



AMERICAN
BANKRUPTCY
INSTITUTE

Winter Leadership Conference

Remote Control: Not Just for Toys Anymore

*Hosted by Commercial and Regulatory Law
& Secured Credit Committees*

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REMOTE CONTROL: NOT JUST FOR TOYS ANYMORE

Presented by the
Commercial and Regulatory Law and
Secured Credit
Committees



Presenters

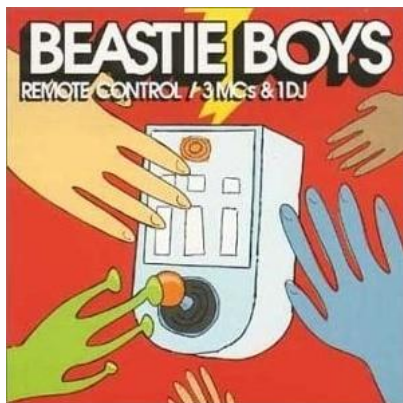
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Genesis of the Discussion



- New technology has advanced to allow new remedies
- The law has not yet caught up
- So what do we do?

“From the satellite dish to your joystick”



Remotely Controlled Collateral



- Software
- Robots
- Satellites
- 3D Printers
- Vehicles
- “Smart” Anything



“Disablement” & “Control”

- What does the law currently say?
 - *Article 9*
 - *Right to Repair*
 - *License Agreements*
 - *Leases*
 - *Torts*
- Historical context for the existing laws
- What law do we apply?
- How do we apply it?



Challenges to Applying Existing Law



“Ownership”

- Does Article 9 even apply?
- Who has the most sticks in the bundle?
 - What is the bargained for exchange?
- Reverse financing transaction disguised as a lease?



Self Help and Control

- What is possession?
 - Does it depend?
- Sliding scale on usage and access?
- Intent of the parties? (Contract around applicability?)



Actual Possession

- Fits better in Article 9
 - How realistic?
 - Vehicles
 - Robots
- Satellites (is there any other way?)



Constructive Possession

- Tough for Article 9
- What is the line for possession?
- Duty of creditor – when no physical possession?
 - What about intangibles?
- Automation and notice issues



Breach of the Peace



- What does it look like?
- What is being protected?
- What should be protected?



Bankruptcy Specific Considerations

- Stay violations
 - *Threat of collection in ability to disable*
 - *Action against collateral v. debtor*
- Post-Petition Perfection
 - *Limiting mobility*
- Executory Contracts
 - *Entirety of the agreement*
- Critical Vendors
 - *Proprietary software matters*
 - *Access and value so intertwined*



Closing Thoughts and Practice Pointers



Thank you to our presenters!

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AUTOMATING REPOSSESSION

Juliet M. Moringiello*

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INTRODUCTION

Apps, gigs, platforms, smart contracts. When emerging technologies change the way in which businesses and individuals conduct familiar transactions, questions naturally arise as to whether and how existing law governs the new models.¹ As the lawmaking process struggles to catch up to new methods of doing business, the new methods become popular with consumers and businesses, sometimes entrenching a model that resists regulation.²

Secured lending has not escaped this phenomenon. Article 9 of the Uniform Commercial Code (UCC), which governs loans secured by personal property collateral, allows a lender, after its borrower's default, to take possession of the collateral without judicial process in order to sell that collateral to satisfy the debt.³ If the collateral is property used in a business, the lender is permitted to disable the collateral in anticipation of selling that collateral in place.⁴ The UCC limits these rights, however, by allowing the lender to avoid court only if it can take or disable the collateral without causing a breach of the peace.⁵ This

¹ See, e.g., Nakita Q. Cuttino, *The Rise of “FringeTech”: Regulatory Risks in Earned-Wage Access*, 115 NW. U. L. REV. 1505, 1509 (2021) (questioning whether an app that gives employees access to a portion of their wages before payday is a new financial tool or a type of payday lending); Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205, 205 (2017) (asking whether “gig” enterprises “become the employers of some or all of [their] workers, or . . . should we regard these workers as newly minted micro-entrepreneurs?”); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 95–97 (2016) (listing various industries, such as hotels, office space, and grocery shopping, that have been affected by the “platform economy” and reporting on Airbnb’s arguments that existing laws do not capture its business model); Kevin Werbach & Nicolas Cornell, *Contracts Ex Machina*, 67 DUKE L.J. 313, 316–318 (2017) (addressing claims that smart contracts will replace contract law).

² For example, when the Canadian province of Quebec implemented rules requiring Airbnb hosts to register their properties with the provincial tax authority, Airbnb responded that the province had created “red tape, bureaucracy and needless friction for every day people.” Raquel Fletcher, *Quebec Announces New Regulations for Airbnb Rentals*, GLOBAL NEWS (June 5, 2019, 4:37 PM), <https://globalnews.ca/news/5356642/quebec-new-airbnb-regulations/> [perma.cc/B6P8-4PQJ].

³ U.C.C. §§ 9-609(a)(1), 9-610(a)–(b) (AM. L. INST. & UNIF. L. COMM’N 2020).

⁴ *Id.* § 9-609(a)(2).

⁵ *Id.* § 9-609(b)(2). Article 2A of the UCC contains a similar provision that applies to leases of goods. See *id.* § 2A-525 (2)–(3) (allowing a lessor to repossess leased goods from a defaulting lessee without judicial process only if it can do so without causing a breach of the peace).

is an important limitation; self-help remedies to recover possession of property are rare and run the risk of disturbing the public order.⁶ Today's electronic technologies that allow a lender to remotely interfere with a borrower's possession of collateral by electronically disabling it upon default test the boundaries of these rules.

A creditor's ability to electronically disable collateral is not a future fantasy. Two decades before the explosion in scholarship about smart contracts,⁷ writers discussed the use of such technology to enforce creditors' rights in collateral. The proto-smart contract example, the one used in 1997 by cryptocurrency and smart contracts pioneer Nick Szabo to explain the mechanics and use cases for smart contracts, was the automated disablement of a car by a creditor holding a lien on that car.⁸ Indeed, subprime automobile lenders have been disabling collateral upon the debtor's failure to pay since the 1990s despite the fact that the use of electronic means to disable collateral exists in a gray area of commercial law.⁹ The UCC is silent with respect to the use of this remedy in loans secured by consumer goods, and the disablement remedy authorized when the collateral is business property was created in an era in which disablement was neither electronic nor remote, and is cabined by an ill-fitting breach of the peace standard.¹⁰ In the absence of clear guidance, the practice of electronic disablement has grown, and the methods have become increasingly

⁶ See Richard A. Epstein, *The Theory and Practice of Self-Help*, 1 J.L. ECON. & POL'Y 1, 27–29 (2005) (discussing the use of self-help by landlords to evict defaulting tenants and by persons in hot pursuit of the person who has wrongly dispossessed the pursuer of goods).

⁷ The term smart contract is unfortunate; a smart contract is a piece of computer code that can execute a contractual obligation, not a contract itself. See Adam J. Kolber, *Not-So-Smart Blockchain Contracts and Artificial Responsibility*, 21 STAN. TECH. L. REV. 198, 208–210 (2018) (explaining how smart contracts work). For recent scholarship on smart contracts, see, for example, Jonathan G. Rohr, *Smart Contracts and Traditional Contract Law, or: The Law of the Vending Machine*, 67 CLEV. ST. L. REV. 71 (2019); Amy J. Schmitz & Colin Rule, *Online Dispute Resolution for Smart Contracts*, 2019 J. DISP. RESOL. 103 (2019); Werbach & Cornell, *supra* note 1.

⁸ Nick Szabo, *Formalizing and Securing Relationships on Public Networks*, FIRST MONDAY (Sept. 1, 1997), <https://firstmonday.org/ojs/index.php/fm/article/view/548/469> [perma.cc/J64E-7T3M].

⁹ A high-profile early adopter of the technology was former Detroit Lions halfback Mel Farr, who was once the owner of the largest group of black-owned car dealerships in the United States. See Brent Snaveley & David Sedgwick, *Debts, Lawsuit Cloud Farr's Future*, AUTOMOTIVE NEWS (Apr. 1, 2002, 12:00 AM), <https://www.autonews.com/article/20020401/ANA/204010774/debts-lawsuit-cloud-farr-s-future> [https://perma.cc/6DDS-6PS6].

¹⁰ U.C.C. § 9-609(a)(2)–(b)(2) (AM. L. INST. & UNIF. L. COMM'N 2020) (permitting a secured party to render equipment unusable if it can do so without a breach of the peace); *id.* § 9-102(a)(33) (excluding consumer goods from the definition of equipment). Although the right to disable equipment collateral has been in the UCC since the first Official Text, U.C.C. § 9-503 (AM. L. INST. & UNIF. L. COMM'N 1952), the breach of the peace limitation was not added until 1999. See Timothy R. Zinnecker, *The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part I*, 54 BUS. LAW. 1113, 1148–49 (1999) (explaining that “[r]evised Article 9 expressly requires the creditor to avoid breaching the peace” when disabling collateral).

automated.¹¹ As more and more goods are connected to networks that enable sellers to retain control over them after sale,¹² the possibility of automated disablement will only increase in both consumer and business transactions. Self-help repossession has traditionally been most common in consumer and other small dollar secured transactions,¹³ but the ability to remotely disable goods may make disablement a desired remedy in even large transactions.¹⁴

This Article will make the case for including remote disablement in the UCC as a creditor's remedy and discuss possible limitations on its use. The time is ripe; in 2019, the co-sponsoring bodies of the UCC—the American Law Institute and the Uniform Law Commission—appointed a committee to study the feasibility of amending the UCC to accommodate and govern the use of emerged and emerging technologies in commercial transactions.¹⁵ Moreover,

¹¹ Today's "kill switches" include GPS technology that allows the creditor to disable the cars remotely. See Elaine S. Povich, *Late Payment? A 'Kill Switch' Can Strand You and Your Car*, STATELINE (Nov. 27, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/11/27/late-payment-a-kill-switch-can-strand-you-and-your-car> [<https://perma.cc/C69B-3E2A>]; Michael Corkery & Jessica Silver-Greenberg, *Miss a Payment? Good Luck Moving That Car*, N.Y. TIMES (Sept. 24, 2014, 9:33 PM), <https://dealbook.nytimes.com/2014/09/24/miss-a-payment-good-luck-moving-that-car/> [<https://perma.cc/2C39-NFRR>] (explaining that lenders retain the "ultimate control" over collateral "[b]y simply clicking a mouse or tapping a smartphone").

¹² Authors describe tangible goods susceptible to remote control as "smart goods" that form the "Internet of Things." See JOSHUA A.T. FAIRFIELD, OWNED: PROPERTY, PRIVACY, AND THE NEW DIGITAL SERFDOM 16 (2017) ("Smart property is software-enhanced . . . personal property."). When linked together, smart goods create the Internet of Things. Stacy-Ann Elvy, *Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond*, 44 HOFSTRA L. REV. 839, 840 (2016) (describing the Internet of Things as "a network of products, systems, and platforms connected through enabled devices that collect, store, and communicate with other devices, cloud software, on-site infrastructure, and individuals to maximize efficiency"); Chris Jay Hoofnagle et al., *The Tethered Economy*, 87 GEO. WASH. L. REV. 783, 790 (2019) ("When the functionality of a product or service is dictated by software, a developer can decide not only who uses it, but when, how, and where they do so with remarkable precision."); Rebecca Crootof, *The Internet of Torts: Expanding Civil Liability Standards to Address Corporate Remote Interference*, 69 DUKE L.J. 583, 595 (2019) (observing that buyers of Internet of Things devices enter into a relationship with the IoT company that is "characterized by a new power dynamic—and a new risk of property and bodily harm").

¹³ See Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 WASH. U. L.Q. 549, 558 (1997).

¹⁴ See VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR 190 (2017) (predicting that technological tools tested on poor people will become common in all transactions); Chris Jay Hoofnagle et al., *supra* note 12, at 806 (explaining that tethering could make new economic models possible); Sarah Jeong, *How Technology Helps Creditors Control Debtors*, ATLANTIC (Apr. 15, 2016), <https://www.theatlantic.com/technology/archive/2016/04/rental-company-control/478365/> [<https://perma.cc/2ZTQ-H2KN>] (explaining the expansion of digital rights management from a method of controlling intellectual property rights to a method of controlling access to physical goods).

¹⁵ That committee has become a drafting committee. See *Uniform Commercial Code and Emerging Technologies Committee*, UNIF. L. COMM'N, <https://www.uniformlaws.org/>

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two states have enacted non-uniform amendments to the UCC to address remote disablement, and a handful of others have restricted the practice in their laws governing consumer lending.¹⁶

Given the law's general disdain for self-help remedies, the reality that a disablement is an interference with the debtor's possession, and the impossibility of anticipating automated shutoff of collateral when Article 9 was first drafted, this Article will demonstrate that it is not permitted in consumer transactions under the UCC as enacted in its uniform version. Although the language of Article 9 is broad enough to permit automated disablement in business transactions, the remedy is cabined by an ill-fitting breach of the peace standard designed for an era in which disablement required physical contact with the item being disabled. Recognizing, however, that creditors are using this remedy in consumer transactions and that the existing standard for permissible disablement in business transactions does not anticipate remote disablement, this Article will discuss interests that policymakers should consider when evaluating how to include remote disablement in the secured creditor's list of remedies.¹⁷

Part I will introduce automated disablement by discussing its use in subprime automobile lending transactions and discussing the judicial opinions and regulatory actions addressing its use. Part II will illustrate how current statutory law treats remote disablement, and Part III will discuss the states that have modified their laws to accommodate remote disablement. Part IV will discuss the limitations that the law places on the exercise of self-help remedies to recover property and the interests that are protected by those limitations. Part V will discuss interests that can be harmed when a repossession or disablement crosses the digital–physical divide and suggest limitations on the practice tailored to those harms. Part VI will conclude that automated disablement is sufficiently different from self-help repossession and face-to-face disablement that it should be addressed in Article 9 of the UCC with restrictions tailored to the practice.

committees/community-home?CommunityKey=cb5f9e0b-7185-4a33-9e4c-1f79ba560c71
[<https://perma.cc/VWA6-PBDB>].

¹⁶ See *infra* Part III.

¹⁷ This policy question has been festering for more than twenty years, having last surfaced during the drafting process for several UCC articles in the 1990s, see Esther C. Roditti, *Is Self-Help a Lawful Contractual Remedy?*, 21 RUTGERS COMPUT. & TECH. L.J. 431, 452–55 (1995) (discussing proposed amendments to Article 2 of the UCC that would have expanded the article's scope to include software); Michael L. Rustad & Elif Kavusturan, *A Commercial Law for Software Contracting*, 76 WASH. & LEE L. REV. 775, 798, 856 (2019) (explaining that early drafts of UCC Article 2B, which became the Uniform Computer Information Transactions Act, permitted electronic self-help), and the Uniform Consumer Leases Act. See Ralph J. Rohner, *Leasing Consumer Goods: The Spotlight Shifts to the Uniform Consumer Leases Act*, 35 CONN. L. REV. 647, 735–37 (2003) (describing the negotiations over including the then-new practice of electronic self-help in the Uniform Consumer Leases Act and concluding that “[w]e can expect more skirmishes in this area”).

I. AUTOMATED DISABLEMENT TODAY

Subprime auto lending provides a current example of automated disablement in practice. Supporters of the practice recognize that its users operate in a legal vacuum in most jurisdictions but argue that automated disablement is consistent with UCC policies.¹⁸ To summarize one argument, if one views disablement as a repossession, the UCC permits it and it avoids breaching the peace; if one views disablement as a remedy distinct from repossession, its use is also consistent with Article 9 policies because Article 9 permits the disablement of equipment.¹⁹

A. *Disabling Cars*

Automobile lenders started using disablement of collateral as a remedy in subprime lending transactions in the late 1990s. Lenders disabled cars by the use of starter interrupt devices installed in financed vehicles. The use of the early versions of these devices was neither automated nor remote. In the early days of starter interrupt devices, the debtor received a code every time she made a payment and the code enabled her to start the car until the next payment was due.²⁰ Today's more sophisticated payment assurance devices are able to disable a car remotely using GPS technology.²¹

In the absence of clear legal guidance on the use of starter interrupt technologies, the payment assurance industry developed standards for their use. In 2009, the manufacturers of payment assurance devices established the Payment Assurance Technology Association to develop these best practices.²² The resulting practices were published in two documents, the PATA Ethical Stand-

¹⁸ Thomas B. Hudson & Daniel J. Laudicina, *The Emerging Law of Starter Interrupt Devices*, 61 BUS. LAW. 843, 843 (2006).

¹⁹ *Id.* at 845.

²⁰ See *Hampton v. Yam's Choice Plus Autos, Inc. (In re Hampton)*, 319 B.R. 163, 165–67 (Bankr. E.D. Ark. 2005) (explaining the operation of a payment assurance device); Hudson & Laudicina, *supra* note 18, at 843–44 (explaining the operation of payment assurance devices).

²¹ See, e.g., *PassTime Elite GPS Tracking Solution*, PASSTIME, <https://passtimegps.com/solutions/elite/> [<https://perma.cc/LE2S-YLGZ>] (vendor website explaining the features of the PassTime Elite GPS tracking and assured payment system solution); Nationwide Acceptance LLC, LoanPlus GPS and Starter Interrupt System Disclosure and Agreement for Installation (on file with author) [hereinafter *Nationwide Disclosure and Agreement*] (explaining that the device's starter interrupt functionality allows the lender to remotely disable the vehicle's starter in the event of a default by the borrower); *In re Franklin*, 614 B.R. 534, 540–41 n.11 (Bankr. M.D.N.C. 2020) (explaining the operation of a remote “kill switch”).

²² See Roger, *Vehicle Payment Assurance Industry Establishes Association*, TU AUTOMOTIVE (Jan. 28, 2009), <https://www.tu-auto.com/vehicle-payment-assurance-industry-establishes-association/> [<https://perma.cc/UV9Q-LF3T>]; Terry O'Loughlin, *Not Your Father's Payment Assurance Device—A Plea to Regulators*, P&A MAG. (June 10, 2015), <https://www.providers-administrators.com/348185/not-your-fathers-payment-assurance-device-a-plea-to-regulators> [<https://perma.cc/DP7U-CM67>].

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ards²³ and the Standards for Manufacture and Utilization of Devices for Starter Interrupt/GPS Tracking in Consumer Financial Transactions.²⁴ The primary duty that the industry members committed to in these documents is disclosure; in both the ethical standards and the manufacture and use standards, the association members commit to disclose the existence of the device on financed vehicles and to explain the purpose of the devices.²⁵ In the manufacturing standards, the members also promise to explain the proper functioning of the devices and to inform the consumer about override procedures.²⁶

The contracts that creditors use in connection with disabling devices reflect the practices established by the payment assurance technology industry. The contracts contain some common elements. The following observations are based on a small survey of contracts that finance companies use when they equip financed automobiles with starter interrupt devices.²⁷ All of the companies surveyed require their borrowers to sign a document acknowledging the borrower's knowledge that installation of the device is a condition of the loan. Creditors require the car owner borrowers to acknowledge that the devices will prevent the car from starting if the borrower misses a payment.²⁸ Some of the contracts provide borrower protections. Several promise to give the borrower notice before disabling the vehicle.²⁹ Some lenders allow limited emergency access to the disabled vehicle.³⁰

The contracts illustrate the spectrum of remedies to which the creditor can resort upon the debtor's failure to pay. The remedies range from a system of

²³ Payment Assurance Tech. Ass'n, PATA Ethical Standards (2015) (on file with author) [hereinafter PATA Ethical Standards].

²⁴ Payment Assurance Tech. Ass'n, Standards for Manufacture and Utilization of Devices for Starter Interrupt/GPS Tracking in Consumer Financial Transactions (Jan. 2012) (on file with author) [hereinafter PATA Manufacture Standards].

²⁵ PATA Ethical Standards, *supra* note 23; PATA Manufacture Standards, *supra* note 24.

²⁶ PATA Manufacture Standards, *supra* note 24.

²⁷ See PassTime GPS, Payment Assurance System Disclosure Statement and Agreement for Installation (on file with author) [hereinafter PassTime Disclosure and Agreement]; Crossbow Grp., Inc., Agreement for Installation of the ReCaP 'Extreme' Payment Assurance System and Disclosure Statement to Customer (on file with author) [hereinafter ReCaP 'Extreme' Agreement]; Nationwide Disclosure and Agreement, *supra* note 21; Pinnacle Fin. Grp., Starter Interrupt and Locator Device Acknowledgment (on file with author) [hereinafter Pinnacle Device Acknowledgment]; People's Credit, Buyer's Agreement for Installation and Disclosure of GPS Device (on file with author) [hereinafter People's Credit Agreement].

²⁸ See PassTime Disclosure and Agreement, *supra* note 27; ReCaP 'Extreme' Agreement, *supra* note 27; Nationwide Disclosure and Agreement, *supra* note 21; Pinnacle Device Acknowledgment, *supra* note 27; W. Funding, GPS Disclosure Form (on file with author) [hereinafter Western Funding Disclosure].

²⁹ Nationwide Disclosure and Agreement, *supra* note 21; ReCaP 'Extreme' Agreement, *supra* note 27; Western Funding Disclosure, *supra* note 28 ("[The lender] may remind [the borrower] that a payment is coming due or past due by sending an audible tone through the Device." (emphasis added)).

³⁰ ARA GPS Sys., Customer Agreement and Disclosure Statement for Installation of Starter Interrupt/GPS Device, (on file with author) [hereinafter ARA Customer Disclosure]; Western Funding Disclosure, *supra* note 28. Nationwide Disclosure and Agreement, *supra* note 21.

automated payment alerts³¹ to physical repossession.³² This spectrum illustrates the difference between remedies against the debtor, which are not governed by Article 9 of the UCC, and remedies against the collateral, which are covered by Article 9. Some contracts emphasize the payment assurance role.³³ The UCC is silent on those creditor actions, as they are remedies taken against the debtor and not against the property. One contract reminds the vehicle owner that the purpose of the warning is to give the owner the opportunity to make a payment.³⁴ At the other end is the traditional repossession, unquestionably governed and limited by the UCC because it is an action to recover collateral. Although the threat of seizing collateral can coerce payment, blurring the line between the two types of remedies, only creditors with an interest in property—secured creditors—are entitled to seize that property.³⁵

The contracts distinguish disablement from repossession. For example, two contracts warn that if the borrower fails to cure the default that triggered the disablement, the lender “may take any action permitted by law . . . including THE RIGHT TO REPOSSESS.”³⁶ Another notifies the borrower that the lender, after disablement, may use the starter interrupt device’s GPS technology “to locate the vehicle for repossession.”³⁷ While the contracts distinguish disablement from repossession, some also acknowledge that the purpose of starter interrupt devices is to protect a creditor’s interest in property.³⁸

As a remedy against property, disablement should be governed by the laws governing secured transactions. There is very little case law on the issue, and all of the cases arose in bankruptcy courts. The next Section describes those cases.

³¹ ReCaP ‘Extreme’ Agreement, *supra* note 27 (“The system may remind me of payments due and/or past due via E Mail, SMS Text, IVR, and/or in-vehicle beeper.”); Nationwide Disclosure and Agreement, *supra* note 21 (“A warning from the [d]evice will be provided to you no less than 48 hours before the starter interrupt capability of the [d]evice is activated to disable the Vehicle’s starter.”); Western Funding Disclosure, *supra* note 28 (“[W]e may remind you that a payment is coming due or past due by sending an audible tone through the Device.”).

³² ARA Customer Disclosure, *supra* note 30 (“[W]e may take any action as permitted under applicable law, including THE RIGHT TO REPOSSESS THE VEHICLE.”); Nationwide Disclosure and Agreement, *supra* note 21 (“[W]e may take any action as permitted under applicable law, including exercising our RIGHT TO REPOSSESS THE VEHICLE.”); Western Funding Disclosure, *supra* note 28 (“We may use the Device’s GPS to locate the Vehicle for repossession . . .”).

³³ People’s Credit Agreement, *supra* note 27 (“The Device is designed to ensure that you make your payments on time in accordance with the Sales Contract.”).

³⁴ Nationwide Disclosure and Agreement, *supra* note 21.

³⁵ See U.C.C. § 9-609 (AM. L. INST. & UNIF. L. COMM’N 2010).

³⁶ ARA Customer Disclosure, *supra* note 30; Nationwide Disclosure and Agreement, *supra* note 21.

³⁷ Western Funding Disclosure, *supra* note 28; *see also* Pinnacle Device Acknowledgment, *supra* note 27 (explaining consequences that may occur if the vehicle is “electronically disabled or repossessed”).

³⁸ ARA Customer Disclosure, *supra* note 30 (“The [v]ehicle has been equipped with a starter interrupt device with GPS capabilities.”).

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B. Automated Disablement in the Courts: Bankruptcy and the Automatic Stay

Few courts have addressed the use of remote disablement of goods as a creditor remedy. Those that have are bankruptcy courts that considered whether the use of payment assurance devices by automobile lenders violates the Bankruptcy Code's automatic stay.³⁹ The automatic stay, which is effective at the moment a debtor files for bankruptcy, prohibits all entities from taking a wide range of actions against the debtor and the debtor's property.⁴⁰ The Bankruptcy Code enumerates the different types of prohibited actions: commencement of legal proceedings, acts to obtain possession of property of the estate, acts to exercise control over property of the estate, acts to enforce liens against the debtor's property or property of the estate, and "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of" the bankruptcy case.⁴¹ Although there is a long list of prohibited acts, they can be divided into two categories: actions to establish or enforce personal liability on a claim and actions to establish or enforce the liability of property for a claim. The bankruptcy courts that have addressed the issue all agree that the use of payment assurance devices to disable collateral are acts that interfere with the debtor's property interest in the collateral.

The bankruptcy court in *Hampton v. Yam's Choice Plus Autos, Inc. (In re Hampton)*⁴² focused on the automatic shutoff device as an act of control over property of the bankruptcy estate.⁴³ The opinion in that case contains a detailed description of how early payment assurance devices operated.⁴⁴ The creditor in *Hampton* had used a PayTeck device, which required the debtor to provide a code periodically in order to start her car.⁴⁵ The debtor had committed at the outset to make monthly payments on her loan, and the lender promised to provide a new code after receipt of each monthly payment.⁴⁶ The PayTeck device was programmed to require a new code every thirty days; if the debtor either did not have a code because of a missed payment or was given an incorrect

³⁹ *In re Franklin*, 614 B.R. 534, 544 (Bankr. M.D.N.C. 2020); *Grisard-Van Roey v. Auto Credit Ctr., Inc. (In re Grisard-Van Roey)*, 373 B.R. 441, 444–45 (Bankr. D.S.C. 2007); *Hampton v. Yam's Choice Plus Autos, Inc. (In re Hampton)*, 319 B.R. 163, 172 (Bankr. E.D. Ark. 2005); *In re Horace*, No. 14-30103, 2015 Bankr. LEXIS 2886, at *11–13 (Bankr. N.D. Ohio Aug. 28, 2015); *In re Garner*, No. 09-81998, 2010 Bankr. LEXIS 721, at *8–10 (Bankr. M.D.N.C. Mar. 9, 2010); *Dawson v. J&B Detail, LLC (In re Dawson)*, No. 05-22369, Adv. No. 05-1463, 2006 Bankr. LEXIS 4396, at *19–20 (Bankr. N.D. Ohio July 28, 2006).

⁴⁰ 11 U.S.C. § 362. The stay protects the debtor, all property of the debtor, and all property of the bankruptcy estate.

⁴¹ *Id.*

⁴² *In re Hampton*, 319 B.R. at 163.

⁴³ This is a curious choice because in most chapter 13 cases, the property vests in the debtor immediately upon confirmation of the plan. In the plan at issue, the property remained estate property until the plan was completed. *Id.* at 171 n.6.

⁴⁴ *Id.* at 166–67.

⁴⁵ *Id.* at 166.

⁴⁶ *Id.* at 165–66.

code, the car would not start.⁴⁷ The debtor in that case found that the automatic shutoff device on her car prevented her from starting the car after she filed for bankruptcy.⁴⁸

The issue before the court in *Hampton* was whether the stay violation was willful on the part of the lender, but the court's analysis of how automatic shutoff devices fit within the panoply of creditor remedies is useful. The court observed that the automated shutoff device gave the creditor a mechanism for exercising control over the debtor's property,⁴⁹ but that the existence of the shutoff device on the debtor's car by itself was not a violation of the automatic stay.⁵⁰ The creditor's policy after a bankruptcy was filed was to require the debtor to call in every month to receive a new code. Because the debtor had the burden of asking for the code every month, the court found that the creditor's bankruptcy policy created a stay violation.⁵¹ According to the court, once the debtor filed for bankruptcy, she should have been free to use her car without interference by the creditor until the creditor obtained relief from the automatic stay.⁵²

Two years later, another bankruptcy judge distinguished the mere existence of a payment assurance device on a vehicle with the use of that device to exercise control over the car. Like the court in *Hampton*, the judge in *Grisard-Van Roey v. Auto Credit Center Inc. (In re Grisard-Van Roey)* held that the creditor did not violate the stay by leaving the device on the debtor's car after the debtor's bankruptcy filing.⁵³ Because the creditor in that case provided the correct monthly codes to the debtor after the bankruptcy filing, the creditor avoided exercising control over the vehicle and thus did not violate the stay.⁵⁴ Like the court in *Hampton*, the court in *Grisard-Van Roey* considered the use of a payment assurance device to disable a vehicle to be a method of interfering with the debtor's possessory rights in the collateral.

Several other opinions analyzed the different debt collection functions of a payment assurance device. *In re Horace*⁵⁵ was also an automatic stay case; in that case, the court found a violation of both § 362(a)(3), which stays any act "to exercise control over property of the estate," and § 362(a)(6), which stays any act to collect a claim against the debtor that arose before the bankruptcy.⁵⁶ After describing the operation of the payment assurance device at issue, the court found that the creditor's use of the device after the debtor filed for bankruptcy violated both subsections. The court analogized the warning sounds that

⁴⁷ *Id.* at 166–67.

⁴⁸ *Id.* at 166.

⁴⁹ *Id.* at 172.

⁵⁰ *Id.* at 174.

⁵¹ *Id.* at 172.

⁵² *Id.*

⁵³ *Grisard-Van Roey v. Auto Credit Ctr., Inc. (In re Grisard-Van Roey)*, 373 B.R. 441, 444 (Bankr. D.S.C. 2007).

⁵⁴ *Id.*

⁵⁵ *In re Horace*, No. 14-30103, 2015 WL 5145576 (Bankr. N.D. Ohio Aug. 28, 2015).

⁵⁶ *Id.* at *3–4 (quoting 11 U.S.C. § 362(a)(3)).

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the payment device emitted before payment was due to sending the debtor a monthly statement with a payment coupon.⁵⁷ In addition, the court found that the creditor's continued use of the device after bankruptcy was an act to exercise control over property of the estate.⁵⁸ The court stressed that the latter stay violation was "particularly evident on the several occasions when Debtors' Vehicle was rendered inoperable."⁵⁹ Another bankruptcy court, in *Dawson v. J&B Detail, LLC (In re Dawson)*, made a similar distinction between the use of a payment assurance device as an act to collect a debt (a blinking light to alert the debtor that payment was due) and an act to exercise control over estate property (in disabling the debtor's vehicle).⁶⁰

Although none of the bankruptcy court opinions addressed whether automated disablement is permitted by the UCC, their holdings are clear that disablement is a remedy against property, not a remedy to enforce personal liability. As such, they support the position that disablement should be governed by Article 9.

C. *The Automated Repossessor and the Regulators*

Regulators in a handful of states have issued formal and informal advice regarding the use of starter interrupt devices. The communications from various Attorney General's offices illustrate the lack of legal clarity regarding disablement as a creditor's remedy. In 1999, the Iowa Attorney General's Office, in concluding that starter interrupt devices were not permitted under the Iowa Consumer Credit Code and the UCC, characterized the use of a starter interrupt device as a method of effectuating the "functional equivalent" of a repossession.⁶¹ After classifying disablement as a form of repossession, the office's letter catalogued several occurrences that could be viewed as a prohibited breach of the peace.⁶² The listed occurrences were ones that jeopardized the safety of the debtor-driver and drivers of nearby autos; the letter warned that "if a wired car died at a stop sign on a hill . . . in a winter snow, and would not restart because of the device, traffic back-ups or fender-benders would affect not only the borrower, but other citizens as well."⁶³ In a later letter, the same office listed other occurrences that "might run afoul of applicable laws," such as rendering the owner unable to move the car in an emergency and causing harm to

⁵⁷ *Id.* at *4.

⁵⁸ *Id.*

⁵⁹ *Id.* The court included in a footnote that the continued existence of the device after bankruptcy was also a violation of § 362(a)(5), which stays any act to enforce a prepetition lien. *Id.* at *4 n.3.

⁶⁰ *Dawson v. J&B Detail, LLC (In re Dawson)*, No. 05-22369, Adv. No. 05-1463, 2006 Bankr. LEXIS 4396, at *19–21 (Bankr. N.D. Ohio July 28, 2006); *see also In re Garner*, No. 09-81998, 2010 Bankr. LEXIS 721, at *9–11 (Bankr. M.D.N.C. Mar. 9, 2010) (explaining the dual roles of a payment assurance device).

⁶¹ Letter from Kathleen Keest, Assistant Att'y Gen. and Deputy Adm'r, Iowa Consumer Credit Code, State of Iowa Dep't of Just. (Oct. 22, 1999) (on file with author).

⁶² *Id.*

⁶³ *Id.*

persons seeking to escape dangerous situations.⁶⁴ These are not traditional breach-of-the-peace scenarios, but occurrences that most people would want to avoid in loan enforcement. That said, merely depriving a defaulting debtor of the use of collateral runs afoul of no laws, and a person whose car has been repossessed without a breach of the peace similarly will not be able to escape from a dangerous situation.

In 2007, the Michigan Attorney General's office wrote a letter analyzing the legality of starter interrupt devices under that state's law. In concluding that it was impossible to render an opinion on the legality of the use of such devices in all situations, the Attorney General's office explained the ways in which remote disablement resembles and is different from physical repossession.⁶⁵ Like the Iowa Attorney General's Office letters, the Michigan letter catalogs dangerous disablement scenarios, such as a vehicle being disabled in an unsafe area or a vehicle that is struck or vandalized after disablement. The letter explains that these dangers are unique to remote disablement—when an item of collateral is physically repossessed, the item is removed from the area in which it is located and is thus not exposed to the dangers of an unsafe area.⁶⁶

The payment assurance industry has pushed for clarity from regulators. Yet that clarity remains elusive. For example, the Wisconsin Department of Financial Institutions has stated that the use of payment assurance devices to disable cars is not illegal, but that it must comply with the Wisconsin Consumer Act and other applicable laws.⁶⁷ Although proponents of the devices hailed this statement as a pathway to the use of payment assurance technology in Wisconsin,⁶⁸ it is not entirely clear how the use of such devices fits within the applicable statutes. As explained in the next Part, the UCC is silent on the use of remote disablement, and replacing the words “take possession” and “repossess” with “disable” in both the UCC and governing consumer laws can lead to absurd results. For example, a creditor who repossesses a motor vehicle from an individual in Wisconsin must notify the local law enforcement agency of the repossession.⁶⁹ This requirement makes sense because someone whose car has been repossessed in the traditional sense may think that her car has been stolen. It does not make sense in the context of remote disablement.

⁶⁴ Letter from William L. Brauch, Special Assistant Att’y Gen. and Director, Consumer Protector Div., State of Iowa Dep’t of Just. (Dec. 29, 2006) (on file with author).

⁶⁵ Letter from Carol L. Isaacs, Chief Deputy Att’y Gen., State of Mich. Dep’t of Att’y Gen., to State Representative Edward J. Gaffney (Jan. 22, 2007) (on file with author).

⁶⁶ *Id.*

⁶⁷ *Installation of GPS and/or Starter Interrupt Technology on a Vehicle*, STATE OF WIS.: DEP’T OF FIN. INSTS. (Jan. 26, 2016), https://www.wdfi.org/wca/business_guidance/interpretive_opinions/Installation_of_GPS_Device_on_a_Vehicle.htm [<https://perma.cc/XAL3-W9JM>]; see also *Wisconsin Clarifies Policy on GPS & Payment Assurance Technology*, BHPH REP., Mar./Apr. 2016, at 15, 15.

⁶⁸ See *Wisconsin Clarifies Policy on GPS & Payment Assurance Technology*, *supra* note 67, at 15 (describing the guidance as “good news for buy-here, pay-here operators who have interests in Wisconsin”).

⁶⁹ WIS. STAT. § 425.2065(2) (2022).

II. AUTOMATED DISABLEMENT IN THE STATUTES

Laws governing secured creditors' remedies permit and restrict self-help repossession. Repossession is a remedy unique to secured creditors; only those creditors have bargained for an interest in the debtor's property at the outset of the loan transaction.⁷⁰ Because remote disablement is an interference with the debtor's right to possess property, it too is a remedy available only to secured creditors.⁷¹ This Part will explain how the existing law of secured credit, in assuming that all interferences with the debtor's possession of collateral will be "contact interferences," is inadequate to govern the practice of remote disablement.

A. *Article 9 of the UCC*

Article 9 gives a creditor with a security interest in tangible personal property two self-help remedies upon its debtor's default. A secured creditor has the right to take possession of collateral without judicial process if the creditor can do so without a breach of the peace.⁷² Article 9 also permits a secured creditor to render unusable property used in a business upon the debtor's default.⁷³ Both the language of the statute itself and the Official Comment provide the reason for the second remedy: some collateral may be too heavy and complex to remove from the debtor's place of business,⁷⁴ and a creditor's removal and storage costs for such equipment would likely be high.⁷⁵ The statute therefore allows a secured creditor to disable such equipment in anticipation of selling it on the debtor's premises.

Although Article 9 distinguishes between taking possession and rendering equipment unusable, it treats the two actions identically in one important respect. Whether a creditor disables or takes possession of collateral, if it does so

⁷⁰ See 1 BARKLEY CLARK & BARBARA CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* § 4.01 (3d ed. 2022) ("The right to pursue earmarked property after default is what distinguishes the secured creditor from its unsecured cousin.").

⁷¹ If a creditor with no interest in the debtor's property disabled that property, the disablement would be a trespass to chattels. See RESTATEMENT (SECOND) TORTS § 217 (AM. L. INST. 1965) (defining trespass to chattel as "using or intermeddling with a chattel in the possession of another"); *id.* § 218 (imposing liability on one who deprives the possessor of the use of the chattel "for a substantial time").

⁷² U.C.C. § 9-609(a)(1) (AM. L. INST. & UNIF. L. COMM'N 2010).

⁷³ *Id.* § 9-609(a)(2) ("[A secured party] without removal, may render equipment unusable."). The UCC defines "equipment" as "goods other than inventory, farm products or consumer goods." *Id.* § 9-102(a)(33).

⁷⁴ *Id.* § 9-609 cmt 6.

⁷⁵ See William E. Hogan, *The Secured Party and Default Proceedings Under the UCC*, 47 MINN. L. REV. 205, 243 (1962) (explaining that allowing the secured party to disable collateral in lieu of removal would reduce the amount of the deficiency); Pierre R. Loiseaux, *Default Proceedings Under the Texas Uniform Commercial Code*, 44 TEX. L. REV. 702, 704 (1966) (explaining that this section was included to allow the secured party to avoid undesirable expenses in enforcing its security interest).

without judicial involvement, it must do so without a breach of the peace.⁷⁶ The UCC provides no guidance on whether an action constitutes a breach of the peace, leaving the answer to that question to judicial development.⁷⁷

In determining whether Article 9 permits automated disablement of collateral, it is important to note two things. First, the section that governs disablement neither permits nor prohibits the remedy in consumer transactions. Second, the disablement remedy was included in the UCC in the 1950s, when disablement required an individual to enter a place of business to physically render the collateral unusable.

Because the UCC was designed to adapt to emerging methods of doing business, it is necessary to ask whether the current language of Article 9 is flexible enough to allow parties to use remote disablement as a remedy upon default. One underlying policy of the UCC is to “permit the continued expansion of commercial practices through custom, usage, and agreement of the parties.”⁷⁸ At first glance, the text of Article 9 indicates that automated disablement may be a permissible remedy. Seemingly consistent with the UCC policy of freedom of contract,⁷⁹ the list of rights granted to the secured creditor by Article 9 is not exhaustive. An Article 9 secured creditor has, after a debtor’s default, the rights enumerated in Article 9 and any rights “provided by agreement of the parties.”⁸⁰ The first two versions of the Official Text of Article 9 did not explicitly permit parties to define post-default rights by agreement.⁸¹ Although the first Official Text enumerated the rights of the secured party and the debtor upon default, the section doing so added in a later subsection that the list of those rights did “not purport to be exhaustive.”⁸² The next Official Text, promulgated in 1957, eliminated any mention of the non-exclusivity of the enumerated rights and made clear in an Official Comment that Part 5, which governed

⁷⁶ U.C.C. § 9-609(b)(2).

⁷⁷ *Id.* § 9-609 cmt. 3. Colorado has provided examples of actions that breach the peace in its enactment of Article 9. COLO. REV. STAT. ANN. § 4-9-601(h) (West, Westlaw through 2021 Legis. Sess.) (stating that breach of the peace includes entering into a locked or unlocked residence or residential garage; breaking, opening, or moving any lock, gate, or other barrier to enter enclosed real property; or using or threatening to use violent means). For a detailed discussion of actions that create a breach of the peace, see *infra* Section IV.A.

⁷⁸ U.C.C. § 1-103(a)(2).

⁷⁹ See *id.* § 1-302(a) (permitting parties to vary the effect of the provisions of the UCC unless as otherwise provided). Although the UCC has embodied freedom of contract for most of its life, that was not the case in the first draft of the act. Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 807 (1958). The provisions of the first version of the UCC were mandatory with the exception of rules that were prefaced with “unless otherwise agreed.” *Id.* As a result, that first version attracted substantial negative commentary. See *id.* at 807–08 (explaining the origin of the UCC freedom of contract principle).

⁸⁰ U.C.C. § 9-601(a).

⁸¹ U.C.C. § 9-501(1) (1952 Official Text) (enumerating the secured party’s rights upon the debtor’s default); U.C.C. § 9-501(1) (1957 Official Text) (stating that the secured party, upon the debtor’s default, has the rights provided by the part of Article 9 that governed default).

⁸² U.C.C. § 9-501(3) (1952 Official Text).

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default, granted specific rights to the secured party but also placed limitations on their exercise.⁸³

The 1958 Official Text was the first version of Article 9 that authorized the debtor and the secured party to define their rights by agreement. Both the text and the Official Comment made clear that the existence of enumerated rights and remedies in the default provisions of Article 9 did not preclude the parties agreeing to additional rights and remedies in their loan documents.⁸⁴ There is little explanation, however, of the types of remedies and rights that might be added by an agreement between the parties.

Commentary on the permission to add remedies by contract is scant. In the early years of the UCC, commentators lauded the flexibility of Article 9 as compared to its predecessor acts. The flexibility that the authors praised was in the procedures for selling or otherwise realizing on collateral⁸⁵ and in the expanded scope of security agreements,⁸⁶ not in methods of obtaining collateral. This is not surprising given that the bulk of the scholarship explaining Article 9 was produced between the 1950s and 1970s; the only way of interfering with possession of collateral more than fifty years ago was to take manual possession of it. One author opined that the justification for allowing parties to define remedies is that the effectiveness of the remedy will depend on the type of collateral; for example, a creditor needs the flexibility to both take possession of physical goods in order to sell them and collect accounts in order to realize the value of the accounts.⁸⁷ Given that the text of the UCC provides distinct possession⁸⁸ and collection⁸⁹ remedies for goods and payment obligations respectively, that observation does not explain the permission to add remedies by agreement. Another provided loan acceleration as an example of a right on which the UCC is silent but that the parties can and universally do include in

⁸³ U.C.C. § 9-501(1) cmt. 1 (1957 Official Text).

⁸⁴ U.C.C. § 9-501(1) cmt. 1 (1958 Official Text).

⁸⁵ See Hogan, *supra* note 75, at 220 (“In pursuit of its goal of flexibility, the Code substitutes for the more specific and rigid tests of the prior law a requirement that every aspect of a disposition . . . must be ‘commercially reasonable.’”); William B. Davenport, *Default, Enforcement and Remedies Under Revised Article 9 of the Uniform Commercial Code*, 7 VAL. U. L. REV. 265, 267–68 (1973) (explaining that Article 9 substitutes “flexibility in default procedure . . . for the rigidity and complexity of default procedure under pre-Code chattel security law”); Harold F. Birnbaum, *Article 9—a Restatement and Revision of Chattel Security*, 1952 WIS. L. REV. 348, 385 (1952) (explaining that if the collateral is accounts, the secured party has the choice of selling them or collecting them, and if the collateral is bills of lading, the secured party has the choice of selling either the documents or the goods covered by the documents).

⁸⁶ See Charles Bunn, *Freedom of Contract Under the Uniform Commercial Code*, 2 B.C. INDUS. & COM. L. REV. 59, 70, 71 & n.44 (1960) (explaining how the UCC enabled debtors and creditors to agree to security agreements that extended to after-acquired property and future advances).

⁸⁷ See Davenport, *supra* note 85, at 268 (comparing the different methods of enforcement for different types of collateral).

⁸⁸ U.C.C. § 9-609(a) (AM. L. INST. & UNIF. L. COMM’N 2010).

⁸⁹ *Id.* § 9-607(a).

their installment loan agreements.⁹⁰ This second explanation sheds better light on the permission to add remedies by contract and indicates that the drafters intended to leave actions to enforce payment rights to contractual definition and define and limit remedies against collateral by statute.

The case law on the parties' ability to define additional remedies by agreement is similarly thin. Some of the opinions address agreements that establish standards for a commercially reasonable sale of collateral, something that the UCC permits parties to accomplish by agreement.⁹¹ Others address attempts to obtain waivers prohibited by Article 9.⁹² The ones that address the creation of bespoke remedies involve parties' attempts to provide a strict foreclosure remedy that avoids the necessity of complying with the UCC rules for an effective strict foreclosure.⁹³ One of the requirements for a strict foreclosure is that the debtor agree after default to the creditor's retention of collateral in satisfaction of the debt.⁹⁴ The opinions striking down parties' attempts to define an alternative to strict foreclosure that operates like strict foreclosure provide evidence that if parties agree to a remedy that resembles an Article 9 remedy without the Article 9 safeguards, such a remedy is impermissible.

Although the apparent permission to define remedies is consistent with the general UCC policy of freedom of contract, it runs counter to the limits on that freedom that pervade Article 9. This freedom has two important limits that restrict the ability of parties to contract out of Article 9's rules. The first limit applies when a UCC provision affects the rights of third parties. Many Article 9 provisions affect third parties, for example perfection of a security interest in

⁹⁰ See Fred H. Miller, *Is Revision Due of U.C.C. Article 9, Part 5?*, 44 OKLA. L. REV. 125, 128 (1991) (giving acceleration as an example of a remedy that is provided in installment loan contracts); see also Redding v. Rowe, 678 P.2d 337, 338–39 (Wash. Ct. App. 1984) (acknowledging that although the UCC is silent as to acceleration, parties may agree to it, but their agreement will be strictly construed).

⁹¹ U.C.C. §§ 9-602(7), 9-603(a) (prohibiting parties from eliminating the requirement that a sale of collateral be commercially reasonable but allowing them to define the standards by which commercial reasonableness will be measured); see also Burns v. Anderson, 123 F. App'x 543, 547–48 (4th Cir. 2004) (holding that parties to a security agreement were permitted to define the standards by which a foreclosure sale of collateral consisting of corporate stock would be commercially reasonable and citing to § 9-601(a) as authority).

⁹² See, e.g., Chamberlain v. Optima Servs. Int'l, Ltd., No. A-05-CA-394, 2008 U.S. Dist. LEXIS 144291, at *14 (W.D. Tex. Sept. 26, 2008) (observing that a debtor cannot waive its rights to a surplus under Article 9, notwithstanding a clause in a security agreement that allows the creditor to sell the collateral and keep any surplus).

⁹³ See, e.g., Forbes v. Four Queens Enters., Inc., 210 B.R. 905, 911 (D.R.I. 1997) (holding that a pre-default agreement that provided that an escrowee would turn collateral over to the secured party upon the debtor's default was not effective to create a strict foreclosure); Emmons v. LeMaster, Inc., 10 P.3d 33, 35–36 (Kan. Ct. App. 2000) (striking down an attempted strict foreclosure when the debtor and creditor agreed in their loan agreement that the creditor could exercise an "exclusive option to purchase" the collateral upon the debtor's default); Chen v. Profit Sharing Plan of Donald H. Bohne, 456 S.E.2d 237, 240 (Ga. Ct. App. 1995) (holding that an agreement providing for a "full and complete assignment" of promissory note collateral to the secured party upon the debtor's default was "nothing more than an unenforceable attempt at pre-default waiver of the debtor's rights").

⁹⁴ U.C.C. § 9-620(c).

property gives a secured party priority over subsequent parties claiming an interest in the same property. As a result, parties cannot “otherwise agree” to the rules regarding publication of a security interest.⁹⁵ The other is the default context, in which the drafters of all versions of Article 9 recognized that defaulting debtors are especially vulnerable to creditor overreach and thus should be limited in the matters to which they could freely agree.⁹⁶

Article 9 codifies restrictions on freedom of contract in the remedies context. The seemingly broad authorization to fashion post-default rights in Section 9-601 is cabined by a list of restrictions in Section 9-602. That section prohibits parties from waiving several duties on the part of the secured party, including the duty to notify the debtor before selling collateral in a foreclosure sale and the duty to conduct the foreclosure sale in a commercially reasonable manner.⁹⁷ Although parties cannot waive or modify these duties, they can define the standards by which those duties are satisfied, so long as the standards are not “manifestly unreasonable.”⁹⁸ The reported opinions analyzing Section 9-602 address waivers and modifications of rights and obligations that are enumerated in Article 9.⁹⁹ The most stringent restriction relates to self-help repossession; the parties can neither eliminate the requirement that a repossession be conducted in such a way that avoids breaching the peace nor define acts that constitute breach of the peace in their agreement.¹⁰⁰ It is this last restriction that makes it unlikely that automated disablement is a permissible remedy in states that have enacted the Official Text of the UCC.

The Official Text of the UCC presents several challenges to parties desiring to include remote disablement as a remedy in their loan agreements. Alt-

⁹⁵ See Bunn, *supra* note 86, at 62–63.

⁹⁶ See, e.g., U.C.C. § 9-501 cmt. 4 (AM. L. INST. & UNIF. L. COMM’N 1972) (amended 2001) (“In the area of rights after default our legal system has traditionally looked with suspicion on agreements designed to cut down the debtor’s rights and free the secured party of his duties.”). The identical comment appears in the commentary to the 1958 Official Text, the first version of Article 9 to allow parties to provide for remedies in their agreements. See also Michael M. Greenfield, *The Role of Assent in Article 2 and Article 9*, 75 WASH. U. L.Q. 289, 300 (1997) (explaining that Article 9 “is sensitive to problems of assent in connection with the procedures on default”); *Walker v. Grant Cnty. Sav. & Loan Ass’n*, 803 S.W.2d 913, 916 (Ark. 1991) (“[A] clear policy reason underlying Article 9 default provisions is the protection of post default debtors from the potential of overbearing tactics and intimidation by secured parties.”).

⁹⁷ U.C.C. § 9-602.

⁹⁸ *Id.* § 9-603(a).

⁹⁹ See, e.g., *In re Walter B. Scott & Sons, Inc.*, 436 B.R. 582, 596–97 (Bankr. D. Idaho 2010) (holding that the attempted definitions of standards for a commercially reasonable sale in the security agreement were manifestly unreasonable because the agreement defined commercially reasonable sale as one for which specified notice was given, eliminating the statutory requirements that such a sale be reasonable as to method, manner, time, place, and other terms); *In re Schwalb*, 347 B.R. 726, 749–50 (Bankr. D. Nev. 2006) (prohibiting a pre-default waiver of the debtor’s right to object to a strict foreclosure).

¹⁰⁰ U.C.C. § 9-603(b). There is scant literature on this section and thus little agreement on the types of exculpatory clauses that will survive judicial scrutiny. See generally Michael Korybut, *The Uncertain Scope of Revised Article 9’s Statutory Prohibition of Exculpatory Breach of Peace Clauses*, 10 HASTINGS BUS. L.J. 271 (2014).

though parties could agree to remote disablement of equipment under Article 9 in that it is a method of rendering equipment unusable, it is not clear what disablement actions would breach the peace, and Article 9 prohibits parties from defining breach of the peace in their agreements. It is difficult to argue that agreeing to remote disablement of consumer goods is permissible. The UCC does not appear to allow parties to design additional remedies against collateral, and allowing parties to allow remote disablement of consumer goods as an additional remedy without requiring at least an ill-fitting breach of peace limitation to protect the debtor would have the counterintuitive consequence of providing business debtors with better protections than consumer debtors. Although the UCC is not a consumer protection statute, most would consider that to be a step too far.

B. Expanding the Concept of Possession to Include Disablement

It would be easy to avoid some of the problems described above by considering disablement to be a method of taking possession under Article 9. The concept of possession has never been limited to the act of taking manual possession of an item.¹⁰¹ Courts have implied that “possession” for the purpose of Article 9 remedies includes “constructive possession.”¹⁰² Expanding the meaning of possession to include disablement, however, would make some of the language in Article 9 nonsensical. Repossession is also a trigger in the statutes that govern consumer lending and allowing disablement to serve as the same trigger would also make no sense.

Statutes specify that the act of taking possession triggers obligations on the part of the secured party. For example, statutes have deadlines that run to or from the time that a creditor takes possession of collateral. From a statutory interpretation perspective, remote disablement is not a repossession because the triggers make no sense when an act of disablement does not transfer the physical possession of the collateral to the creditor.

C. Article 9 of the UCC

The first hurdle to characterizing automated disablement as a method of taking possession is the language of Article 9 itself. Article 9 explicitly distin-

¹⁰¹ See FREDERICK POLLOCK & ROBERT SAMUEL WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW 13 (1888) (stating that any power to use and exclude others from an item will suffice as possession and noting that whether an act will be sufficient to constitute possession will depend on the “nature of the thing dealt with, and the manner in which things of the same kind are habitually used and enjoyed”).

¹⁰² Conn. Nat’l Bank v. Douglas, 606 A.2d 684, 688 (Conn. 1992) (“In the absence of either actual or constructive possession by the bank, [guarantor] cannot prevail on his claim that the bank violated his rights under part 5 of article 9 of the Uniform Commercial Code.”); see also WM Cap. Partners, LLC v. Thornton, 525 S.W.3d 265, 272 (Tenn. Ct. App. 2016) (“[T]he requirement for a commercially reasonable disposition applies only once the secured party has possession, either actual or constructive, of the collateral.”); *infra* notes 159–61 and accompanying text.

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guishes taking possession from disablement.¹⁰³ If disablement is a method of taking possession, the permission to render equipment unusable is redundant. In addition, if Article 9 permits a creditor to take possession of collateral by disabling it, any distinction between consumer and business collateral in Section 9-609(2) disappears.

Another hurdle is found in the duties that the UCC places on a creditor that has taken possession of collateral. For example, Section 9-207 of the UCC requires a secured party to “use reasonable care in the custody and preservation of collateral in [its] possession.”¹⁰⁴ The same section allocates various expenses, risks, and duties incurred with respect to collateral in the possession of the secured party between the secured party and the debtor.¹⁰⁵ These sections do not make sense in the disablement context; the hallmarks of possession in that context are divided between the secured party, who has the ability to make the collateral useless, and the debtor, who remains in control of the physical embodiment of the collateral. Although a disablement interferes with the debtor’s right to possess collateral, it does not transfer manual possession of the collateral to the creditor.

For example, if a creditor, in a transaction governed by Article 9 of the UCC, takes possession of collateral that is consumer goods, that creditor must dispose of it and may not keep it in satisfaction of the obligation secured if the debtor has paid 60 percent or more of the obligation secured.¹⁰⁶ The statute requires that the secured party dispose of such collateral within ninety days of taking possession unless the debtor has agreed otherwise.¹⁰⁷ If a secured creditor has possession of collateral, it must use reasonable care in its custody or preservation.¹⁰⁸ In these provisions, Article 9 contemplates that the secured party has manual possession of the physical embodiment of the collateral.

D. Motor Vehicle Sales Finance Laws

Automated repossession is used most often today in the automobile finance industry. Lenders in that industry operate subject to motor vehicle sales finance laws, which impose duties additional to those imposed by Article 9 of the UCC. Under some of these laws, it is clear that repossession means only the physical retaking of a vehicle. For example, such statutes require notice to the borrower after repossession, and the notice must identify the location where the car is stored.¹⁰⁹ Some also require the notice to state that the car will be sold within a

¹⁰³ U.C.C. § 9-609.

¹⁰⁴ *Id.* § 9-207(a).

¹⁰⁵ *Id.* § 9-207(b).

¹⁰⁶ *Id.* § 9-620(c).

¹⁰⁷ *Id.* § 9-620(f).

¹⁰⁸ *Id.* § 9-207(a).

¹⁰⁹ *See, e.g.*, 12 PA. STAT. AND CONS. STAT. ANN. § 6254(a), (c)(4) (West 2014) (Pennsylvania Motor Vehicle Sales Finance Act); MD. CODE ANN., COM. LAW §§ 12-624(d), 12-601(k)(1) (West 2021) (Maryland statute applicable to all consumer loans secured by per-

stated period of time after repossession.¹¹⁰ In some states, a repossessing creditor must notify the local police department of the repossession.¹¹¹ To require a creditor to send such notices after a disablement is to force that creditor to spend time and money complying with a nonsensical requirement (a debtor whose car is disabled knows the location of that car) or face penalties for non-compliance.

E. Statutory Triggers and Non-Contact Repossessions

Courts have recognized the difficulty of expanding the statutory concept of possession to include disablement. The opinion in *Dawson v. J&B Detail, LLC (In re Dawson)*¹¹² illustrates why expanding current statutory definitions of possession to include disablement does not make sense. The debtor in *Dawson* challenged his creditor's use of a payment assurance device not only as a violation of the automatic stay, but as a violation of Ohio's Retail Installment Sales Act. That statute requires a secured party to give a debtor "specific notice to the debtor after the secured party takes possession of collateral."¹¹³ In rejecting this complaint, the court observed that when the retail installment sales act used the word possession, it meant only physical possession. This was clear from the fact that the statute required the secured party to make the collateral available for the debtor's inspection and to "assemble the collateral and make it available to the debtor at a time and place that is reasonably convenient to both parties."¹¹⁴

In its opinion, the court made a distinction between a repossessing creditor and a disabling creditor, noting that although the use of a shutoff device interferes with the owner's use of a car, it does not deprive the owner of possession.¹¹⁵ The court observed that the statute in question clearly contemplates only "physical repossessions" because of requirements such as the requirement that a secured party make collateral available "for inspection by the debtor during reasonable hours."¹¹⁶

Because of these triggers, simply including disablement within repossession makes little sense. Yet disablement is a remedy against property, and it dispossesses the owner of the use of that property. As such, disablement is a remedy that belongs uniquely to a creditor with an interest in the debtor's property; in other words, a secured creditor.

sonal property collateral with a value of less than \$100,000). See generally NAT'L CONSUMER L. CTR., REPOSSESSIONS § 6.5.2 (10th ed. 2022), www.nclc.org/library.

¹¹⁰ 12 PA. STAT. AND CONS. STAT. ANN. § 6254(c)(3) (West 2014).

¹¹¹ MASS. GEN. LAWS ch. 255B, § 20C (2016).

¹¹² See generally *In re Dawson*, No. 05-22369, 2006 WL 2372821, at *1 (Bankr. N.D. Ohio Aug. 15, 2006).

¹¹³ *Id.* at *13.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

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F. Including Non-Contact Deprivations of Possession in the UCC

Although the primary self-help remedy in Article 9 is self-help repossession, the drafters who limited the self-help right recognized that a debtor's possessory interest in collateral deserved protection from all types of interference. The debtor, as owner of the collateral, has a property interest that allows it to possess collateral free from interference by the secured party until default.¹¹⁷ The original drafters of the UCC made clear that a secured party had no right to take possession of collateral from a debtor not in default, recognizing that any exercise of physical control by the secured party can interfere with a debtor's day-to-day personal or business transactions.¹¹⁸ Although early secured transactions scholars and practitioners recognized that the act that warranted regulation in secured credit statutes¹¹⁹ was the act of taking physical possession, the result that warranted protection was the interference with the debtor's use of the collateral. In the 1950s and 1960s, the only interference possible with respect to tangible collateral involved physical interference; hence, they regulated the act of taking physical possession. The acts that constitute possession have long been dependent on the nature of the asset sought to be possessed and the manner in which it is "habitually used and enjoyed."¹²⁰ It is indisputable that deprivation of use is a property interest deserving of protection. In two cases, one involving the Due Process Clause and the other involving the Fourteenth Amendment, the United States Supreme Court recognized that possession and use are interests protected under the Constitution and that their deprivation, even if temporary, was harmful.¹²¹

Article 9 recognizes that disablement is a remedy that should be governed by Article 9 rules. The UCC has provided for a face-to-face disablement remedy against property used in a business since the first version of Article 9.¹²² That authorization has not changed in seven decades; today, as in the early 1950s, a secured party "without removal, may render equipment unusable and

¹¹⁷ See 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43.3, at 1191 (1965) ("The debtor who remains in possession of personal property collateral is not, so long as he avoids default, customarily disturbed in his use of the property."). Security interests that are perfected by possession are the exception to this rule; a debtor can agree with a secured party to give the secured party manual possession of collateral at the outset of a transaction. See U.C.C. § 9-313(a) (AM. L. INST. & UNIF. L. COMM'N 2010) (allowing a secured party to perfect a security interest in tangible personal property by taking possession of that property).

¹¹⁸ See GRANT, *supra* note 117 ("An automobile is meant to be driven; a machine is meant to be used in making things; inventory is meant to be sold; receivables are meant to be collected.").

¹¹⁹ The UCC rules governing repossession are substantively identical to the repossession rules in predecessor statutes such as the Uniform Conditional Sales Act and the Uniform Trust Receipts Act. *Id.* § 43.6, at 1201.

¹²⁰ See POLLOCK & WRIGHT, *supra* note 101, at 13.

¹²¹ *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972); *Sniadach v. Fam. Fin. Corp.*, 395 U.S. 337, 342 (1969).

¹²² See U.C.C. § 9-503 (1952 Official Text).

dispose of collateral on a debtor's premises."¹²³ In the 1950s, the only way to disable equipment was to send a person in to do so. In that context, a breach of the peace limitation makes sense.

Today, it is possible to deprive a debtor of possession of collateral in a way that crosses the digital–physical divide. Article 9 does not yet account for the fact that a remedy can cross that divide. Article 9 recognizes wholly intangible collateral and has provisions for the collection of collateral consisting of payment rights upon a debtor's default.¹²⁴ That remedy is effected not by any type of high-tech remote intervention, but by a letter or email message.¹²⁵ After a remote disablement, the debtor remains in possession of the physical asset. Remote disablement causes different harms from those caused by “contact” disablement, and any limitations on the use of remote disablement should be geared towards minimizing those harms. In the next Part, I discuss how a handful of states have revised their secured credit statutes to account for the possibility of non-contact disablement by specifically allowing it as a creditor remedy and limiting it by standards appropriate to the harms caused by deprivations of possession that cross the digital–physical divide.

III. STATUTORY RESPONSES TO AUTOMATED REPOSSESSION

Article 9 of the Uniform Commercial Code has been revised several times since its original promulgation in the 1950s. Every significant revision in the history of Article 9 responded to business practices that had evolved in a way that stretched the then-existing law. The first version of Article 9 synthesized the rules that had developed over the course of the prior decades to accommodate the demand for financing secured by a wide range of assets, both tangible and intangible.¹²⁶ The drafters of the last comprehensive revision, promulgated in 1998, intended to take Article 9 into the digital age.¹²⁷ Yet while the 1998 amendments facilitated electronic filing of financing statements,¹²⁸ recognized

¹²³ U.C.C. § 9-609(a)(2) (AM. L. INST. & UNIF. L. COMM’N 2010).

¹²⁴ Article 9 remains deficient, however, in providing for creditors’ remedies against intangible collateral that does not consist of payment rights. *See generally* Juliet M. Moringiello, *False Categories in Commercial Law: The (Ir)relevance of (In)tangibility*, 35 FLA. STATE U. L. REV. 119, 119–20 (2007).

¹²⁵ *See* U.C.C. § 9-607(a)(1) (allowing a secured party, after a debtor’s default, to “notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party”).

¹²⁶ *See* 1 GILMORE, *supra* note 117, § 9.1, at 288–89 (explaining that the demand to use all types of personal property as security led to a fragmentation of personal property security law and created a need for synthesis in what became Article 9 of the UCC).

¹²⁷ *See* Jane Kaufman Winn, *Electronic Chattel Paper Under Revised Article 9: Updating the Concept of Embodied Rights for Electronic Commerce*, 74 CHI. KENT L. REV. 1055, 1055 (1999) (explaining the amendments intended to accommodate electronic contracts and electronic filing of financing statements).

¹²⁸ *See* U.C.C. § 9-102(a)(70) (defining “record” as “information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form”); *id.* § 9-102(a)(39) (defining “financing statement” as “a record or records composed of an initial financing statement and any filed record relating to the initial financ-

electronic execution of documents,¹²⁹ and anticipated some new types of intangible or electronic collateral,¹³⁰ they did not anticipate electronic methods of enforcing security interests. This omission is understandable; at the time the amendments were being developed, electronic enforcement was most common in software transactions, which were being addressed in another project: the Article 2B project that ended as the ill-fated Uniform Computer Information Transactions Act, known as UCITA.¹³¹ At the time of the Article 9 revision, the technology-related pressures on commercial law could all be traced to the movement away from paper as a medium for negotiating and memorializing commercial transactions.¹³²

Several states have recognized in their statutes that creditors have the ability to disable collateral remotely. Some have done so by adding non-uniform provisions to Article 9 of the UCC. Others have enacted laws aimed at curbing abuses in consumer transactions and have placed their restrictions in statutes governing unfair trade practices or motor vehicle sales.

A. *Non-Uniform UCC Restrictions*

The first state to place restrictions on remote disablement was Connecticut, which did so in 2001 as a non-uniform amendment to the major Article 9 amendments that went into effect nationwide that year.¹³³ The placement of Connecticut's electronic self-help provision and its cross-reference indicate that the Connecticut legislature anticipated that creditors would use electronic self-help in both consumer and business transactions. The statute does that in a curious way, allowing a creditor to use electronic self-help to either take posses-

ing statement"); *id.* § 9-516(a) (defining filing as "communication of a record to a filing office").

¹²⁹ See *id.* § 9-102(a)(7) (defining "authenticate" as either "(A) to sign; or (B) with present intent to adopt or accept a record, to attach or logically associate with the record an electronic sound, symbol, or process"); *id.* § 9-203(b)(3)(A) (requiring authentication of a security agreement as a prerequisite for attachment of a security interest).

¹³⁰ See *id.* § 9-102(a)(31) (defining electronic chattel paper). See generally Winn, *supra* note 127 (discussing the electronic chattel paper provisions of the 1998 version of Article 9).

¹³¹ See *infra* notes 210–26 and accompanying text.

¹³² See Patricia Brumfield Fry, *X Marks the Spot: New Technologies Compel New Concepts for Commercial Law*, 26 LOY. L.A. L. REV. 607, 609–10 (1993) (explaining that the move away from paper in commerce necessitated a reexamination of some of the "fundamental structures of commercial law").

¹³³ S.B. 1226, 2001 Gen. Assemb., Jan. Sess. (Conn. 2001). At the same time, Connecticut included electronic self-help provisions in its versions of Article 2A of the UCC and in its enactment of the Uniform Consumer Leases Act. See CONN. GEN. STAT. § 42a-2A-702(e) (2003) (recognizing electronic self-help as a method of taking possession after a lessee's default under Article 2A); *id.* § 42-419(d)(1) (recognizing a lessor's right to use electronic means to disable leased goods under Connecticut's Consumer Leases Act); see also Ralph J. Rohner, *Leasing Consumer Goods: The Spotlight Shifts to the Uniform Consumer Leases Act*, 35 CONN. L. REV. 647, 736 (2003) (explaining the origins of Connecticut's electronic self-help provision).

sion of collateral or render equipment unusable.¹³⁴ To take possession by electronic self-help could not have meant anything other than remote disablement in 2001;¹³⁵ even today, the idea that a car might drive itself to a lender remains in the realm of science fiction.¹³⁶

Connecticut's curious wording expands the disablement remedy to consumer goods. A secured creditor may use electronic self-help to disable collateral only if the debtor agrees to such self-help in the security agreement.¹³⁷ In a consumer transaction, that agreement must be separate; in other words, merely agreeing to a security agreement that includes an electronic self-help provision does not constitute agreement to the use of electronic self-help in a consumer transaction.¹³⁸ The Connecticut statute requires the secured party to give notice to the debtor before exercising electronic self-help.¹³⁹

The Connecticut statute restricts the use of electronic self-help with a limitation that is tailored to the remote and automated nature of the remedy. The one absolute restriction on the use of electronic self-help is that even if the secured party complies with all of the requirements of Connecticut's statute, a secured party cannot use electronic self-help if the secured party "... has reason to know that its use will result in substantial injury or harm to the public health or safety or grave harm to the public interest substantially affecting third parties not involved in the dispute."¹⁴⁰

Colorado also regulates automated disablement in its version of Article 9. Like Connecticut, Colorado enacted its non-uniform provision with the package of amendments that became effective in 2001.¹⁴¹ There are significant differences, however, between Colorado's restrictions on automated disablement and those in Connecticut. Colorado's rules governing the use of automated self-help

¹³⁴ The statute defines "electronic self-help" as "the use of electronic means to exercise a secured party's rights under" the subsections addressing the use of self-help to take possession of collateral and disable collateral that can be described as equipment. CONN. GEN. STAT. § 42a-9-609(d) (2003).

¹³⁵ In 1998, Julie Cohen used the analogy of "beam[ing]" a sofa out of an owner's living room to illustrate the harms inherent in the self-help disablement of software. Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1106 (comparing automated disablement to a "team of high-tech repo men" that had the ability to "'beam' your sofa out of your living room and back to the furniture store").

¹³⁶ See Andrew J. Hawkins, *Tesla's Smart Summon Feature Is Already Causing Chaos in Parking Lots Across America*, THE VERGE (Sept. 30, 2019, 12:22 PM), <https://www.theverge.com/2019/9/30/20891343/tesla-smart-summon-feature-videos-parking-accidents> [<https://perma.cc/F86G-CBYG>] (reporting on the problems caused by a Tesla feature that purportedly enables a driver to cause her car to drive out of a parking spot to meet the driver).

¹³⁷ CONN. GEN. STAT. § 42a-9-609(d)(2) (2003).

¹³⁸ *Id.*

¹³⁹ *Id.* § 42a-9-609(d)(3).

¹⁴⁰ *Id.* § 42a-9-609(d)(5). Connecticut's language is identical to that in the 2000 draft of UCITA. UNIF. COMPUT. INFO. TRANSACTIONS ACT (NAT'L CONF. OF COMM'RS ON UNIF. STATE L., Draft Amendments July 28–Aug. 4, 2000).

¹⁴¹ John L. McCabe & Arthur H. Travers, *Introducing Revised Article 9 of the Uniform Commercial Code*, 30 COLO. LAW. 9, 9 (2001).

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apply only when the collateral is equipment.¹⁴² The statute does not contain any additional notice requirements, but like the Connecticut statute, Colorado's statute imposes restrictions on electronic self-help that are tailored to the nature of the remedy. The statute prohibits a secured party from disabling or rendering unusable any computer program or other similar device embedded in collateral if immediate injury to any person or property is a reasonably foreseeable consequence of such action.¹⁴³ According to the scant commentary on the section, it may have been intended to prevent disabling "the software that operates certain critical care equipment in hospitals and the like without the consent of the debtor."¹⁴⁴ Both Colorado and Connecticut have therefore replaced the ill-fitting breach of the peace standard as a limitation on remote disablement with one that recognizes the desirability of protecting the public from the harms that are unique to remote disablement.

B. Restrictions Targeted at Subprime Auto Lending: Motor Vehicle Sales Finance Acts and Unfair Trade Practice Legislation

A handful of states target subprime automobile lending in their statutes regulating the use of remote disablement. These restrictions are tailored to consumer lending and also to the harms that can result from the remote disablement of an individual's vehicle.

California regulates the use of automated disablement in its Motor Vehicle Sales Finance Act. The scope of California's restrictions is narrow; its restrictions apply only to the automated shutoff of cars and, further, only to the use of automated means of disablement by "buy here, pay here" automobile dealers.¹⁴⁵ The Act requires the dealer to give notice at the time the loan is made that it will be using starter interrupt technology, and it requires the dealer to give notice before it activates the technology.¹⁴⁶ The California Act also requires the dealer to activate a deactivated car in the event of an emergency.¹⁴⁷

Nevada passed starter interrupt legislation in 2017 and included it in its laws regulating deceptive trade practices.¹⁴⁸ Nevada's statute is also limited to motor vehicle financing and further limited to consumer transactions. Nevada's statute requires that the lender give actual notice to the borrower before it activates the starter interrupt device, prohibits disablement of a vehicle while it is being operated, and provides for emergency operation.¹⁴⁹ The statute specifies that automated shutoff is a "constructive repossession" for the purposes of Ar-

¹⁴² COLO. REV. STAT. ANN. § 4-9-609(a)(2) (West 2022) ("After default, a secured party . . . [w]ithout removal, may render *equipment* unusable" (emphasis added)).

¹⁴³ *Id.* § 4-9-609(e).

¹⁴⁴ McCabe & Travers, *supra* note 141, at 18.

¹⁴⁵ A "buy here, pay here" dealer sells used cars and holds the majority of its loans as lender. See CAL. VEH. CODE § 241 (West 2021) (defining "buy-here, pay-here" dealers).

¹⁴⁶ CAL. CIV. CODE § 2983.37 (West 2021).

¹⁴⁷ *Id.*

¹⁴⁸ NEV. REV. STAT. § 598.9715 (2017).

¹⁴⁹ *Id.*

ticles 2A and 9 of the UCC and Nevada's law governing contracts for the installment sale of vehicles.¹⁵⁰

New Jersey's restrictions on electronic self-help are contained in its statutes governing unfair trade practices. New Jersey's restrictions are also limited to consumer motor vehicle financing, and they require robust notice of the use of such a device, a grace period before activation, a warning prior to activation, and the ability of the borrower to use the vehicle for a period of forty-eight hours post-disablement.¹⁵¹ New Jersey's statute makes clear that a vehicle cannot be disabled while in motion.¹⁵²

New York's provisions are placed in two different acts. The legislation placed the definition of "payment assurance device" in the Uniform Commercial Code, yet it did not include that term anywhere in the UCC outside of the definitional section.¹⁵³ The remainder of the law is found in New York's statute regulating consumer debt collection and has very little in it other than specifying that notice of use of such a device be provided in the original security agreement and that notice be given prior to its use.¹⁵⁴ Although the New York UCC does not include the use of payment assurance devices in its sections dealing with repossession, the consumer debt collection law refers to payment assurance devices as one method of effecting repossession.¹⁵⁵

C. *Sowing Confusion Through Untested Terminology and Stealth Amendments to the UCC*

In some of the statutes described above, the drafters attempted to fit a new method of interfering with possession—disablement—into a known category of doing so—manual interference. As explained in the last Section, that approach sometimes leads to nonsensical results.¹⁵⁶ Nevada and New York, in amending their consumer laws, in fact appear to have amended the UCC to create a non-uniform act with respect to consumer transactions.

Nevada's law, for example, uses a term that appears nowhere in the UCC: "constructive repossession." Yet the statute dictates that an automated disablement should be treated as a constructive repossession under the UCC.¹⁵⁷ Not only does the UCC not use the term constructive repossession, but courts have also used the term very few times in opinions involving Article 9 remedies, and authors writing about secured financing have used it even less frequently.¹⁵⁸

In that last category is one author who used the term in discussing satellite

¹⁵⁰ *Id.* § 598.9715(2)(c).

¹⁵¹ N.J. REV. STAT. § 56:8-206(5) (West 2021).

¹⁵² *Id.*

¹⁵³ N.Y. U.C.C. LAW § 9-102 (60-a) (McKinney 2018).

¹⁵⁴ N.Y. GEN. BUS. LAW § 601(10) (McKinney 2018).

¹⁵⁵ *Id.*

¹⁵⁶ *See supra* notes 112, 115 and accompanying text.

¹⁵⁷ NEV. REV. STAT. § 598.9715(2)(c) (2017).

¹⁵⁸ *See* U.C.C. (AM. L. INST. & UNIF. L. COMM'N 2010); *see also* sources cited *infra* notes 159–61.

financing. In her article, she uses “constructive repossession” to mean automated disablement, which is the only method by which a secured creditor can interfere with the possession of a satellite.¹⁵⁹ When parties use the term “constructive repossession” in litigation under the UCC and consumer finance statutes, they are usually arguing over whether actions taken by the secured creditor that fall short of taking physical possession of collateral should trigger statutory duties, such as the duty to give the debtor notice, that arise when the secured party takes possession of collateral.¹⁶⁰ In such cases, courts find a repossession when the secured party exercises dominion and control over the collateral.¹⁶¹

The statement in Nevada’s statute that remote disablement is a constructive repossession raises several interpretative problems under the UCC. Nevada’s statute importantly protects the safety of the debtor and members of the public by prohibiting the automated shutoff of a moving car.¹⁶² It is not clear whether characterizing automated shutoff as a constructive repossession for the purpose of the UCC subjects it to the breach of peace limitation, given that the scant case law on constructive repossession is limited to finding that such acts trigger post-repossession duties on the part of the secured creditor.

New York’s law is muddy, but in a different way. The statute regulates a lender’s use of a payment assurance device, as defined in the UCC, as a method of effecting a repossession of a vehicle.¹⁶³ Although the statute does not specify that such an act is a repossession under the UCC, the UCC provides the foundational rules for repossession of all collateral, with consumer statutes providing enhanced protection for individual debtors.¹⁶⁴ If remote disablement is a repossession under New York law, then it is limited by the breach of peace standard, which is not well suited to address the harms caused by the remote disablement, or non-contact deprivation of possession, of physical collateral. The next Part of this Article will explore the breach of peace standard in more detail to illustrate that it protects society’s interests that could be harmed by contact repos-

¹⁵⁹ See Joanne Irene Gabrynowicz, *Space Law: Its Cold War Origins and Challenges in the Era of Globalization*, 37 SUFFOLK U. L. REV. 1041, 1062 (2004) (describing constructive repossession as a method of taking the right to use and control a space asset).

¹⁶⁰ See, e.g., *Russell Nat’l Bank v. Smith*, 556 A.2d 899, 900 (Pa. Super. Ct. 1989) (dispute over a mobile home that the debtors had surrendered to their lender); *Van Wormer v. Charter Oak Fed. Credit Union*, 2000 Conn. Super. LEXIS 2246, *7–8 (Conn. Super. Ct. Aug. 25, 2000) (automobile collateral had been in an accident and borrower did not have the car repaired because she was waiting for the lender’s instructions); *Indus. Equip. Credit Corp. v. Green*, 467 N.E.2d 525, 526–27 (N.Y. 1984) (lender intended to sell collateral consisting of movie theater seats while allowing the debtor to use the seats as it normally would).

¹⁶¹ *Green*, 467 N.E.2d at 527 (finding no constructive repossession where the collateral remained on the debtor’s premises and the debtor used the collateral as it did before the default); *Russell Nat’l Bank*, 556 A.2d at 901 (finding a constructive repossession when the debtors surrendered the mobile home collateral to the lender, and the lender sent a letter to the debtors notifying them that the mobile home had been repossessed).

¹⁶² NEV. REV. STAT. § 598.9715(2)(d)(1) (2017).

¹⁶³ N.Y. GEN. BUS. LAW § 601(10) (McKinney 2018).

¹⁶⁴ See NAT’L CONSUMER L. CTR., REPOSSESSIONS § 2.3.2.1 (9th ed. 2017) (explaining that state consumer credit law “almost always provides debtor protections beyond those found in the UCC”).

sessions of physical objects, but it is not well suited to serve as a standard by which non-contact disablements of physical objects should be judged.

IV. WHAT WE PROTECT WHEN WE LIMIT SELF-HELP

The privilege to use self-help to recover property exists in few places outside of Article 9 of the UCC. One is in landlord-tenant law, although courts have restricted or eliminated that right in many states.¹⁶⁵ Yet another is in the high-dollar, niche area of satellite financing. In the late 1990s, lawmaking bodies discussed providing a self-help remedy in software transactions,¹⁶⁶ and although these attempts failed, the drafts of UCITA provide guidance on the types of interests we might want to protect when the item interfered with is software.

Because a self-help remedy allows a wronged party to right the wrong without resort to the courts, laws that provide self-help remedies place restrictions on their exercise. When the party exercising the self-help remedy violates those restrictions, the law forces that party to go to court to obtain redress. As explained below, the restrictions on self-help remedies are designed to minimize the harm that can arise when a party takes the law into its own hands.

The interests protected by limitations on self-help vary according to the self-help remedy at issue. This Part will explore limitations on self-help in several areas: Article 9 of the UCC, landlord-tenant law, software transactions, and satellite financing.

A. Physical Interference with Possession I: Self-Help Repossession Under Article 9 of the UCC

The UCC limits on the exercise of self-help to recover collateral are designed to minimize the harm that can occur in a contact interference with possession. The Article 9 rules assume that a repossession or disablement will involve a human who takes manual possession of or disables the collateral. Such an interference might lead to a physical confrontation if the owner or a bystander witnesses the repossession. Because of this possibility, the secured party's right to take possession of or disable collateral without legal process is limited by the duty not to breach the peace when doing so.¹⁶⁷ This focus on avoiding the harms of physical contact predates the UCC; a treatise on the law of conditional sales before the UCC described the restriction on recapture as one that prohibited acts that would "constitute a personal assault *or* a breach of the peace."¹⁶⁸

The drafters of Article 9 intended flexibility in defining breach of the

¹⁶⁵ See, e.g., *Berg v. Wiley*, 264 N.W.2d 145 (Minn. 1978); Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69, 85 (2005) (explaining that the modern trend is to force eviction into a judicial forum).

¹⁶⁶ See *infra* notes 208–26 and accompanying text.

¹⁶⁷ U.C.C. § 9-609(b)(2) (AM. L. INST. & UNIF. L. COMM'N 2010).

¹⁶⁸ 3 LEONARD A. JONES, *THE LAW OF CHATTEL MORTGAGES AND CONDITIONAL SALES* 424 (6th ed. 1933) (emphasis added).

peace. The Official Text of the UCC gives no guidance as to what acts constitute a breach of the peace,¹⁶⁹ and the Official Comment to Section 9-609 expresses the drafters' desire that the identification of conduct that causes a breach of the peace be left to "continuing development by the courts."¹⁷⁰ To reinforce the drafters' intention that only courts may develop standards for determining when a breach of the peace occurs, the UCC prohibits parties from defining breach of peace in their contracts.¹⁷¹

Broad policy statements about the interests that the breach of peace standard protects influence the courts in developing guidelines for holding that a reposessor's actions caused a breach of the peace. These policies include "society's interest in tranquility"¹⁷² and reduction of "the risk to the public associated with extrajudicial conflict resolution."¹⁷³ To implement these policies, courts have established their own spectra of acts that might constitute a breach of the peace. For example, physical violence, whether instigated by the debtor or creditor, will be a breach of the peace.¹⁷⁴ Some courts describe actions that "breach the peace" as actions that disturb public order.¹⁷⁵ On the other end of that spectrum, there is no breach of the peace when a creditor "peaceably persuades" the debtor to give up the collateral.¹⁷⁶ One court set forth a catalogue of actions that could be classified as breaching the peace, listing "the use of law enforcement, violence or threats of violence, trespass, verbal confrontation, and disturbance to third parties."¹⁷⁷

Courts agree unanimously that the entry into a debtor's home without contemporaneous consent of the debtor results in a breach of the peace. Such an act will always constitute a breach of the peace even if no one is home to witness the repossession because the chance that a returning homeowner will resort to violence upon finding a reposessor in his home is just too great.¹⁷⁸ Because an

¹⁶⁹ Colorado's version of the UCC provides a non-exclusive list of actions that constitute a breach of the peace, including entering a locked or unlocked residence; breaking, opening, or moving a lock or barrier to enter any enclosed real property; and using or threatening to use violent means. COLO. REV. STAT. ANN. § 4-9-601(h) (West 2006).

¹⁷⁰ U.C.C. § 9-609 cmt. 3.

¹⁷¹ *Id.* § 9-603(b); see also *supra* notes 98–100 and accompanying text.

¹⁷² See *Salisbury Livestock Co. v. Colo. Cent. Credit Union*, 793 P.2d 470, 473 (Wyo. 1990).

¹⁷³ *Chrysler Credit Corp. v. Koontz*, 661 N.E.2d 1171, 1173 (Ill. App. Ct. 1996).

¹⁷⁴ See *Ivy v. Gen. Motors Acceptance Corp.*, 612 So. 2d 1108, 1112 (Miss. 1992) (explaining that a secured party's privilege to use self-help to repossess collateral will end "if repossession evokes physical violence, either on the part of the debtor or the secured party").

¹⁷⁵ See *Madden v. Deere Credit Servs., Inc.*, 598 So. 2d 860, 865 (Ala. 1992) (adding that the violation of "any law enacted to preserve peace and good order" is likewise considered a breach of the peace).

¹⁷⁶ *Ivy*, 612 So. 2d at 1112.

¹⁷⁷ *Rivera v. Dealer Funding, LLC*, 178 F. Supp. 3d 272, 279 (E.D. Pa. 2016).

¹⁷⁸ See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 26–7 (6th ed. 2010); Braucher, *supra* note 13, at 572 (setting forth a typology of breach of the peace cases).

individual has the right to resort to violence to protect his home,¹⁷⁹ courts recognize that an entry into a home “has a tendency to excite a breach of the peace and invite violent resistance.”¹⁸⁰ One court opining on a repossession under a conditional sale contract ruled that an entry into a home was impermissible because it “constituted a gross outrage on the rights and feelings of [the debtor], . . . for which courts of justice must either grant redress or sanction the personal exaction of satisfaction by violence.”¹⁸¹

An entry into a home carries with it a great potential for violence. That potential is less when the repossession is from terrain surrounding the residence. Many courts have had the opportunity to opine on repossessions from residential driveways and tend to conclude that a repossession without force or confrontation from a private residential driveway does not breach the peace.¹⁸² In opining on a repossession from a ranch that contained a residence, one court observed that the potential for violence increases as the distance between the repossession and the dwelling decreases.¹⁸³ In that case, the court focused also on privacy expectations; finding no other opinions addressing a repossession from a large rural property, the court questioned whether rural privacy expectations were sufficiently unique to rule that an uncontested repossession from a secluded area next to the residence was a breach of the peace.¹⁸⁴

Determining whether entry into business premises breaches the peace is a more complicated task. Courts are unanimous in holding that a trespass, without more, is not a breach of the peace.¹⁸⁵ A secured party, having been granted by law a right to obtain possession of collateral, has a privilege to enter land, so long as it does so “at a reasonable time and in a reasonable manner.”¹⁸⁶ Such a reasonable manner precludes the use of force.¹⁸⁷ Yet when collateral is kept in an enclosed space, a repossession from that space risks breaching the peace, es-

¹⁷⁹ RESTATEMENT OF TORTS § 87(2) (AM. L. INST. 1934); see also Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & ECON. 201, 205 (1971) (explaining that the Restatement authorizes the use of deadly force to “prevent wrongful dispossession from the user’s dwelling place, even if the dispossession involves no danger of physical harm”).

¹⁸⁰ *Girard v. Anderson*, 257 N.W. 400, 402 (Iowa 1934).

¹⁸¹ *Van Wren v. Flynn*, 34 La. Ann. 1158, 1159 (La. 1882).

¹⁸² See *Butler v. Ford Motor Credit Co.*, 829 F.2d 568, 570 (5th Cir. 1987) (applying Mississippi law and relying on pre-UCC authority that held that such a repossession did not invade the privacy of the debtor’s home); *Ivy v. Gen. Motors Acceptance Corp.*, 612 So. 2d 1108, 1111 (Miss. 1992) (stating that repossession from a private driveway without the use of force does not breach the peace).

¹⁸³ See *Salisbury Livestock Co. v. Colo. Cent. Credit Union*, 793 P.2d 470, 474 (Wyo. 1990).

¹⁸⁴ See *id.* at 475.

¹⁸⁵ See *Chrysler Credit Corp. v. Koontz*, 661 N.E.2d 1171, 1174 (Ill. App. Ct. 1996) (listing cases).

¹⁸⁶ RESTATEMENT (SECOND) OF TORTS § 183(1) (AM. L. INST. 1965); see also Braucher, *supra* note 13, at 604–11 (discussing cases that apply Restatement rules in resolving repossession disputes).

¹⁸⁷ RESTATEMENT (SECOND) OF TORTS § 183 cmt. h (AM. L. INST. 1965).

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pecially if the reposessor must break or destroy a barrier.¹⁸⁸ For example, in ruling that a creditor that gained access to the debtor's business premises by breaking a lock breached the peace, the Kansas Supreme Court stated that breaking and entering any premises, whether residential or business, is "a serious act detrimental to any concept of orderly conduct of human affairs and a breach of the peaceful solution to a dispute."¹⁸⁹

When the dispute does not involve an entry into or onto real estate, some courts hold that "violence, or at least some threat of violence" is necessary for a court to find that a repossession breached the peace.¹⁹⁰ A simple exhortation not to take the collateral is not a threat of violence.¹⁹¹ According to one court, holding an "unequivocal oral protest," without more, to be a breach of the peace would "render the self-help repossession statute useless."¹⁹² Many courts hold the opposite, however, finding that a repossession over a debtor's oral objection is likely to lead to violence and is therefore a breach of the peace.¹⁹³

Protected interests other than the interest in being free from violence come into play in two scenarios: repossessions in which law enforcement officers are involved without a court order authorizing their involvement and repossessions involving trickery. Some courts hold that there is a breach of the peace when the creditor brings a law enforcement officer along to help with the repossession. In these cases, the officers are not acting in their official capacity pursuant to a court order.¹⁹⁴ This action would not appear to be a breach of the peace in the traditional sense; the presence of law enforcement personnel should avoid violence. In one case in which the creditor enlisted the aid of law enforcement because the repossession was to take place in a neighborhood located next to a housing project, the court held that a creditor "cannot use the power of the state to prevent a breach of the peace from occurring If law enforcement is needed, then a breach of the peace has occurred, and the creditor must secure judicial intervention to carry out the repossession."¹⁹⁵ The court added that the

¹⁸⁸ See *Koontz*, 661 N.E.2d at 1175; *Laurel Coal Co. v. Walter E. Heller & Co.*, 539 F. Supp. 1006, 1007 (W.D. Pa. 1982) (holding that a reposessor who cut a chain that locked a fence enclosing the collateral breached the peace).

¹⁸⁹ *Riley State Bank v. Spillman*, 750 P.2d 1024, 1030 (Kan. 1988). The creditor in that case did not leave the premises unlocked; it replaced the locks after breaking them. *Id.* at 1026.

¹⁹⁰ See *Harris Truck & Trailer Sales v. Foote*, 436 S.W.2d 460, 463–64 (Tenn. App. 1968) (holding that the term "breach of the peace" as used in Article 9 "should be construed according to the ordinary and usual meaning of the words there used" and rejecting the trial judge's charge to the jury that violence or a threat of violence was not necessary to determine that a breach of the peace had occurred).

¹⁹¹ See *Koontz*, 661 N.E.2d at 1174 (holding that the debtor's screams of "don't take it" would not lead a reasonable reposessor to conclude that violence was imminent).

¹⁹² *Id.*

¹⁹³ See generally NAT'L CONSUMER L. CTR., *supra* note 164, § 6.4.4 (listing opinions on both sides).

¹⁹⁴ One case described the officers' role as "civil standby," under which a private party pays police officers to "assist in matters such as preventing violence at the scene of a domestic quarrel, directing traffic at a highway construction project, or escorting a wide-load truck." *In re MacLeod*, 118 B.R. 1, 1 (Bankr. D.N.H. 1990).

¹⁹⁵ *Albertorio-Santiago v. Reliable Fin. Servs.*, 612 F. Supp. 2d 159, 170 (D.P.R. 2009).

presence of a law enforcement officer chills the “legitimate exercise” of the defaulting debtor’s right to object to the repossession.¹⁹⁶

Although most courts permit a secured creditor or its agent to trick a debtor into giving up possession of collateral, others place trickery into the breach of peace category. Courts in the former category do not view misrepresentations about the repossessioner’s right to take collateral as actions that provoke violence.¹⁹⁷ Those in the latter category draw only a tenuous connection between trickery and violence, condemning trickery not because it causes violence but because allowing repossession by trick would “encourage practices abhorrent to society: fraud, trickery, chicanery, and subterfuge, as alternatives to employment of judicial processes that foster the concept of ours being a government of laws and not of men.”¹⁹⁸

In reviewing the breach of peace cases, protection against violence emerges as a key goal. Violence is the potential undesirable result of a contact repossession or disablement, so it is logical that the interest that the law protects when the law restricts the use of repossession or disablement in the purely physical realm is the interest of being free from violent confrontation. Yet in many reported opinions under the Uniform Commercial Code, the Uniform Conditional Sales Act, and the common law preceding that Act, courts have found breach of the peace in actions that had little chance of disturbing public order.¹⁹⁹ Some courts appear to value friction in the repossession process by recognizing a right to object to repossession. Others protect debtors against practices that society abhors. The next Section will address another type of physical interference with possession: eviction from real property.

B. Physical Interference with Possession II: Self-Help Evictions Under Landlord-Tenant Law

Repossession of personal property has an analog in the world of real property: eviction. Like personal property repossession, eviction traditionally takes place in a purely physical realm. Due to the likelihood of violence that accompanies the interference with an individual’s home, the difficulty inherent in defining “peaceable self-help,” and the availability in many jurisdictions of summary eviction proceedings,²⁰⁰ the majority of states have prohibited self-help

¹⁹⁶ *Id.*

¹⁹⁷ See *K.B. Oil Co. v. Ford Motor Credit Co.*, 811 F.2d 310, 314 (6th Cir. 1987) (finding no likelihood of violence when the creditor’s agent misrepresented to the owner of premises on which the collateral was located that he had permission to take the collateral).

¹⁹⁸ *Ford Motor Credit Co. v. Byrd*, 351 So. 2d 557, 559 (Ala. 1977).

¹⁹⁹ See *supra*, text accompanying notes 194–98.

²⁰⁰ Adam B. Badawi, *Self-Help and the Rules of Engagement*, 29 YALE J. ON REG. 1, 3 (2012) (identifying the availability of summary eviction proceedings as a factor in the elimination of self-help remedies in residential leases). The Restatement (Second) of Property takes the position that the availability of such proceedings makes self-help unnecessary. RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 14.3 (AM. L. INST. 1977).

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eviction with respect to residential leases.²⁰¹

When self-help eviction is allowed, it is limited by the requirement that it be done without a breach of the peace. Landlords in many jurisdictions are permitted to evict commercial tenants without resort to judicial process, but only if that eviction can be done peaceably.²⁰² The restrictions on self-help evictions anticipate the possibility of contact.²⁰³ As a result, actions that could produce violence are prohibited. To determine whether an entry is peaceable, courts apply the same standards as they do in UCC cases; in other words, the entry must be accomplished in a manner that avoids violence.²⁰⁴

Eviction law recognizes that landlords can deny tenants possession by methods designed to avoid physical contact with the tenant. As a result, acts such as padlocking the premises and terminating utilities have been limited by statute or by judicial decision.²⁰⁵ The termination of utilities is an example of an eviction that crosses the digital–physical divide, and eviction law recognizes the equivalence of physical intrusions that result in a deprivation of use of physical space and remote interventions that have the same result. The Revised Uniform Residential Landlord and Tenant Act, which prohibits the use of self-help by a landlord to retake leased premises,²⁰⁶ similarly prohibits a landlord from discontinuing an essential service to the property.²⁰⁷ Because the prohibition is absolute, there is no analysis of whether a utility shutoff breaches the peace. Possession of a dwelling is the protected interest, and the law protects against both the physical and remote deprivations of that possession.

²⁰¹ See DALE A. WHITMAN ET AL., *THE LAW OF PROPERTY* § 6.79 (4th ed. 2019) (explaining that “the substantial majority of American jurisdictions” have abolished self-help evictions in residential leases either by statute or by judicial decision); Mary B. Spector, *Tenants’ Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 155–56 (2000) (describing the move away from allowing self-help evictions from dwellings).

²⁰² See, e.g., *Donegal Assocs., LLC v. Christie-Scott, LLC*, 241 A.3d 1011, 1025 (Md. App. Ct. 2020) (“[A] commercial landlord is permitted, although it is not encouraged, to resort to self-help to repossess premises.”); see also *Watson v. Brown*, 686 P.2d 12, 16 (Haw. 1984) (allowing self-help evictions in commercial leases in Hawaii). But see *Turks Head Realty Tr. v. Shearson Lehman Hutton, Inc.*, 736 F. Supp. 422, 428 (D.R.I. 1990) (explaining Rhode Island’s prohibition of self-help in all leases, residential and commercial).

²⁰³ For example, the Restatement (Second) of Property protects against two categories of harm in its restrictions on self-help evictions. The first is physical harm to individuals, and the second is harm to the tenant’s property located on the leased premises. RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 14.2 cmt. A (AM. L. INST. 1977).

²⁰⁴ See generally *Rucker v. Wynn*, 441 S.E.2d 417, 420 (Ga. App. Ct. 1994) (citing to UCC cases for the standards by which a breach of the peace is determined).

²⁰⁵ James DePriest, *Self-Help Evictions*, 25 CLEARINGHOUSE REV. 798, 802 (1991); see, e.g., TEX. PROP. CODE ANN. § 92.008(a) (West 2013) (prohibiting a landlord from terminating utilities to a tenant because of a lease default); see also *id.* § 92.0081(b) (restricting a landlord’s ability to exclude a tenant from residential premises without judicial process for failure to pay rent).

²⁰⁶ UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 604 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2015).

²⁰⁷ *Id.* § 605.

C. *Digital Deprivations of Digital Assets: Self-Help Disabling of Software*

At the same time that subprime auto lenders were introducing primitive electronic means to disable physical collateral, debates were raging over the use of remote controls to disable software. In the 1990s, the Uniform Law Commission and American Law Institute embarked on major amendments to Articles 2 and 9 of the UCC.²⁰⁸ As part of the effort, the sponsoring bodies proposed an Article 2B of the UCC to govern computer information transactions.²⁰⁹ After several years of controversy, the ALI withdrew from the project, and the ULC promulgated it as the Uniform Computer Information Transactions Act, or UCITA.²¹⁰ The Act was a failure, enacted by only two states: Maryland and Virginia.²¹¹ Concerns about electronic self-help remedies proliferated during the UCITA debates. Although UCITA was a failure, it provides some lessons about what interests the law might protect when it allows electronic interference with property rights.

UCITA attempted to provide a contracting framework for computer information, which was different from other contract subjects in several significant ways. One was that a computer information contract could be both formed and performed electronically.²¹² Another was that the customary method of transferring rights in software is by a license that defines the parameters of the licensee's use. In effect, the license, rather than any physical manifestation, defines the product.²¹³ Another key factor that distinguishes software from other products is that it can be copied and transferred on a wide scale.²¹⁴ For these reasons, software licensors wanted a statute that would bless technological controls over software licensees.

One of the many objections to UCITA was its prematurity. In the late 1990s, software transactions were fairly new, and there was not a lot of settled common law on which a statute could be based.²¹⁵ The specter of electronic

²⁰⁸ Michael L. Rustad, *Making UCITA More Consumer-Friendly*, 18 J. COMPUT. & INFO. L. 547, 547 (1999).

²⁰⁹ *Id.* at 547–48.

²¹⁰ *Id.*

²¹¹ *Computer Information Transactions Act Enactment Map*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=92b2978d-585f-4ab6-b8a1-53860fbb43b5> [<https://perma.cc/KKZ3-VYGX>].

²¹² Mary Jo Howard Dively, *The New Laws That Will Enable Electronic Contracting: A Survey of the Electronic Contracting Rules in the Uniform Electronic Transactions Act and the Uniform Computer Information Transactions Act*, 38 DUQ. L. REV. 209, 225 (2000).

²¹³ See Maureen A. O'Rourke, *Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing Towards Nonuniformity?*, 14 BERKELEY TECH. L.J. 635, 648 (1999) (explaining that computer information is “not defined physically, but rather by the bundle of rights granted under the license”).

²¹⁴ Nim Razook, *The Politics and Promise of UCITA*, 36 CREIGHTON L. REV. 643, 648 (2003).

²¹⁵ See O'Rourke, *supra* note 213, at 651 (explaining that the customs in software contracting in the later 1990s were rapidly evolving and that as a result it was not appropriate to defer to particular norms at that time); Pamela Samuelson, *Intellectual Property and Contract Law for the Information Age: Foreword to a Symposium*, 87 CAL. L. REV. 1, 3–4 (1999) (ob-

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disablement raised the possibility of impairing the security of computer systems and destroying other programs and data on the host computer.²¹⁶ These novel harms were different from the known harms inherent in contact interferences with physical assets and thus required new types of protection. The internet created rights that merited protection from remote interference, but at the turn of the twenty-first century, the legal world was only beginning to sort out how those rights would be protected. The rich literature discussing electronic intrusions into computer systems and the application of the tort of trespass to chattels to those intrusions²¹⁷ illustrates the challenges in identifying purely digital harms and the remedies for those harms.

Another fatal objection to UCITA was its poor harmonization of intellectual property and commercial law. UCITA was about transactions in information, and intellectual property law governs many aspects of information transactions.²¹⁸ UCITA's graft of commercial law's freedom of contract principles onto transactions that are subject to federal law and policy subjected UCITA to the well-deserved scorn of intellectual property experts.²¹⁹

In its various iterations, the Act that started life as Article 2B and ended as UCITA delivered two sections that allowed technological controls over contractual obligations. It permitted licensors to regulate performance electronically by including restraints in software code to enforce a contract term.²²⁰ This provision drew the ire of intellectual property experts who argued that such restraints violated rights, such as fair use, that were granted to licensees by federal law.²²¹ Early drafts of UCITA also permitted a licensor to disable software upon the licensee's breach of contract.²²² That section was one of the most reviled provisions of the Act and was deleted from the final promulgated version.²²³ Yet the automated disablement provision that was deleted from UCITA

serving that the act then known as Article 2B "would apply not only to commerce occurring in mature markets, but also to forms of electronic commerce that are immature, emerging, or yet to be developed").

²¹⁶ See Robert A. Hillman & Maureen O'Rourke, *Defending Disclosure in Software Licensing*, 78 U. CHI. L. REV. 95, 111 (2011) (explaining some of the possible harms that can come from electronic disablement of software).

²¹⁷ See, e.g., Greg Lastowka, *Decoding Cyberproperty*, 40 IND. L. REV. 23, 23 n.2, 24 & n.4 (2007) (providing a catalog of articles in which authors advocated for a "right to exclude others from connected resources" and articles whose authors were skeptical of such a right); Catherine M. Sharkey, *Trespass Torts and Self-Help for an Electronic Age*, 44 TULSA L. REV. 677, 678 (2009) (noting the re-emergence of trespass to chattels "in a new guise, as a sword against electronic intrusions over the Internet").

²¹⁸ Samuelson, *supra* note 215, at 4.

²¹⁹ See Charles McManis, *The Privatization (or "Shrink-Wrapping") of American Copyright Law*, 87 CAL. L. REV. 173, 176 (explaining how proposed Article 2B would have permitted the interference with fair use rights granted by federal copyright law).

²²⁰ Cohen, *supra* note 135, at 1096–97.

²²¹ See, e.g., McManis, *supra* note 219, at 176.

²²² Cohen, *supra* note 135, at 1100.

²²³ As ultimately promulgated by the Uniform Law Commission, UCITA prohibited electronic self-help entirely. UNIF. COMPUT. INFO. TRANSACTIONS ACT § 816 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2002). Nevertheless, only two states, Maryland and Virginia,

is useful because it illustrates what interests the law might protect when it allows a system to be disabled remotely. The last draft that permitted electronic self-help did so only if a list of conditions was satisfied. The draft required the licensee to separately assent to electronic disablement and required the licensor to give fifteen days' notice before exercising electronic disablement.²²⁴ Even if those conditions were satisfied, the draft prohibited electronic disablement if the licensor had "reason to know that its use will result in substantial injury or harm to the public health or safety or grave harm to the public interest substantially affecting third persons not involved in the dispute."²²⁵ Moreover, the draft prohibited self-help electronic disablement in all "mass market transactions," which the Act defined as all consumer licenses as well as all licenses that were offered to the general public on standard forms.²²⁶

After UCITA failed, the American Law Institute took another bite of the remote disablement of software apple in its Principles of the Law of Software Contracts. Unlike UCITA, the Principles allow automated disablement of software, but prohibit it in mass-market and consumer transactions.²²⁷ Acknowledging that self-help automated disablement was one of the most controversial topics in the UCITA drafting process, however, the Principles prohibit automated disablement without a court order.²²⁸ In addition, the Principles require that the software vendor provide notice of its intention to disable the software, again acknowledging a unique feature of software disablement—if one software program is disabled, there is a chance that other data on the computer, unrelated to the software, will be harmed. Notice gives the owner the opportunity to take steps to alleviate the potential harm.²²⁹

The practice of disabling physical collateral and the practice of disabling software share characteristics but are distinguishable in an important way. When a creditor disables physical collateral remotely, it is reaching through the digital–physical divide to infringe upon a recognized property right—possession—that debtor-creditor law protects in a detailed way.

D. Remedies that Cross the Digital–Physical Divide: Self-Help Remedies in Satellite Financing

This Article presented, as an example of disablements that cross the digital–physical divide, the relatively low-dollar, non-negotiated world of subprime automobile financing. Remote disablement also plays a role on the other end of the financing spectrum in the sophisticated, high-dollar world of satellite fi-

enacted the law. See *Uniform Computer Information Transaction Act Enactment Map*, *supra* note 211.

²²⁴ UNIF. COMPUT. INFO. TRANSACTIONS ACT § 816 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L., Draft Amendments July 28–Aug. 4, 2000).

²²⁵ *Id.*

²²⁶ *Id.* § 102.

²²⁷ PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 4.03 cmt. a (AM. L. INST. 2010).

²²⁸ *Id.*

²²⁹ *Id.*

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nancing. The limits on disabling space assets provide another example of the interests that the law protects when it limits self-help creditor remedies. In the 1990s, the satellite business shifted from one comprised of solely public providers to one comprised of a mix of public and private providers.²³⁰ This shift led to a demand for secured financing of satellites. Because it is undesirable and almost impossible to physically repossess a satellite and bring it back to Earth,²³¹ secured creditors desire to seize control of their satellite collateral.²³²

To accommodate this demand for financing secured by satellites and other space assets, the International Institute for the Unification of Private Law, more commonly known as UNIDROIT, drafted a Space Protocol to its Convention on International Interests in Mobile Equipment.²³³ In fashioning creditor remedies against space asset collateral, the drafters faced two tasks. The first was to protect a creditor's interest in a satellite in the event of non-payment. The second was to place limits on the creditor's ability to exercise those remedies in a way tailored to the harms that the remedy could produce.

The Convention and Space Protocol permit a creditor to take control of a space asset upon the debtor's default.²³⁴ The Space Protocol recognizes that in order to take control, a creditor must have the codes and data to enable such control and allows parties to a security agreement to agree to an escrow arrangement for such codes.²³⁵

Providing for control is the easy part, and the existence of the control remedy in the Cape Town Convention is useful to illustrate that law-making bodies have recognized that control of a tangible asset is a remedy that is available only to secured creditors. The repossession, disabling, or transfer of control of a satellite could have serious repercussions on the ground, however, and the Space Protocol attempts to mitigate those effects by its public service provisions. Satellites are used to provide telecommunications and air navigation services, and the disruption, even for a short time, of either of these could have se-

²³⁰ See Paul B. Larsen & Juergen A. Heilbock, *UNIDROIT Project on Security Interests: How the Project Affects Space Objects*, 64 J. AIR L. & COM. 703, 705–06 (1999); Zhao Yun, *Revisiting Selected Issues in the Draft Protocol to the Cape Town Convention on Matters Specific to Space Assets*, 76 J. AIR L. & COM. 805, 806 (2011) (explaining trends in space commercialization).

²³¹ Yun, *supra* note 230, at 817–19 (explaining that technology current at the time would not have allowed for physical retrieval of satellites and that bringing a satellite back to Earth would destroy the value of the satellite).

²³² See Larsen & Heilbock, *supra* note 230, at 707 (describing the secured creditors' interests in regulating the financing of space assets).

²³³ For the text of the Space Protocol, see Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, Mar. 9, 2012, UNIDROIT [hereinafter Space Protocol]. For the text of the Convention, see Convention on International Interests in Mobile Equipment, Nov. 16, 2001, UNIDROIT [hereinafter Cape Town Convention].

²³⁴ See Cape Town Convention, *supra* note 233, at art. 8 § 1(a) (permitting a secured creditor to take possession or control of collateral after a debtor's default).

²³⁵ See Space Protocol, *supra* note 233, at art. XIX.

vere and dangerous consequences.²³⁶ Recognizing this, the Space Protocol limits a creditor's remedies when a satellite is used to provide public services. Pursuant to the Space Protocol's public service provision, a country or a public services provider within that country can file a public service notice in the International Registry, notifying all relevant parties that the space asset is used to provide a public service.²³⁷ If such a notice is filed with respect to a satellite, a creditor may not exercise its remedies in such a way that would make the satellite unable to provide that service.²³⁸

In limiting self-help remedies against property, the law recognizes the harms inherent in the remedy and incorporates protections appropriate to the remedy. In the next Part, this Article will discuss considerations in fashioning appropriate limits around remote disablement of personal property collateral.

V. PROTECTED INTERESTS WHEN ACTIONS CROSS THE DIGITAL–PHYSICAL DIVIDE

As explained above, the most important limit on self-help repossession in the UCC is the proscription against it if exercising self-help will cause a breach of the peace. Flexibility is a hallmark of the UCC by design; the original drafters designed a code that would allow courts to adjust the law to respond to the evolution of commercial practices.²³⁹ This flexibility is prominent in Article 9's default provisions, which leave the definition of "breach of the peace" up to the courts. In opinions analyzing breach of the peace, courts find a breach of the peace when the creditor's actions create a possibility of violence and physical confrontation.²⁴⁰ But there is a limit to the flexibility of the breach of the peace standard—although it can be stretched to encompass the panoply of harms caused by a contact deprivation of possession, non-contact deprivations stretch the standard to its breaking point.

In permitting creditors to use self-help to remotely disable collateral, the UCC should restrict its use by a standard tailored to the harm that self-help remote disablement can cause. The UCC limits contact self-help repossessions by a breach of the peace standard because it has been long recognized that "the preservation of the public peace is of more importance to society than the right of the owner of a chattel to get possession of it."²⁴¹ Although proponents of remote disablement claim that such disposessions avoid the possibility of physical confrontation and thus cannot breach the peace,²⁴² automated disablement harms other interests that the law should protect.

Remote disablement allows a creditor to gain control over property that it

²³⁶ See Yun, *supra* note 230, at 819.

²³⁷ See Space Protocol, *supra* note 233, at art. XXVI.

²³⁸ See *id.* at art. XXVI, cl. 3.

²³⁹ Braucher, *supra* note 13, at 549–50, 568.

²⁴⁰ See *supra* Section IV.A.

²⁴¹ Williams v. Whittle, 82 S.C. 500, 502 (1909).

²⁴² See Hudson & Laudicina, *supra* note 18, at 845 ("[T]here appears to be scarce opportunity to breach the peace when a vehicle's starter is disabled because of a payment default.").

would not otherwise be able to reach if the creditor had been required to proceed physically. For example, a physical entry into a home is always a breach of the peace,²⁴³ and thus, a creditor cannot reach items typically kept in a home without bringing an action for replevin. Courts also find that breaking into locked business premises results in a breach of the peace.²⁴⁴ By using remote disablement, a creditor could more easily shut down a business or deprive an individual of an important household good such as life-sustaining medications kept in a smart refrigerator (or even a car kept in an attached garage).

Here, the lessons from the UCITA debates can be useful. In critiquing the UCITA automated disablement provisions, several authors identified other interests that could be harmed in self-help software disablement. For example, although a remote deactivation of software would likely not lead to physical violence, it could harm a software licensee's property interests in digital files, other software, and its business.²⁴⁵ Such a deactivation might also violate privacy norms in that although remote disablement avoids physical violence, it is nonetheless invasive from the user's perspective.²⁴⁶

States that have borrowed from UCITA in revising their versions of the UCC to recognize and regulate remote disablement make safety the paramount protected interest. As a result, in Colorado and Connecticut, a creditor cannot use remote means to disable collateral if doing so would put the safety or health of the public at risk.²⁴⁷ Safety is also a motivating factor in the limits that the subprime auto financing industry has imposed on itself in using remote means to disable vehicles. According to the industry's standards and the contracts used by subprime automobile lenders, a lender shall not disable a moving vehicle.²⁴⁸ Safety plays a role on the other end of the loan size spectrum, with satellite disablements prohibited if they would deprive the public of an essential service.²⁴⁹

The Article 9 self-help restriction often goes beyond the prevention of violence. Some courts have noted friction as a protected interest, finding that the involvement of law enforcement officers in a repossession that is being conducted privately by a creditor breaches the peace.²⁵⁰ Such a repossession, designed to avoid violence, is nonetheless considered to breach the peace because it deprives the debtor of its right to object to the repossession.²⁵¹ As enforcement of security interests and other rights becomes more automated, parties

²⁴³ See *supra* notes 178–81 and accompanying text.

²⁴⁴ See, e.g., *Riley State Bank v. Spillman*, 750 P.2d 1024, 1030 (Kan. 1988).

²⁴⁵ Stephen L. Poe & Teresa L. Conover, *Pulling the Plug: The Use and Legality of Technology-Based Remedies by Vendors in Software Contracts*, 56 ALB. L. REV. 609, 624 (1993).

²⁴⁶ See Cohen, *supra* note 135, at 1105 (comparing automated disablement to “a team of high-tech repo men” that had the ability to “‘beam’ your sofa out of your living room and back to the furniture store”).

²⁴⁷ See *supra* notes 140–43 and accompanying text.

²⁴⁸ See *supra* Section I.A.

²⁴⁹ See *supra* Section IV.D.

²⁵⁰ See, e.g., *Albertorio-Santiago v. Reliable Fin. Servs.*, 612 F. Supp. 2d 159, 170 (D.P.R. 2009).

²⁵¹ See *supra* notes 194–96 and accompanying text.

will be deprived of the opportunity to apply flexibility in enforcing those rights.²⁵² As a result, borrowers may suffer asset losses that could otherwise have been prevented.²⁵³

The preservation of friction plays a role in some of the laws that have restricted automated shutoff. Some of these statutes require the creditor to notify the debtor of the possibility of remote disablement in the loan agreement and again after default but before exercising disablement.²⁵⁴ Article 9 does not require the creditor to give notice before exercising its right of self-help repossession, but a debtor has the ability to prevent the repossession by negotiating or acting in a way that might cause a breach of the peace. The lack of a notice requirement, combined with the proscription on breach of the peace, protects the interests of the creditor, the debtor, and the public. A creditor can move without notice, thus protecting its right to obtain the collateral free from the possibility that the debtor will hide the collateral. The debtor is protected in theory because if the debtor is present, the debtor or its agent can take some action to stall the repossession. If the repossession breaches the peace, then it stops. Requiring notice before disablement preserves this friction.

One court held that a repossession effectuated by breaking and changing the locks to the debtor's business breached the peace because breaking and entering is "detrimental to any concept of orderly conduct of human affairs and a breach of the peaceful solution to a dispute."²⁵⁵ This raises a question as to whether the concepts of "orderly conduct of human affairs" have evolved to adapt to an environment in which goods are connected in such a way that they can be shut off remotely. There is a rich literature addressing how interpretation of the Fourth Amendment has evolved from the era in which "search" meant ruffling through papers²⁵⁶ to an era in which a person's goods include not only physical objects but the data and signals emanating from those objects.²⁵⁷ That literature could be informative in thinking about how the expectations protected by Article 9's breach of the peace standard may change as tangible personal

²⁵² See Danielle D'Onfro, *Smart Contracts and the Illusion of Automated Enforcement*, 61 WASH. U. J.L. & POL'Y 173, 181–82 (2020) (explaining that both businesses and consumers desire some flexibility in enforcement). The Supreme Court's recent decision in *City of Chicago v. Fulton* illustrates how the removal of friction can increase costs and inconvenience in bankruptcy cases. See *City of Chicago v. Fulton*, 141 S. Ct. 585, 590, 592 (2021) (holding that a creditor's mere retention of debtor property that the creditor took possession of before the bankruptcy petition is not a violation of the automatic stay, thus forcing the debtor to file a turnover action to recover the property).

²⁵³ See Melissa B. Jacoby, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261, 2273 (2008) (explaining that the number of completed home foreclosure sales is smaller than the number of foreclosure actions filed, in part because of the "property-retentive features" of foreclosure law).

²⁵⁴ Connecticut's non-uniform version of Article 9 provides an example. See *supra* note 139 and accompanying text.

²⁵⁵ *Riley State Bank v. Spillman*, 750 P.2d 1024, 1030 (1988).

²⁵⁶ Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1517–18 (2010).

²⁵⁷ Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 CALIF. L. REV. 805, 809 (2016).

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property changes.

It is difficult to anticipate some of the dangers that may arise from remote disablement. Remote disablement does not take place in the same physical environment, but any time that a person is deprived of her use of an item that she owns without any court review, there is the possibility of an emotionally charged atmosphere.²⁵⁸ As goods are combined with software and machine learning capabilities, individuals might be tempted to attack the product itself if it is turned off unexpectedly.²⁵⁹ Although it might seem like a silly fantasy to protect the item itself from harm, at least two authors have discussed the implications of technology-fueled integration of both physical items and commercially valuable information with human bodies.²⁶⁰ As items become more connected to humans in a digital and physical sense, protection of the human may come to the fore in restricting remote disablement of items.

CONCLUSION

The UCC was designed to allow and facilitate the expansion of commercial practices. Article 1 of the UCC directs courts to liberally construe the statute's provisions to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties.²⁶¹ The same section sets forth the policies of the UCC, which include simplification, clarification, and modernization of the law governing commercial transactions.²⁶² Sometimes, the evolution of new methods of doing business require amendments to existing law, and automated disablement is such a method.

As explained in the Introduction and throughout this Article, the most common use of remote disablement as a creditor remedy is in sub-prime auto lending. That is cause enough to regulate its use, and our law has long attempted to restrict creditor overreach in consumer transactions. Automation is nothing all that new, but today's automated processes combined with goods connected to networks opens up vast possibilities for lenders in managing the risk of borrower default. It is time to modernize commercial law to manage the risks of creditor overreach in exercising remedies that cross the digital-physical divide.

²⁵⁸ See 2 RAYMOND T. NIMMER, INFORMATION LAW § 11.156 (2021) (making the same argument with respect to electronic self-help in software licenses).

²⁵⁹ See Christina Mulligan, *Revenge Against Robots*, 69 S.C. L. REV. 579, 582, 595 (2018) (explaining that revenge creates satisfaction in harmed individuals). Professor Mulligan goes on to suggest that "a wronged party may indeed be quite justified in dragging a robot out into an empty field and walloping it with a baseball bat." *Id.* at 595.

²⁶⁰ See Andrea M. Matwyshyn, *The Internet of Bodies*, 61 WM. & MARY L. REV. 77, 154 (2019) (discussing the bankruptcy ramifications of contract rights of remote access into "Internet of Bodies" devices); see also Gowri Ramachandran, *Assault and Battery on Property*, 44 LOY. L.A. L. REV. 253, 257 (2010) (anticipating that an iPhone might be considered a human's exobrain, thus making an interference with that device an assault or battery on that person).

²⁶¹ U.C.C. § 1-103(a)(2) (AM. L. INST. & UNIF. L. COMM'N 2010).

²⁶² *Id.* § 1-103(a)(1).

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