Law-Enforcement Officers and Self-Help Repossession: A State-Action Approach

Aaron Loterstein
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Commercial Law Commons, Law Enforcement and Corrections Commons, Legislation Commons, and the Secured Transactions Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol111/iss7/4

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
NOTE

LAW-ENFORCEMENT OFFICERS AND SELF-HELP REPOSESSION: A STATE-ACTION APPROACH

Aaron Loterstein*

Repossession of secured collateral is a fundamental component of the consumer credit industry. The Uniform Commercial Code authorizes a secured party to engage in self-help repossession of secured collateral under section 9-609, so long as the repossession takes place without "breach of the peace." While that term is undefined, several courts have adopted a counterintuitive rule, holding that a law-enforcement officer's presence during a self-help repossession—regardless of purpose or level of involvement—creates a breach of the peace. The Official Comments to the Code have seemingly endorsed this position as well. This Note rejects the primary justifications courts have offered to justify a bright-line rule and makes clear that an officer's involvement in self-help repossession is unrelated to breach of the peace. The correct approach to law-enforcement-officer involvement in self-help repossession asks whether the officer's presence constitutes state action. An officer's involvement should only invalidate a repossession where it is deemed state action sufficient to trigger a constitutional violation under section 1983. In such cases, the repossession is not of the sort authorized by section 9-609 and would therefore be wrongful, rather than a breach of the peace. In accordance with this approach, this Note concludes with a proposal for a modified Official Comment to section 9-609.

TABLE OF CONTENTS

INTRODUCTION .................................................................................... 1362
I. FRUSTRATION OF THE RIGHT TO OBJECT AS BREACH OF THE PEACE ................................................................. 1365
   A. Genesis of the Right to Object .................................................. 1366
   B. Exploring the Stone Machinery Rationale .............................. 1368
   C. Fallacy of the Right to Object ...................................................... 1370
II. SELF-HELP REPOSESSION AS STATE ACTION ...................... 1372
   A. Overview of Creditors' Remedies as State Action ................. 1373
   B. State Action and Self-Help Repossession .............................. 1375
   C. The Proper State-Action Approach ........................................ 1376
   D. Misuse of the State-Action Approach .................................... 1378
III. A PROPOSED SOLUTION .......................................................... 1379

* J.D., December 2012, University of Michigan Law School. I am grateful to Rob Boley, Aaron Brecher, Maggie Mettler, and Spencer Winters for their thoughtful comments and suggestions. I would also like to thank Professor James J. White for his valuable assistance. Finally, thanks to my wife, Rachel, for her endless love and support.
A. Proposed Modification to Section 9-609's Official Comments .......................................................... 1380

B. Application of the State-Action Approach .................................. 1380

CONCLUSION ....................................................................................... 1383

INTRODUCTION

The repossession industry is dangerous. Tensions frequently run high, and when an unsuspecting car owner learns that his vehicle is being repossessed, his reaction is unpredictable and can be violent.¹ Sensationalist portrayals of repossessions in television shows such as Operation Repo can attract violent personalities to the repossession industry,² further contributing to the likelihood of violence during repossessions. The sheer number of vehicle repossessions far exceeds home mortgage defaults.³ Despite the risk of violence, repossession is a vital aspect of the consumer credit industry. Of the various rights triggered upon debtor default, repossession is paramount.⁴ It provides a secured party⁵ with an avenue of recourse to collect at least part of a debt owed to him, which also provides some assurance that a debtor will comply with repayment obligations.⁶

The Uniform Commercial Code ("UCC") provides a secured party with the right to repossess its collateral upon default in two ways: repossession by judicial process and repossession by self-help.⁷ Because of the financial and time-related costs associated with reducing a claim to judgment, se-


³. Nathalie Martin & Ozymandias Adams, Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending, 77 Mo. L. Rev. 41, 45 (2012).


⁵. The UCC defines a secured party as "a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding." U.C.C. § 9-102(a)(73)(A) (2012). Several older cases and commentators refer to such parties as creditors. For the purposes of this Note, the terms should be viewed interchangeably.

⁶. See sources cited supra note 4.

⁷. U.C.C. § 9-609. Aside from repossession, the UCC makes other rights available to a secured party as well. See U.C.C. § 9-601.
secured parties prefer instead to engage in self-help repossession. The UCC only imposes one statutory limitation on self-help repossession: it may not result in a "breach of the peace." Typically, independent contractors, popularly known as "repo men," perform such repossessions. Even though a repo agent is an independent contractor, a secured party who hires one will still be held personally liable for a breach of the peace. The most commonly repossessed goods are automobiles, as they are frequently purchased with credit and are easy to transport. Section 9-609, however, applies to any collateral in which a lender has a security interest.

Despite its importance as the sole statutory limitation on self-help repossession, the UCC does not define "breach of the peace" or explain how one can avoid doing so during a repossession. Some scholars have called for the UCC to clearly define the contours of breach of the peace, though the drafters of revised Article 9 considered and rejected these proposals. Accordingly, in the Official Comment to revised section 9-609, the drafters explain that they intentionally chose not to define the term "breach of the peace," instead leaving it open to judicial determination. Though the breach-of-the-peace inquiry implicates several considerations, the essential question that often underlies courts' decisions regarding breach of the peace in this context is whether the repossession created an unreasonable risk of violence. In fact, one can understand many standard examples of breach of the peace by framing the rule's motivation as avoidance of violence.

Despite the lack of statutory guidance in defining breach of the peace, an Official Comment to section 9-609 notes a peculiar rule: This section does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law-enforcement officer. A


10. Jean Braucher, The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law, 75 WASH. U. L.Q. 549, 562–63 (1997) ("[C]ourts have consistently held that the lender is liable for a breach of the peace by an independent contractor. The courts have characterized section 9-503 [the predecessor to current section 9-609] as recognizing a nondelegable duty to avoid breaches of the peace." (footnote omitted)).

11. E.g., id. at 566–91, 614–15; see also Alvin C. Harrell, Revised Article 9 Moves Closer to Completion, 52 CONSUMER FIN. L.Q. REP. 93, 99 n.16 (1998).

12. Harrell, supra note 11, at 99 n.16.

13. U.C.C. § 9-609 cmt. 3 ("Like former Section 9-503, this section does not define or explain the conduct that will constitute a breach of the peace, leaving that matter for continuing development by the courts.").


15. For example, one case discussing the use of trickery in repossession presented the concern as one of impermissible violence. Ford Motor Credit Co. v. Byrd, 351 So. 2d 557, 559 (Ala. 1977) (noting that trickery is "fraught with the likelihood of resulting violence").
number of cases have held that a repossessing secured party’s use of a law-
enforcement officer without benefit of judicial process constituted a failure
to comply with former Section 9-503.16

This Comment is ambiguous. The fact that section 9-609 “does not
authorize” the use of a law-enforcement officer is not to say that the
statute expressly forbids it. In addition, the Comment’s reference to the
“assistance” of law-enforcement officers may only intend to prohibit law-
enforcement officers from actively facilitating repossession, rather than
standing by to keep the peace.17 Scholars and courts have interpreted the
Comment as an unqualified prohibition on the participation of law-
enforcement officers,18 and, absent further clarification, this interpretation of
the Official Comment is compelling.

This rule against the use of law-enforcement officers in self-help
repossession is counterintuitive. Why would the involvement of a law-
enforcement officer constitute a breach of the very peace that he has sworn
to protect? Moreover, the Official Comment does not clearly indicate how
much of an active role—if any—an officer may take in a repossession
before a breach of the peace occurs. This Note addresses these questions and
concludes that the current state of the law is more nuanced than section 9-
609’s comments suggest.

Part I argues that the most prevalent theory that courts use to explain
why a law-enforcement officer’s involvement constitutes a breach of the
peace—frustration of the debtor’s right to object—is unsatisfactory. First, it
is based on a misconstruction of existing case law that turned a fact-specific
inquiry into a bright-line prohibition of law-enforcement-officer involve-
ment. Second, the debtor does not have a right to object under the UCC,
which, on the contrary, compels the debtor to cooperate with lawful repos-
session efforts.

Part II argues that the best approach to law-enforcement-officer
involvement in self-help repossession is one that considers whether a
law-enforcement officer’s presence constitutes state action. When a law-
enforcement officer’s involvement is repossession-facilitating rather than
peacekeeping, it becomes state action, which makes the officer’s
involvement wrongful because it is neither the self-help repossession nor the
judicial-process repossession authorized by the UCC. This approach
provides a more nuanced and logically consistent framework for addressing
law-enforcement involvement in self-help repossession.

Drawing upon this framework, Part III suggests language for an Official
Comment to section 9-609 to replace the less precise rule that it currently
endorses. This proposal unambiguously links the issue of law-enforcement

16. U.C.C. § 9-609 cmt. 3.
17. If this is the correct reading of the Official Comment, it is consistent with the dis-
tinction I draw between repossession-facilitating and peacekeeping actions, see infra Section
II.B. The Comment’s ambiguity, however, still requires clarification to make this point explic-
it.
18. E.g., WHITE & SUMMERS, supra note 4, § 26-7, at 1337; see also infra Part I.
involvement to the state-action inquiry and makes clear that the question is generally not one of breach of the peace. Part III then offers several illustrations to demonstrate application of the state-action approach.

I. Frustration of the Right to Object as Breach of the Peace

Even prior to the promulgation of the UCC, courts found improper the involvement of law-enforcement officers in self-help repossession. In one of the earliest formulations of this principle, the Supreme Court of Washington stated that a "mortgagor becomes a trespasser by going upon the premises of the mortgagor, accompanied by a deputy sheriff who has no legal process, but claims to act color of officii, and taking possession without the active resistance of the mortgagor." The court further explained that this type of behavior violates societal order, noting that "[t]o obtain possession under such a show and pretense of authority is to trifle with the obedience of citizens to the law and its officers.

Thus, according to this and similar cases from this era, the mere presence of a law-enforcement officer at a self-help repossession constituted a breach of the peace only if the officer acted color of officii, under color of office. The significance of acting under color of office was the officer's use of his law-enforcement authority as a basis for the repossession. An action was color of officii when the officer acted beyond the scope of official duties but as if he were acting pursuant to law-enforcement authority. Accordingly, these cases did not hold that the officer's involvement was inherently a breach of the peace. Where an officer did not act under color of office, there was nothing improper about the repossession, assuming that no independent breach of the peace occurred.

Early cases often framed this inquiry in terms of intimidation. That is, where an officer facilitated the repossession by improperly intimidating the debtor with the weight of his position, a breach of the peace occurred. The underlying issue was that an officer's use of his position to repossess property exceeds the scope of his official duties. To find a breach of the peace, not only did courts require that the officer intend to intimidate, but they also

22. See, e.g., Waggoner v. Koon, 168 P. 217, 217 (Okla. 1917) ("The only restrictions upon the mode by which the mortgagee secures possession of the mortgaged property, after breach of condition, is that he must act in an orderly manner and without creating a breach of the peace, and must not intimidate by securing the aid of an officer who pretends to act color of officii.")
23. Cf. infra notes 40-41 and accompanying text (providing other examples of officers acting outside the scope of their official duties).
considered whether the debtor felt intimidated. The inquiry was therefore case specific and did not assume that an officer's presence was inherently intimidating enough to invalidate the repossession automatically. However, these cases predated the UCC and did not consider this question under its statutory framework for self-help repossession.

The remainder of this Part argues that post-UCC cases that eschew this fact-specific intimidation inquiry and instead adopt a bright-line prohibition against law-enforcement-officer presence at self-help repossessions are in error. Section I.A explains that this bright-line rule is premised on the notion that law-enforcement-officer presence impermissibly stifles a "right" that the debtor does not have—the right to object. Section I.B demonstrates that the foremost case to utilize this theory misconstrued the line of cases on which it relied. Section I.C argues that debtors do not have a right to object to a repossession because that right would run counter to the UCC's requirement that the debtor facilitate the lawful repossession of collateral.

A. Genesis of the Right to Object

The first case to consider the issue of officer involvement in self-help repossession under the UCC was Stone Machinery Co. v. Kessler. Although Stone Machinery was a Washington Court of Appeals decision, courts in other jurisdictions have relied on its holding, presumably due to a dearth of case law on the subject. This Section therefore focuses extensively on Stone Machinery and its rationale.

In 1966, a debtor purchased a tractor from Stone Machinery but did not make timely payments. A credit manager from Stone Machinery located the tractor and sought to repossess it. Fearing violence, he requested assistance from a local sheriff, who agreed to help after examining

---

24. See, e.g., Beneficial Fin. Co. of Tulsa v. Wiener, 405 P.2d 691, 696 (Okla. 1965) ("By securing aid of the constable who pretended to act under his authority, a question was presented for the jury to determine whether plaintiff was intimidated, and for such reason let defendants remove her furniture.").

25. The 1917 edition of the CORPUS JURIS provided as follows:

According to some authorities the mortgagee must not intimidate by securing the aid of an officer who pretends to act colore officii; but the mere fact that the mortgagee is accompanied by a constable or other officer who does not act under color of his office, and where it does not appear that any force or threats were used in taking possession, will not make the mortgagee liable for trespass.

11 C.J. Chattel Mortgages § 257 (1917) (footnote omitted).


29. Id.
documentation confirming Stone Machinery's right to repossess the tractor. The sheriff took an active role in the repossession, accompanying the credit manager and proclaiming, "We come to pick up the tractor." The debtor protested but did not offer physical resistance, allegedly because of the officer's presence. The credit manager completed the repossession, and the debtor sued for wrongful repossession. The trial court awarded the debtor more than $30,000 in compensatory and punitive damages.

On appeal, the court considered the legality of the self-help repossession by turning to Oregon's adoption of former UCC section 9-503, which provided that "a secured party may proceed without judicial process if this can be done without breach of the peace." Ostensibly relying on previous cases, the court held that the officer's involvement constituted a breach of the peace. The court reasoned that the sheriff's involvement served to "prevent the defendant Kessler from exercising his right to resist by all lawful and reasonable means a nonjudicial take-over." The Stone Machinery court seems to have invented this alleged "right to resist." Such a notion was not apparent in prior case law and, as discussed infra in Section I.C, it conflicted with long-accepted principles of repossession.

Thus, the court effectively stated that because an officer's mere presence has the ability to intimidate the debtor into compliance with the repossession, the officer's involvement constituted a breach of the peace as a matter of law. It had taken the previously independent rule against using an officer for intimidation and folded it into the prohibition against breaching the peace. The upshot of this analysis was a bright-line rule against officer involvement in repossessions based upon frustration of the debtor's supposed "right to object." Subsequent cases, relying on Stone Machinery's misinterpretation of the law and creation of a previously nonexistent right to object, have framed the inquiry in this way as well.

This is not a question of mere semantics. The cases on which Stone Machinery relied dealt largely with law-enforcement officers who acted

30. Id.
31. Id. at 652–53.
32. Id. at 653.
33. Id.
34. Id. at 652.
35. Id. at 653 (quoting Or. Rev. Stat. § 79.5030 (repealed 2001)).
36. The Stone Machinery court cited several of the pre-UCC cases referenced above, such as Burgin v. Universal Credit Co., 98 P.2d 291, 296 (Wash. 1940). Stone Mach., 463 P.2d at 654. However, whereas those cases kept distinct the question of a breach of the peace from that of officer intimidation of the debtor under color of office, Stone Machinery combined the two for the purposes of its analysis. See id. at 654 (describing the officer's involvement using language that originally referred to breach of the peace due to actual violence).
37. Id. at 655.
38. Id.
39. See cases cited supra note 27.
beyond the scope of their official duties or threatened the use of violence.\(^{40}\) In such cases, courts correctly applied the law in finding the repossessions invalid. *Stone Machinery* went one step further, however, holding that officer involvement is always unlawful intimidation and constitutes a per se breach of the peace.\(^{42}\)

While one can certainly characterize an officer’s presence as intimidating in that it might reduce one’s willingness to engage in certain behaviors, it is not the same type of intimidation usually considered a breach of the peace. For example, in an Alabama decision, a court of appeals stated that, in the context of a breach of the peace inquiry, “[t]he threats or intimidation referred to are those which if carried out would amount to a breach of peace or if resisted would tend to promote a breach of peace.”\(^{43}\) As one practitioner puts it, “[T]o quote [a] line from *Repo Man*, you should not say something like: ‘You gonna give me my car, or do I gotta go to your house and shove your dog’s head down the toilet?’”\(^{44}\) Similarly, if a repo agent were to show up at a debtor’s door with a shotgun, that intimidation would be sufficient to trigger a breach of the peace. Taken to its conclusion, the implied threat in such a case is that the repo agent will use the weapon if the debtor refuses to assist in the repossession. In contrast, an officer’s presence does not typically carry with it the same implied threat of violence and so would not alone create a breach of the peace because of intimidation.\(^{45}\) *Stone Machinery* did not recognize this distinction; rather, it utilized a broad definition of intimidation that includes any action that limits the debtor’s “right to object” to the repossession.

**B. Exploring the *Stone Machinery* Rationale**

*Stone Machinery* and related cases, which hold that frustrating a debtor’s objections results in a breach of the peace, rely on the logic that in an officer’s absence, violence would erupt or the debtor would vocally object—outcomes that would normally result in a breach of the peace.\(^{47}\)

---

40. See, e.g., McClellan v. Gaston, 51 P. 1062, 1064 (Wash. 1898) (describing how the sheriff personally repossessed collateral where the creditor had filed a foreclosure action).

41. See, e.g., Ray v. Navarre, 147 P. 1019, 1021 (Okla. 1915) (concerning repossession of collateral with the assistance of a law-enforcement officer “by means of force, threats, and a display of firearms”).

42. See *Stone Mach.*, 463 P.2d at 757.


45. In situations in which the officer threatens violence, however, the intimidation would be sufficient. See *Ray*, 147 P. 1019.

46. See *Stone Mach.*, 463 P.2d at 655; First & Farmers Bank of Somerset, Inc. v. Henderson, 763 S.W.2d 137, 141 (Ky. Ct. App. 1988); see also 79 C.J.S. Secured Transactions § 198 (2006) (“The use of a law enforcement officer without judicial process is treated as the equivalent of a breach of the peace, where the strong arm of the law is needed to prevent violence.” (footnote omitted)).

47. See *White & Summers*, supra note 4, § 26-7, at 1337.
The argument concludes that the officer’s mere presence constitutes “constructive force, intimidation and oppression” and therefore, absent a prohibition on the presence of law-enforcement officers, the creditor would always be able to circumvent the statute by involving law enforcement in repossessions.\(^4\)

This line of reasoning misunderstands the relationship between secured party and debtor and the fundamental concern that motivates the breach of the peace proscription: avoiding violence. Because the UCC’s drafters left “breach of the peace” undefined, courts are left to offer their own interpretations of the term and have utilized various standards.\(^4\) Generally, the most obvious way for a repossessing party to breach the peace is to engage in violent behavior,\(^5\) though courts typically do not require the presence of actual violence or the threat of violence to find a breach of the peace.\(^5\) One court provided as follows:

In general terms a breach of the peace is a violation of public order, a disturbance of the public tranquility [sic], by any act or conduct inciting to violence or tending to provoke or excite others to break the peace. By “peace” as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the right of all persons in political society.\(^2\)

Consequently, a creditor’s wrongful conduct will only create a breach of the peace if it is likely to violate public order or create some public disturbance.\(^3\) Analysis of Stone Machinery reveals that the court did not properly

\(^{48}\) See, e.g., Stone Machinery, 463 P.2d at 655.

\(^{49}\) See McRobert, supra note 14, at 578–80 (contrasting courts that use a five-factor balancing test with those that engage in a fact-specific inquiry).

\(^{50}\) BARKLEY CLARK & BARBARA CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 4.05[2][b][i], at 4–77 (3d ed. 2012) (“The clearest example of a breach of the peace would be the secured party’s banging down the doors of the house to repossess the piano, drowning the debtor’s screams of protest in an ocean of expletives.”).

\(^{51}\) See, e.g., Thompson v. Ford Motor Credit Co., 324 F. Supp. 108, 115 (D.S.C. 1971) (“This court is of the opinion, however, that the tortious act needs no element of violence in order to constitute a breach of the peace.”); Davenport v. Chrysler Credit Corp., 818 S.W.2d 23, 29 (Tenn. Ct. App. 1991) (“[N]either violence, the threat of violence, nor personal confrontation is necessary in order for a secured party’s conduct to amount to a breach of the peace.”).

\(^{52}\) See, e.g., Chrysler Credit Corp. v. Koontz, 661 N.E.2d 1171, 1173 (Ill. App. Ct. 1996) (“We therefore conclude that the term ‘breach of the peace’ connotes conduct which incites or is likely to incite immediate public turbulence, or which leads to or is likely to lead to an immediate loss of public order and tranquility.”); Davenport, 818 S.W.2d at 29 (concluding that while violence or threat of violence is not required to breach the peace, any “conduct that is ‘incompatible with the tranquility and good order which governments are organized to maintain’” will breach the peace (citing State ex rel. Thompson v. Reichman, 188 S.W. 597, 602 (Tenn. 1916))).
apply this principle. The fact that a public disturbance could have occurred but for an officer's involvement should not constitute a breach of the peace, as the mere presence of an officer does not create a public disturbance.\textsuperscript{54} It seems that the court itself recognized the weakness in its argument as it concluded that law-enforcement presence alone was not necessarily a breach of the peace but would always allow the creditor to circumvent the statute by utilizing the assistance of law-enforcement officers.\textsuperscript{55}

*Stone Machinery*'s ultimate concern regarding statutory circumvention is unpersuasive. The prevention of breach of the peace due to the officer's presence is no different from the repo man engaging in a stealthy, nighttime repossession or a clever ruse.\textsuperscript{56} Put simply, if the officer's presence does not independently constitute a breach of the peace (that is, if it is not the type of public disturbance that we would normally consider a breach of the peace), the creditor has satisfied the statutory requirement regardless of the method of repossession employed.\textsuperscript{57} Courts should not seek to take away nonviolent or nonwrongful means of repossession from creditors for the sake of leveling the playing field between parties who knowingly entered into a binding security agreement.

\section*{C. Fallacy of the Right to Object}

The notion that a debtor has the "right to object" is inconsistent with other principles of repossession. In fact, many state statutes subject the debtor to damage payments for failing to make collateral available or for wrongfully damaging collateral.\textsuperscript{58} Moreover, some states even criminalize acts undertaken by the debtor with intent to limit a creditor's ability to effectuate a repossession,\textsuperscript{59} and several courts have held that the debtor's mere

\begin{itemize}
\item[54.] This argument is even more tenuous when considered using a definition of breach of the peace that requires at least the existence of the threat of violence. Under such a formulation, questionable behavior (such as utilizing the assistance of law enforcement) would never be considered a breach of the peace without the threat of violence.
\item[55.] *Stone Mach.*, 463 P.2d at 655.
\item[56.] See generally *Clark & Clark*, supra note 50, ¶ 4.05[2][b][i], at 4–80 ("The courts have generally held that a little stealth is all in the game of repossession.").
\item[57.] Nonetheless, there may be a point at which the officer's involvement can be so intimidating to the debtor that it makes the repossession wrongful, perhaps where accompanied by threat of force or active involvement in the repossession. See *supra* notes 22–25 and accompanying text for examples of intimidating conduct by law enforcement in the context of pre-UCC repossession.
\item[59.] *E.g.*, Alaska Stat. § 11.46.730(a)(1)(B) (2010) (stating that a debtor criminally defrauds a creditor where he knowingly "destroys, removes, conceals, encumbers, transfers, or otherwise deals with that property with intent to hinder enforcement of that security interest"); Cal. Penal Code § 154(a) (West 1999 & Supp. 2012) (providing that a "debtor who . . .
refusal to make the collateral available is sufficient to implicate these statutes.\footnote{60} These statutes reflect an understanding that where a creditor has a valid security interest, the debtor’s role is to serve as a facilitator, not an agitator. \textit{Stone Machinery}'s notion of the debtor's right to object runs counter to these statutes.

Similarly, at least one court has expressly held that the debtor has a duty not to impede a lawful repossession. In \textit{Texas National Bank v. Sandia Mortgage Corp.}, the Fifth Circuit held that a debtor has a contractual duty “not to interfere or hinder [a creditor’s] right to perform its side of the contract.”\footnote{61} While the case dealt specifically with the interpretation of a Texas statute,\footnote{62} the court based the ruling on its understanding of former section 9-503, so the decision is broadly applicable. Like the above referenced statutes,\footnote{63} this case presents the relationship between debtor and creditor in a way that would not grant the debtor a right to object in the face of an otherwise lawful repossession.

Moreover, by holding that a breach of the peace can arise from the debtor’s right to object, \textit{Stone Machinery} makes section 9-609 internally contradictory. Specifically, section 9-609(c) provides that “[i]f so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.”\footnote{64} The import is clear: the debtor has a duty to actively assist the secured party in repossessing collateral. At the very least, this section is at odds with a rule that would encourage the debtor to object to an otherwise lawful repossession and would penalize the secured party who frustrates that “right.” However, that is exactly the result of applying \textit{Stone Machinery}'s interpretation of the rule from what is now section 9-609(b).

Only when a breach of the peace is thought to depend upon a debtor’s right to object are these statutory provisions in conflict. Absent \textit{Stone Machinery}'s holding, the statute is clear. The UCC obligates the debtor to cooperate with a repossession.\footnote{65} It prohibits breaches of the peace, meaning that where the debtor does not comply with the repossession efforts, the secured party is

\footnotesize{\begin{itemize}
  \item E.g., Montgomery v. State, 91 S.W.3d 426, 431 (Tex. App. 2002). Other courts have held that mere refusal to make collateral available does not implicate criminal statutes. For a discussion of this issue, see \textit{Carter}, supra note 9, § 6.2.4.2, at 202–05.
  \item 872 F.2d 692, 698 (5th Cir. 1989).
  \item Specifically, the court was considering the issue of whether a breach of contract occurred for the purposes of applying Texas’s attorney’s fees statute. \textit{Tex. Nat'l Bank}, 872 F.2d at 698.
  \item See supra notes 58–59 and accompanying text.
  \item U.C.C. § 9-609(c) (2012).
  \item \textit{Id.}
\end{itemize}}
not at liberty to continue with the repossession. However, that does not authorize or encourage the debtor to make the repossession difficult. Where the debtor does not actually object, therefore, the secured party cannot be held liable for infringing on the debtor's "right."

It is also difficult to explain why a right to object should exist solely in this context. Why does a routine driveway repossession of which the debtor is unaware not implicate this rule? Taken to its logical conclusion, such a right would require that the secured party give advance notice to the debtor to enable him to exercise his right to object. This would clearly limit the economy of self-help repossession and would blur the line between self-help repossession and repossession through judicial process.

Thus, while an officer's actions during a repossession could create a breach of the peace in limited circumstances, the "right to object" approach does not explain a per se restriction on officer involvement in self-help repossessions. Courts, however, have discussed an alternative justification for finding a breach of the peace in cases of officer involvement: state action. Generally, the concern is that the law-enforcement officer is a state actor and cannot deprive the debtor of private property without notice and a hearing, at the risk of violating the debtor's constitutional rights. The following Part addresses this state-action issue.

II. SELF-HELP REPOSESSION AS STATE ACTION

This Part introduces a state-action approach to law-enforcement involvement in self-help repossession. Section II.A sets forth the existing Supreme Court jurisprudence on the issue of state action and self-help repossession, which holds that a typical self-help repossession does not constitute state action. Section II.B considers how the involvement of a law-enforcement officer during a self-help repossession can affect the state-action calculus. Section II.C argues that only when a law-enforcement officer's involvement in a self-help repossession becomes repossession-facilitating rather than peacekeeping does the repossession become wrongful. Section II.D discusses the ways in which courts have misused the state-action doctrine so that the result is no better than that yielded by the "right to object" approach discussed in Part I.

66. See id. § 9-609(b)(2).
67. See White & Summers, supra note 4, § 26-7, at 1336 ("We have found no case which holds that the repossession of an automobile from a driveway or public street (absent other circumstances, such as the debtor's objection) itself constitutes a breach of the peace.").
68. See Braucher, supra note 10, at 581 ("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.").
69. See Dunagan, supra note 8 and accompanying text.
70. Cf. Carter, supra note 9, § 6.3.2, at 205-07 (discussing the few states in which a creditor may not repossess collateral without authorization from the debtor).
A. Overview of Creditors' Remedies as State Action

Because repossession involves depriving a debtor of property without notice and a hearing, the debtor has a plausible claim that a repossession violated his Fourteenth Amendment due process rights if the repossession qualifies as state action. Section 1983 of title 42 of the U.S. Code provides a remedy for a constitutional right violated "under color of any statute, ordinance, regulation, custom, or usage, of any State." There are thus two elements to a § 1983 cause of action: first, a constitutional violation must have occurred, and second, that violation must have occurred under color of state law. It is a basic principle of constitutional law that a constitutional violation cannot occur without state action. In § 1983 claims premised on Fourteenth Amendment violations, such as repossession without notice, courts have, in some cases, treated the "color of state law" and state-action inquiries as identical.

The Supreme Court first addressed whether creditors' remedies could implicate state action in Sniadach v. Family Finance Corp. of Bay View. At issue in that case was the constitutionality of a Wisconsin statute that allowed a creditor to initiate an action for prejudgment wage garnishment. The Court found the statute unconstitutional, noting that prejudgment garnishment was a "taking which may impose tremendous hardship on wage earners with families to support." It was a landmark case, and because of the anti-wage-garnishment polemic of the opinion, courts were unsure whether it should extend to other creditor remedies as well.

---

74. See id. at 924.
75. See id. at 935 & n.18 ("[W]e hold in this case that the under-color-of-state-law requirement does not add anything not already included within the state-action requirement of the Fourteenth Amendment . . . "); see also SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 2:11 (4th ed. 2012).
77. Sniadach, 395 U.S. at 338.
78. Id. at 340.
79. See Barkley Clark & Jonathan M. Landers, Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution, 59 VA. L. REV. 355, 355 (1973) ("Nineteen sixty-nine was a momentous year. In that year the United States put a man on the moon, and in that year the creditor met the Constitution.").
80. In a strongly worded dissent, Justice Black argued that the majority opinion was based solely on "emotional rhetoric [that] might be very appropriate for Congressmen to make against some phases of garnishment laws" but in an opinion by the Court served as "a plain, judicial usurpation of state legislative power to decide what the State's laws shall be." Sniadach, 395 U.S. at 344–45 (Black, J., dissenting).
81. Clark & Landers, supra note 79, at 357–58.
This uncertainty did not last long. In *Fuentes v. Shevin*, the Court struck down Pennsylvania and Florida prejudgment replevin statutes. Applying *Sniadach*, the Court held that even a temporary deprivation of property violated the Fourteenth Amendment, and therefore the replevin statutes were unconstitutional. The Court then took the opportunity to conclusively state that *Sniadach* was to be construed broadly, requiring notice and a hearing for all temporary deprivations of property except for in “extraordinary situations.” The Court tempered its sweeping position somewhat in *Mitchell v. W.T. Grant Co.*, by upholding a Louisiana statute that authorized a writ of sequestration similar to the writ of replevin declared unconstitutional in *Fuentes*. *Mitchell* distinguished the case on its facts, though a persuasive dissent presented the distinctions as pretenses for overruling *Fuentes*.

Given these holdings, we can see why the constitutionality of former section 9-503, which authorized self-help repossession, was open to debate. Commentators differed in their conclusions, and the Supreme Court never offered a formal resolution. However, in *Flagg Bros. v. Brooks*, the Court concluded that a similar self-help remedy authorized by UCC Article 7—a warehouseman’s lien—did not constitute state action. Even though New York’s adoption of § 7-210 authorized the deprivation of property, the Court rejected the argument that “a State’s mere acquiescence in a private action converts that action into that of the State.” The Court concluded that “the State of New York ha[d] not compelled the sale of a bailor’s goods, but ha[d]...

82. 407 U.S. 67 (1972).
83. These statutes provided that where a private individual claimed that he was entitled to seize another’s property in replevin, he could apply for a writ of replevin after meeting specific procedural requirements, even without a formal judgment. A sheriff would then seize the property and the debtor could challenge the replevy. Clark & Landers, supra note 79, at 359.
84. *Fuentes*, 407 U.S. at 85–86.
85. Id. at 90 (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).
88. Id. at 615–17.
89. Id. at 634–35 (Stewart, J., dissenting) (“In short, this case is constitutionally indistinguishable from *Fuentes v. Shevin*, and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent.”). The seemingly contradictory nature of these cases is likely explained by a change in composition of the Court, as Justice Stewart noted in his dissent. Id. at 635–36 (“The only perceivable change that has occurred since *Fuentes* is in the makeup of this Court.”).
91. 436 U.S. 149 (1978). A warehouseman’s lien permits a bailee to retain possession of goods until storage fees are paid. The UCC authorizes the enforcement of the lien through public or private sale, subject to certain restrictions. U.C.C. § 7-210 (2012).
92. *Flagg Bros.*, 436 U.S. at 164.
merely announced the circumstances under which its courts will not interfere with a private sale.\footnote{Id. at 166.}

Presumably, the same logic would hold true in self-help repossession, where the government merely acquiesces to a private party’s repossessing collateral, though the Supreme Court has never expressly spoken on the issue.\footnote{CARTER, supra note 9, § 6.3.6.1, at 213–14.} Not surprisingly, a majority of federal circuit and state courts have extended this reasoning to private repossessions, holding that government acquiescence alone does not constitute state action.\footnote{Id. § 6.3.6.1, at 214 nn.169–71 (providing a lengthy list of cases holding that self-help repossession does not constitute state action).} The presence of a law-enforcement officer during a self-help repossession, however, could transform the repossession into state action, subjecting the self-help repossession to the holding of \textit{Fuentes}. The following Section explores this issue.

**B. State Action and Self-Help Repossession**

While a garden-variety self-help repossession does not violate the Constitution, the presence of a law-enforcement officer at a repossession makes the case for a due process violation significantly stronger. Debtors often bring such constitutional claims against law-enforcement officers rather than private actors, thus presenting no breach-of-the-peace issue.\footnote{E.g., Marcus \textit{v. McCollum}, 394 F.3d 813, 817, 819–20 (10th Cir. 2004). Private actors can be sued under § 1983 as well, Lugar \textit{v. Edmondson Oil Co.}, 457 U.S. 922, 928 n.8 (1982), though such suits are less common than suits against law-enforcement officers, see Allison Hartwell Eid, \textit{Private Party Immunities to Section 1983 Suits}, 57 U. CHI. L. REV. 1323, 1326 (1990).} A common example of this is \textit{Marcus \textit{v. McCollum}, where the Tenth Circuit denied qualified immunity to law-enforcement officers who became involved in an automobile repossession after the parties began arguing heatedly.}\footnote{Marcus, 394 F.3d at 815–17.}

In evaluating the merits of the action, the court noted that while the Tenth Circuit had never considered whether law-enforcement-officer involvement in a private party’s repossessing of property could constitute state action, other circuits had done so. The Tenth Circuit summarized the general treatment that those circuits have adopted for such claims, stating that where officers act only to keep the peace during a private repossession, they are not deemed state actors. If they participate to facilitate the repossession, however, they are considered state actors.\footnote{Id. at 818.}

This distinction is not a binary one but a continuum. As the Second Circuit explained, “When an officer begins to take a more active hand in the repossession, and as such involvement becomes increasingly critical, a point may be reached at which police assistance at the scene of a private repossession may
cause the repossession to take on the character of state action." Because it would be difficult to provide an ex ante list of law-enforcement behavior that would be far enough along the continuum to qualify as state action, courts instead engage in a fact-specific inquiry that requires careful judicial deliberation.

The following Sections focus on the relationship between the state-action component of the § 1983 inquiry and the breach-of-the-peace component of the section 9-609 inquiry. They also examine the effect that this relationship can have on private self-help repossessions. They argue that the best approach to law-enforcement-officer presence at self-help repossession is to conduct a fact-specific inquiry into whether the presence was peacekeeping or repossession-facilitating, where repossession-facilitating law-enforcement presence renders the repossession wrongful under the UCC. This inquiry should mirror the one courts undertake to decide questions of state action, described earlier in this Section.

C. The Proper State-Action Approach

The best approach to law-enforcement presence at self-help repossessions relies on the logic that, when an element of state action is introduced into a repossession, the repossession is no longer statutorily authorized. As mentioned above, the UCC only condones two forms of repossession: self-help (without a breach of the peace) and repossession through judicial process. If an officer helps with a repossession, it may no longer count as self-help and would certainly not count as judicial process. This rationale was articulated by the New Mexico Supreme Court’s holding in *Waisner v. Jones* that “the presence of a law-enforcement official, without judicial process, removes a repossession from the ambit of [New Mexico’s self-help statute] and places it among conduct proscribed by either the fifth or fourteenth amendments.” *Waisner* correctly identified an association between state action and statutory self-help repossession, though it categorically stated that an officer’s “presence” transforms a valid self-help repossession into a constitutional violation. This presentation is at odds with the majority of circuits noted.

99. Barrett v. Harwood, 189 F.3d 297, 302 (2d Cir. 1999). Other circuits have held this way as well. *E.g.*, Cofield v. Randolph Cnty. Comm’r, 90 F.3d 468, 471 (11th Cir. 1996) (stating that where an officer facilitates a repossession, state action might be present); Harris v. City of Roseburg, 664 F.2d 1121, 1127 (9th Cir. 1981) (“[P]olice intervention and aid in the repossession does constitute state action.”); United States v. Coleman, 628 F.2d 961, 964 & n.1 (6th Cir. 1980) (listing facilitative behaviors that would constitute state action); Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 513 (5th Cir. 1980) (“[P]olice intervention and aid in this repossession . . . would constitute state action . . . .”).

100. *Marcus*, 394 F.3d at 819.

101. *See supra* notes 96–100 and accompanying text.

102. U.C.C. § 9-609(c) (2012).

103. 755 P.2d 598, 602 (N.M. 1988); *see also* MacLeod v. C & G Inv. Grp. (In re MacLeod), 118 B.R. 1, 3 (Bankr. D.N.H. 1990) (“The repossession . . . with the assistance of the state police was not a self-help repossession and accordingly was unlawful.”).

above, which view officer involvement for purposes of state action along a continuum.105

Once we frame the problem of officer involvement as one of nonstatutorily authorized repossession, we must then consider to what extent an officer’s actions will remove a repossession from the ambit of section 9-609. It is conceivable that a lesser amount of law-enforcement action, while not enough for a § 1983 claim, would be sufficient to invalidate a repossession. This possibility rests on the assumption that “self-help” cannot contain any nonprivate element. As Professor Braucher has noted, “[B]y authorizing a secured party to proceed without judicial process, [section 9-609] implicitly disapproves of using law officers without first getting the right to do so by use of judicial process.”106 This inference is consistent with at least one generally accepted definition of self-help: “legally permissible conduct that individuals undertake absent the compulsion of law and without the assistance of a government official in efforts to prevent or remedy a legal wrong.”107 This definition suggests that government involvement that would be insufficient to trigger constitutional due process requirements would nonetheless be sufficient to remove a repossession from the ambit of self-help.

The best approach, however, is likely to treat the quantum of law-enforcement involvement required to constitute a wrongful repossession as equal to that required to constitute a § 1983 claim. An officer’s involvement that does not reach a level of constitutional moment should be insignificant for purposes of section 9-609 as well. This approach is still consistent with the above-referenced definition of self-help. Where an officer’s actions are peacekeeping in nature, he stands passively near the scene of a repossession. He takes action only if violence erupts, and then merely to restore the peace, not to ensure the repossession’s completion. The purpose of his presence is therefore not to remedy a legal wrong but to carry out the generally accepted role of law-enforcement officers. Any ancillary benefit provided to reposseors is irrelevant for the purposes of self-help.

Put simply, the same standard that courts apply to answer the state-action question should also determine the self-help question. Accordingly, an officer’s mere presence designed only to keep the peace at the scene of a repossession—alone insufficient to trigger a constitutional violation—should not transform a lawful repossession into an unlawful one under section 9-609. In contrast, where law-enforcement officers intend to assist a creditor in an effort to repossess an asset, such involvement should be state action, and courts should deem the repossession wrongful because it would qualify as neither a self-help repossession nor a judicial process.

105. See cases cited supra note 99 and accompanying text.
repossession. The difficulty for courts lies in determining which of these functions—facilitating a repossession or keeping the peace—an officer’s actions serve.

As a final matter, courts should consider an unauthorized repossession due to law-enforcement involvement a wrongful repossession, rather than a breach of the peace. Wrongful repossession is an umbrella term that includes the more specific breach of the peace. As I have shown, an officer’s presence can violate section 9-609 because it is not statutorily authorized, regardless of the likelihood of violence. One of the problems with the prevailing doctrine is the oddity of discussing passive law-enforcement-officer presence as a “breach of the peace.” Referring to the problem of officer involvement as a “wrongful repossession” is more precise and makes the legal framework logically coherent.

D. Misuse of the State-Action Approach

Simply introducing state-action analysis does not solve the problem, as courts that employ state-action analysis are prone to fall into the same pitfalls as courts that employ the flawed “right to object” analysis discussed in Part I. For example, an Arizona court of appeals, while addressing the question of whether a repossessing party had breached the peace, held “that the introduction of law-enforcement officers into the area of self-help repossession, regardless of their degree of participation or nonparticipation in the actual events, would constitute state action, thereby invalidating a repossession without a proper notice and hearing.”

This incorrectly assumes that law-enforcement presence automatically constitutes state action, creating a

108. For an example of a court utilizing this framework, see United States v. Coleman, 628 F.2d 961, 964 (6th Cir. 1980) (“[The officers’] benign attendance was not designed to assist [the repossession agent] in repossession of the truck; rather, it was in furtherance of their official duties. . . . [M]ere acquiescence by the police to ‘stand by in case of trouble’ was insufficient to convert the repossession of the truck into state action.” (footnote omitted)).

109. See infra Section III.B for examples.


111. See Braucher, supra note 10, at 581 (“[The rationale] would be more credibly stated if it were not in terms of breach of the peace or a right of objection.”).

It is also possible that a significant divergence between labeling officer involvement as a “breach of the peace” and “wrongful repossession” may lie in whether the parties could consent to a law-enforcement-assisted repossession in their security agreement. Section 9-602 of the UCC governs waiver and variance of Article 9’s repossession provisions and states that “the debtor or obligor may not waive or vary the rules stated in . . . [s]ection 9-609 to the extent that it imposes upon a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace.” U.C.C. § 9-602 (2012).

In other words, parties may not waive the prohibition on breaching the peace in a self-help repossession. If law-enforcement involvement is classified as a breach of the peace, the debtor may not preemptively agree to permit it. If, however, the involvement falls outside section 9-609’s breach of the peace rule, the parties would be free to contract to permit a secured party to repossess with the aid of a law-enforcement officer for peacekeeping purposes.

bright-line prohibition on law-enforcement presence that is identical in effect to the holding in *Stone Machinery*.

The significance of this analysis is most apparent when contrasting it with courts that keep the state-action and breach-of-the-peace inquiries entirely separate. For example, in *Wallace v. Chrysler Credit Corp.*, an off-duty law-enforcement officer repossessed the plaintiff's truck in the middle of the night. The plaintiff brought a § 1983 claim against the officer and separately alleged that both the officer and the creditor had breached the peace, violating Virginia's self-help repossession statute. The court first considered and dismissed the breach of the peace claim on the grounds that the repossession took place at two o'clock in the morning and the debtor did not interpose or object at the time of the repossession. It then evaluated the § 1983 claim, concluding that it too lacked merit because the officer's actions did not constitute state action. These were entirely independent inquiries; the result in one had no bearing on the other.

### III. A Proposed Solution

The discussion thus far has presented a theoretical framework for courts to use in evaluating cases of law-enforcement involvement in a self-help repossession. Whether a law-enforcement officer's presence at a self-help repossession will render the repossession wrongful depends on whether the officer's presence transforms the repossession into state action, which itself depends on the level of officer involvement. The closer an officer's actions come to facilitating the repossession, the more likely it is that there will be state action sufficient to remove the repossession from the ambit of section 9-609. In furtherance of this goal, Section III.A proposes a modification to section 9-609's Official Comments that summarizes the state-action approach. Section III.B applies the framework to a number of examples to demonstrate its application.

116. *Id.* at 1235 ("[T]he allegations . . . make no suggestion or even hint that [the officer] was using his power as an agent of the state in effecting the actual repossession; rather, he acted as any private individual undertaking the same action would have done. His status as a deputy was completely irrelevant." (footnote and citation omitted)).
117. *Id.* For another example of a court refusing to connect the state-action and breach-of-the-peace inquiries, see First & Farmers Bank of Somerset, Inc. v. Henderson, 763 S.W.2d 137, 141 n.5 (Ky. Ct. App. 1988). There, the court faced a breach-of-the-peace claim based on an officer's involvement and distinguished cases that discussed officer involvement in the context of state action. *Id.* ("We do not find [such cases] exceptionally helpful since the degree of intervention by the officer necessary in our analysis is less than a finding that the state compelled the private party through the actions of the officer to act as he did.").
118. *See supra* note 99 and accompanying text.
A. Proposed Modification to Section 9-609’s Official Comments

As noted above, section 9-609’s current Official Comment 3 seems to adopt the bright-line anti-law-enforcement rule that several courts apply. Of course, one could read the Comment’s imperative against utilizing the “assistance of a law-enforcement officer” to support the distinction I have drawn between peacekeeping and repossession-facilitating actions. That is, only the “assistance” of an officer, rather than an officer’s passive observation, would be problematic. If this result is the Comment’s intention, it should say so expressly. Similarly, to this point in the discussion I have presented as problematic the misconception that an officer’s involvement breaches the peace. While the Comment does not label officer involvement a breach of the peace, it could more clearly distinguish between wrongful repossession and breach of the peace. The UCC commentary generally receives “considerable weight” and accuracy is therefore paramount.

Based on the foregoing analysis, this Note recommends incorporating the following language into the Official Comments to section 9-609:

Under former Section 9-503 and current Section 9-609, the involvement of law-enforcement officers in self-help repossession does not necessarily constitute a breach of the peace or otherwise invalidate a repossession. However, the use of law-enforcement officers to aid in repossession, rather than to keep the peace, can constitute state action. In addition to implicating procedural due process concerns, this would serve to remove a repossession from the types authorized by this Section, thereby invalidating it. Whether the involvement of law-enforcement officers constitutes state action requires a fact-specific inquiry.

This language would improve the current Comment in several ways. First, it rejects the “right to object” theory discussed in Section I.B. Second, it distinguishes between peacekeeping and repossession-facilitating actions by the officer, more accurately reflecting the current legal landscape regarding the state-action question. Third, it extends this distinction to determining the validity of a repossession, noting that where an officer’s involvement is sufficient to constitute state action, such involvement is also statutorily unauthorized. Fourth, it correctly describes the potential problem as nonstatutorily authorized repossession, rather than as a breach of the peace. Finally, it makes clear that the nature of an officer’s involvement depends on the specific facts of each case.

B. Application of the State-Action Approach

The approach outlined above would still challenge courts to distinguish between peacekeeping and repossession-facilitating actions. I offer several

119. 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.9, at 47 (3d ed. 2004); see also JOM, Inc. v. Adell Plastics, Inc., 193 F.3d 47, 57 n.6 (1st Cir. 1999) (“UCC Official Comments ‘do not have the force of law, but are nonetheless the most useful of several aids to interpretation and construction of the [UCC].’”).
hypothetical scenarios to illustrate how a court might evaluate officer involvement in self-help repossessions.120

Scenario One: Creditor seeks to repossess an automobile from Debtor. To protect himself, Creditor enlists the help of local Law-Enforcement Officer to stand by in case violence ensues. Officer remains in his car down the street from Debtor’s home while Creditor attaches the collateral to a tow truck. Debtor does not see Officer and only becomes aware of his presence after the repossession is complete.

Analysis: Officer in this case did not actively assist in repossessing the collateral. Nor did his presence aid Creditor in any meaningful way. This is a clear case of Officer acting pursuant to his official duties. Even under the current state of the law, courts have correctly decided that Officer’s conduct in this scenario is permissible.

Scenario Two: The facts are the same as in Scenario One, but Officer parks in view of Debtor’s home. Debtor exits his home while Creditor attaches the collateral to a tow truck. Upon seeing Officer’s car, Debtor returns to his home and does not protest the repossession.

Analysis: As in Scenario One, Officer in this case did not actively assist in repossessing the collateral. Unlike in Scenario One, however, Officer’s presence likely contributed to Creditor’s ability to repossess the collateral. Applying the “right to object” rationale, some courts have deemed this scenario an invalid self-help repossession.121 A court applying the approach proposed in this Note, however, would likely find this scenario to be a permissible repossession because Officer played a peacekeeping role. Officer participated to prevent violence, not to facilitate the repossession.

Scenario Three: The facts are the same as in Scenario Two, but instead of remaining in his car to observe the situation, Officer accompanies Creditor to Debtor’s front door. Creditor informs Debtor that he plans to repossess the collateral. Officer says nothing, standing by in case of violence.

Analysis: This scenario is likely the most difficult for a court to assess. On the one hand, Officer is merely present to prevent violence. Yet by accompanying Creditor to Debtor’s front door, Officer potentially becomes an active participant in the repossession.122 Despite the difficulty, this type of involvement should be insufficient to invalidate the repossession. It is

120. A word of caution is in order. The examples in this Section are for illustrative purposes only. Because the rightfulness or wrongfulness of repossession turns on the state-action question, a complete consideration of potential scenarios requires in-depth analysis of the divide between state and private action in § 1983 cases. Such a survey is beyond the scope of this Note. For an extensive list of cases addressing the state–private action divide, see NAHMOD, supra note 75, § 2:13.

121. See, e.g., Walker v. Walthall, 588 P.2d 863, 866 (Ariz. Ct. App. 1978) (“[T]he introduction of law enforcement officers into the area of self-help repossession, regardless of their degree of participation or non-participation in the actual events, would constitute state action, thereby invalidating a repossession without a proper notice and hearing.”). The Walker court’s sweeping statement indicates that it might have found the facts of Scenario One to constitute an invalid repossession as well.

122. Cf. WHITE & SUMMERS, supra note 4, § 26-7, at 1336 (noting a distinction between repossessions that take place at various distances from the home).
substantively no different than Scenario Two; Officer is simply closer to the action. It would be helpful for Officer to make it clear to Debtor that his presence is solely to prevent violence and that he in no way validates or seeks to assist in the repossession.

**Scenario Four:** The facts are the same as in Scenario Three, where instead of remaining in his car to observe the situation, Officer accompanies Creditor to Debtor’s front door. Creditor informs Debtor that he plans to repossession the collateral. Officer now warns Debtor that Creditor has a right to repossession the automobile and cautions that “violence will not be tolerated.” Debtor protests but does nothing to prevent the repossession.

**Analysis:** This scenario is likely an impermissible form of law-enforcement involvement. While Officer’s warning ostensibly serves only to limit violence, his more active role at the outset in speaking words of warning to Debtor serves to facilitate the repossession more than in the former scenarios. This is especially true because Officer’s statements make clear that he is an active participant in the repossession.

**Scenario Five:** The facts are the same as in Scenario Four, but Officer is off-duty, serving in a “civil standby” capacity. He wears his uniform and does nothing to indicate that he is on civil standby.\(^{123}\)

**Analysis:** This is impermissible aid by an officer acting under color of state law. Because Officer is off-duty, he is not engaged in his professional role in minimizing violence. Although working off the clock, Officer is still acting under the vestiges of state law. In *Monroe v. Pape*, the Supreme Court held that for purposes of § 1983, state officials act “under color of” state law even when acting in contravention of state law.\(^{124}\) In this scenario, Officer’s involvement constitutes state action for § 1983 purposes; hence, the repossession takes on the character of state action and is therefore wrongful.

The above illustrations represent the difficulty courts face in determining how much law-enforcement involvement in a repossession is too much. It is conceivable that a court will factor a number of variables into its conclusion. For instance, if a repo agent has had a prior history with a debtor and knows him to be a violent individual, a court may more readily accept that Officer’s sole purpose at the scene is to keep the peace. Whatever the individual factors used by courts to determine the nature of the officer’s involvement, tying the inquiry to state action will allow courts to more readily ground their decisions in an established body of case law.

---

123. This was the case in *MacLeod v. C & G Inv. Grp. (In re MacLeod)*, 118 B.R. 1 (Bankr. D.N.H. 1990). Law-enforcement officers on civil standby “are paid by a private party to assist in matters like preventing violence at the scene of a domestic quarrel, directing traffic at a highway construction project, or escorting a wide-load truck.” *Id.* at 1.

124. 365 U.S. 167, 184 (1961) (“Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color’ of state law.” (quoting United States v. Classic, 313 U.S. 299, 326 (1941))).
CONCLUSION

With self-help repossessions enduring as a mainstay of the consumer-credit industry, it is important that we correctly understand and consistently apply the laws of repossession. The current leading position related to officer involvement in self-help repossession is based on a “right” that debtors do not possess: the right to object. Rather than treating any level of officer involvement as a per se breach of the peace, courts must instead begin by characterizing the officer’s actions for purposes of § 1983. Where an officer’s behavior constitutes state action for constitutional purposes, such behavior correspondingly makes the repossession unauthorized by statute and therefore wrongful. The Official Comments to section 9-609 should clearly state this more accurate and nuanced approach.