing creditors to "evade" the statutory bar on breaches of the peace.¹⁵⁶ Two courts have even said that the debtor has a "right to object," which the creditor violates by bringing along law officers.¹⁵⁷ The idea of such a "right" was first introduced by the well-known case *Stone Machinery Company v. Kessler*,¹⁵⁸ where the court said that having a sheriff present to prevent anticipated violence had the effect of preventing the debtor "from exercising his right to resist by all lawful and reasonable means a nonjudicial take-over."¹⁵⁹

It is hard to take seriously the idea of a right to object, which has only surfaced in cases involving the presence of law officers. Does this right also exist in other cases of interrupted repossessions? No doubt many more debtors would object if they knew they had such a right and that exercising it means reposseors are obligated to retreat. The only reason many debtors now relinquish their "right to object" is ignorance of this arcane bit of case

153. See *Harris v. City of Rosebury*, 664 F.2d 1121 (9th Cir. 1981); *Colfield v. Randolph County Comm'n*, 874 F. Supp. 1276 (M.D. Ala. 1994); *Haverstick Enter. v. Financial Fed. Credit, Inc.*, 803 F. Supp. 1251 (E.D. Mich. 1992), *aff'd*, 32 F.3d 989 (6th Cir. 1994); *Wright v. National Bank of Stamford*, 600 F. Supp. 1289 (N.D.N.Y.), *aff'd*, 767 F.2d 909 (2d Cir. 1985); *Meilicke v. County of L.A.*, 282 Cal. Rptr. 893 (Cal. Ct. App. 1991).

154. *In re MacLeod*, 118 B.R. 1 (Bankr. D.N.H. 1990); *Walker v. Walthall*, 588 P.2d 863 (Ariz. Ct. App. 1978); *First & Farmers Bank of Somerset, Inc. v. Henderson*, 763 S.W.2d 137 (Ky. Ct. App. 1988); *Waisner v. Jones*, 755 P.2d 598 (N.M. 1988); *Stone Mach. Co. v. Kessler*, 463 P.2d 651 (Wash. Ct. App. 1970). By stating their holdings in a rule-like form (that using a law officer constitutes a breach of the peace), these cases respond to debtors' need for specificity in the law.

155. *Walker*, 588 P.2d at 865; *Stone Mach.*, 463 P.2d at 655.

156. *First & Farmers Bank*, 763 S.W.2d at 141.

157. *MacLeod*, 118 B.R. at 3; *First & Farmers Bank*, 763 S.W.2d at 141.

158. 463 P.2d 651 (Wash. Ct. App. 1970).

159. *Id.* at 655.

law. One might argue that an unknowing relinquishment of a right is ineffective, so that repossession must give a *Miranda*-like warning to debtors: "You have the right to object to this self-help repossession. If you say, 'I unequivocally object to this repossession,' we will have to leave." Furthermore, do debtors only have the right of objection if they fortuitously are present at the time of repossession? Otherwise, a debtor's attorney might convince a court to bootstrap the idea of a debtor's right of objection into a right to get prior notice of repossession. If the right to object applied in all repossessions, not just those involving a surprise interruption, creditors might then have to give notice of a repossession so that the debtor could arrange to be present to object. While there is much to be said for requiring notice of repossession as a means to reduce risk of violence, the courts that recognize a right to object have yet to extend the idea that far.

The rule-like holdings in the law officer cases are desirable because they specify that making use of officers is not permitted. The rationale of these cases, however, is confusing. It would be more credibly stated if it were not in terms of breach of the peace or a right of objection. Rather, a repossession using a law officer is not self-help, and thus it is not authorized by UCC section 9-503, making it unlawful. Section 9-503, by authorizing a secured party to proceed without judicial process, implicitly disapproves of using law officers without first getting the right to do so by use of judicial process. The UCC should be amended to state this explicitly.

2. *Trespass and Trickery*

The trespass and trickery cases also reveal some confusion about what constitutes a breach of the peace. In the trespass cases, some courts focus on violence to property, even when it causes only trivial damage (for example, cutting a chain),¹⁶⁰ while other courts are not bothered by this sort of forced entry.¹⁶¹ In trickery cases, it is sometimes not clear whether the trickery itself

160. See *Martin v. Dorn Equip. Co.*, 821 P.2d 1025, 1028, (Mont. 1991) (saying that cutting a locked chain on a fence gate with bolt cutters in itself constituted a breach of the peace); *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 29 (Tenn. Ct. App. 1991) (in a case in which repo men cut a padlock on a chain attaching a car to a garage post, the court said, "forced entries onto the debtor's property or into the debtor's premises are viewed as seriously detrimental to the ordinary conduct of human affairs").

161. See *Wirth v. Heavey*, 508 S.W.2d 263 (Mo. Ct. App. 1974) (no breach of the peace by creditors, who were also landlords, when they broke a lock to enter a leased business premises and repossessed equipment inside, relying in part on a lease provision giving a right of entry on breach); *Global Casting Indus. v. Daley-Hodkin Corp.*, 432 N.Y.S.2d 453, 456 (N.Y. Sup. Ct. 1980) (granting

is objectionable or whether it is treated as a breach of the peace because it creates too great a risk of violence if detected.¹⁶²

Trespass and trickery cases also provide a good vehicle for examining why case law often does not develop specific rules of conduct. An example is the case law of Alabama, the state with by far the largest body of cases concerning breach of the peace, including nine opinions by the state's highest court.¹⁶³

Six of the Alabama Supreme Court cases deal with trespass or trickery situations.¹⁶⁴ One of these cases is in the "trespass" category, involving an entry upon property where no confrontation with the debtor occurred.¹⁶⁵ The other five involved allegations of trickery.¹⁶⁶ One can get a good feel for the difficulty of developing predictability through case law by focusing on these decisions.

In general, cases involving entry into a building or onto private property can be seen as raising the issue of breach of the peace at one step back from the confrontation cases. The problem can be characterized as involving the

summary judgment to the creditor and finding no breach of the peace where the creditor entered the debtor's business with the help of a locksmith, "even if the chains were cut," where the security agreement contained a provision authorizing entry and repossession on default).

162. See *infra* notes 191-215 and accompanying text.

163. See *infra* Appendix. In addition to the nine Alabama Supreme Court cases, there are four by Alabama intermediate courts of appeal, not further appealed to the Supreme Court, and three by federal courts applying Alabama law. Five states—Arkansas, Kansas, Mississippi, Ohio and West Virginia—have two reported decisions concerning a breach of the peace issue by the highest state court, nine states have one decision by the highest court, and 35 states have no decisions by the state's highest court, including the populous states of California, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Oregon, Pennsylvania, Virginia, and Washington. Fourteen jurisdictions, including the District of Columbia, have no reported cases at all, state or federal.

164. In the three other Alabama Supreme Court cases, the court treated two as easy cases of breach of the peace. In a five-paragraph opinion in one of these, the court affirmed summary judgment for the lender in a case involving an entry into the debtor's home with a minor child's "permission." *Collins v. Gulf Furniture Stores, Inc.*, 549 So. 2d 6 (Ala. 1989). The court thus chose not to treat the case as one involving unauthorized entry into a home or as one involving trickery (by repossessing when a child but not the debtor was at home). The other barely discussed breach of the peace, saying only that "without dispute" no breach of the peace was committed in a repossession of a van from a public street after the reposessor first knocked on the debtor's door and got no response although the debtor was home. *Ash v. Peoples Bank of Greensboro*, 500 So. 2d 5, 7 (Ala. 1986). The third involved remedy issues only and did not describe the facts that constituted a breach of the peace. *General Fin. Corp. v. Smith*, 505 So. 2d 1045 (Ala. 1987); see *supra* note 77 (concerning remedial issue).

165. *Madden v. Deere Credit Servs., Inc.*, 598 So. 2d 860 (Ala. 1992).

166. *Pleasant v. Warrick*, 590 So. 2d 214 (Ala. 1991); *Chrysler Credit Corp. v. McKinney*, 38 U.C.C. Rep. Serv. (CBC) 1409 (Ala. 1984), *rev'd on other grounds*, 456 So. 2d 1069 (Ala. 1984); *Big Three Motors, Inc. v. Rutherford*, 432 So. 2d 483 (Ala. 1983); *Reno v. General Motors Acceptance Corp.*, 378 So. 2d 1103 (Ala. 1979); *Ford Motor Credit Co. v. Byrd*, 351 So. 2d 557 (Ala. 1977).

question of whether there is too great a *risk* of a surprise confrontation *in the particular location*, which would in turn unduly risk violence, so that the repossession constitutes a breach of the peace even though no confrontation actually occurs. This is a good way to explain a prohibition on entering a residence. If a repo man rang the bell, got no response, and then entered through an unlocked front door, it would still be a breach of the peace to enter because someone *might* get out of the shower at that moment, hear the repo man in the house, and come running with a gun. Because of that sort of risk, the law takes the position that it is a breach of the peace to enter a house even if no one is home and no confrontation occurs.

Alternatively, courts sometimes focus on the use of force against property in the course of entering, rather than the risk of violence because of a surprise confrontation. Of course, the need to use force to enter property can be seen as related to the risk of violence to persons from a confrontation in certain locations. If a debtor locks a building or the gate of a fence around land, the debtor is expressing a desire that the property not be entered. Arguably, the debtor is more likely to react violently if he interrupts a repossession in progress on a locked premises rather than on an unlocked one.

Remedies for breach of the peace are discussed at length in Part IV, but suffice it to say here that trespass is a cause of action that is commonly used in cases involving repossessions from private property. According to the *Restatement (Second) of Torts*, there is a privilege to enter private property to effect a repossession if this is done “at a reasonable time” and “in a reasonable manner.”¹⁶⁷ The Alabama Supreme Court in *Madden v. Deere Credit Service, Inc.*¹⁶⁸ cited the *Restatement* when it held that it was a question of fact for the jury whether a repossession was conducted at a reasonable time and in a reasonable manner where the creditor allegedly broke a lock on a gate at a remote, unattended logging site at 10 p.m. in order to repossess cutting equipment, with no confrontation occurring. The court also quoted a comment in the *Restatement* disapproving of the use of force.¹⁶⁹

167. RESTATEMENT (SECOND) OF TORTS § 183 (1965). It states this privilege for, among others, a “conditional vendor” and a “chattel mortgagee,” thus using pre-Code terminology and not even referring to the UCC. *Id.*

168. 598 So. 2d at 864-65.

169. *Id.* at 865. The *Restatement (Second) of Torts* states that a conditional seller may not use force and “will therefore be liable if he breaks and enters the land, as by removing a padlock.” RESTATEMENT (SECOND) OF TORTS § 183 cmt. h (1965); *see also infra* note 173; *infra* Part IV.C.2 (concerning the way in which this comment conflicts with section 213(3)(a) of the *Restatement (Second) of Torts*).

The court, reversing a summary judgment for the creditor and remanding for trial, quoted a broad definition of breach of the peace as including not only “any act or conduct inciting to violence or tending to provoke or excite others,” but also “any violation of any law enacted to preserve peace and good order.”¹⁷⁰ In addition, the court linked forced entry to increased risk of provoking violence, saying that “the likelihood of a breach of the peace increases in proportion to the efforts of the possessor to prevent unauthorized intrusions and the creditor’s conduct in defiance of those efforts.”¹⁷¹

While on the surface *Madden* creates expansive possibilities for debtors to assert breaches of the peace, it provides no specific guidance and thus is not effective as debtor protection.¹⁷² After this case, a debtor’s lawyer could expect to be able to defeat a creditor’s summary judgment motion in a case involving an allegation of forced entry at an unattended business site. But the debtor could not count on a favorable determination that the lender is liable as a matter of law for breach of the peace on such facts, because the facts are treated as merely creating a jury question concerning the reasonableness of the manner of entry. Furthermore, the court’s emphasis in its reasoning on the use of force and on the alleged breaking of a lock means the court might not treat an unauthorized but unforced entry as a breach of the peace. Suppose in another case that the gate was closed but unlocked?¹⁷³

Madden can be contrasted with two cases from other states to get a feel for how judges can try to move breach-of-the-peace case law toward a set of rules. In *Bloomquist v. First National Bank*,¹⁷⁴ the Minnesota Court of Appeals reversed summary judgment for a bank and said it was a breach of the peace to remove a cracked window pane in order to enter closed business premises to repossess tools and equipment. The case reflects a greater

170. *Madden*, 598 So. 2d at 865 (quoting *City of Akron v. Mingo*, 160 N.E.2d 225, 226 (Ohio 1959)).

171. *Id.* at 866.

172. Whitford, *supra* note 49, at 1022.

173. *Restatement (Second) of Torts* section 213(3)(a), which refers back to section 183, gives a conditional vendor or chattel mortgagee the right to break and enter a fence or other enclosure or a building other than a dwelling. *RESTATEMENT (SECOND) OF TORTS* § 213(3)(a) (1965). Comment a to section 213 defines “breaking” in the sense the word is used in defining the crime of burglary, including not only breaking or destruction of an outer part of a building or enclosure, but also the moving or pushing aside of any barrier. *Id.* cmt. a. Thus, section 213(3)(a) seems to allow forced entries as well as entries involving moving a barrier to effect a repossession. On the other hand, comment h to section 183 says the conditional mortgagor or chattel mortgagee is not justified in using force and “will therefore be liable if he breaks and enters the land, as by removing a padlock.” *Id.* § 183 cmt. h; *see also infra* Part IV.C.2.

174. 378 N.W.2d 81 (Minn. Ct. App. 1985).

willingness to state a legal rule. The question is not just one for the jury, as the Alabama Supreme Court said in *Madden*; the Minnesota court suggests that on the facts alleged, there was a breach of the peace as a matter of law.

But even in *Bloomquist*, how much of a rule is really created? It is not even clear there is a rule for the case itself. The court said that it was remanding “for trial on the issue of debtor’s damages” for the conversion.¹⁷⁵ But because the debtor did not move for partial summary judgment, presumably there would have to be a trial not only on the issue of damages, but also on the issue of breach of the peace, with the possibility that new facts might come to light. Furthermore, even if the debtor had sought, and the court had granted, a partial summary judgment, the *Bloomquist* case still might not turn out in future cases to stand for a rule that a breaking and entry into a business premises is, as a matter of law, a breach of the peace. These facts were recited by the court in *Bloomquist*: some of the debtor’s business tenants saw the repossession in progress and complained to the bank’s agents that they could not just break and enter into the business; one tenant called the police and reported observing a crime; and, finally, the debtor had repeatedly told the bank’s vice president that he would not consent to the repossession.¹⁷⁶ The absence of one or more of these facts in a future case might make it distinguishable from *Bloomquist*. In summary, *Bloomquist* seems to create more of a rule than *Madden*, but the listing of facts makes it hard to know the reach of that rule.

The Kansas Supreme Court in *Riley State Bank v. Spillman*¹⁷⁷ even more clearly stated its holding in terms of a rule, at least for cases involving the breaking of locks. The bank’s agents entered the debtors’ business premises by having a locksmith remove the locks.¹⁷⁸ The bank’s agents also deactivated the burglar alarm.¹⁷⁹ No one was present except the bank’s agents, who entered at 11:45 a.m.¹⁸⁰ On the debtors’ appeal from a summary judgment for the bank, the court said, “We hold the Bank breached the peace by breaking the locks to the Spillman’s place of business. . . . A creditor must obtain possession of the collateral through the courts if entry to the debtor’s premises, whether residential or commercial, can only be obtained through

175. *Id.* at 86.

176. *Id.* at 83, 84.

177. 750 P.2d 1024 (Kan. 1988).

178. *Id.* at 1026.

179. *Id.*

180. *Id.*

force.”¹⁸¹ This statement of the holding followed the court’s observation that it had not previously decided whether the breaking of locks by a creditor is “per se a breach of the peace,”¹⁸² strongly suggesting that was what it was doing in *Riley*. As in *Bloomquist*,¹⁸³ the appeal in *Riley* was from a summary judgment for the creditor and resulted in a remand,¹⁸⁴ but assuming the breaking of a lock was established on remand, the debtor could expect a finding that there was a breach of the peace.

While it might be possible to distinguish a future case involving the breaking of a lock, a lawyer reading *Riley* would be justified in predicting that the court would reject that sort of argument. While *Riley* is the kind of case law likely to encourage debtors to assert similar claims, the reach of the case still is limited. The court’s reasoning would not necessarily extend to many other factual situations, such as those where force would not be necessary (say, to enter an unlocked building). The rationale for the *Riley* holding is also not clearly stated in terms of risk of violence because of a possible confrontation, but rather in terms of the use of force against the debtor’s property, potentially limiting the scope of the rule. On the other hand, the court in *Riley*¹⁸⁵ did recite the facts and rationale of *Wade v. Ford Motor Credit Co.*,¹⁸⁶ perhaps meaning to imply that *Wade* was consistent with its holding.

In *Wade*, the Kansas Court of Appeals reversed a judgment for a car loan debtor in a case where the reposessor had a key to the debtor’s car, used the key to unlock the car while it was parked in the debtor’s driveway, and drove the car away at 2 a.m., without a confrontation.¹⁸⁷ The debtor had earlier threatened that she would shoot anyone attempting to repossess the car.¹⁸⁸ The Kansas Supreme Court in *Riley* referred, without comment, to the reasoning in *Wade* that the lapse of time between the threat of violence and the repossession and the unlikelihood that the debtor would become aware of a 2 a.m. repossession made the actions unlikely to produce a violent confrontation.¹⁸⁹ It is unclear whether the Kansas Supreme Court intended by

181. *Id.* at 1030.

182. *Id.*

183. See *supra* notes 174-75 and accompanying text.

184. *Riley State Bank*, 750 P.2d at 1031.

185. *Id.* at 1030.

186. 668 P.2d 183 (Kan. Ct. App. 1983).

187. *Id.* at 184-85.

188. *Id.* at 184.

189. *Riley State Bank*, 750 P.2d at 1030.

this description of the facts and reference to the reasoning in *Wade* to suggest that its holding in *Riley* was in part based upon the risk of violence. One could certainly make that argument in a future case, but it would be impossible to know whether one would succeed.

Between *Wade* and *Riley*, there are many factual gradations. Which case governs entry into an unlocked but closed business premises or into an open garage? These cases would not involve force, so in either one a Kansas court might extend *Wade* to find no breach of the peace, or the court might extend *Riley* to find that a breach did occur.

This close look at several cases on entries into or upon private property illustrates that courts interested in discouraging breaches of the peace should try to state their holdings as rules, and they should make their reasoning as broad as possible in order to encourage extension to other cases by analogy. For example, the court in *Riley* might have explicitly said that a repossession from within a residence, garage, or business premises without contemporaneous permission is a breach of the peace, whether or not force is used to enter, because of the risk of confrontation. Courts should also state in their reasoning that they recognize the difficulty for debtors in using a vague provision, and so that is why they are using rule-like holdings and broad rationales.

Ultimately, however, as Llewellyn recognized,¹⁹⁰ a statute could be much more direct. The law would more effectively deter breaches of the peace if the UCC particularized a number of common types of entry into or onto property which are impermissible. It could leave the “breach of the peace” language as a residual standard, to be used when none of the specific instances applies. To be a more effective deterrent, UCC section 9-503 should state that it is a breach of the peace for repossessors to enter any locked or unlocked residence, garage, or commercial building without contemporaneous permission. Similarly, it should specify that it is a breach of the peace for repossessors to break, open, or move any lock, gate, or other barrier in order to enter enclosed real property.

The Alabama trickery cases provide further evidence of the limits of case law as a means to achieve predictability under the vague “breach of the peace” standard. Trickery is viewed as involving too great a risk of violent confrontation, or it may be seen as wrongful fraud even if there is no great

190. See text accompanying *supra* notes 45-46 (quoting LLEWELLYN, CASE LAW SYSTEM, *supra* note 29).

risk of violence. A third possibility is that trickery sometimes carries an implication of waiver of default, so that repossession is not permitted at all, even if there is no breach of the peace. For example, when a creditor calls a debtor and asks her to come in to talk, this could be interpreted as implying that default is waived until after the discussion.

The five trickery cases decided by the Alabama Supreme Court began with *Ford Motor Credit Co. v. Byrd*.¹⁹¹ In *Byrd*, the court affirmed a verdict for a debtor where he, at a repo man's request, drove his car to the defendant Ford dealership to discuss whether payments on his car loan were in arrears.¹⁹² While the debtor was inside, the car was removed and locked up in a storage area behind the dealership.¹⁹³ The court explicitly relied upon a rationale of avoiding risk of retaliatory violence, saying it could not condone acts "fraught with the likelihood of resulting violence."¹⁹⁴ The court did not discuss the possibility of waiver of default.

The court in *Byrd* also used a second, more sweeping rationale: "possession of a chattel obtained through fraud, artifice, stealth, or trickery without consent of the owner, implied or expressed, is wrongful and will support an action for . . . conversion . . ."¹⁹⁵ The erosion of this rationale in a series of later cases shows the unreliability of case-law "rules" stated more broadly than necessary to cover the facts in issue. In *Reno v. General Motors Acceptance Corp.*,¹⁹⁶ the court's commitment to the broad statement of *Byrd* was tested and found lacking. In *Reno*, the court affirmed summary judgment for the lender, rejecting an argument that the lender had used "artifice or stealth" in a repossession of the debtor's car when the reposessor used a duplicate key to start the car at a supermarket parking lot where the debtor was working the night shift.¹⁹⁷ The court distinguished the facts of *Byrd* and *Reno*, noting the lack of misrepresentation in *Reno*. The court also noted that the plaintiff was not present when the auto was removed and that a fellow employee who saw it being driven away had made no effort to intercede.¹⁹⁸ The court also resorted to a strained definition of "stealth," as necessarily carrying an implication of theft or stealing, rather than as including action that

191. 351 So. 2d 557 (Ala. 1977).

192. *Id.* at 558-59.

193. *Id.* at 559.

194. *Id.*

195. *Id.* at 560.

196. 378 So. 2d 1103 (Ala. 1979).

197. *Id.* at 1103-04.

198. *Id.* at 1105.

is intended to be imperceptible (as with a “stealth” bomber).¹⁹⁹ Under the more ordinary meaning of trying to avoid detection, stealth is the preferred mode of operation for repo men, who seek to minimize the risk of violent confrontation and avoid the possibility that the debtor will object, forcing a retreat. The court clarified in *Reno* that it did not mean to disapprove of repo men using tactics designed to avoid detection by the debtor, and it retreated to the narrower rationale of *Byrd*, undue risk of violence. On the facts alleged, the court found no such risk and thus no breach of the peace.

In two cases decided after *Reno*, the Alabama Supreme Court found *Byrd* applicable and affirmed verdicts for debtors based at least in part on trickery.²⁰⁰ One of these, however, involved an employee of the lender driving a truck so as to force the debtor to drive off an interstate highway, surely an easy case of breach of the peace without the need to depend on any trickery.²⁰¹ In the other case, *Chrysler Credit Corp. v. McKinney*, a decision later withdrawn on other grounds,²⁰² the court held that a jury could find impermissible trickery in a case where there was evidence that the lender lured the debtor to bring the car to a dealership for repairs.²⁰³ A few days after the car was in the shop, the lender sent the debtor a repossession notice.²⁰⁴ This trickery was in the context of a longstanding dispute over the dealer’s failure to repair a leaky roof that left two inches of standing water on the floor of the car after a rainshower.²⁰⁵ Although the court never makes this point, one could see *McKinney* as extending *Byrd* in that the risk of retaliatory violence was not so great because the trickery did not become apparent while the debtor was at the dealership. Rather, the court said only that UCC section

199. *Id.*

200. *Chrysler Credit Corp. v. McKinney*, 38 U.C.C. Rep. Serv. (CBC) 1409, 1411-12 (Ala. 1984); *Big Three Motors, Inc. v. Rutherford*, 432 So. 2d 483, 486 (Ala. 1983).

201. *Big Three Motors*, 432 So. 2d at 484. The case is interesting primarily because it said that a jury could find impermissible trickery if the creditor’s employee lulled the debtors into a false sense of security by telling them they had a few extra days to pay, even if such a statement was not an enforceable modification of the contract. Also striking is the fact that the lender had the temerity to appeal a jury verdict against it even though the evidence easily supported the verdict: one of the debtors testified that an employee of the lender, driving a truck, forced her to pull off an interstate highway on which she was driving, blocked her access back to the road, got into her car, and rode with her to the dealership, where the car was moved and locked in storage while she was inside. *Id.* at 484. The court said the evidence was sufficient for the jury to conclude that the creditor used “force, trickery and fraud in the repossession.” *Id.*

202. *See infra* note 213.

203. *McKinney*, 38 U.C.C. Rep. Serv. at 1410.

204. *Id.*

205. *Id.* at 1409.

9-503 “gives the secured party the right to possession upon default, but it does not authorize repossession by trick or fraud.”²⁰⁶

The most recent trickery case decided by the Alabama Supreme Court rejects the broad trickery rationale used in both *Byrd* and *McKinney*. In *Pleasant v. Warrick*,²⁰⁷ the court affirmed summary judgment for the defendants, concluding that there was no basis for finding a breach of the peace. In *Pleasant*, the plaintiff’s evidence was that the lender’s agent met with the debtor to discuss the past-due amount and obtained directions to the collateral, a drivable type of logging equipment called a skidder.²⁰⁸ Also according to the plaintiff’s evidence, the agent said he was going to check the condition of the collateral before coming to the debtor’s home later to pick up a payment.²⁰⁹ The court said there was no impermissible trickery in obtaining information about the location of the equipment.²¹⁰ No one was present other than the lender’s agent when the repossession occurred on a road, so there was no confrontation or trespass. The difference between *McKinney* and *Pleasant* seems to be neither a matter of greater trickery nor a matter of greater risk of violence. Rather, the crucial difference seems to have been that the debtor in *Pleasant*, as the court said, was “well aware of his \$4000 arrearage,”²¹¹ while the debtor in *McKinney* had a warranty claim that the court viewed as meritorious.²¹² Of course, in *Pleasant* the court did not have to distinguish *McKinney*’s trickery analysis because the case had been withdrawn, although on other grounds.²¹³

Ultimately, the Alabama Supreme Court cases leave confusion about what sorts of tricks are impermissible. Some trickery cases involve an undue risk of violence because the tricks either can or will lead to violent confrontation and therefore should be treated as breaches of the peace. Other trickery cases could be dealt with under the doctrines of waiver and modification. Some cases could fall under either of these rationales. *Byrd* is a good example of a case that involves both the risk-of-violence and the waiver rationales. The

206. *Id.* at 1411.

207. 590 So. 2d 214 (Ala. 1991).

208. *Id.* at 215.

209. *Id.*

210. *Id.* at 216-17.

211. *Id.* at 217.

212. *Chrysler Credit Corp. v. McKinney*, 38 U.C.C. Rep. Serv. (CBC) 1409, 1413 (Ala. 1984).

213. The *McKinney* decision was not officially published; on rehearing, the court reversed and remanded because an illiterate and unqualified juror had served in the case. *Chrysler Credit Corp. v. McKinney*, 456 So. 2d 1069, 1069 (Ala. 1984).

debtor there was asked to come to the dealership to discuss an arrearage. This should be seen as involving an implicit waiver of default and promise not to exercise the right of repossession on that occasion. Both *McKinney*²¹⁴ and *Pleasant*²¹⁵ are also cases that could have been based on a waiver of default and thus of the right of repossession. *Byrd* also involved setting up a confrontation with undue risk of violence. The debtor was inside the dealership when his car was repossessed, and the lender knew the debtor would come out to find that he had been tricked, which might cause him to react violently.

Courts should abandon the trickery rationale as an independent basis for finding a breach of the peace. But to deal with tricks that involve too much risk of violence, the statutory language should make it a breach of the peace to attempt a repossession by a trick that either will or could foreseeably lead to a confrontation between the reposessor and the debtor. Although it would be desirable also to give examples of waiver of default in statutory language, that topic is beyond the scope of this article.

IV. UNCERTAINTY ABOUT THE REMEDY FOR BREACH OF THE PEACE

A. Overview

In addition to the UCC's silence about the meaning of breach of the peace, another problem with the Code treatment of this issue is its confusion about the remedy. Although Article 9 could be interpreted as providing an exclusive statutory remedy for breach of the peace in UCC section 9-507, most courts have used the common law without even considering that possibility.²¹⁶ Conversion is the remedy that courts most frequently recognize for breach of

214. The court does not clearly state the rationale of *McKinney*. It relies in part upon trickery, 38 U.C.C. Rep. Serv. at 1411, but also upon the questionable notion that it is permissible to withhold payment on goods until all defects are repaired, *id.* at 1413. *But see* *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 26 (Tenn. Ct. App. 1991). Unless a buyer rejects or revokes acceptance, the buyer is bound to pay the price, but has a warranty claim. U.C.C. §§ 2-601, 2-602, 2-607(1), 2-608 (1995). The trickery part of the court's analysis in *McKinney* is particularly unhelpful. It would have been better to base the decision exclusively on the reasoning that there was no default because of a waiver or modification—that the parties had agreed that because of *McKinney*'s breach of warranty claim, the debtor was not obligated to pay until the dealer repaired the car. If there was no default, there was no right to repossess, even if no trickery were used.

215. The *Pleasant* court rejected the modification argument, 590 So. 2d at 216-17, but it could have found waiver in the evidence that the lender's agent said he was coming to see the debtor about his past-due account and to pick up a payment.

216. *See infra* Part IV.B.

the peace,²¹⁷ but this is conceptually wrong, as the *Restatement (Second) of Torts* recognizes.²¹⁸

The conversion theory is wrong because it misconceives both the injury caused by a breach of the peace and the redress that is appropriate. Use of conversion reflects the desire of courts to make the remedy both predictable and compensatory for the debtor's loss. There are two problems with this approach. One is that the debtor's loss is not equivalent to the value of the property repossessed. The other is that liability for breach of the peace should be a way of expressing social disapproval, which is at least as important as providing compensation for debtors.²¹⁹ Each of these problems with conversion as the remedy for breach of the peace requires elaboration.

First, even if the goal of the remedy is only compensation, conversion is inadequate. The debtor's entitlement to the collateral is wiped out by a default, and the secured party then has the right to gain control of the collateral by self-help, if that can be achieved peacefully, or otherwise by judicial proceedings. The concept of breach of the peace protects the debtor against unreasonable self-help, which threatens the victim's sense of personal security. The value of the debtor's property interest bears no necessary relationship to the loss of sense of personal security involved in a breach of the peace. The value of the property interest may be small, while the breach of the peace is egregious, or the value of the property may be great, but the breach of the peace minor. Unreasonable self-help may also interfere with quiet enjoyment of real property, which includes an element of loss of sense of personal security.

Second, breach of the peace is an intentional tort, and the remedy should be at least as much about expressing moral disapproval and deterring the wrong in question as it is about compensating the debtor. Asking the trier of fact to value the debtor's property interest deflects attention from disapproval and deterrence. The law should put the focus on the amount of money needed to compensate the debtor for loss of a sense of personal security, because this

217. See, e.g., *Clark v. Associates Commercial Corp.*, 877 F. Supp. 1439 (D. Kan. 1994); *Naddy v. Hansen*, Civ. No. 4-83-644, 1985 WL 4993 (D. Minn. Dec. 6, 1985); *Big Three Motors v. Rutherford*, 432 So. 2d 483 (Ala. 1983); *First & Farmers Bank of Somerset, Inc. v. Henderson*, 763 S.W.2d 137 (Ky. Ct. App. 1988); *Bloomquist v. First Nat'l Bank*, 378 N.W.2d 81 (Minn. Ct. App. 1985); *Smith v. John Deere Co.*, 614 N.E.2d 1148 (Ohio Ct. App. 1993); *Kimble v. Universal TV Rental, Inc.*, 417 N.E.2d 597 (Ohio, Franklin County Mun. Ct. 1980); *Harris v. Cantwell*, 614 P.2d 124 (Or. Ct. App. 1980); *Stone Mach. Co. v. Kessler*, 463 P.2d 651 (Wash. Ct. App. 1970).

218. See *infra* Part IV.C.1.

219. See *infra* notes 232-33 and accompanying text.

allows the trier of fact to take into account the degree of disapproval appropriate for the particular breach of the peace.

Another problem with conversion as the remedy for breach of the peace is that it can produce damages of zero, so that there is no compensation or deterrence. Using conversion, courts may offset the debt owing against the conversion recovery.²²⁰ As a result, the debtor gets as damages only the value of his equity, if any.²²¹ Using the conversion approach, if the debtor has no equity, the debtor recovers no damages despite the breach of the peace. Also, despite a breach of the peace, the debtor may be liable for a deficiency judgment.²²²

In short, the conversion theory suffers from a serious flaw of a lack of proportionality to the loss suffered and to the undesirability of the tortious acts in question. The value of the debtor's equity in the collateral bears no necessary relationship to how nasty the reposessor's behavior was. In consumer cases, the value of the debtor's equity may be small or nonexistent, yet the reposessor may have been responsible for a frightening, intimidating face-to-face confrontation. In such cases, the value of the debtor's equity is disproportionately low in comparison to the invasion of personality. On the other hand, in some cases, particularly nonconsumer transactions, the debtor's equity may be huge and thus disproportionately high in relation to the nature of the breach of the peace.²²³

Even without a breach of the peace, a debtor is entitled under Article 9 to

220. See *Clark*, 877 F. Supp. at 1450 n.9 (quoting from 68A AM. JUR. 2D, *Secured Transactions* § 620 (1993) (stating the typical conversion formula used by courts)); *First & Farmers Bank*, 763 S.W.2d at 139 (affirming judgment calculating conversion damages by the difference between the fair market value of the repossessed property and the "amount of the security interest," apparently referring to the amount of the debt); *Kimble*, 417 N.E.2d at 605 (purporting to offset the value of the collateral against the indebtedness, but computing value as the sum of debtor's payments, a very favorable valuation for the debtor). Few breach of the peace cases actually discuss computation of damages because of their procedural posture; most cases are on appeal from summary judgment on the issue of whether there is a valid cause of action.

221. See *WHITE & SUMMERS*, *supra* note 12, § 25-17, at 1240-41. ("[C]onversion damages usually consist of the fair market value of the collateral at the time of the conversion less the amount the debtor owed on the debt, plus interest. This amounts to the value of the debtor's 'equity.'" (footnote omitted)).

222. See, e.g., *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23 (Tenn. Ct. App. 1993).

223. See *Rogers v. Allis-Chalmers Credit Corp.*, 679 F.2d 138 (8th Cir. 1982) (in case involving both a question of waiver of default and breach of the peace by entry upon private property in the early morning hours, a \$35,000 compensatory award was affirmed). If there were a waiver of default and this caused loss of use of the property, a bulldozer, the award in *Rogers* would be proper. But if the award were only for a trespass to commercial real property that involved no confrontation, the award would seem excessive.

an accounting for any surplus realized by the creditor on the collateral in excess of the debt plus expenses of repossession and disposition.²²⁴ This may mean that conversion liability for breach of the peace does not change the settlement between the secured party and debtor after default and repossession, unless the significance of the conversion theory is that it changes the method of valuing the collateral to fair market value (what the debtor would have to pay to buy a substitute for the repossessed collateral). On a conversion theory, the debtor's equity is recoverable, figured as the excess of fair market value over any amount of the debt unsatisfied. In a disposition of collateral after default and a peaceful repossession, by contrast, the collateral is valued by what is realized in a commercially reasonable resale.²²⁵ A reasonable foreclosure sale of collateral usually brings less than fair market value (in the sense of price to the debtor for a substitute), because a forced sale usually depresses value.

While this is a way in which the conversion theory could matter, the problem is that the difference between fair market value and foreclosure sale value of the collateral does not measure the nature of the injury caused by a breach of the peace—an injury to one's sense of personal security caused by actual violence or the threat of, or undue risk, of violence. By way of comparison, conversion (and the differential between fair market value and forced sale value) *is* the appropriate remedy for a peaceful repossession when the debtor is not in default. Where the debtor has not defaulted, the secured party does not have a right to the collateral and the injury caused is loss of the collateral, an injury that is properly compensated by giving the debtor the means to buy a replacement. This will not be at a foreclosure sale price, but at fair market value. After a repossession without default, the debtor should remain liable for the debt according to the contractual payment schedule, but should be able to replace the repossessed collateral with comparable goods (or the goods taken could be returned).

Under the conversion remedy for breach of the peace, the breach does not matter, except possibly on the valuation question, unless in addition to nonpeaceful behavior, the behavior is malicious or outrageous, justifying punitive damages. According to Gilmore, juries "love to award punitive damages" for outrageous breaches of the peace.²²⁶ But courts often refuse to

224. See U.C.C. § 9-504(2) (1995).

225. *Id.* § 9-504(3).

226. 2 GILMORE, *supra* note 3, § 44.1, at 1213.

uphold punitive damage awards, explaining that these are appropriate only in the most extreme situations.²²⁷ They do not want to condone borderline behavior by reposseors, but they do not want to deal with it harshly either. It is all too common for a court to find a breach of the peace, no significant actual damages, and no malicious or outrageous behavior that can justify a punitive damage award. Despite great rhetorical flourishes disapproving of

227. Courts frequently have said that punitive damages could not be awarded because the reposessor's behavior was not bad enough to justify them. *See Henderson v. Security Nat'l Bank*, 22 U.C.C. Rep. Serv. (CBC) 846, 848-50 (Cal. Ct. App. 1977) (repossession of an auto by breaking the lock on the debtor's garage door constituted a conversion because force was used, but punitive damages were inappropriate because malice on the part of the bank or car dealership was not proven); *Fulton v. Anchor Sav. Bank*, 452 S.E.2d 208, 211-12, 218 (Ga. Ct. App. 1994) (when debtor attempted to move her vehicle into her garage, repo men stepped in front of the garage door, blocking debtor's way, among other actions; although court found issues of material fact on breach of the peace, it held that punitive damages were unwarranted because the defendants' conduct was "not so aggravating or outrageous such as to indicate spite or malice, or a fraudulent evil motive, or such a conscious and deliberate disregard of plaintiff's interests"); *Ivy v. General Motors Acceptance Corp.*, 612 So. 2d 1108, 1110, 1117-19 (Miss. 1992) (Court held that the evidence viewed in light most favorable to verdict consisted of a breach of the peace, when reposseors towed debtor's auto from debtor's driveway as debtor ran toward them "hollering and flagging them to stop" and when debtor and tow truck later got in a minor accident as debtor pursued the truck, and reposseors showed the debtor some "official-looking" documents that led the debtor to believe that they were court documents giving a legal right to repossess the auto, but they were not. Punitive damages were not appropriate, however, because this was not a case "attended by 'malice, fraud, oppression or wilful wrong evincing a disregard of the rights' of the debtor."); *Waisner v. Jones*, 755 P.2d 598, 602-03 (N.M. 1988) (The presence of an armed and uniformed military security police sergeant removed the repossession from the ambit of section 9-503 and made it "conduct proscribed by either the fifth or fourteenth amendments," but punitive damages were inappropriate because the evidence did not "support the reasonable conclusion that the repossession was willful, wanton, malicious, reckless, grossly negligent, fraudulent or in bad faith."); *Davenport*, 818 S.W.2d at 32-33 ("A party is entitled to punitive damages only if it recovers actual damages and if the defendant's conduct amounts to fraud, malice, oppression, gross negligence, or outrageous conduct." (citations omitted). Here, no punitive damages were allowed because the debtor could prove no actual damages and the reposessor's conduct, cutting a padlock on a chain attaching the debtor's car to a garage post, did not warrant punishment.); *Stone Mach. Co. v. Kessler*, 463 P.2d 651, 655-56 (Wash. Ct. App. 1970) (Although the participation of a sheriff in a self-help repossession "amounted to constructive force, intimidation and oppression constituting a breach of the peace and conversion of the defendant's tractor," punitive damages should not have been awarded because the actions of the sheriff were not enough to show improper motives or willful, wanton, or reckless disregard for the rights of the debtor.); *Hollibush v. Ford Motor Credit Co.*, 508 N.W.2d 449, 455 (Wis. 1993) (Punitive damages are available in section 9-503 cases if reposessor's conduct is outrageous or if reposessor acts in wanton, willful, or reckless disregard of the debtor's rights or interest, but punitive damages were not appropriate because the reposessor only proceeded to repossess an auto when told not to do so.).

Of course, one can also find cases upholding punitive damages for breaches of the peace. *See Big Three Motors, Inc. v. Rutherford*, 432 So. 2d 483 (Ala. 1983) (total of \$25,000 to debtor and wife); *Star Bank v. Laker*, 637 N.E.2d 805 (Ind. 1993) (\$7000); *First & Farmers Bank of Somerset, Inc. v. Henderson*, 763 S.W.2d 137 (Ky. Ct. App. 1988) (\$75,000); *Kimble v. Universal TV Rental, Inc.*, 417 N.E. 2d 597 (Ohio, Franklin County Mun. Ct. 1980) (\$4000).

violence and risk of violence in repossessions, case results often amount to a wink and a nod indicating that breaches of the peace will be tolerated.

Although conversion is not the right remedy, there are appropriate common-law tort remedies for some breaches of the peace. These include assault, battery, intentional infliction of emotional distress,²²⁸ and false imprisonment,²²⁹ when the elements of these torts occur during a repossession. The *Restatement (Second) of Torts* classifies these as torts that address “intentional invasions of personality.”²³⁰ Whether or not the elements of these torts are present, a breach of the peace in a repossession involves an intentional invasion of a person’s sense of personal security. Another appropriate tort remedy is trespass (where entry on real property was not privileged),²³¹ and this tort protects against invasions of a person’s quiet enjoyment of real property, which is related to the “personality” torts because it also involves protection of the sense of personal security.

Why have the courts used conversion most frequently? One problem is that not all breaches of the peace will involve an assault, battery, false imprisonment, intentional infliction of emotional distress, or trespass. Conversion is commonly used because one or more elements for a cause of action under the other theories is missing. Suppose repossessors are preparing to tow a debtor’s car from a public street when the debtor appears and clearly objects, but does not physically interfere with the repossession. If the repo men silently tow the car away anyway, without inflicting any injury to persons or property or making any threats, this is a breach of the peace, but not one of the listed torts. The solution should be to treat this as a tort nonetheless, one recognized by section 9-503. It could be called the tort of breach of the peace, one which protects against this sort of invasion of sense of personal security in a self-help repossession. Instead, courts have used an

228. See, e.g., *Smith v. John Deere Co.*, 614 N.E.2d 1148 (Ohio Ct. App. 1993) (in which assault and intentional infliction of emotional distress were raised but a directed verdict was awarded on the emotional distress claim for lack of supporting evidence, and assault was ruled inappropriate because the injured person testified she was not afraid at the time of the incident); *Mauro v. General Motors Acceptance Corp.*, 626 N.Y.S.2d 374 (Sup. Ct. 1995) (saying that a creditor is liable for personal injuries caused by assault and battery in a repossession).

229. See *Haverstick Enter. v. Financial Fed. Credit, Inc.*, 32 F.3d 989 (6th Cir. 1994) (affirming remand of state law claims to state court, including one for false imprisonment, in a repossession in which the repo men were accompanied by a policeman who stopped the debtor to question him and seek identification).

230. This is the title of Chapter 2 of the *Restatement (Second) of Torts* (1965), a chapter dealing with assault, battery, false imprisonment, and outrageous conduct causing severe emotional distress.

231. See *infra* Part IV.C.2.

existing common-law name for the cause of action, conversion, but this has led to an inappropriate remedy.

Another reason courts use conversion is to attempt to make the damages more certain. The courts' discomfort with breach-of-the-peace cases seems to stem from the fact that they raise tort law issues in the midst of what is primarily a contract setting, where the value of predictability is conventional wisdom. Not only do breach-of-the-peace cases involve tort law, but its most anachronistic, vestigial form—the intentional tort.²³² The purpose of intentional tort law is not primarily compensatory, but more to address concerns about morality and to enhance safety through deterrence.²³³ By turning to conversion, the courts have tried to make breach-of-the-peace cases more about property loss, rather than safety. They have also tried to render the injury more measurable by tying it to the value of property, which can result in no damages at all if the debtor has no equity. Attuned to the inherent unpredictability involved in carrying out repossessions, judges have worried about uncertain liability for lenders but not uncertain recovery for debtors subjected to breaches of the peace. Their solution to the problem of uncertainty has commonly been to dramatically reduce the remedy, even when they say there has been a breach of the peace. This approach creates something close to certainty by the back door—a certainty for lenders of not having to pay significant damages in all but the most extreme cases.

If the UCC added some specific rules barring particular repossession practices as breaches of the peace, the lack of a clear, meaningful remedy would not be so problematic. Since lenders are now liable for independent contractors' breaches of the peace, the resulting demand that repossession businesses obtain insurance has prompted these businesses to strive for greater respectability.²³⁴ They would be likely to comply with clear rules, even without a meaningful remedy.²³⁵ Current law, however, combines a vague standard with a lack of a clear or meaningful remedy—a one-two

232. Abel, *supra* note 72, at 786-89 (concerning the origins of tort in moral condemnation of intentional wrongs). While criminal law has largely taken over the sorts of disputes that used to be handled by intentional tort law, *id.* at 789, breaches of the peace in repossessions are probably more likely to be treated as civil rather than criminal violations. For a few reported cases dealing with criminal prosecutions of repo men, see *White v. State*, 288 So. 2d 175 (Ala. Crim. App. 1974) (reversing conviction for grand larceny); *State v. Trackwell*, 458 N.W.2d 181 (Neb. 1990) (reversing conviction for assault, although in dicta the court said there was a civil breach of the peace); *State v. Pranger*, 822 P.2d 714 (Or. Ct. App. 1991) (upholding conviction for theft and criminal trespass).

233. Abel, *supra* note 72, at 786-89; Shuman, *supra* note 74, at 131-32.

234. See *supra* note 66 and accompanying text.

235. Whitford, *supra* note 49.

punch knocking out effective deterrence.

Courts need not be so solicitous about lenders, however, because lenders can and do use insurance to manage and spread their risk.²³⁶ Also, with more specific statutory or case-law rules about what actions constitute a breach of the peace, creditors could more predictably avoid liability. A usable remedy would contribute to effective deterrence, and a statutory remedy could best accomplish this task, while also providing predictability to lenders in the process. Until a statutory remedy is enacted, however, courts should use intentional tort theories and punitive damages with a recognition that breaches of the peace will go unchecked if debtors' lawyers do not see enough potential recovery to be willing to pursue litigation. Where no other tort theory fits, courts should be willing to submit cases to juries under a statutory tort theory, a breach of the peace contrary to section 9-503, with the compensatory damages measured by the loss of one's sense of personal security suffered by the victim or victims.

B. Article 9's Lack of Clarity About the Remedy

Section 9-503 recognizes a secured party's privilege to take possession of collateral after default without judicial process, but only if this can be done without breaching the peace. Thus, the section also recognizes a duty on the part of the secured party not to breach the peace when carrying out a self-help repossession. Although the debtor's right not to be subjected to a breach of the peace is not stated, the secured party's duty implies a correlative right (to a claim) in the debtor.²³⁷

The caption of section 9-507, "Secured Party's Liability for Failure to Comply with This Part," suggests that it provides a generic remedy for all failures to comply with Part 5 of Article 9. In the UCC, captions are part of the statute.²³⁸ Section 9-507 can thus be taken as making explicit the notion that the debtor has a statutory cause of action for a secured party's breach of the peace. Yet the language of section 9-507(1) is concerned primarily with disposition of collateral after repossession, leaving some doubt whether it addresses breaches of the peace. The courts rarely rely on section 9-507(1) in

236. *See supra* Part II.

237. Wesley Newcomb Hofeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913-14).

238. U.C.C. § 1-109 (1995).

breach-of-the-peace cases,²³⁹ resorting instead to common-law causes of action, most frequently conversion²⁴⁰ but also to assault, battery, false imprisonment, intentional infliction of emotional distress, and trespass.²⁴¹

An indication that section 9-507 does not apply to breaches of the peace can be found in Article 2A. UCC section 2A-525(3) provides that a lessor may take possession of leased goods after default “without judicial process if it can be done without breach of the peace.” Comment 3 to section 2A-525 explains that subsection (3) is taken from section 9-503. Although Article 2A permits a lessor to dispose of leased goods, a comment notes that exercise of this right is “a function of commercial judgment, not a statutory mandate replete with sanctions for failure to comply.”²⁴² Article 2A does not have a parallel provision to section 9-507(1). Either the drafters of Article 2A read section 9-507(1) as only dealing with problems in disposition of collateral, not with breaches of the peace, or they forgot that section 9-507(1) also applies to breaches of the peace.

Assuming section 9-507(1) is meant to apply to breaches of the peace, it provides for compensatory relief, thereby giving a debtor the right to recover for “any loss caused.” The section provides no guidance, however, on what sort of loss the courts should consider to be caused by a breach of the peace. Since common-law remedies carry compensatory measures of damages, the statutory language “any loss caused” is not in conflict with the use of common-law causes of action to obtain compensation.

Article 9, and Article 2A, can and should be read as authorizing a cause of action for breach of the peace even when no common-law tort theory fits the facts. Under this interpretation, even if no common-law cause of action works, the debtor or lessee can recover for any loss caused by a breach of the peace. For example, a debtor or lessee should be able to recover for breach of the peace where a repossession is carried out over a clear objection, even though the facts do not support the theory that an assault or intentional infliction of emotional distress occurred.²⁴³ The proper reading of UCC sections 9-503 and 2A-525 is that they authorize statutory causes of action in

239. A lonely exception is *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 31 (Tenn. Ct. App. 1991), discussed in the text at *infra* notes 255-63 and accompanying text. See also *Kouba v. East Joliet Bank*, 481 N.E.2d 325 (Ill. App. Ct. 1985) (citing section 9-507(1) in dicta).

240. See *supra* note 217 and accompanying text.

241. See *supra* notes 228-31 and accompanying text.

242. U.C.C. § 2A-527 cmt. 1 (1995).

243. The courts tend to use conversion in these circumstances, but that theory is not appropriate. See *supra* notes 217-25 and accompanying text.

situations where no common-law theory fits, a position supported by UCC section 1-103 (i.e., the Code does not displace but supplements the common law). In Article 9, section 9-507(1) provides further support for a statutory cause of action in that it provides a statutory remedy. Under either section 9-503 or section 2A-525, the remedy, based on loss caused, could be supplied by the common law—by analogy to the tort of assault. The injury in a breach of the peace is to the victim's sense of personal security, and the measurement of this loss could be left generally to the trier of fact. It would be preferable, however, to put a specific remedy for breach of the peace into the sections of each Article which address breach of the peace.²⁴⁴

Another unresolved issue in the Code is whether common-law punitive damages are appropriate for breaches of the peace. As already mentioned, the courts usually do not view the remedy for breach of the peace as governed by the UCC and thus do not even analyze the question of whether the UCC displaces punitive damages. They treat the remedy as a question of intentional tort, with punitive damages appropriate only in cases of especially bad intent, characterized as malice, willful wrongfulness, or reckless disregard of a debtor's rights.²⁴⁵ The paucity of citations to section 9-507(1) in the reported cases²⁴⁶ probably reflects choices by debtors' lawyers to use intentional tort theories because they clearly carry with them the possibility, if not the likelihood, of punitive damages. Even using section 9-507(1) as a basis for a compensatory remedy for breach of the peace, there is no reason the courts could not also supply a punitive remedy using the common law.

UCC sections 1-103, 1-106, and 9-507(1)²⁴⁷ are relevant to recovery of punitive damages for breach of the peace. Section 1-103 provides that principles of law and equity supplement the Code unless displaced by particular provisions. Section 1-106(1) provides that the Code's remedies shall be administered to achieve compensation and states that penal damages may not be had "except as specifically provided in this Act or by other rule of law."²⁴⁸ Section 9-507(1), in its last sentence, provides that if the collateral is

244. See *infra* Part IV.D for a proposed statutory remedy for Article 9.

245. See *supra* note 227. The cases demonstrate reluctance to allow a debtor to recover punitive damages.

246. See *supra* note 239 and accompanying text.

247. Also relevant is comment 3 to UCC section 2A-525, referring to the right of self-help repossession of leased goods upon the lessee's default as "intended to supplement and not displace principles of law and equity." U.C.C. § 2A-515 cmt. 3 (1995).

248. *Id.* § 1-106(1). The language providing for compensatory remedies refers to putting the aggrieved party in "as good a position as if the other party had fully performed." *Id.* This language

consumer goods, the debtor has a right to recover “in any event” the total of interest payments plus ten percent of the principal debt.²⁴⁹ This amount, because recoverable “in any event,” seems to be recoverable in addition to “loss caused,” even if the loss caused is zero and there is no showing of malice or other especially bad intent required for common-law punitive damages.²⁵⁰ Because the special consumer provision in the last sentence of section 9-507(1) is not based on the loss caused and seems to be recoverable in addition to the loss caused, Soia Mentschikoff characterized it as “penalty damages.”²⁵¹ Contrary to Mentschikoff’s “penalty” characterization, however, one could see the sum provided under the last sentence of section 9-507(1) as a means to provide compensation to consumers and their lawyers for acting as private attorneys general in disputes involving small dollar amounts.

Because the Code seems to provide for recovery of “loss caused” in any breach of the peace and for statutory damages in consumer secured transactions when a breach of the peace occurs, arguably common-law remedies for breach of the peace are “displaced by the particular provisions of this Act,” so that: (1) common-law remedies are not allowed in general, and (2) punitive damages are not allowed except in consumer cases and then not in an amount greater than the section 9-507(1) “penalty.” Sensibly, the courts have ignored this possible reading of the Code and instead have used common-law remedies for breach of the peace, thus allowing recovery of common-law punitive damages in cases of especially bad intent.²⁵² If the

refers to explicitly agreed-upon duties and also to statutory or tort-based duties, in that the definition of “contract” in Article 1, found in section 1-201(11), is “the total legal obligation which results from the parties’ agreement as affected by this Act and any other applicable rules of law.” *Id.* § 1-201(11).

249. *Id.* § 9-507(1).

250. See *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 32-33 (Tenn. Ct. App. 1993) (allowing recovery of the “minimum penalty” of UCC section 9-507(1) in the absence of proof of more than minor property damage and also in the absence of any basis for awarding punitive damages).

251. Soia Mentschikoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis*, 14 WM. & MARY L. REV. 767, 774 (1973). The fact that there is only one reported case relying on section 9-507(1), see *supra* note 239, suggests that the “penalty” is not much of an enticement for lawyers to take on consumer cases. See also Draft, Uniform Commercial Code Revised Article 9, Secured Transactions; Sales of Accounts and Chattel Paper § 9-624(c) (Nat’l Conference of Comm’rs on Unif. State laws, Oct. 1996) [hereinafter Oct. 1996 Draft, Art. 9], available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Jan. 10, 1997) (providing that a debtor cannot recover this statutory damage amount on top of loss caused, but providing that if the secured party is liable for loss caused, the loss caused is subtracted from the statutory damages).

252. In consumer cases, a tricky issue is whether a consumer could recover the section 9-507(1) “penalty” and common-law penalty damages. This could be rendered a nonissue by informing the jury

Code more explicitly provided a generally applicable penalty for a breach of the peace, it might be appropriate to find common-law remedies (including punitive damages) displaced,²⁵³ but it is not even clear that section 9-507 applies to breaches of the peace, given its preoccupation with disposition of collateral.

The approach used by the courts can be reconciled with the UCC by reading section 9-507(1) not as displacing the law of intentional tort as applied to breaches of the peace, but merely as providing for (1) recovery of loss caused where no intentional tort theory fits but there is a breach of the peace (as with repossessions over the debtor's objection), and (2) a modest amount of statutory damages in consumer transactions, even without a showing of actual loss caused or especially bad intent of the kind necessary at common law to obtain punitive damages. The first part of this reading could be justified on policy grounds as necessary to achieve more peaceful repossessions by providing a remedy where the common law would not, and the second part could be seen as an attempt to make consumer litigation more feasible.²⁵⁴

Consumers are not necessarily well served by even a quite favorable interpretation of UCC section 9-507(1). In *Davenport v. Chrysler Credit Corp.*,²⁵⁵ for example, the Tennessee Court of Appeals stated that UCC section 9-507(1) applies to breach-of-the-peace cases and is a nonexclusive remedy.²⁵⁶ The court found that the statutory damages in the last sentence of the subsection provides a "minimum recovery" for consumers, available even if consumers have suffered no actual loss.²⁵⁷ In *Davenport*, the repossessors had entered the Davenports' enclosed garage and cut a padlock on a logging chain that the debtors had used to attach their car to a garage post, actions the court said breached the peace because "forced entries . . . are viewed as

of the statutory penalty applicable even without malice or other especially bad intent and charging the jury to award additional punitive damages if appropriate, based on findings of especially bad intent.

253. On the other hand, the UCC could provide a mild penalty for any breach of the peace and allow courts to use the common law to justify bigger penalties in especially malicious breaches of the peace. This is the approach I recommend. *Infra* Part IV.D.

254. Another mechanism to make consumer litigation feasible would be for debtors' lawyers to bring an action based on a breach of the peace under a little FTC Act, providing for recovery of treble damages and attorney's fees. Lawyers apparently prefer to pursue common-law punitive damages, because three times little or nothing is still not enough of a prize to stimulate litigation.

255. 818 S.W.2d 23 (Tenn. Ct. App. 1991).

256. *Id.* at 30-31.

257. *Id.* at 31-32.

seriously detrimental to the ordinary conduct of human affairs.”²⁵⁸ The court stated that punitive damages can be allowed in a case involving actual loss, if the defendant’s conduct “amounts to fraud, malice, oppression, gross negligence, or outrageous conduct.”²⁵⁹ The court said that because the debtors proved neither actual loss (in the sense of property loss) nor especially bad intent by the creditor, punitive damages were not appropriate.²⁶⁰ The Davenports were withholding payment after taking their car back to the dealer for repairs seven times, without satisfaction.²⁶¹ But the court refused to make the creditor forfeit its deficiency.²⁶² Instead, it said that under the last sentence of section 9-507(1), the debtors were entitled to the total finance charges under the loan plus ten percent of the original debt amount, but offset against the creditor’s deficiency.²⁶³ As a result, the creditor was still entitled to a small deficiency after the offset.

It is notable that bankruptcy would likely have been a better remedy for the Davenports. Without the necessity of a trial and appeal, involving proof of facts and complicated arguments, the debtors could have discharged the deficiency entirely, along with most other unsecured debts, in a Chapter 7 case.²⁶⁴ With a repossession already on the debtors’ credit report, bankruptcy would not do significant further injury to their access to credit. In Chapter 13, they could have gotten the car back,²⁶⁵ crammed down the secured claim on the car loan to collateral value, and paid the value of the car, with partial payment of the deficiency depending on their disposable income, over the span of three to five years.²⁶⁶ In addition, attorney’s fees would have been reasonable.²⁶⁷ Bankruptcy offers very predictable, relatively affordable relief for consumer debtors. Usually, there is no need for customized legal representation after the filing of a petition. This is why a consumer debtor searching lawyers’ ads in the Yellow Pages in most areas will find many mentions of bankruptcy but none concerning other sorts of consumer legal

258. *Id.* at 26, 29-30.

259. *Id.* at 32-33.

260. *Id.* at 33.

261. *Id.* at 25.

262. *Id.* at 32.

263. *Id.*

264. 11 U.S.C. § 727 (1994).

265. *Id.* § 542.

266. *Id.* §§ 1322(d), 1325(a)(5), (b).

267. Braucher, *supra* note 83, at 545-51.

actions. The “penalty” of section 9-507(1) is often not enough to justify the expense of litigation.²⁶⁸

C. The Restatement Approach

In what seems to be a well-kept secret, there is a body of persuasive authority concerning breach of the peace in repossessions.²⁶⁹ The American Law Institute, one of the two sponsors of the UCC, has provided much gloss on the law governing repossession in its *Restatement (Second) of Torts*, addressing repossession in several sections and myriad comments.²⁷⁰ Not a single commercial law casebook or treatise cites the relevant authority.²⁷¹ With limited exceptions,²⁷² the courts, like the casebook editors and treatise

268. It is notable that the proposed attorney’s fees provision in Revised Article 9 would presumably not require courts to award attorney’s fees to consumers in breach-of-the-peace actions, because secured parties do not bring breach-of-the-peace actions and thus could not be prevailing parties on this issue. See Oct. 1996 Draft, Art. 9, *supra* note 251, § 9-628(1). Under Revised section 9-628(2), courts could award attorney’s fees. *Id.* § 2-628(2).

269. In an informal survey, I have put the following question to a number of commercial law professors and commercial lawyers: In what text does the American Law Institute address the question of what constitutes a breach of the peace in a self-help repossession? All have been stumped. The answer is: *Restatement (Second) of Torts*. See RESTATEMENT (SECOND) OF TORTS § 183 & cmts. a-e, h-i (1965); *id.* §§ 213(3)(a), 272 cmt. b.

270. See sections and comments cited *supra* note 269.

271. One casebook, JOHN O. HONNOLD ET AL., CASES, PROBLEMS AND MATERIALS ON THE LAW OF SALES AND SECURED FINANCING 981 (6th ed. 1993), cites the *Restatement (Second) of Torts* section on conversion, section 222, and quotes its comment c, but does not note that the *Restatement*, in section 272 and its comment b, makes clear that a breach of the peace is not a conversion. See *infra* Part IV.C.1. Another casebook includes a case, *Salisbury Livestock Co. v. Colorado Central Credit Union*, 793 P.2d 470 (Wyo. 1993), that cites three *Restatement* sections, although none of the cited sections deals directly with breach of the peace in a self-help repossession. LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 55-57 (1995). For example, *Salisbury* cites the *Restatement* section defining “breach of the peace,” section 116, but the definition is for purposes of stating when a private person may perform an arrest under section 119.

272. A few cases cite *Restatement (Second) of Torts* section 183. See *Madden v. Deere Credit Servs., Inc.*, 598 So. 2d 860 (Ala. 1992); *Marine Midland Bank-Cent. v. Cote*, 35 So. 2d 750 (Fla. Dist. Ct. App. 1977); *Speery v. ITT Commercial Fin. Corp.*, 799 S.W.2d 871 (Mo. Ct. App. 1990); *Davenport v. Chrysler Credit Corp.* 818 S.W.2d 23 (Tenn. Ct. App. 1991). Section 183 gives a conditional vendor, lessor, and through subsection (3), a chattel mortgagee, or holder of other security instrument, a privilege to enter land for the purpose of taking possession “at a reasonable time and in a reasonable manner,” a privilege which makes the entry not a trespass. RESTATEMENT (SECOND) OF TORTS § 183 (1965).

Six cases cite *Restatement (Second)* section 424 to support the position that a secured lender has a nondelegable duty to avoid breach of the peace and thus is liable for a breach by an independent contractor. *Clark v. Associates Commercial Corp.*, 877 F. Supp. 1439, 1446-47 (D. Kan. 1994); *General Fin. Corp. v. Smith*, 505 So. 2d 1045, 1048 (Ala. 1987); *Sammons v. Broward Bank*, 599 So. 2d 1018, 1020 (Fla. Dist. Ct. App. 1992); *Nichols v. Metropolitan Bank*, 435 N.W.2d 637, 640 (Minn.

authors, have not noticed the *Restatement's* positions.

In two places, the *Restatement (Second)* deals explicitly with the legal rights and duties of secured parties concerning repossession, although it uses what is now antiquated terminology ("conditional vendor" and "chattel mortgagee").²⁷³ First, contrary to what many courts have held, the *Restatement* provides that it is not a conversion or a trespass to chattels when a secured party repossesses collateral after default, even if unlawful force is used.²⁷⁴ This point is correct and crucial to the question of appropriate measure of damages.²⁷⁵ Second, the *Restatement* recognizes a limited privilege to enter upon land to repossess collateral without committing a trespass.²⁷⁶

The *Restatement* also supports the position that breaches of the peace are actionable on tort theories that redress invasions of personality.²⁷⁷ The language in which the *Restatement* limits the privilege to use force against persons seems to cover repossessioners (and cross-references explicitly refer to repossessions),²⁷⁸ so that by breaching the peace, repossessioners may commit one or more of the following torts: assault, battery, false imprisonment, and intentional infliction of emotional distress.

1. A Breach of the Peace Is Not a Conversion.

The *Restatement's* unequivocal statement that a breach of the peace in a repossession is *not* a conversion is found in section 272 and its comments. Section 272 states:

One who is entitled to immediate possession of a chattel is not liable to another for dispossessing him of it.²⁷⁹

Comment a to this section elaborates:

a. The interest in the retention of possession of a chattel is not

Ct. App. 1989); *Mauro v. General Motors Acceptance Corp.*, 626 N.Y.S.2d 374, 377 (Sup. Ct. 1995); *MBank El Paso v. Sanchez*, 836 S.W.2d 151, 153 (Tex. 1992). Section 424 does not explicitly address self-help repossession, but the principle it states is broad enough to encompass that type of case.

273. Article 9 unified the law of pledges, conditional sales, chattel mortgages, trust receipts, and other security interests in personal property. See U.C.C. § 9-102(2) & note (1995).

274. See *infra* Part IV.C.1.

275. See *supra* Part IV.A.

276. See *infra* Part IV.C.2.

277. See *infra* Part IV.C.3.

278. See *infra* note 298.

279. RESTATEMENT (SECOND) OF TORTS § 272 (1965).

protected against a dispossession by one who, as between himself and the other, is entitled to the immediate possession of the chattel. Therefore, it is neither a trespass nor a conversion for a person so entitled to the possession of a chattel to take it from another. It is not within the scope of the Restatement of this Subject to state the rules of the law which determine determine [sic] the right to the possession of a chattel.²⁸⁰

Lest there be any doubt, comment b to this section makes clear that it was intended to cover secured parties:

b. *Repossession by conditional sale vendor or chattel mortgagee.* A person may be entitled to the immediate possession of a chattel as the result of some past transaction. Thus, a conditional sale vendor or a chattel mortgagee may repossess a chattel from his vendee or mortgagor upon failure of the latter to comply with the terms of the contract if a valid agreement between the parties^[281] so provides. This is true although at the time of the repossession the vendee or mortgagor expresses an unwillingness for the vendor or mortgagee to take possession of the chattel. As to the actor's liability if he uses force in effecting the repossession and thereby invades the other's interest of personality, see §§ 100-111.²⁸²

In short, a repossession after default, even if a breach of the peace occurs because of the debtor's objection or because force is used, is not a conversion, but *other* torts (those dealing with invasions of land and personality) address various forms of breach of the peace, as will be discussed below.

2. *A Repossession Is Not a Trespass to Land If Conducted at a Reasonable Time and in a Reasonable Manner.*

The second place in the *Restatement (Second) of Torts* where the rights and duties of repossessing secured parties are addressed explicitly is in section 183. Section 183 sets forth a qualified privilege for a secured party to

280. *Id.* cmt. a. In the context of Chapter 10 on privileges as to chattels, the reference to "a trespass" must be to a trespass to chattels, not a trespass to land. Privileges to enter land are dealt with in Chapter 8.

281. One could add here: or statute such as U.C.C. section 9-503. See *RESTATEMENT (SECOND) OF TORTS* § 183 cmts. b-c (1965); *id.* § 272 cmt. a.

282. *RESTATEMENT (SECOND) OF TORTS* § 272 (1965) (footnote added).

enter upon land to effect a repossession. This section refers to secured parties, using pre-Code terminology, in the language of the section itself:

§ 183. Removal of Thing by Conditional Vendor, Lessor, Chattel Mortgagee, Pledgor, Mortgagor, or Bailor

(1) Except as otherwise agreed, a conditional vendor or lessor of a thing who is entitled to immediate possession thereof, or a successor to his legal interest in the thing, is privileged, at a reasonable time and in a reasonable manner, to enter land in the possession of the vendee or lessee, for the purpose of taking possession of the thing and removing it from the land.²⁸³

Subsection (3)(a) of this section states that the privilege of subsection (1) is available to “a chattel mortgagee, or the holder of other security instruments.”²⁸⁴ The effect of this privilege is that a secured party acting within its scope does not commit a trespass to land, but if the privilege is exceeded, there is a trespass. Comment c to section 183 makes clear that explicit consent to entry is not required, because consent is inferred from the making of a secured transaction,²⁸⁵ and that subsequent withdrawal of consent to entry does not impair the privilege.²⁸⁶ Comment i to section 183, however, notes that “some courts have refused to give effect to agreements permitting the use of force to enter the land for the purpose of repossession, on the ground that they are against public policy as tending to encourage breaches of the peace.”²⁸⁷

The privilege of section 183 to enter land is limited—only entries “at a reasonable time and in a reasonable manner” are covered, so that entries unreasonable as to time or manner *are* trespasses. Two comments, e and h, provide gloss on these time and manner restrictions. Comment e to Section 183 states, “The entry to resume possession must be at a reasonable time. An entry in the nighttime or in time of serious illness or other misfortune may be

283. *Id.* § 183(1).

284. *Id.* § 183(3)(A).

285. This is a questionable inference, one that assumes knowledge of the law, and the law may be contrary to laymen’s experiences and norms. Repossession without notice of default may be contrary to laymen’s experience, and when the law permits this, it may come as a surprise. Form contract disclosures of the right of repossession without notice do not change the picture because they are unlikely to be read.

286. RESTATEMENT (SECOND) OF TORTS § 183 cmt. c (1965).

287. *Id.* § 183 cmt. i.

at an unreasonable time.”²⁸⁸ The most significant language here is the reference to nighttime entries, but the fact that it is qualified by the word “may” leaves considerable doubt about this time limitation. The language suggests that night timing of an entry is a factor which makes an entry unreasonable and thus unprivileged. However, it also suggests that not all nighttime entries are unreasonable, meaning that all circumstances must be considered to determine whether the timing is unreasonable. For example, nighttime entry upon residential property might be unreasonable, or at least more likely to be deemed unreasonable, while nighttime entry of an unguarded construction site might not be. The case law is divided as to whether nighttime entry makes a repossession more peaceful, because confrontation is less likely,²⁸⁹ or less peaceful, because if a confrontation occurs it is more likely to be dangerous.²⁹⁰

UCC section 9-503 should be amended to address explicitly the question of nighttime repossessions conducted at residences. It should make nighttime repossession at residential premises a breach of the peace because of the invasion of sense of personal security that would result from a surprise confrontation in these circumstances and because of the often prohibitive cost of litigation to establish a breach of the peace in a consumer case. The propriety of nighttime repossessions from commercial property could be left to a case-by-case examination in light of all factors. Under the Federal Fair Debt Collection Practices Act, debt collectors may not telephone or otherwise communicate with consumer debtors after 9 p.m.²⁹¹ It makes little sense to say that a phone call after 9 p.m. is objectionable, but repossessors may prowl around homes at any hour of the night. The same periods that federal law bars communications with consumers, before 8 a.m. and after 9 p.m., would be appropriate times to prohibit self-help repossessions from residential premises.

The question of “reasonable manner” is addressed in comment h to section

288. *Id.* § 183 cmt. e.

289. *See* Wallace v. Chrysler, 743 F. Supp. 1228 (W.D. Va. 1990) (2:00 a.m. repossession from debtor’s driveway was not a breach of the peace because the prospect of a confrontation is less at that time); Radge v. Peoples Bank, 767 P.2d 949 (Wash. Ct. App. 1989) (saying that the timing of a 5:00 a.m. repossession from debtor’s driveway reduced the likelihood of a confrontation with the debtor and that the place saved the debtor from the humiliation of a repossession in a public place).

290. Hester v. Bandy, 627 So. 2d 833 (Miss. 1993) (saying that a nighttime repossession from the debtor’s driveway was “fraught with peril of provoking a breach of the peace of the most serious kind”); Salisbury Livestock Co. v. Colorado Cent. Credit Union, 793 P.2d 470 (Wyo. 1990) (saying it was a jury question whether a 5:00 a.m. repossession from a ranch yard was unreasonable).

291. 15 U.S.C. § 1692c(a)(1) (1994).

183, which states:

h. *Use of force.* The privilege stated in this Section is one of entry in a peaceable and reasonable manner to remove the thing from the land. It does not justify the use of any force to enter, to remove the thing, or to prevent interference by the possessor. Since the conditional seller or other actor has parted freely and voluntarily with his original possession, he is not privileged to recover it by force, and must resort to his remedy at law. Compare § 101 and Comments.^[292] The actor will therefore be liable if he breaks and enters the land, as by removing a padlock.

Under exceptional circumstances the actor may have a privilege to use force. Thus he may be so privileged where the thing has been taken from his possession by a fraudulent transaction and he is in prompt pursuit, as stated in §§ 100-111, or where he reasonably believes that there is such a danger of destruction or serious injury to the thing as to bring the case within the rule stated in § 197.²⁹³

Several points in this comment are worth highlighting. First, the comment seems to refer not just to force against property, but also to force against a person. The comment says that force is not permitted “to prevent interference by the possessor,” in which case the secured party must “resort to his remedy at law.” This language is consistent with case law to the effect that a secured party may not proceed where the debtors’ actions or words suggest that continued efforts to repossess will result in an invasion of personality. It is also consistent with the *Restatement*’s limits on use of force against another to recapture chattels.²⁹⁴

Another important point made in comment h to section 183 is that force to enter land is not permitted, and this is defined to include breaking and entering land “as by removing a padlock.” This point in the comment, however, is difficult to reconcile with language in another *Restatement* provision, section 213(3), which provides:

292. Section 101 of the *Restatement (Second) of Torts* deals with the privilege to use force against a person for recaption of chattels, primarily when tortiously obtained. RESTATEMENT (SECOND) OF TORTS § 101 (1965).

293. *Id.* § 183 cmt. h (footnote added). See also *id.* § 197 (dealing with the privilege to enter land based on private necessity, to protect the actor, the possessor of the land, a third person, or the land, or chattels of any such persons, according to comment a).

294. See *infra* Part IV.C.3.

One who is privileged to enter land is further privileged to break and enter a fence or other enclosure, or a building other than a dwelling, but is not privileged to break and enter a dwelling, if it is necessary, or is reasonably believed by the actor to be necessary, to accomplish the purpose of the privilege, and he enters

(a) to remove a thing as stated in §§ 177-184²⁹⁵

Subsection (3)(a) of section 213 thus refers back to, inter alia, secured parties given a privilege to enter land under section 183. Comment a to section 213 defines “breaking” as follows:

a. The word “breaking” is used in the same sense in which it is used in defining the crime of burglary, and includes the breaking or destruction of any portion of the outer part of a building or enclosure used for its protection, or the change in location of any such part, such as the moving or pushing aside of any object placed there as a barrier.²⁹⁶

Comment d to section 213 refers to the “inviolability of a man’s house.”²⁹⁷ While section 213(3)(a) makes clear that breaking and entering a dwelling to effect a repossession is a trespass, it permits breaking and entering fences, enclosures, and buildings other than a dwelling. The section thus seems to conflict with comment h to section 183, which says a secured party will be liable “if he breaks and enters the land, as by removing a padlock.”²⁹⁸ How should this conflict be resolved? Although ordinarily section language should probably override comment language, here the comment language deals specifically with breaking and entering in a repossession, while the section deals with many contexts. It may therefore be appropriate to prefer the specific to the general language.

This discrepancy between the language of section 213(3)(a) and comment h to section 183 is perhaps most important as evidence for why the law of breach of the peace belongs in Article 9, where it could be found most readily. Even the drafters of the *Restatement* seem to have had trouble keeping track of every place secured parties were mentioned and making sure that the various sections and comments worked together.

295. RESTATEMENT (SECOND) OF TORTS § 213(3) (1965) (emphasis added).

296. *Id.* § 213 cmt. a.

297. *Id.* § 213 cmt. d.

298. *Id.* § 183 cmt. h.

In summary, the *Restatement's* position is clear that it is a trespass to break and enter a dwelling to repossess collateral. It also takes the position that there is a privilege to enter land to undertake a repossession provided the entry is conducted at a reasonable time, with a nighttime entry more dubious than one in daytime, and in a reasonable manner. Thus, a daytime entry into a driveway or parking lot is generally not a trespass. On the other hand, nighttime entries into the same locations are more doubtful, although apparently all circumstances concerning reasonableness should be considered. Breaking and entering a fence, enclosure, or building other than a dwelling is permitted under *Restatement* section 213(3)(a), although comment language to another section, dealing specifically with breaking and entering in a repossession, is to the contrary. UCC section 9-503 should be amended to clarify that breaking and entering to carry out a repossession constitutes a breach of the peace.

3. *There Is No Privilege to Use Force Against Persons During a Repossession.*

Repossessions by secured parties are not dealt with explicitly in the *Restatement (Second) of Torts* treatment of invasions of personality. However, language in Chapter 2 of the *Restatement*, dealing with these invasions, is broad enough to address repossessors, and cross-references back to this material make it clear that repossessions can involve one or more of the torts of assault, battery, false imprisonment, and intentional infliction of emotional distress.

In section 108, the *Restatement* provides, "The use of force against another for the purpose of recaption of a chattel which the other is tortiously withholding from the actor is not privileged if the other's possession was rightfully acquired."²⁹⁹ Comment a to section 108 states that this is true although the other's right (meaning, as applied to repossession, the debtor's right) to possession has ceased.³⁰⁰ Although section 108 and its comments do not specifically mention secured parties, the section by its terms applies to certain secured parties who once possessed collateral and have demanded its return.³⁰¹ A fortiori, a secured party who never possessed the collateral and

299. *Id.* § 108.

300. *Id.* § 108 cmt. a.

301. For example, section 108 applies to vendors who once possessed the collateral and have demanded return of collateral. "Recaption" in the *Restatement* refers to when an actor takes possession

who has not made demand for its return cannot use force against a person to take it. More support for the proposition that force against persons is not permitted in repossessions is found in cross-references showing that the intent of the *Restatement's* drafters was to make breaches of the peace in repossessions actionable when they constitute invasions of personality.³⁰²

The lack of explicit reference to the repossession context in its treatment of invasions of personality other than in later cross-references, however, makes the *Restatement* unhelpful in resolving the core problems concerning breach of the peace. Repossessors usually seek to avoid coming into contact with debtors; they prefer to repossess collateral when it is unattended. But inevitably, the debtor sometimes turns up while the reposessor is in the process of taking the collateral. The *Restatement* fails to acknowledge this situation anywhere in its treatment of invasions of personality, and only addresses it in passing in its material on trespass to land. In comment h to section 183, the *Restatement* states that a reposessor may not use force to “prevent interference by the possessor” and must “resort to his remedy at law.”³⁰³ Clearly the reposessor cannot hit, manhandle, or carry off a debtor in order to proceed with a repossession, but the *Restatement* does not address whether an interrupted reposessor can proceed if it is not necessary to lay hands on the debtor or threaten her. This silence is a reason why UCC section 9-503 should be read as creating a statutory tort theory, allowing recovery for breaches of the peace that do not constitute assault, battery, intentional infliction of emotional distress, false imprisonment, or trespass. It would be helpful to amend section 9-503 to make clear that there is a statutory cause of action for breach of the peace which supplements the common law. In the meantime, courts should treat existing section 9-503 as creating this cause of action, with the remedy measured by the loss of sense of personal security involved or as suggested in Part IV.D below (discussing a remedy of disgorgement of property taken, together with cancellation of the debt). As with assaults, false imprisonments, or trespasses that cause no physical injury or out-of-pocket loss, the value to be assigned to the loss of a sense of

of a chattel formerly in his possession, which is in the possession of another. *Id.* at 173 scope note; *see also id.* § 237 (making refusal to surrender chattels on demand to one entitled to immediate possession a conversion, which is authority for treating a debtor who does not surrender collateral as having converted the property).

302. The relevant cross-references are in comment b of section 272 (to sections 100-11, dealing with force against persons in the taking of chattels) and in comment h to section 183 (to section 101, concerning how possession is obtained, and to sections 100-11).

303. *Id.* § 183 cmt. h.

personal security from a breach of the peace is a question that should be left generally to the trier of fact, who can take into account the blameworthiness of the reposessor's behavior.

D. The Need for a More Certain Statutory Remedy

Although conversion is conceptually the wrong remedy for breach of the peace, there is a sound impulse behind the courts' use of it—the desire for predictability. Unless significant recovery is likely, lawyers will be unwilling to take breach-of-the-peace cases on behalf of debtors.³⁰⁴ The result of too much uncertainty about the remedy is a failure of deterrence.

The remedy for conversion is the value of the property taken, which has the virtue of being relatively certain. This remedy does not work in breach-of-the-peace cases, however, if the conversion damages are offset against the debt owing. A lender is most at risk and thus most likely to order a repossession when the lender is undersecured, so frequently debtors have no equity when a repossession occurs. If the debtor's equity is zero, the conversion remedy offset against the debt will also be zero.³⁰⁵ Not only does a remedy of conversion offset by the debt fail to compensate the debtor, but more importantly it fails to provide effective deterrence to the reposessor. With breaches of the peace, the object of a remedy is not so much compensation of the debtor as putting a stop to a socially offensive practice, with the debtor's enforcement action serving the function of a private attorney general. In short, deterrence is the most important function of a breach-of-the-peace remedy, so the proper inquiry is what remedy will deter reposseors from offensive self-help.

A possibility is to force disgorgement of what was taken by breach of the peace and also to cancel the lender's right to any recovery from the debtor.³⁰⁶ While I advocate enactment of such a disgorgement and cancellation of debt remedy in the UCC, courts could fashion such a remedy from existing case

304. See Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 L. & SOC'Y REV. 115 (1979) (describing how lawyers evade providing representation in consumer disputes for a combination of economic and attitudinal reasons).

305. See *supra* notes 220-21 and accompanying text.

306. This is a watered down version of the remedy applicable to a breach of the peace under the Wisconsin Consumer Act. WIS. STAT. ANN. § 425.305 (West 1988) (providing for the customer to retain what was received in the transaction, without obligation to pay, and recovery of any sums already paid). I have left out of the recommended remedy allowing the debtor to recover what has already been paid.

law. Many courts already use conversion as a remedy for breach of the peace, and a number also cancel the right to a deficiency in cases of failure to comply with the law governing disposition of collateral.³⁰⁷ To produce the remedy recommended here, courts could use conversion, but deny the lender the right to any recovery of the debt as a penalty for the breach of the peace. The conversion damages then would not be offset against the debt owing, nor would the lender be entitled to any deficiency.

The beauty of this remedy, which would be conceptually more pristine as a minimum statutory penalty rather than as a product of case law, is that it tailors the deterrence to the purpose of the repossession. A lender orders a repossession hoping to collect the debt. If the repossession is in breach of the peace, under the recommended remedy the lender would receive no benefit from the repossession and would not get a second chance. It would have to return the fair market value of the property taken, or the property itself if still of the same value and acceptable to the debtor, and its recourse against the debtor would be at an end. This remedy should be available for any breach of the peace under Article 9.³⁰⁸ To provide further deterrence against especially awful breaches of the peace, common-law rights to punitive damages should not be displaced.³⁰⁹

CONCLUSION

The law of breach of the peace in self-help repossessions needs statutory elaboration and clarification, both as to the basis of liability and the remedy, to encourage private enforcement. Repossession is a remedy primarily used against consumers, who are without access to counsel for small claims, and as a result, case-by-case adjudication under a vague standard does not provide

307. See Robert M. Lloyd, *The Absolute Bar Rule in UCC Foreclosure Sales: A Prescription for Waste*, 40 UCLA L. REV. 695 (1993) (eleven states have adopted an absolute bar rule for deficiencies by case law and another three have statutes adopting the rule in some or all cases of unlawful disposition of collateral). Since breaches of the peace are more offensive than commercially unreasonable dispositions of collateral (which may involve mere negligent failure to send a notice of the time of sale), an absolute bar on recovery of the debt is appropriate as part of the remedy for a breach of the peace.

308. The remedy would need further tailoring for Article 2A because it is not necessarily appropriate to award the debtor the lessor's residual interest in leased goods. The Article 2A remedy could be to make the lessor liable for the value of the goods for the lease period, or return of the goods for that period, plus cancellation of the lessee's obligation to pay the lease price.

309. See *supra* note 252, for how to charge a jury concerning a statutory penalty and common-law punitive damages.

effective deterrence. The law should be put in clear language and placed where it can be readily found—in Article 9. Article 9’s breach-of-the-peace provision should be revised as a part of the revision of Article 9 now in progress. A number of common types of repossession practices that are breaches of the peace should be explicitly listed because this would likely lead to compliance by most reposseors. A statutory cause of action should be explicitly created. In addition, to codify the great weight of case-law authority, the statute should state that lenders are liable for breaches of the peace by their independent contractors³¹⁰ and for unlawful repossessions when they use law officers without benefit of judicial process.³¹¹ Finally, a remedy of disgorgement of property taken and cancellation of the debt should be put into the statute as a minimum penalty, leaving common-law theories available to recover for such additional items as personal injury and damage to property, as well as punitive damages for egregious breaches of the peace. All of these clarifications and elaborations could be adopted by case law, but statutory enactment would best serve the need for more certainty, in order to promote enforcement actions and thus deter breaches of the peace.

If existing UCC section 9-503 is made subsection (a), then the following subsections (b) and (c) should be added:

(b) In taking possession of collateral by self-help, it is a breach of the peace for the secured party, without the contemporaneous permission of the debtor, to:

(1) enter a locked or unlocked residence, garage or commercial building;³¹²

(2) break, open or move any lock, gate or other barrier to enter enclosed real property;³¹³

(3) enter upon residential real property, including a driveway, before 8 o’clock antemeridian or after 9 o’clock postmeridian;³¹⁴

(4) proceed with a repossession if the debtor, a member of the debtor’s household or an employee of the debtor is present and objects

310. *Supra* notes 68-69 and accompanying text.

311. *Supra* notes 153-59 and accompanying text.

312. For a discussion of entries into buildings, see *supra* notes 167-90 and accompanying text.

313. See *supra* notes 160-61, 294-98 and accompanying text for discussion of entries into enclosed real property.

314. See *supra* text at notes 285-91 and accompanying text (concerning nighttime entries).

by words or actions³¹⁵ or requests³¹⁶ that the repossession not take place;

(5) attempt a repossession by a trick that will or is likely to involve a confrontation with the debtor, a member of the debtor's household or an employee of the debtor;³¹⁷ or

(6) otherwise create an unreasonable risk of violence.

(c) If a secured party or its independent contractor in the course of taking possession of collateral by self-help breaches the peace or uses law officers without the benefit of judicial process,³¹⁸ the secured party shall be liable to the debtor for the fair market value of any property taken, and the debt shall be canceled.³¹⁹

This drafting effort can no doubt be improved upon, but it shows that a number of recurring issues could be addressed without making section 9-503 unwieldy.

315. See text following *supra* note 125 (concerning objection by actions).

316. See text following *supra* note 139 (concerning requests to stop repossessions) and *supra* Part III.B.1 generally (concerning interrupted repossessions and debtors' objections).

317. See text following *supra* note 215 (concerning tricks that involve, or are likely to involve, a confrontation).

318. See *supra* notes 153-59 and accompanying text for a discussion of unlawful use of law officers without judicial process.

319. See *supra* Part IV.D for a discussion of this remedy.

APPENDIX

This appendix lists 114 cases from 1945 to 1995, found by traditional and computer search methods, including officially unreported cases from the UCC Reporting Service and Westlaw. The following WESTLAW search in the UCC-CS and ALLCASES databases from 1945 through 1995, REPOSSESS! AND BREACH! /3 PEACE, found nearly 500 cases, but most of them only referred briefly to the right of self-help repossession without breach of the peace and did not actually address legal issues. In the list that follows, the attempt is to include every case that addresses or discusses issues concerning what constitutes a breach of the peace in a self-help repossession and the appropriate remedy for it. In Part I, the cases are listed by state, including federal cases that apply that state's law. The list also includes criminal cases involving breach of the peace in a repossession. Part II indexes the cases by issue.

I. LIST OF CASES

*Alabama**State Supreme Court:*

1. *Madden v. Deere Credit Servs., Inc.*, 598 So. 2d 860 (Ala. 1992).
2. *Pleasant v. Warrick*, 590 So. 2d 214 (Ala. 1991).
3. *Collins v. Gulf Furniture Stores, Inc.*, 549 So. 2d 6 (Ala. 1989).
4. *General Fin. Corp. v. Smith*, 505 So. 2d 1045 (Ala. 1987).
5. *Ash v. Peoples Bank of Greensboro*, 500 So. 2d 5 (Ala. 1986).
6. *Chrysler Credit Corp. v. McKinney*, 38 U.C.C. Rep. Serv. (CBC) 1409, (Ala. 1984).
7. *Big Three Motors, Inc. v. Rutherford*, 432 So. 2d 483 (Ala. 1983).
8. *Reno v. General Motors Acceptance Corp.*, 378 So. 2d 1103 (Ala. 1979).
9. *Ford Motor Credit Co. v. Byrd*, 351 So. 2d 557 (Ala. 1977).

Intermediate State Court:

10. *Pierce v. Ford Motor Credit Co.*, 373 So. 2d 1113 (Ala. Civ. App. 1979).
11. *Speigle v. Chrysler Credit Corp.*, 323 So. 2d 360 (Ala. Civ. App. 1975).
12. *Ford Motor Credit Co. v. Ditton*, 295 So. 2d 408 (Ala. Civ. App. 1974).
13. *White v. State*, 288 So. 2d 175 (Ala. Crim. App. 1974).

U.S. Court of Appeals:

14. *Thompson v. Ford Motor Credit Co.*, 550 F.2d 256 (5th Cir. 1977) (applying Alabama state law).

Federal District Court:

15. *Cofield v. Randolph County Comm'n*, 874 F. Supp. 1276 (M.D. Ala. 1994) (Because plaintiff did not assert an actionable claim under § 1983, the district court dismissed the rest of plaintiff's Alabama state law claim for lack of subject matter jurisdiction.).

Bankruptcy Court:

16. *In re Hamby*, 19 B.R. 776 (Bankr. N.D. Ala. 1982) (applying Alabama law).

*Alaska**Federal District Court:*

17. *In re Flying W Airways*, 341 F. Supp. 26 (E.D. Pa. 1972) (applying Alaska law).

*Arizona**Intermediate State Court:*

18. *Walker v. Walthall*, 588 P.2d 863 (Ariz. Ct. App. 1978).

*Arkansas**State Supreme Court:*

19. *Ford Motor Credit Co. v. Herring*, 589 S.W.2d 584 (Ark. 1979).
20. *Teeter Motor Co. v. First Nat'l Bank*, 543 S.W.2d 938 (Ark. 1976).

U.S. Circuit Court of Appeals:

21. *Rogers v. Allis-Chalmers Credit Corp.*, 679 F.2d 138 (8th Cir. 1982) (applying Arkansas state law).
22. *Williams v. Ford Motor Credit Co.*, 674 F.2d 717 (8th Cir. 1982) (applying Arkansas state law).

*California**Intermediate State Court:*

23. *Meilicke v. County of L.A.*, 282 Cal. Rptr. 893 (Cal. Ct. App. 1991).
24. *Henderson v. Security Nat'l Bank*, 22 U.C.C. Rep. Serv. (CBC) 846 (Cal. Ct. App. 1977).

Colorado

No cases reported

*Connecticut**Intermediate State Court:*

25. *State v. Indrisano*, 613 A.2d 1375 (Conn. App. Ct. 1992), *rev'd and vacated*, 640 A.2d 986 (Conn. 1994) (without discussion of civil breach of the peace).

Federal District Court:

26. *Clark v. Auto Recovery Bureau Conn., Inc.*, 889 F. Supp. 543 (D. Conn. 1994).

*Delaware**State Trial Court:*

27. Coverdale v. Fisher, C.A. No. 91C-02-015, 1993 WL 487911 (Del. Super. Ct. Nov. 8, 1993).

District of Columbia

No cases reported

*Florida**Intermediate State Court:*

28. Nixon v. Halpin, 620 So. 2d 796 (Fla. Dist. Ct. App. 1993).
29. Sammons v. Broward Bank, 599 So. 2d 1018 (Fla. Dist. Ct. App. 1992).
30. Quest v. Barnett Bank, 397 So. 2d 1020 (Fla. Dist. Ct. App. 1981).
31. Medel v. Republic Nat'l Bank of Miami, 365 So. 2d 782 (Fla. Dist. Ct. App. 1978).
32. Marine Midland Bank-Cent. v. Cote, 351 So. 2d 750 (Fla. Dist. Ct. App. 1977).
33. Raffa v. Dania Bank, 321 So. 2d 83 (Fla. Dist. Ct. App. 1975).

*Georgia**Intermediate State Court:*

34. Fulton v. Anchor Sav. Bank, 452 S.E.2d 208 (Ga. Ct. App. 1994).
35. Hopkins v. First Union Bank of Savannah, 387 S.E.2d 144 (Ga. Ct. App. 1989).
36. Hill v. Federal Employees Credit Union, 386 S.E.2d 874 (Ga. Ct. App. 1989).
37. Dietrich v. Trust Co. Bank of Augusta, 346 S.E.2d 107 (Ga. Ct. App. 1986).
38. Roach v. Barclays Am./Credit, Inc., 298 S.E.2d 304 (Ga. Ct. App. 1982).
39. Pierce v. Leasing Int'l, 235 S.E.2d 752 (Ga. Ct. App. 1977).
40. Deavers v. Standridge, 242 S.E.2d 331 (Ga. Ct. App. 1978).

Hawaii

No cases reported

Idaho

No cases reported

*Illinois**Intermediate State Court:*

41. Kouba v. East Joliet Bank, 481 N.E.2d 325 (Ill. App. Ct. 1985).
42. Dixon v. Ford Motor Credit Co., 391 N.E.2d 493 (Ill. App. Ct. 1979).

*Indiana**State Supreme Court:*

43. Star Bank v. Laker, 637 N.E.2d 805 (Ind. 1994).

Intermediate State Court:

44. Massengill v. Indiana Nat'l Bank, 550 N.E.2d 97 (Ind. Ct. App. 1990).
45. Census Fed. Credit Union v. Wann, 403 N.E.2d 348 (Ind. Ct. App. 1980).
46. Nicholson's Mobile Home Sales, Inc. v. Schramm, 330 N.E.2d 785 (Ind. Ct. App. 1975).

Iowa

No cases reported

*Kansas**State Supreme Court:*

47. Riley State Bank v. Spillman, 750 P.2d 1024 (Kan. 1988).
48. Benschoter v. First Nat'l Bank, 542 P.2d 1042 (Kan. 1975).

Intermediate State Court:

49. Wade v. Ford Motor Credit Co., 668 P.2d 183 (Kan. Ct. App. 1983).

*Kentucky**Intermediate State Court:*

50. First & Farmers Bank of Somerset v. Henderson, 763 S.W.2d 137 (Ky. Ct. App. 1988).

*Louisiana**Intermediate State Court:*

51. Fassitt v. United T.V. Rental Inc., 297 So. 2d 283 (La. Ct. App. 1974).

Maine

No cases reported

Maryland

No cases reported

Massachusetts

No cases reported

*Michigan**Intermediate State Court:*

52. Witucke v. Presque Isle Bank, 243 N.W.2d 907 (Mich. Ct. App. 1976).

Federal District Court:

53. Haverstick Enters. v. Financial Fed. Credit, Inc., 803 F. Supp. 1251 (E.D. Mich. 1992), *aff'd*, 32 F.3d 989 (6th Cir. 1994) (parties to the action were nondiverse after district court dismissed the § 1983 action and remaining Michigan state law claims were remanded back to state court).

*Minnesota**Intermediate State Court:*

54. Nichols v. Metropolitan Bank, 435 N.W.2d 637 (Minn. Ct. App. 1989).

55. Johnson v. State, No. C8-88-264, 1988 WL 47815 (Minn. Ct. App. May 17, 1988).

56. Bloomquist v. First Nat'l Bank, 378 N.W.2d 81 (Minn. Ct. App. 1985).

Federal District Court:

57. James v. Ford Motor Credit Co., 842 F. Supp. 1202 (D. Minn. 1994),
aff'd, 47 F.3d 961 (8th Cir. 1995) (applying Minnesota state law).

58. Naddy v. Hansen, Civ. No. 4-83-644, 1985 WL 4993 (D. Minn. Dec. 6, 1985) (applying Minnesota state law).

Mississippi

State Supreme Court:

59. Hester v. Bandy, 627 So. 2d 833 (Miss. 1993).

60. Ivy v. General Motors Acceptance Corp., 612 So. 2d 1108 (Miss. 1992).

U.S. Circuit Court of Appeals:

61. Butler v. Ford Motor Credit Co., 829 F.2d 568 (5th Cir. 1987) (applying Mississippi state law).

Missouri

Intermediate State Court:

62. Sperry v. ITT Commercial Fin. Corp., 799 S.W.2d 871 (Mo. Ct. App. 1990).

63. Wirth v. Heavey, 508 S.W.2d 263 (Mo. Ct. App. 1974).

Montana

State Supreme Court:

64. Martin v. Dorn Equip. Co., 821 P.2d 1025 (Mont. 1991).

Nebraska

State Supreme Court:

65. State v. Trackwell, 458 N.W.2d 181 (Neb. 1990).

Nevada

No cases reported

New Hampshire

Federal District Court:

66. *In re MacLeod*, 118 B.R. 1 (Bankr. D.N.H. 1990) (applying New Hampshire state law).

New Jersey

State Trial Court, Appellate Division:

67. Slowinski v. Valley Nat'l Bank, 624 A.2d 85 (N.J. Super. Ct. App. Div. 1993).

New Mexico

State Supreme Court:

68. Waisner v. Jones, 755 P.2d 598 (N.M. 1988).

*New York**Lower State Court:*

69. Mauro v. General Motors Acceptance Corp., 626 N.Y.S.2d 374 (Sup. Ct. 1995).
70. Hilliman v. Cobado, 499 N.Y.S.2d 610 (Sup. Ct. 1986).
71. Global Casting Indus. v. Daley-Hodkin Corp., 432 N.Y.S.2d 453 (Sup. Ct. 1980).
72. Chernov v. Bank of Babylon, 282 N.Y.S.2d 114 (Sup. Ct. 1967).

Federal District Court:

73. Wright v. National Bank of Stamford, 600 F. Supp. 1289 (N.D.N.Y.), *aff'd*, 767 F.2d 909 (2d Cir. 1985) (having disposed of the § 1983 federal claim, the District Court chose to dismiss the pendent New York state law claim).

North Carolina

No cases reported

North Dakota

No cases reported

*Ohio**State Supreme Court:*

74. Morris v. First Nat'l Bank & Trust Co., 254 N.E.2d 683 (Ohio 1970).
75. Hileman v. Harter Bank & Trust Co., 186 N.E.2d 853 (Ohio 1962).

Intermediate State Court:

76. State v. LeFevre, No 94APA09-1376, 1995 WL 258959 (Ohio Ct. App. May 4, 1995).
77. Smith v. John Deere Co., 614 N.E.2d 1148 (Ohio Ct. App. 1993).
78. Mace v. Mack Fin. Corp., No. 82 C.A. 26, 1983 WL 6763 (Ohio Ct. App. Feb. 28, 1983).
79. Matthews v. Ohio Bell Tel. Co., No. E-82-8, 1982 WL 6592 (Ohio Ct. App. Oct. 15, 1982) (per curiam).
80. Leighty v. American Can Credit Union, No. 44496, 1982 WL 2574 (Ohio Ct. App. Dec. 9, 1982).
81. Makepeace v. Chrysler Motors Corp., C.A. No. L-80-187, 1981 WL 5572 (Ohio Ct. App. May 8, 1981) (per curiam).

State Trial Court:

82. Kimble v. Universal TV Rental, Inc., 417 N.E.2d 597 (Ohio, Franklin County Mun. Ct. 1980).

U.S. Circuit Court of Appeals:

83. K.B. Oil Co. v. Ford Motor Credit Co., 811 F.2d 310 (6th Cir. 1987) (applying Ohio law).

*Oklahoma**Intermediate State Court:*

84. *Howell v. Ford Motor Credit Co.*, 16 U.C.C. Rep. Serv. (CBC) 881 (Okla. Ct. App. 1975).

*Oregon**Intermediate State Court:*

85. *State v. Pranger*, 822 P.2d 714 (Or. Ct. App. 1991).
86. *Harris v. Cantwell*, 614 P.2d 124 (Or. Ct. App. 1980).

U.S. Circuit Court of Appeals:

87. *Harris v. City of Roseburg*, 664 F.2d 1121 (9th Cir. 1981) (granting defendant qualified immunity against plaintiff's § 1983 claim and dismissing plaintiff's pendent Oregon state law claim).

*Pennsylvania**Federal District Court:*

88. *Laurel Coal Co. v. Walter E. Heller & Co.*, 539 F. Supp. 1006 (W.D. Pa. 1982) (applying Pennsylvania state law).

Rhode Island

No cases reported

*South Carolina**State Supreme Court:*

89. *Jordan v. Citizens & S. Nat'l Bank*, 298 S.E.2d 213 (S.C. 1982).

Federal District Court:

90. *Butler v. Vanderbilt Mortgage & Fin., Inc. (In re Daniel)*, 137 B.R. 884 (Bankr. D.S.C. 1992) (applying South Carolina state law).
91. *Thompson v. Ford Motor Credit Co.*, 324 F. Supp. 108 (D.S.C. 1971) (applying South Carolina law to breach-of-peace claim, while applying Michigan state law for contract interpretation).

South Dakota

No cases reported

*Tennessee**Intermediate State Court:*

92. *McCall v. Owens*, 820 S.W.2d 748 (Tenn. Ct. App. 1991).
93. *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23 (Tenn. Ct. App. 1991).
94. *Harris Truck & Trailer Sales v. Foote*, 436 S.W.2d 460 (Tenn. Ct. App. 1968).
95. *Owens v. First Am. Nat'l Bank*, 6 U.C.C. Rep. Serv. (CBC) 427 (Tenn. Ct. App. 1968).

Federal District Court:

96. Clark v. Associates Commercial Corp., 877 F. Supp. 1439 (D. Kan. 1994)
(applying Tennessee law).

*Texas**State Supreme Court:*

97. MBank El Paso v. Sanchez, 836 S.W.2d 151 (Tex. 1992).

Intermediate State Court:

98. Giese v. NNCB Tex. Forney Banking Ctr., 881 S.W.2d 776 (Tex. App. 1994).
99. Guillory v. Westheimer, No. 01-89-00609-CV, 1990 WL 79818 (Tex. Ct. App. June 14, 1990).
100. Meyers v. Ford Motor Credit Co., 619 S.W.2d 572 (Tex. Civ. App. 1981).
101. Robertson v. Union Planters Nat'l Bank, 561 S.W.2d 901 (Tex. Civ. App. 1978).
102. Ford Motor Credit Co. v. Cole, 503 S.W.2d 853 (Tex. Civ. App. 1973).
103. Gulf Oil Corp. v. Smithey, 426 S.W.2d 262 (Tex. Civ. App. 1968).

U.S. Circuit Court of Appeal:

104. Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (5th Cir. 1980)
(finding no § 1983 liability and dismissing plaintiff's Texas state law claim for lack of subject matter jurisdiction).

*Utah**State Supreme Court:*

105. Cottam v. Heppner, 777 P.2d 468 (Utah 1989).

Vermont

No cases reported

*Virginia**Federal Appeals Court:*

106. Renaire Corp. v. Vaughn, 142 A.2d 148 (D.C. App. 1958) (applying Virginia law).

Federal District Court:

107. Wallace v. Chrysler Credit Corp., 743 F. Supp 1228 (W.D. Va. 1990)
(applying Virginia law).

*Washington**Intermediate State Court:*

108. Radge v. Peoples Bank, 767 P.2d 949 (Wash. Ct. App. 1989).
109. Jackson v. Peoples Fed. Credit Union, 604 P.2d 1025 (Wash. Ct. App. 1979).
110. Stone Mach. Co. v. Kessler, 463 P.2d 651 (Wash. Ct. App. 1970).

*West Virginia**State Supreme Court:*

111. General Elec. Credit Corp. v. Timbrook, 291 S.E.2d 383 (W.Va. 1982).
 112. Cox v. Galigher Motor Sales Co., 213 S.E.2d 475 (W. Va. 1975).

*Wisconsin**Intermediate State Court:*

113. Hollibush v. Ford Motor Credit Co., 508 N.W.2d 449 (Wis. Ct. App. 1993).

*Wyoming**State Supreme Court:*

114. Salisbury Livestock Co. v. Colorado Cent. Credit Union, 793 P.2d 470 (Wyo. 1990).

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