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SPECIAL PROJECT

Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society

The notion that most people want black-robed judges, well dressed lawyers and fine-paneled courtrooms as the setting to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.[1]

. . .[I]n the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold . . . petitioners . . . constitutionally free to ignore all the procedures of the law and carry their battle to the streets . . . . [R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.[2]

I. INTRODUCTION

Self-reliance, perserverance, ingenuity, and the noble notion of rugged individualism have been pervasive themes in the American lifestyle since the precolonial era. Not the least formidable of the innumerable matters to test these qualities in pilgrims, pioneers, and modern Americans, is the task of securing and nurturing a comprehensive system of laws that commands the respect of the citizenry and sustains an ordered society. The American legal system has evolved into a complex and sophisticated amalgam of statutes, procedures, actors, and forums. The benefits of this orderly system of justice, however, can manifest themselves only to the extent that certain typically American, self-reliant behavior suffers a degree of concomitant restraint. Ordered justice demands a semblance of consistency; consistency necessarily precludes ad hoc, individually prescribed remedies and responses. The judicial scheme survived despite its apparent contravention of American wherewithal and human nature, partly because the courts and laws provide an adequate and efficient alternative for redressing wrongs. Additionally, a policing authority furthers the system's ability to endure by managing those persons who wander beyond the legally established bounds of permissible behavior. The American legal system also owes its durability to its effective incorporation of a significant number of the common individual methods of dealing

1. Address by Chief Justice Warren E. Burger, National Conference on Minor Dispute Resolution (1977).

2. Walker v. City of Birmingham, 388 U.S. 307, 320-21 (1967) (footnote omitted).

with others that predate the system's refinement to its current dignity. This Special Project examines lawful self-help—the prevailing legal accommodations for extrajudicial lawful rights and remedies engendered by the longstanding tension between the imperatives of an established system of laws and the individual needs and desires to avoid and remedy injury as effectively and efficiently as possible.

"Self-help," in this Special Project, denotes legally permissible conduct that individuals undertake absent the compulsion of law and without the assistance of a government official in efforts to prevent or remedy a legal wrong.[3] Extrajudicial forms of dispute resolution and citizens' arrests qualify as self-help under the Special Project's definition; extreme actions like shooting the neighbor because his dog attacked your cat, however, are not "self-help" for purposes of the following discussion. Self-help, therefore, is a legally recognized alternative or substitute for a judicial remedy. Any exercise of self-help, of course, quickly may become unlawful when a self-helper oversteps the limits of the privilege. One objective of this Special Project is to identify potential self-help situations and the legal boundaries of appropriate self-help responses.

The common law roots of many self-help privileges,[4] for example, illustrate that self-help is by no means a nascent legal phenomenon. In many respects, self-help was the progenitor of our modern legal system. It was the law without the trappings—*sans* black robes, pinstriped suits, and high vaulted ceilings. The rapid growth and refinement of the American legal system apparently diverted legal commentators' attention from self-help. Nevertheless, many self-help privileges survived. Today, the resounding concerns that American courts are overburdened,[5] American society is un-

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3. *Cf.* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1, 4 (1973).

4. For example, the privileges of self-defense, *see infra* notes 73-106 and accompanying text, and the right to escape from unlawful confinement, *see infra* notes 377-95 and accompanying text, derive from the common law.

5. In his 1982 State of the Judiciary Address, Chief Justice Burger noted that annual federal district court civil case filings increased from 35,000 to 180,000 between 1940 and 1981. That increase, which nearly doubled the yearly caseload of each judge to 350 cases per year, was six times the size of the countries' population growth. W. Burger, State of the Judiciary Address, (Jan. 24, 1982), *reprinted in* 68 A.B.A.J. 274, 274 (1982). From 1950 to 1981 annual federal apellate court filings climbed from 2800 to more than 26,000, thereby increasing each judge's annual caseload from 44 to 200 cases. *Id.* Meantime, from 1967 to 1976 state appellate court dockets expanded eight times as fast as the rate of population growth. *Id.* Chief Justice Burger also alluded to increased complexity of trials by noting that although only 35 trials lasted for more than one month in 1960, five times that number

duly litigious,[6] the American criminal justice system is failing to protect society,[7] and the justice available through the American legal system is neither swift nor effective,[8] have redirected attention to the law of self-help.

Dissatisfaction with conventional processes for preventing and remedying legal wrongs encourages a greater reliance upon self-help; private individuals may become more educated about their self-help privileges and, thereby, exercise them more frequently. This situation, in turn, dictates that courts, legislatures, and the legal profession reassess the state of self-help and discard the antiquated and unnecessary, clarify and redefine the valuable, and design and implement new forms of self-help. Absent such efforts, the citizenry, out of ignorance and frustration, may tear the delicate veneer that overlies an ordered society.

Although this Special Project specifically addresses the self-help options available to the common citizen, it also should educate lawyers, legislators, and judges. The extrajudicial nature of self-help excludes none of the factions that traditionally make the judicial machinery run smoothly. The lawyer must be capable of advising a client on the potential legal consequences of his conduct, both prospectively and retrospectively. The lawyer also must be qualified to counsel clients about alternative, nonlitigious means of obtaining remedies for legal wrongs. Conflict management and conflict resolution are two invaluable services that lawyers offer their clients.[9] A full comprehension of self-help options may broaden the role of the legal profession, rather than shrink it as

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occurred in 1981. *Id.*

6. *Id.*

7. *See infra* notes 161-62 and accompanying text.

8. West Virginia Supreme Court Justice Richard Neely recently painted a pessimistic picture of courtroom justice in America:

> The point that most judges and lawyers miss is that the whole litigation process is inexact—perfect justice under ideal conditions is illusory. To ask perfect justice of a court system is like asking a skilled surgeon to perform brain surgery with a meat ax. He might be able to do it 5 percent of the time if he is really skilled, but the smart money does not bet on it.

R. NEELY, WHY COURTS DON'T WORK ___ (1983).

9. Chief Justice Burger recently observed:

> The obligation of our profession is, as has long been thought to be, to serve as healers of human conflicts. To fulfill our tradtional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time with the least possible expense, and with a minimum of stress on the participants. That is what justice is all about.

W. Burger, State of the Judiciary Address, *supra* note 5. *See also* W. Burger, the State of Justice Address (Feb. 12, 1984), *reprinted in* 70 A.B.A. J. 62, 66 (1984).

some lawyers fear. Similarly, the legislatures must remain mindful of any discordance between the laws and public opinion, and of the inadequacies of the judicial system, whether real or perceived. In conjunction with the courts, the legislatures can fashion self-help laws and remedies that benefit citizens to the greatest extent while only minimally disrupting social order—in fact, such laws and remedies can help preserve social order.

This Special Project examines the myriad forms of self-help currently available to persons in American society. It groups and discusses notable self-help rights, privileges, and remedies under topical classifications that parallel traditional jurisprudential categories. Parts II through VI of the Special Project sketch the legally fashioned contours and explore the legal, social, and political consequences of self-help methods in tort law, criminal law and law enforcement, commercial transactions, landlord-tenant relations, and family law matters. Part VII explores the attorney's role in the development and implementation of curative self-help procedures such as mediation. In Part VIII the Special Project concludes by examining the function, mechanisms, and merits of two increasingly popular alternative dispute resolution processes—rent-a-judge programs and the ombudsman—that offer hope for continued peaceable dispute resolution.

II. TORT

A. *Introduction*

Tort self-help is any extrajudicial act that cures, prevents, or minimizes a tort. The earliest tort remedies were exclusively self-help.[10] Early medieval plaintiffs, without courts on which to depend or with only a few courts of limited jurisdiction to which they could turn, often had to seek redress directly from the tortfeasor or his family, usually by force of arms.[11] This ad hoc system often led to breaches of the peace and, not uncommonly, bloodshed.[12] Exclusive reliance on self-help also gave the strongest members of society a disproportionate ability to recover[13] and led to an inequitable distribution of remedial fruits.[14] These concerns and the desire to

10. *See* W. WALSH, A HISTORY OF ANGLO AMERICAN LAW 24 (2d ed. 1932).

11. *See* J. JEUDWINE, TORT, CRIME, AND POLICE IN MEDIEVAL BRITAIN 24-25 (1917).

12. *See id.* at 25.

13. *See* 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (T. Cooley 2d ed. 1872) (one purpose of courts is to protect the weak from the strong).

14. *See* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 100 (3d ed. 1923) (before establishment of a rule of law a person would use self-help whenever he had the power and

centralize economic and judicial power caused medieval rulers to establish a system of courts that generally discouraged self-help, especially in the tort field. One commentator has described the "first business of the law, and more especially of the law of crime and tort" of fifteenth century courts as the suppression of self-help.[15]

The inability of medieval courts to stop all forms of self-help and the judicial realization that some self-help was preferable to formal legal redress spurred the development of indistinct guidelines for permissible self-help. As early as 1768 Blackstone recited rules to govern the self-help privileges of self-defense, recapture of property, and summary abatement of nuisance.[16] This equivocal development of permissible self-help activity currently is evident in the confusion with which courts approach contemporary tort self-help law. Modern courts generally are dubious of or hostile to self-help.[17] The rationale for this concern remains unchanged since medieval times; self-help frequently leads to breaches of the peace, violence, and inequities. One state supreme court justice recently commented that "[s]elf-help may well be the first step toward anarchy."[18]

This attitude of hostility, however, is not universal and some modern courts and legislatures have chosen to validate certain narrow areas of tort self-help. The individual and societal interests that self-help serves in these areas outweigh society's interest in channeling the disputes through formal legal processes. Two principal factors which indicate that self-help will be acceptable are that the available judicial remedies are somehow inadequate and the threat of a self-help remedy to society's interests in law and order is minimal.

This part of the Special Project examines some of the major

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the opportunity).

15. 3 W. HOLDSWORTH, *supra* note 14, at 278.

16. *See* 3 W. BLACKSTONE, *supra* note 13, at 2-5. Blackstone suggested the following rules to govern self-help privileges: (1) A party may repel force by force, and any breach of peace that results is changeable to the attacker; (2) a party may retake his wrongfully taken chattels but may not breach the peace in effecting such recapture; and (3) a party may remove any nuisance that causes him harm but may not commit a riot to achieve such abatement. *Id.*; *cf.* 2 W. HOLDSWORTH, *supra* note 14, at 100 (early courts allowed self-help that did not disturb the general public once the rule of law had become second nature to society).

17. *See, e.g.*, Holleman v. City of Tulsa, 79 Okla. Crim. 387, 394-95, 155 P.2d 254, 257 (1945) (court refused to allow party to take law into his own hands to abate a nuisance).

18. Duthie v. Lewiston Gun Club, 104 Idaho 751, 762, 663 P.2d 287, 298 (1983) (Bistline, J., dissenting).

areas that fall within permissible tort self-help. Section B discusses certain significant personal interests and the self-help privileges that these interests create. This section includes an analysis of the interest in bodily integrity and the privilege of self-defense, the interest in reputation and the privilege to rebut defamatory statements, and the interest in maintaining uncoerced religious beliefs and the privilege of parents to "deprogram" adult children who have joined religious cults. Section C explores the interest in ownership and possession of property and the privileges these interests create. It includes an analysis of the privilege to defend one's possession of property, the privilege to recover tortiously taken property, the privilege of a merchant to detain and investigate suspected shoplifters, and the privilege to summarily abate a nuisance. Section D examines certain instances in which courts have required the victim of a tort to attempt some type of self-help remedy as a precondition to awarding complete relief.

B. Personal Interests and Self-Help Privileges

1. Bodily Harm

One commentator describes the interest in protecting one's self from offensive bodily contact or confinement as " 'the first law of nature.' "[19] The privilege[20] of self-defense in both the tort and criminal contexts, therefore, rests upon society's interest in permitting an individual to take reasonable steps to protect his bodily integrity when there is no time to resort to formal judicial processes.[21] In tort law this privilege shields the defending person from liability for acts that ordinarily would result in liability.[22] The self-defense privilege, therefore, includes the right to commit a battery,[23] an assault,[24] or an imprisonment[25] on one's attacker. Because society places such a high value on bodily integrity, this

19. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 19, at 109 (4th ed. 1971).

20. The term "privilege" in this part of the Special Project connotes an act or type of behavior that courts recognize as legally permissible under certain conditions. The privileged conduct might serve an important interest by preventing, minimizing, or curing a tort. The same behavior, however, sometimes might be tortious or criminal because of judicial relurtance to recognize the privilege under other circumstances. *Cf.* RESTATEMENT (SECOND) OF TORTS § 10 (1965); W. PROSSER, *supra* note 19, § 16, at 98.

21. W. PROSSER, *supra* note 19, § 19, at 108.

22. Similarly, in the criminal law context, the privilege shields defenders from prosecution for their behavior. *See infra* notes 185-233 and accompanying text.

23. RESTATEMENT (SECOND) OF TORTS § 63 (1965).

24. *Id.* at § 67.

25. *Id.*

right to use repelling force exists even if the defender misjudges the degree of danger to his person, as long as the mistake is reasonable under the circumstances.[26] The threatened intrusion, however, must be imminent, and the defender may use only the amount of force reasonably necessary to ward off the attack.[27] If he uses excessive force, the defender will be liable for the harm that the excess force causes, but the defender's overzealousness does not mitigate the liability of the attacker for any torts which he commits.[28]

The loose limitations on the privilege of self-defense illustrate the favorable judicial view of this concept in the tort context. Because certain concessions to instinctive human behavior are reasonable and because effective self-help will prevent or minimize the initial tort, such favorable treatment by the courts is justifiable. Although utilization of the self-defense privilege creates a significant risk of breaching the peace, an attacker has already raised this spectre before a person must resort to self-defense. Fighting fire with fire in these situations, therefore, often is the most effective method of minimizing the total personal and societal harm that is possible. This privilege, while substantially similar to the self-defense privilege in criminal law,[29] differs significantly because it shields the defender only from liability to his attacker.[30] Tort actions by an instigator against his intended victim, however, are relatively rare.[31]

2. Reputation

The Supreme Court of the United States recently stated in *Gertz v. Robert Welch, Inc.*[32] that the "first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation."[33] Public and private individuals share this

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26. W. PROSSER, *supra* note 19, § 19, at 109.

27. RESTATEMENT (SECOND) OF TORTS §§ 63, 70 (1965).

28. *Id.* § 71.

29. *See infra* notes 185-233 and accompanying text.

30. *See* RESTATEMENT (SECOND) OF TORTS Ch. 4, Topic 1, Scope Note (1965).

31. *See* W. PROSSER, J. WADE, & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 113 (7th ed. 1982). Because of the infrequency of this type of civil litigation and the similarity of the tort privilege to its criminal law counterpart, Part III of this Special Project provides a more detailed discussion of self-defense in the criminal law context. *See infra* notes 185-233 and accompany text.

32. 418 U.S. 323 (1974).

33. *Id.* at 344. The Court found the increased efficiency of this remedy to be one reason for requiring public figures to probe the defendant's defamatory intent before allowing collection of defamation damages. *See id.*

qualified privilege of rebuttal,[34] and oral or written replies to a defamatory statement are not actionable unless they are false and exhibit "actual malice"[35]—the knowing or reckless disregard of whether the reply was false.[36] A negligent defamatory reply to an original defamatory verbal attack, therefore, is insufficient to support a cause of action.

This apparently broad self-help remedy becomes markedly more narrow in practice and often is inadequate. It may protect the rebutter from suits premised on his statements but, as the Supreme Court has acknowledged, "the truth rarely catches up with a lie"[37] and the self-help "remedy" of rebuttal often is ineffective at salvaging damaged reputations. Fruitful channels for rebuttal usually are unavailable for both public and private individuals because rebuttals rarely are "hot news" and, therefore, receive little media attention.[38] Legislative attempts to fortify this self-help remedy are tenuous; statutes requiring publication of rebuttals are highly suspect as unconstitutional restrictions on freedom of the press.[39] Additionally, one commentator has suggested that the Supreme Court has created a disincentive to using the rebuttal remedy.[40] This assertion rests on the reasoning that an attempt to rebut, particularly in a public forum, may tend to prove that the rebutter is a public figure, thereby requiring him to meet the heavy burden of showing actual malice in the original defamatory act to recover damages in a formal judicial setting.[41]

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34. *See* RESTATEMENT (SECOND) OF TORTS § 594, comment k (1977); *see also* Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 458, 546 P.2d 81, 92 (1976) (Horowitz, J., dissenting) (right to verbal self-defense of defamation); Phifer v. Foe, 443 P.2d 870, 871 (Wyo. 1968) (replies to defamatory attacks are not tortious unless the reply is false and made with actual malice).

35. Phifer v. Foe, 443 P.2d 870, 871 (Wyo. 1968).

36. *Id.*

37. Gertz v. Robert Welch, Inc., 418 U.S. at 344 n.9.

38. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46 (1971) (plurality opinion).

39. The United States Supreme Court held a Florida statute that required the publication of a rebuttal violative of the first amendment. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Although *Tornillo* applied only to the specific statute before the Court, the *Tornillo* rationale logically could extend to most mandatory rebuttal statutes. The Court did not address statutes requiring retractions. *Id.* at 258 (Brennan, J., concurring).

40. *See* Note, *In Defense of Fault in Defamation Law*, 88 YALE L.J. 1735, 1747 (1979).

41. *Id.* This Note also suggested a method to enhance the rebuttal remedy in cases concerning defamatory news reports. The author suggested that courts use an evidentiary rule which would allow the plaintiff to prove actual malice by imputing to the reporter information that the reporter could have obtained at the time of the writing. This rule would induce reporters to check carefully the accuracy of a story with its subject because courts would hold reporters responsible for knowledge of any information or inaccuracy that such a

Given these problems, the efficacy of rebuttal remains questionable, and a defamed party only cautiously should resort to it. Protracted counterattacks enhance the possibility of breaches of the peace. Zealous assertions and bitter reprisals, likewise, can subject a rebutting party to liability if the original defaming party convinces a jury that actual malice existed in the rebuttal. Rebuttal, furthermore, may be insufficient to cure financial losses that sometimes result from injuries to a person's reputation. Following the Court's opinion in *Gertz*,[42] the additional availability of judicial protections for the significant interest in personal reputations[43] makes rebuttal even less attractive. In *Gertz* the Court held that the first amendment precludes only strict liability for defamatory statements concerning private individuals.[44] Most state courts that have interpreted *Gertz* require only a showing of negligent defamation to win damages.[45] Under this standard the plaintiff's prospects of financial recompense through formal judicial proceedings are good. Recourse to the formal judicial process also arguably will disseminate the victim's attempts to restore his reputation as effectively as a simple rebuttal. Of course, self-help rebuttal still merits consideration because it allows defamed individuals to react immediately, and it supplements the judicial remedy in cases in which the court's vindication of a plaintiff's rights does not totally and effectively restore the individual's reputation. Another possible justification for continued judicial acceptance of rebuttal is the concept's role as an accommodation to human frailty, which permits the healthy venting of emotions to promote peaceful, nonadversarial subsidence of potential conflicts.[46]

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check would have produced. This checking requirement would give the subject of the story a chance before publication to exercise effective, preventative self-help by correcting any defamatory falsehoods. *See id.* at 1747-51; *see also* KARK-TV v. Simon, 280 Ark. 228, ——, 656 S.W.2d 702, 709 (1983) (Dudley, J. concurring) (favors such a rule because, *inter alia*, it would provide a viable self-help remedy).

42. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); *see supra* notes 32-33 and accompanying text.

43. *See* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (reputation is a fundamental liberty that the state cannot abridge without due process); *cf.* Paul v. Davis, 424 U.S. 693 (1976) (reputation is significant enough to deserve fourteenth amendment due process protections only when some other interest accompanies it).

44. 418 U.S. at 347.

45. *See* R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 251-53 (1980) (seventeen states, Puerto Rico, and the District of Columbia had adopted a negligence standard as of 1980).

46. One court has noted that the modern cause of action for defamation is a substitute for the older, unhealthy self-help remedy of dueling. *See* Ashton v. Commonwealth, 405 S.W.2d 562, 567 (Ky. 1965), *rev'd on other grounds*, 384 U.S. 195 (1966).

3. Uncoerced Religious Beliefs and Deprogramming

The recent growth in religious cult activity in the United States[47] has spurred the development of a new self-help remedy—deprogramming. This process entails attempts by family or friends to take an adult person[48] away from a religious cult and to use various psychological methods to turn the person away from the cult, the beliefs it espouses, and its practices.[49] The desire of family and friends to rescue the individual from the perceived evils of the cult frequently motivates such actions.[50] Judicial review of the legality of this remedy arises when, despite the deprogramming, the person returns to the cult and sues her abductors under a variety of legal theories. The tort cases that usually arise in this area include claims for assault, battery,[51] intentional infliction of emotional distress, and false imprisonment.[52] The false imprisonment cases, although infrequent, most clearly illustrate the self-help issues. Usually, parents either kidnap their adult child[53] or trick the child into accompanying them away from the cult's property.[54] The parents then take the adult child to "professional deprogrammers" or family friends who confine the child and attempt to deprogram her. This confinement clearly constitutes a prima facie case of false imprisonment because it forcibly curtails the adult child's liberty without legal right.[55]

One state supreme court recently addressed such a situation in *Peterson v. Sorlien*,[56] a case concerning a twenty-one year old

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47. *See* Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1, 6 (1977) (one to three million Americans are members of 200 to 1000 religious cults).

48. This discussion focuses on the problems attendant to deprogramming adults rather than minors.

49. For a description of the techniques that deprogrammers use, see T. PATRICK & T. DYLACK, LET OUR CHILD GO! (1976); *see also* LeMoult, *Deprogramming Members of Religious Sects*, 46 FORDHAM L. REV. 599, 603-08 (1978).

50. *See* Delgado, *supra* note 46, at 25-36 (perceived evils include destruction of family relationships, forced marriages, poor medical care, and bad living conditions).

51. *See, e.g.*, Weiss v. Patrick, 453 F. Supp. 717, 718 (D.R.I.), *aff'd mem.*, 588 F.2d 818 (1st Cir. 1978), *cert. denied*, 442 U.S. 929 (1979) (claims of assult and battery).

52. *See, e.g.*, Peterson v. Sorlien, 299 N.W.2d 123, 125 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981) (claims of false imprisonment and intentional infliction of emotional distress).

53. *See, e.g., id.* at 127 (parents kidnapped daughter from college and religious community).

54. *See, e.g.*, Weiss v. Patrick, 453 F. Supp. at 719 (parents tricked daughter into returning home using pretext of ill mother).

55. *See infra* note 109.

56. 299 N.W.2d 123 (Minn. 1980), *cert. denied*, 430 U.S. 1031 (1981).

woman's false imprisonment claim[57] against her parents and other individuals who attempted to disaffiliate her from a religious cult. The cult's use of coercive belief indoctrination techniques figured prominently in the court's decision to sustain the legality of the parents' drastic self-help deprogramming effort. The daughter proved that her parents had taken her from college where she was active in a cult and brought her to the home of a deprogrammer.[58] She also demonstrated that for the first three days of the process the deprogrammer confined her against her will.[59] By the fourth day, however, the deprogramming apparently had worked, and the daughter once again acted " 'like her old self' "[60] and voluntarily remained with her parents for an additional ten days.[61] Subsequently, however, she returned to the cult from which her parents had taken her and filed suit against her parents and the deprogrammer. Despite the evidence that the defendants detained the woman against her will, the jury concluded that no false imprisonment occurred[62] because she had voluntarily consented to the confinement.[63] The state supreme court sustained the judgment and stated that a determination of whether the jury correctly concluded that she had consented would entail consideration of the daughter's initial resistance to the deprogramming efforts "in light of her actions in the remainder" of her stay with her parents.[64] The court then stated the following:

> [W]hen parents, or their agents, acting under the conviction that the judgmental capacity of their adult child is impaired, seek to extricate that child from what they reasonably believe to be a religious or pseudo-religious cult, and the child at some juncture assents to the actions in question, limitations upon the child's mobility do not constitute meaningful deprivations of personal liberty sufficient to support a judgment for false imprisonment.[65]

Although the court expressly refused to endorse deprogramming self-help as a "preferred alternative,"[66] the court's choice of lan-

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57. The woman also sued the hired deprogrammers for intentional infliction of emotional distress. *Id.* at 125.

58. *See id.* at 127.

59. *See id.* at 128.

60. *Id.*

61. *Id.*

62. *Id.*

63. The parents seemed to have realized the strength of their daughter's case because they asked her to sign an agreement releasing them from liability for their actions before she returned to the cult's headquarters. *See id.* at 127.

64. *Id.* at 128.

65. *Id.* at 129 (footnote omitted).

66. *Id.*

guage and willingness to adopt a "relating back"[67] theory of consent clearly reflect the court's sympathy for the parent's plight.[68]

This example of a self-help remedy defies the logic of tort self-help doctrine.[69] The *Peterson* court effectively created a remedy without first identifying a legally cognizable cause of action; when adults voluntarily join religious cults, neither they nor the cults commit a legal wrong. One judge in *Peterson* correctly observed that "sympathy for parents seeking to help their 'misguided' offspring, however well-intentioned and loving their acts may be," does not justify modifying the longstanding tort law of false imprisonment.[70] The court's real motive may have been to allow a self-help remedy for situations in which the first amendment precludes state creation of a statutory response to the concerns that religious cult activity raises.[71] Such legal legerdemain, however, sanctions an especially troublesome species of tort self-help that courts should not condone. The defendants' behavior in *Peterson*, unlike other self-help remedies that this part of the Special Project discusses, does not supplement or replace formal judicial remedies. Instead, the *Peterson* court has carved out a narrow niche in traditional tort law that invites citizens tortiously to breach the peace[72] in efforts to remedy situations which neither the courts nor legislatures deem unlawful.

C. *Property Interests and Self-Help Privileges*

1. Defense of Property

The common law generally recognizes a person's privilege to use reasonable force to defend his lawful present possessory interest in realty or chattels.[73] This privilege excuses any batteries that

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67. *Id.* at 134 (Wahl, J., dissenting in part, concurring in part).

68. The court also briefly noted that "[w]ere the relationship other than that of parent and child, the consent would have less significance." *Id.* at 128.

69. *See supra* notes 11-15 and accompanying text.

70. 299 N.W.2d at 133 (Wahl, J., dissenting in part, concurring in part).

71. The first amendment free exercise clause, applicable to the states through the fourteenth amendment, prohibits states from interfering with the practice of a religion absent a compelling state interest. *See* Larson v. Valente, 456 U.S. 228 (1982) (assuming the Unification Church is a religion within the protective sphere of the first amendment); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (assuming the Krishna society is a religion within the protective sphere of the first amendment).

72. *See, e.g.*, T. PATRICK & T. DYLACK, *supra* note 49, at 96 (deprogrammers using violence on subjects), *quoted in* LeMoult, *supra* note 49, at 636 n.294.

73. *See* RESTATEMENT (SECOND) OF TORTS § 77 comment a (1965). The *Restatement* also recognizes a privilege that excuses any assaults or false imprisonments resulting from the use of force. *Id.* § 80.

the defender commits through use of reasonable force to protect his property from another person's tortious or criminal[74] act. The justifications for this self-help remedy exemplify the cardinal concerns that underlie all tort self-help mechanisms. First, the judicial mentality reflects the American societal consensus that the interest in peaceful possession and enjoyment of property is a paramount concern of an ordered society.[75] Second, judicious recourse to or threatened use of self-help privileges may serve a deterrent function by preventing or minimizing tortious and criminal behavior against property owners.[76]

Courts and legislatures, however, significantly limit this self-help privilege of protecting one's property. An essential precondition to its exercise is the apparent reasonable necessity to repel forcefully the invasion of property.[77] Courts typically construe the requirement of necessity as an imminent threat of tortious behavior.[78] Force is permissible, therefore, if a reasonable person standing in the shoes of the self-helper would think that force was necessary to defend her property against an immediate danger of unlawful or tortious trespass, entry, or carrying off.[79] Courts also usually require that owners give a warning before resorting to the self-help privilege of defending their property by force.[80]

Another principal limitation on the privilege to defend property is that any force must be reasonable under the circum-

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74. *Cf. infra* notes 73-106 and accompanying text.

75. *See* W. PROSSER, *supra* note 19, § 21, at 113.

76. *Cf. id.*

77. *See, e.g.*, Bunten v. Davis, 82 N.H. 304, 312, 133 A. 16, 20 (1926).

78. *See* RESTATEMENT (SECOND) OF TORTS § 77 comment g (1965).

79. W. PROSSER, *supra* note 19, § 21, at 114. Accordingly, a mistake concerning the necessity of using force is excusable if the mistake was reasonable under the circumstances. *See, e.g.*, Smith v. Delery, 238 La. 180, 187, 114 So. 2d 857, 859 (1959) (defendant privileged in shooting paperboy whom defendant reasonably mistook for an intruder).

80. *See* RESTATEMENT (SECOND) OF TORTS § 77 comment j (1965). The privilege to use self-help may not exist when a warning or request to desist would avoid the imminent danger because a court could hold the self-helper criminally liable for his actions. *See, e.g.*, State v. Cessna, 170 Iowa 726, 153 N.W. 194 (1915). Section 3.06(3)(a) of the *Model Penal Code* states:

> The use of force is justified under this Section only if the actor first requests the person against whom such force is used to desist from his interference with the property, unless the actor believes that:
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> i) such request would be useless; or
>
> ii) it would be dangerous to himself or another person to make the request; or
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> iii) substantial harm will be done to the physical condition of the property which is sought to be protected before the request can effectively be made.

MODEL PENAL CODE § 3.06(3)(a) (1962).

stances.[81] A common measure of reasonableness is whether the owner's force was proportionate to both the threatened property interest and the force that the person threatening the property interest used.[82] The *Restatement (Second) of Torts (Restatement)* provides that a person may use only the least amount of force that is reasonably necessary to prevent or terminate the intrusion.[83] Most courts,[84] however, agree with the *Restatement's* position that the use of deadly force[85] is never reasonable in protecting simple property rights, even if deadly force is the least amount of force necessary to prevent or end the intrusion.[86] Many state legislatures have adopted statutes that similarly restrict the use of deadly force.[87] If the interest in protecting property accompanies a self-defense interest such as protecting one's self or family from an attack, then the law may condone the use of deadly force.[88] Most

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81. W. PROSSER, *supra* note 19, § 21, at 114-17.

82. *See id.* § 21, at 115.

83. RESTATEMENT (SECOND) OF TORTS § 81 (1965). The issue of reasonableness usually is a question for the jury. W. PROSSER, *supra* note 19, § 21, at 114.

84. *E.g.*, Anderson v. Jenkins, 220 Miss. 145, 150-51, 70 So. 2d 535, 538 (1954) (no rigbt to use deadly weapon to repel invasion of property); *see* Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & ECON. 201, 218-22 (1971).

85. Deadly force or killing force means force that threatens death or serious bodily harm. *See* RESTATEMENT (SECOND) OF TORTS § 79 (1965).

86. *See id.*

87. *E.g.*, ARIZ. REV. STAT. ANN. § 13-411 (1978); CAL. PENAL CODE §§ 197, 198 (West 1970); FLA. STAT. ANN. § 782.02 (West 1976); LA. REV. STAT. ANN. § 14:19 (West 1974); N.Y. PENAL LAW § 35.20 (McKinney 1975); WIS. STAT. ANN. § 939.49 (West 1982).

88. *See* W. PROSSER, *supra* note 19, § 21, at 115; *see also* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 55, at 400. These limitations also apply to the use of mechanical devices to protect one's property. *See, e.g.*, Katko v. Briney, 183 N.W.2d 657 (Iowa 1971) (use of spring triggered gun to protect unoccupied barn unreasonable); Bohlen & Burns, *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices*, 35 YALE L.J. 525 (1926). Indeed, the use of deadly mechanical devices to protect property from theft or trespass may be criminal. *See, e.g.*, State v. Beckham, 306 Mo. 566, 267 S.W. 817 (1924) (owner of chili stand guilty of manslaughter when a loaded shotgun that he had rigged to the stand's window killed an intruder). Although some courts may acquit if a death results from the use of such a device in a situation in which the owner would have been justified in using deadly force if he had been present, W. LAFAVE & A. SCOTT, *supra*, § 55, at 401, the *Model Penal Code* completely prohibits the use of deadly mechanical devices. Section 3.06(5) states:

> The justification afforded by this Section extends to the use of a device for the purpose of protecting property only if:
> (a) the device is not designed to cause or known to create a substantial risk of causing death or serious bodily harm; and
> (b) the use of the particular device to protect the property from entry or trespass is reasonable under the circumstances, as the actor believes them to be; and
> (c) the device is one customarily used for such a purpose or reasonable care is taken to make known to probable intruders the fact that it is used.

MODEL PENAL CODE § 3.06(5) (1962).

American courts, however, reject the early English propensity to justify more readily the use of deadly force to prevent unlawful intrusions into the property owner's dwelling.[89] The judicial desire and societal interest in avoiding excessive violence apparently transcend the personal and societal need to protect the venerated sanctity of the home through self-help.

2. Recovery of Property

The privilege to recapture property complements the prospective right to protect property interests without incurring liability by providing property owners with a limited shield against tort liability for acts that they take to recover property which others wrongfully have taken.[90] This privilege, however, allows a person to use only nondeadly force.[91]

The chief historical justification for the privilege of recapture was the significance that the common law placed on physical possession as a determinate of ownership.[92] The rightful owner needed a swift and effective cure for wrongful possession lest he lose his claim to the property because of a lack of adequate proof of ownership. The remedy at law was inadequate for two reasons. First, courts rarely would compel the return of specific property, instead opting to award damages.[93] Second, the judicial process was slow and the rightful owner suffered deprivation of his property for the length of the proceedings.[94] Such prolonged disruptions in possession obviously could aggravate injuries and heighten the potential for violence.

The limitations that modern courts impose on this privilege

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89. W. LaFave & A. Scott, *supra* note 88, § 55, at 400. Under the early English view one could use deadly force to prevent an unlawful intrusion into his residence if he warned the intruder to desist and reasonably believed that such force was necessary to repel the intruder. This heightened right to protect one's home arose from the sentiment that the defense of one's home was as important as the defense of one's life. *Id.*

90. *See* W. Prosser, *supra* note 19, § 22, at 117-18. The Uniform Commercial Code has preempted this privilege to some degree, especially with respect to conditional sales. A subsequent section of this Special Project discusses the concern that attempted recapture of property may constitute criminal behavior. *See infra* notes 252-75 and accompanying text. This section explores current judicial attitudes toward recapture in the tort law context. Most of the policy and practical concerns about the scope of the recapture privilege, however, apply equally in the criminal and tort context.

91. Restatement (Second) of Torts § 106(b) (1965).

92. The common law considered physical possession a major attribute of ownership and required proof of possession to effect most transfers. Note, *The Right of Recaption of Chattels by Force*, 34 Ky. L.J. 65, 65 (1945).

93. *See id.* at 65-66.

94. *See id.*

reflect a judicial fear of the drastic nature and potential ramifications of this remedy. Courts view tortious dispossession, either by force or by fraud, as a threshold requirement for recovering property.[95] Courts also require that the attempted recapture occur immediately after dispossession or upon "fresh pursuit" of the wrongdoer.[96] A self-helping property owner who cannot meet these prerequisites runs a risk of liability because the privilege to recover property will not have attached.[97] A property owner also can use only a reasonable amount of force to recover her property, and some courts have held that force which causes a breach of the peace is unreasonable.[98] Of course, if the dispossessor forcibly resists, the person attempting recapture can exercise the privilege to meet and repel such force.[99] Finally, a court may hold the person seeking recapture liable for a mistake concerning his right to the property or the wrongfulness of the dispossession.[100]

Unlike the defense of property privilege, the right to recapture essentially gives the self-helper a license to be an aggressor.[101] Consequently, the rules that require fresh pursuit and which limit the permissible force to anything short of a breach of the peace may be the courts' method of reducing the opportunity for blatant reprisals and the likelihood of violence in recapture situations. Despite these constraints, the value of sustaining this privilege becomes questionable because of the policies that currently guide courts in the tort self-help area,[102] and the probability of violent breaches of

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95. RESTATEMENT (SECOND) OF TORTS § 101 (1965).

96. W. PROSSER, *supra* note 19, § 22, at 118; *cf.* Allen v. People, 82 Ill. 610 (1876).

97. *See* W. PROSSER, *supra* note 19, § 22, at 118. The *Restatement* requires pursuit upon discovery without unreasonable delay. RESTATEMENT (SECOND) OF TORTS § 103 & comment b (1965); *cf.* MODEL PENAL CODE § 3.06(1)(b)(ii) (1962) (in criminal prosecution, permits force in recapture even after elapse of time if the recapturer believes that his victim has no claim of right to the property).

98. *See, e.g.*, Stuyvesant v. Wilcox, 92 Mich. 233, 52 N.W. 465 (1892) (right to recapture property is subordinate to preservation of public peace); Hodgeden v. Hubbard, 18 Vt. 504, 507 (1846) (one can only retake fraudulently obtained property if it can be done without breach of the peace). The *Restatement*, however, appears to allow any reasonable force up to, but not including, deadly or killing force. RESTATEMENT (SECOND) OF TORTS § 106 (1965); *accord* Note, *supra* note 92, at 68 (arguing that all reasonable force should be permitted regardless of breaches of the peace as an accommodation to human frailty).

99. *See, e.g.*, Hodgeden v. Hubbard, 18 Vt. 504, 507 (1846).

106. *See* Estes v. Brewster Cigar Co., 156 Wash. 465, 472, 287 P. 36, 39 (1930); RESTATEMENT (SECOND) OF TORTS § 100 comment d (1965). Under the *Model Penal Code*, however, that person might not he guilty of a criminal act. *See* MODEL PENAL CODE § 3.06(1)(b)(ii) (1962).

101. *See* W. PROSSER, *supra* note 19, § 22, at 117.

102. *See supra* notes 11-15 and accompanying text.

the peace[103] seem to outweigh the societal benefits of recapture. More importantly, however, the original justifications for allowing recapture are inconsistent with current judicial practices. Courts no longer consider physical possession the principal determinant of ownership, and they increasingly are more willing to use the remedy of specific performance.[104] The present judicial remedy, therefore, does not evince the same degree of inadequacy that influenced the development of the original principle of recapture. Furthermore, self-help in situations necessitating defense of property is more justifiable than self-help in the recapture situation. In the former, self-help may avert or minimize a tort when judicial preventive measures are impossible. In recapture, however, the objective is to remedy a tort-related harm, and normal judicial proceedings can achieve this goal as effectively as self-help, yet without the additional likelihood of violence or other breaches of the peace. One possible justification for the continued recognition of privileged recapture is that such a privilege comports with fundamental notions of fairness and "the frailties of human nature."[105] The natural reaction of one who experiences the wrongful dispossession of property frequently is to attempt to regain it, and judicial imposition of liability on the wronged person for the results of such natural behavior arguably is inequitable.[106]

3. Merchant's Privilege to Detain Suspected Shoplifters

Shoplifting is one of the rare areas in which modern courts and legislatures have enlarged the scope of self-help remedy to meet changing circumstances. In the past ten years merchants suffered an estimated annual loss attributable to shoplifting that rose from $7 billion[107] to $16 billion.[108] One reason for this unchecked increase was the unenviable position with respect to shoplifters in

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103. *See, e.g.*, Hatfield v. Gracen, 279 Or. 303, 306, 567 P.2d 546, 548 (1977) (defendant in attempting to recapture stolen property wounded innocent bystander above the eye with .357 magnum birdshot).

104. The judicial remedy still may be slow, but delay alone is not a sufficient rationale for self-help because it would justify self-help in practically all cases.

105. *See* Note, *supra* note 92, at 68.

106. Recognition of the natural impulse to pursue the taker of one's property also may help explain the "fresh pursuit" requirement, since a delay obviously would allow the ire of the wronged party to subside, thereby negating the natural impulse justification. Conversation with Dean Wade, Jan. 4, 1984.

107. Comment, *Shoplifting: Protection for Merchants in Wisconsin*, 57 MARQ. L. REV. 141, 141 (1973).

108. Wall St. J., Sept. 17, 1981, at 1, col. 5.

which traditional common law placed merchants. Merchants historically could use one of three alternative methods to handle suspected shoplifters. First, the merchant could stop and search or question a suspected shoplifter at the risk of facing a false imprisonment claim by an innocent detainee.[109] Second, the merchant could gamble on being correct about the suspected shoplifter and make a citizens' arrest, but this alternative risks liability for false arrest and false imprisonment.[110] Last, the merchant could ignore the suspected shoplifter, thereby conceding the potential loss of property but avoiding any liability under a false imprisonment claim.

The first judicial attack on the merchants' dilemma occurred in *Collyer v. S.H. Kress & Co.*[111] when the California Supreme Court recognized a limited privilege for a merchant to detain on his business premises a person whom the merchant had probable cause to suspect of shoplifting.[112] This court-fashioned privilege permitted merchants to use reasonable force to detain a suspected shoplifter for a reasonable period of time to further investigate the incident.[113] Although the *Restatement* eventually adopted California's approach,[114] only a few other jurisdictions judicially have recognized this privilege.[115] State legislatures, sensitive to the concerns of their domestic businesses, subsequently have adopted statutory versions of the merchant's privilege in almost all jurisdictions that had failed judicially to recognize an immunity for

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109. False imprisonment occurs when one loses either liberty of movement or freedom to remain in the place of his lawful choice by force or threat of force. Moore v. Pay'N Save Corp., 20 Wash. App. 482, 486, 581 P.2d 159, 162-63 (1978). *See also* RESTATEMENT (SECOND) OF TORTS § 120A comment a (1965); *see, e.g.*, Zayre, Inc. v. Gowdy, 207 Va. 47, 147 S.E.2d 710 (1966) (false imprisonment liability imposed on the store owner for a good faith mistake as to shoplifting). Liability for mistakenly detaining suspected shoplifters also makes the privilege to recapture property useless in suspected shoplifting situations. *See supra* notes 90-106 and accompanying text.

110. False arrest is an unjustified arrest that subjects the arrestor to liability for false imprisonment. RESTATEMENT (SECOND) OF TORTS § 118 comment b (1965).

111. 5 Cal. 2d 175, 54 P.2d 20 (1936).

112. *See id.* at 180-81, 54 P.2d at 23.

113. *Id.* at 181-82, 59 P.2d at 24.

114. *See* RESTATEMENT (SECOND) OF TORTS § 120A (1965) (one who reasonably believes that another has tortiously taken a chattel from his premises, or has failed to make due cash payment for a chattel purchased or services rendered there, is privileged, without arresting the other, to detain him on the premises for the time necessary for a reasonable investigation of the facts).

115. *See* Note, *Torts—False Imprisonment and Arrest—Powers of a Merchant to Detain Suspected Shoplifters*, 50 N.C.L. REV. 188, 193 (1971) (by 1971 the courts of eight states had adopted merchant privileges).

merchants to detain and conduct reasonable investigations of suspected shoplifters.[116] The scope of the self-help right to detain a suspected shoplifter, whether judicially or statutorily created, varies among jurisdictions,[117] but a merchant's exposure to tort liability for stopping and questioning a suspected shoplifter clearly is much less under the current laws than it was under the traditional common law.[118]

The judicial and legislative creation of this new self-help privilege is somewhat contrary to the usually restrictive policy of courts and legislatures toward tort self-help. It is, however, an understandable accommodation to an indentifiable, costly problem and an anomalous inconsistency in the law. The old common law discouraged merchants from protecting their property and business interests.[119] The common law, therefore, effectively denied merchants privileges analogous to the rights that it recognized for the average citizen, such as the privileges to defend and recover property.[120] The modern approach to a merchant's privilege to detain shoplifting suspects serves as a logical method to combat a problem not readily amenable to a judicial remedy. The privilege does not disturb dramatically society's interest in peace and order because merchants exercise their right within the confines of their places of business. Furthermore, merchants are not likely to abuse the privilege because courts limit it by making the merchants liable in tort for overstepping reasonable bounds,[121] and because the economic disincentives of mistakenly or unnecessarily harassing customers subdue the merchants' overzealousness. A narrowly defined merchant's privilege to detain suspected shoplifters, therefore, serves a legitimate purpose in a difficult situation.

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116. *See* Comment, *supra* note 107, at 155 n.46. Interestingly, although the courts were the first to recognize the privilege to detain suspected shoplifters, the legislatures solidified the privilege. *See supra* notes 113-14 and accompanying text.

117. *See, e.g.*, Bonkowski v. Arlan's Dep't Store, 12 Mich. App. 88, 162 N.W.2d 347 (1968), *rev'd on other grounds*, 383 Mich. 90, 174 N.W.2d 765 (1970) (extending privilege beyond business premises).

118. A merchant, however, may still be liable for slander if he uses defamatory language toward a suspected shoplifter. *See* Zayre, Inc. v. Gowdy, 207 Va. 47, 50, 147 S.E.2d 710, 713 (1966) (words falsely conveying the charge of a criminal offense involving moral turpitude are slanderous per se).

119. *See supra* text accompanying notes 109-10.

120. *See supra* notes 73-106 and accompanying text.

121. This limit, of course, applies to all self-help privileges. By overstepping the bounds of the privilege, a person continues to exercise self-help, but not in a legally permissible manner.

4. Summary Abatement of Nuisance

The privilege to summarily abate a nuisance is a self-help remedy arising from property interests that has existed at least since the earliest reported cases.[122] Two types of nuisance exist.[123] A private nuisance is an unreasonable interference with a person's right to use or enjoy his real property.[124] A public nuisance, however, is an unreasonable interference with common public rights[125] such as health, safety, morality, or convenience.[126] Because the tortfeasor's awareness of the nuisance is a prerequisite to permissible summary abatement,[127] self-help abatement applies only to intentional nuisances.[128] Similarly, self-help abatement chiefly concerns private nuisance, although a limited privilege exists to abate a public nuisance if the abater has suffered "special harm."[129]

The current limitations on the privilege are not very strict. A person may abate with the use of reasonable force any nuisance that he suffers after the tortfeasor knows of the nuisance and fails to take action to cure it.[130] This privilege gives the abater the right to commit a trespass and, in some instances, the right to destroy the nuisance-creating property.[131] *Maddran v. Mullendore*[132] illustrates both of these privileges. The defendant grocery store owner

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122. *See* W. PROSSER, *supra* note 19, at § 90, at 605 & n.67, *citing* Y.B. 14 Edw. II, 422, pl. 3 (1322). Dean Prosser has described the law of nuisance as an "impenetrable jungle." W. PROSSER, *supra* note 19, § 86, at 571.

123. For an extensive discussion of the law of nuisance see Prosser, *Private Action For Public Nuisance*, 52 VA. L. REV. 997, 997-1004 (1966); Note, *Self-Help: A Viable Remedy for Nuisance? A Guide For the Common Man's Lawyer*, 24 ARIZ. L. REV. 83, 83-87 (1982).

124. W. PROSSER, *supra* note 19, § 89, at 591.

125. *Id.* § 88, at 583.

126. Note, *supra* note 123, at 84.

127. *See* RESTATEMENT (SECOND) OF TORTS § 201(c) (1965). This provision requires a demand by the aggrieved landowner that the person causing the nuisance abate it. Presumably, the nuisance is intentional if it continues after the demand to abate.

128. Tort liability for creating a nuisance can be based on the theories of intentional, negligent, or strict tort liability. W. PROSSER, *supra* note 19, § 87, at 574.

129. RESTATEMENT (SECOND) OF TORTS § 203(2) (1965). "Special harm" means an injury different in kind, not just degree, from that which the general public suffers. Burgess v. M/V Tamano, 370 F. Supp. 247, 250 (D. Me. 1973), *aff'd mem.*, 559 F.2d 1200 (1st Cir. 1977); Reynolds, *Public Nuisance: A Crime in Tort Law*, 31 OKLA. L. REV. 318, 332 (1978).

130. *See* State ex rel. Herman v. Cardon, 112 Ariz. 548, 551, 544 P.2d 657, 660 (1976); Note, *supra* note 123, at 94.

131. *E.g.*, State ex rel. Herman v. Cardon, 112 Ariz. 548, 551, 344 P.2d 657, 660 (1976) (plaintiff justified in destroying state built curb that restricted access to his property); *see* W. PROSSER, *supra* note 19, § 90, at 606; RESTATEMENT (SECOND) OF TORTS § 201 comment j (1965).

132. 206 Md. 291, 111 A.2d 608 (1955). One author has discussed this case in depth. *See* Note, *supra* note 123, at 89-90.

in *Maddran* also owned the right of way through an alley between his store and the plaintiff neighbor's residence.[133] Defendant had used the alley for years to make deliveries to his store. A locked gate blocked the alley, but plaintiff, pursuant to defendant's easement, always had provided defendant with a key.[134] The neighbor objected to defendant's increased use of the alley, especially for deliveries of meat which she claimed dripped blood. Plaintiff consequently put a new lock on the gate and refused defendant's employee access to the alley even after he had requested it. The employee then pulled the entire lock mechanism off the gate, and plaintiff, in a further effort to block the employee's access, moved a chair into the alley and sat down. After plaintiff refused to move, the employee moved the chair out of the way and, as he walked past, apparently brushed plaintiff with the meat.[135] Plaintiff brought suit for assault and battery and appealed after the trial court directed a verdict for the store owner.[136] The Maryland Court of Appeals found that defendant was reasonably within his property rights in using his easement for meat deliveries and held that the employee's destruction of the lock and trespassing upon the neighbor's property were privileged actions. Furthermore, the court found that defendant was privileged in moving plaintiff and battering her since the store owner was doing no more than abating a nuisance that had deprived him of his property rights in the alley.[137] Although plaintiff had argued that the court should have required defendant to use the judicial system to enforce his right to use the alley,[138] the court of appeals affirmed the privilege to summarily abate a nuisance because recourse to the courts will be too slow in most cases to provide effective relief.[139] The court, however, was careful to emphasize that the force which one uses to abate a nuisance must be reasonable. Thus, because plaintiff had suffered no actual physical injuries in the instant case, the trial court properly directed the verdict for defendant.[140]

The *Maddran* decision illustrates the potential limitations of self-help abatement. The abater must act reasonably and show

133. 206 Md. at 295, 111 A.2d at 609.
134. *Id.* at 296, 111 A.2d at 610.
135. *Id.*
136. *Id.* at 297, 111 A.2d at 610.
137. *Id.* at 299-300, 111 A.2d at 612.
138. *See id.* at 297, 111 A.2d at 610.
139. *Id.* at 297, 111 A.2d at 610-11.
140. *Id.* at 302, 111 A.2d at 613.

that any damage he caused was necessary to abate the nuisance.[141] Furthermore, the court likely will hold an abater liable for any personal injuries that result from his use of self-help abatement.[142] Implicit in this limitation is the court's willingness to engage in a retrospective balancing of the risk of violence that an attempted self-help abatement creates. In effect, the court uses this balancing analysis to delineate the boundaries of privileged activity; and if the court feels that the abater's self-help activity creates an unreasonable risk of violence or harm as evidenced by physical injury, for instance, the court will not extend the liability shield of privilege to the abatement.

Several factors justify the apparent judicial willingness to impose minimal guidance on the privilege of summary abatement. First, incidents involving summary abatement of nuisances usually have an essentially local flavor. The nuisance maker and the self-help abater often are neighbors, and many courts may be reluctant to encourage property owners to escalate every neighborly disagreement into a civil lawsuit.[143] Second, in many instances summary abatement could settle the problem more quickly, inexpensively, and equitably than a formal judicial proceeding.[144] Last, courts may depend upon the traditional notion of an individual's unquestioned dominance over his real property to justify the privilege of property owners to summarily abate nuisances which threaten that interest.[145] Despite these considerations, however, more definite judicial guidance is necessary in this area, in addition to good common sense, because the potential for breaches of the peace and violence in summary abatement situations is significant. If courts continue to condone summary abatement of nuisances, therefore, individuals should exercise this privilege with great care.

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141. *Accord* Fick v. Neilson, 98 Cal. App. 2d 683, 220 P.2d 752 (1950); RESTATEMENT (SECOND) OF TORTS § 201 comment o (1965).

142. *Accord* RESTATEMENT (SECOND) OF TORTS § 201 comment k (1965); W. PROSSER, *supra* note 19, § 90, at 606. Of course, if the nuisance creator instigates the violence, the abater could exercise his privilege to inflict injury in self-defense. *See supra* notes 19-28 and accompanying text.

143. *See, e.g.*, Michalson v. Nutting, 275 Mass. 232, 234, 175 N.E. 490, 491 (1931) (common sense dictates that it is preferable for an individual to protect himself from a nuisance than to subject his neighbors to possibly vexatious suits).

144. Also, a judicial remedy may be difficult to fashion for a given nuisance. *See* Boomer v. Atlantic Cement Co., Inc., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (court divided over type of remedy to award for curing pollution nuisance).

145. *See* W. PROSSER, *supra* note 19, § 90, at 605.

D. *Judicially Required Self-Help*

Judicially required self-help may seem anomalous given modern courts' hesitant, limited acceptance of tort self-help remedies. Tort law, however, sometimes requires a person to exercise self-help as a prerequisite to obtaining a full and effective judicial remedy for an injury.[146] The "avoidable consequences" or "mitigation of damages" rule is the most notable form of self help that courts require tort victims to exercise. This tort damages principle requires injured parties to make all reasonable self-help efforts necessary to minimize tort injuries.[147] Courts will not award compensatory damages for any portion of an injury attributable to the victim's failure to employ reasonable self-help to minimize the severity of the harm.[148]

Mitigation of damages, unlike the previously discussed tort self-help privileges, is a judicial mandate. It does not create a privilege to do something which, except for the circumstances, would be tortious, and it requires only that the victim do what is reasonable and legal.[149] When a self-help privilege exists, therefore, the tort victim usually may choose between exercising her right to self-help or securing a remedy through formal legal proceedings. In a mitigation of damages situation, however, the tort victim must choose between using all reasonable measures to mitigate the damages and forfeiting any judicial remedy for injuries that result from her failure to mitigate. This form of self-help reflects the law's interest in equitably apportioning liability for tortious behavior.

The logic supporting the mitigation of damages rule does not apply to the rare cases in which courts classify the failure to cure or prevent a tort by exercising a self-help privilege as a type of contributory negligence that limits or bars a judicial remedy. An

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146. Under a broad interpretation of tort "self-help," the doctrines of contributory negligence and comparative negligence are classifiable as judicially required types of self-help. Courts may deny any or part of a judicial remedy to an individual who contributes to his own injury by failing to exercise reasonable care. The law requires each individual to make reasonable efforts to avoid harm that the unreasonable behavior of others causes. *See* RESTATEMENT (SECOND) OF TORTS § 463 (1965) (contributory negligence is conduct by the plaintiff that shirks the duty to protect himself); UNIFORM COMPARATIVE FAULT ACT § 1 (1979) (negligent conduct by claimant will proportionately diminish recoverable damages).

147. *See* W. PROSSER, *supra* note 19, § 65, at 422-23. These efforts may include seeking appropriate medical attention, replacing a converted chattel, or protecting one's property from further invasions.

148. *Id.* § 65, at 423-24.

149. The mitigator, however, may be liable for the costs of any unreasonable steps taken. Also, the initial costs of reasonable mitigation measures may make mitigation infeasible for some victims. *See* RESTATEMENT (SECOND) OF TORTS § 950 comment c (1979).

Illinois appellate court recently ruled in *Mahurin v. Lockhart*[150] that the plaintiff's failure to exercise his privilege of summary abatement of a nuisance raised a question of contributory negligence for the jury to consider.[151] Plaintiff in *Mahurin* sued to recover for injuries that he sustained from the fall of a neighbor's tree limb which extended over plaintiff's property. The appellate court remanded the case with instructions that the jury should consider whether plaintiff's failure to exercise his privilege of entering his neighbor's yard and severing the limb constituted contributory negligence.[152] The court, thereby, took an ill-considered step toward converting the privilege of summary abatement of nuisance, a longstanding alternative to judicial dispute resolution, into an essential precondition to recovering damages for injuries resulting from nuisances. This holding is plainly inequitable because it places the injured party in a quandary. Actionable nuisances are prerequisites to the privilege of summary abatement, but actionable nuisances frequently are difficult to identify.[153] The *Mahurin* rationale penalizes the injured party for failing to anticipate the court's characterization of a condition as a nuisance. Even when the privilege is easier to identify, however, the victim should be able to opt for a formal judicial remedy. The *Mahurin* position also could penalize the injured party because he chose to avoid the risks of disturbance and violence that self-help remedies engender. Courts should be wary of confusing the rationales and principles of required damage mitigation and discretionary self-help measures. Such confusion illogically clouds relatively well-established tort doctrine.

III. Criminal Law

A. *Introduction*

Commenting on the role of individuals in the American criminal law system, one court observed "[t]hat no person should take the law into his own hands is so basic to our legal tradition that it needs no citation."[154] Although this remark may typify the reluc-

150. 71 Ill. App. 3d 691, 390 N.E.2d 523 (1979).

151. *Id.* at 694, 390 N.E.2d at 525.

152. *Id.*

153. *See supra* notes 122-25 and accompanying text. This difficulty is especially apparent when trees create a nuisance. *See* Michalson v. Nutting, 275 Mass. 232, 175 N.E. 490 (1931) (holding that overhanging hranches from a neighbor's tree are not a nuisance).

154. State v. Kyles, 169 Conn. 438, 443, 363 A.2d 97, 99 (1975). Courts have demonstrated their adherence to this proposition through their treatment of jury instructions. In

tance of courts and legislatures to relinquish or to share their authority over preventing crime, protecting citizens, and apprehending, prosecuting, and punishing criminals, these sentiments clearly have not precluded the exercise of self-help in criminal matters. The term "self-help" in the criminal law context denotes two distinct but often related concepts. First, many forms of self-help constitute criminal activity for which the state may prosecute and punish the self-helper.[155] Under specified circumstances, however, the law permits an individual to take identical self-help measures without incurring criminal liability. These privileges are defenses against criminal prosecution in much the same way that tort self-help privileges are shields against tort liability.[156] In fact, the criminal and tort privileges, because they share similar and well-established rationales, are often virtually coterminous.[157] Second, many individuals and groups actively participate in crime prevention, criminal arrests, punishment, and retribution. These self-help measures, whether intended to supplement or supplant the role of the state as the guardian of public safety and justice, are neither consistently lawful nor unlawful. In these situations a privilege or duty to act sometimes exists. In other situations, however, self-helpers might incur tort or criminal liability.[158] Society has a stake in every exercise of self-help that violates the law because it threatens public peace, order, and administration of justice.

State v. Puryear, 30 N.C. App. 719, 729, 228 S.E.2d 536, 543 (1976), the court found no error in the following jury instructions:

> Now, Ladies and Gentlemen of the Jury, you should not decide this case upon the basis of your own standard of morals, nor upon what you might like the law to be.
>
> (No person is justified in taking the law in his own hands. No person is justified to constitute himself the keeper of the morals of his fellowman. No person is justified in acting as judge, jury and executioner. You should not decide this case upon the basis of sympathy for anyone, nor upon the basis of anger at anyone. You should decide this case upon the basis of the law that I have given you and the facts as you find them to be.)

Cf. People v. Johnson, 83 Ill. App. 3d 586, 588, 404 N.E.2d 531, 533 (1980) (the examination of a defendent on the question whether any person has the right to take the law into his own hands was improper because the question has no bearing on the defendent's guilt).

155. The prohibitions set forth in criminal statutes typically define the boundaries of permissible self-help activity.

156. *See supra* notes 19-106 and accompanying text.

157. For example, part II, section B, subsection 1 discusses the rationale underlying the privilege of self-defense concerning tort liability. This privilege, with almost identical limitations, also exists in susbstantive criminal law. *See infra* notes 185-283 and accompanying text.

158. Some instances of self-help raise the issue of whether the acts of a private citizen might subject the state to liability or responsibility under the state action theory. See *infra* note 367 for a discussion of the exclusionary rule.

Courts and legislatures have not retracted their recognition of the legitimacy and benefit of some self-help measures.[159] They are, however, understandably more wary and critical of self-help in criminal law contexts than in tort law contexts. In addition to their concern about the heightened potential for violence that stems from self-help in criminal contexts, legislators and judges probably feel that citizens should resort first to courts and law enforcement officials before using self-help methods of remedying criminal activity. For example, a Michigan Supreme Court Justice, demonstrating this attitude, regarded the intrusion of private citizen groups into the domain of law enforcement and public safety as one of the most unfortunate phenomena of recent decades.[160]

Public concern over the increasing incidence of crime[161] amplifies the likelihood of the public's recourse to extrajudicial self-help measures to protect itself and punish criminals.[162] Coincidentally, however, the citizenry is ignoring the basic purpose of the organized judicial system by engaging in self-help. The criminal justice system evolved out of governmental and societal concern with maintaining order and preventing chaos in society.[163] The substantive and procedural structure of the modern criminal justice system is the product of decades of development and refinement aimed toward the goal of creating an effective system that the public can rely upon and trust.[164] Ironically, the complexity and com-

159. One court that discussed the applicability of a self-defense statute recently observed that "while it can be acknowledged that one element of a mature criminal justice system is to narrow the areas where individuals may resort to self-help in the infliction of punishment or the taking of life, no court has seen fit to abolish the concept of self-defense." State v. W.J.B., 276 S.E.2d 550, 556 (W. Va. 1981).

160. Johnston v. Harris, 387 Mich. 569, 577, 198 N.W.2d 409, 412 (1972) (Brennan, J., dissenting).

161. In a speech urging enactment of the Reagan Administration's proposed changes in the federal criminal justice system, former United States Attorney General William F. Smith warned that violent crime has increased 85% in the past 10 years and is now at a "crisis level." N.Y. Times, Aug. 6, 1983, at D12, col. 5.

162. *See, e.g.*, State v. Levi, 259 La. 591, 595, 250 So. 2d 751, 753 (1971).

163. State v. Higgins, 338 A.2d 159, 164 (Me. 1975).

164. See C. REMBAR, THE LAW OF THE LAND (1980), for a fascinating description of the evolution of the American legal system. Two of the most notable features of our criminal justice system that influence the public's faith in its effectiveness are open judicial trials and sentencing procedures. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980). The Court in *Richmond Newspapers* observed that the citizenry must be able to see that the judicial system is acting in its best interest. *Id.* One commentator suggested that open judicial forums placate society's urge to punish. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 6 (1961). This commentater suggested that the judicial process of accusation and determination of guilt satisfies society's urge to punish as much as the actual execution of punishment. *Id.*

prehensiveness of this procedural structure may encourage some citizens to spurn formal judicial processes.[165] Self-help in many cases, unfortunately, is antithetical to order and peace because it allows individuals to disregard legal rules and determine for themselves what is law.[166]

Courts and legislatures strongly encourage reliance on the formal judicial processes rather than self-help in several ways. Legislatures, of course, provide and maintain police forces charged with promoting public safety and protecting society against crime. Additionally, legislatures may specifically prohibit or permit self-help activity.[167] Courts may impose criminal penalties on persons who deliberately bypass adequate judicial remedies and participate in illegal self-help activities.[168] Courts also interpret and apply law in a manner that condones[169] or condemns certain self-help actions. Clearly, courts avoid establishing presumptions that authorize self-help as an alternative to the criminal justice procedures because they fear that unrestrained self-help in criminal matters could lead to anarchy.

The retributive function of sentencing convicted criminals also may suppress temptations to resort to vigilante justice. *See, e.g.*, State v. Christopher, 133 Ariz. 508, 510, 652 P. 2d 1031, 1033 (1982). Although retribution no longer is the primary objective of criminal sentencing, *see* Williams v. New York, 337 U.S. 241, 248 (1949), it remains a consideration. Furman v. Georgia, 408 U.S. 238, 394-95 (1972) (Burger, C.J., dissenting). The Supreme Court stated that:

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

Gregg v. Georgia, 428 U.S. 153, 183 (1976) (quoting Furman v. Georgia, 408 U.S. at 451).

165. *See* United States v. Fay, 323 F.2d 65, 70 (2d Cir. 1963) (Lumbard, C.J., concurring).

166. In United States v. United Mine Workers, 330 U.S. 258, 308 (1947), the Supreme Court cautioned against self-help remedies because "[i]f one man can be allowed to determine for himself what is law, every man can." *Id.* at 312.

167. The privilege of self-defense is an example of self-help that courts and legislatures expressly have permitted.

168. For example, when a truck driver drove through a fence to gain entry to a driveway that he had the right to use, the court convicted him of criminal trespass. State v. Moore, 243 Ga. 594, 255 S.E.2d 709 (1979).

169. Courts are more likely to condone peaceful self-help measures than forceful ones because they pose only a minimal threat to social order. In Wyche v. Hester, 431 F.2d 791 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971), the court held that, despite the law's general condemnation of self-help, nonforcible attempts to gain admittance to establishments that the federal civil rights acts regulate are immune from prosecution. *Id.* at 794-95. The court also remarked that the protestors must pursue a statutory remedy. *Id.* at 795.

A notable example of a court's express refusal to acknowledge the propriety of self-help retribution for criminal acts occurred in *Crumpton v. Confederation Life Insurance Co.*,[170] a recent life insurance contract dispute case. In *Crumpton*, a woman murdered the insured decedent who she claimed had raped her. The plaintiff in the insurance contest sought payment from Confederation Life under the policy's accidental death clause. The insurance company argued that the death was not accidental because the decedent should have foreseen that the woman he raped would attempt to injure him.[171] The court instructed the jury that the law did not require it to find that murder of the insured decedent was the natural result of his actions. The court observed that, although "rape and assault are violent actions, one does not necessarily anticipate that the victim will sometimes later take the law into her own hands."[172]

Self-help in the criminal context survives despite this atmosphere of general disapproval. The persistence of self-help perhaps is attributable to public frustration with and contempt for the American criminal justice system, which many people perceive as inadequate or ineffective.[173] Two recent and striking examples of strong public support for private self-help actions reflect the attitudes that some citizens harbor about police, courts, and legislatures. First, in August 1983 an elderly woman repelled her attackers in Manhattan's Port Authority bus terminal by threatening them with an unloaded .32 caliber revolver.[174] The police arrested the woman on a weapons charge, but later dropped the charges and released her. A group of private citizens rewarded the woman by replacing her confiscated weapon and awarding her five hundred dollars.[175] The second incident presents a more shocking example of public support for self-help responses to criminal acts. In a Buffalo, New York housing project, a young girl described to her father and a group of neighbors the man she said had sodomized

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170. 672 F.2d 1248 (5th Cir. 1982). The court in *Crumpton* acknowledged that the question might be closer if the woman had shot the insured decedent during the rape. *Id.* at 1255. *Cf.* State v. Graves, 252 N.C. 779, 780, 114 S.E.2d 770, 771 (1960) (the court granted a retrial of a rape case because the prosecutor told the jury that because rape was the kind of crime that naturally tempts people to take the law into their own hands, the jury ought to recommend the death penalty to dissuade people from engaging in self-help retribution).

171. Crumpton v. Confederation Life Ins. Co., 672 F.2d 1248, 1251 (5th Cir. 1982).

172. *Id.* at 1255.

173. *See, e.g.*, Birmingham Post Herald, Sept. 2, 1983, at A-7, col. 5.

174. *Id.*

175. *Id.*

her.[176] Recognizing the description, the group rushed to the alleged attacker's apartment and repeatedly stabbed, kicked, and beat the man while a television crew filmed the episode.[177] The girl's father spent one night in jail before being released on an unsecured $10,000 bond.[178] A defense fund established for the father by neighbors[179] attracted contributions from several states,[180] while Albany's mayor issued statements that supported the father's action.[181] Although support for the self-helpers in these cases was not unanimous,[182] the public responses exemplify the alarming undercurrents of support in society for self-help, lawful and unlawful, in the field of criminal activity.

The American criminal justice system and substantive criminal law contain accommodations that allow private citizens to protect themselves, maintain social order, and vent their frustrations about crime and the legal system. Criminal law, for example, gives citizens the right to defend themselves, their property, and third persons against criminal conduct.[183] The law also authorizes more active citizen participation in crime-fighting.[184]

This part of the Special Project examines judicial, legislative, and societal treatment of self-help responses to crime. Part B reviews the privileges of individual citizens to defend themselves, their property, and third persons. Part C addresses the role of private citizens in crime prevention and criminal arrests. More importantly, part C explores vigilantism, from its historical roots to con-

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176. *Street Sentence*, TIME, Aug. 15, 1983, at 15.

177. *Id.* Many people were supportive of Williams' self-help. A Buffalo bartender said that Williams "should have kept on stabbing. He did what any father would have done, and he shouldn't be charged." *Id.* Paul J. Cambria, Williams' defense attorney, stated that "[c]op after cop came up to him in the cell and congratulated him." *Id.*

178. *Id.*

179. *Id.* A Buffalo city councilman also established a defense fund for the father. Winerip, *Rape Case: Vengeance and Furor*, N.Y. Times, Aug. 1, 1983, at B1, col. 1.

180. This fund attracted contributions from Iowa, Utah, Florida, and Delaware. *Street Sentence*, TIME, Aug. 15, 1983, at 15.

181. *Id.* Buffalo Mayor James Griffin also remarked that "if a guy raped my daughter, he would have got the same thing from me." Winerip, *Rape Case: Vengeance and Furor*, N.Y. Times, Aug. 1, 1983, at B1, col. 1.

182. In the Buffalo incident, the father's prosecutor, Richard J. Arcara, asked, "[i]f you allow people to put themselves above the law, where do you draw the line?" *Street Sentence*, TIME, Aug. 15, 1983, at 15. "The reason we have a whole system of laws is to prevent vigilante-style justice. We cannot turn our system of justice to the streets." Winerip, *Rape Case: Vengeance and Furor*, N.Y. Times, Aug. 1, 1983, at B1, col. 1. Buffalo City Court Judge Wilbur P. Trammell agreed with Arcara that this "kind of anarchy is no good for anyone, especially minorities." *Street Sentence*, TIME, Aug. 15, 1983, at 15.

183. *See infra* notes 188-275 and accompanying text.

184. *See infra* notes 276-355 and accompanying text.

temporary practices. Part C also discusses citizen action groups, which are organized to discourage and combat crime. Part D examines the right to resist unlawful arrests, and the privilege to escape from police incarceration.

B. Self-Help and Criminal Liability

1. Self-Defense

(a) Historical and Theoretical Background

The privilege of self-defense is perhaps the most notable form of self-help in criminal law. The privilege allows persons to use reasonable force against an aggressor to protect themselves against tortious or criminal attacks.[185] When persons properly exercise the self-defense privilege, courts will not hold them criminally liable for their actions. Thus, self-defense may be a complete defense to murder, manslaughter, and assault and battery.[186]

Although courts in contemporary society embrace the self-defense privilege,[187] English common law did not recognize this privilege.[188] Persons who acted in self-defense risked absolute criminal liability.[189] Rulers in early societies prohibited self-defense to discourage violent self-help activity that could disrupt societal order and threaten their ruling authority.[190] As societies became more stable these concerns about self-defense dissipated. Initially, the law recognized self-defense as a "mitigating factor" in, rather than a complete defense to, the commission of a criminal act.[191]

In 1532 the English legislature codified the privilege to use deadly force in self-defense under certain circumstances.[192] This

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185. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 391 (1972).

186. *Id.; see also* J. SMITH & B. HOGAN, CRIMINAL LAW 361 (5th ed. 1983).

187. *See supra* note 159.

188. Donovan & Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A.L. REV. 435, 442 (1981).

189. *Id.; see also* Brown, *Self-Defense in Homicide from Strict Liability to Complete Exculpation*, 1958 CRIM. L. REV. 583, 583-84 (discussing examples of strict liability in early English self-defense cases).

190. *See* Donovan & Wildman, *supra* note 188, at 442; Brown, *supra* note 189, at 583. Brown argues that the elimination of self-help was essential to the establishment of social control and discipline in early societies. Early rulers had to counter the natural instinct for self-preservation with laws of strict liability to create an ordered governable society where previously "the savage law of the jungle" had prevailed. *Id.*

191. Donovan & Wildman, *supra* note 188, at 442.

192. *See* R. PERKINS, CRIMINAL LAW 998 (2d ed. 1969). The statute stated:

> That if any person or persons, at any time hereafter, be indicted or appealed of or for the death of any such evil disposed person or persous attempting to murder, rob, or burglarily to break mansion-houses, as is above said, that the person or persons so

statute, however, failed to clarify the nature and scope of the privilege to use deadly or nondeadly force in self-defense.[193] Until the early 1800's[194] the English criminal law characterized murders committed in self-defense as "excusable" homicides.[195] Unlike "justifiable homicides,"[196] which were homicides "commanded or authorized by law,"[197] an excusable homicide did not completely shield the self-helpers from criminal liability.[198] Persons who committed homicide in self-defense forfeited their goods and chattels to the King and had to apply for royal pardon.[199] The King granted royal pardons so routinely that chancellors eventually began to grant pardons without applying to the King.[200] Coincidentally, self-defense evolved into a complete defense for homicide. In 1829 England statutorily adopted this view of self-defense.[201]

Commentators attribute the contemporary prevalent acceptance of self-defense to American society's recognition that self-defense is necessary and beneficial to society.[202] Professor Robinson describes self-defensive acts as conduct that society generally condemns as harmful, but tolerates under certain circumstance to

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indicted or appealed thereof, and of the same by verdict so found and tried, shall not forfeit or lose any lands, tenements, goods or chattels, for the death of any such evil disposed person in such manner slain, but shall be thereof, and for the same fully acquitted and discharged, in like manner as the same person or persons should be if he or they were lawfully acquitted of the death of said evil disposed person or persons.

24 Hen. 8, ch. 5 (1532) (quoted in R. PERKINS, *supra* at 998 n.30).

193. *See* R. PERKINS, *supra* note 192, at 997-98. See *id.* at 998-1004 for an exhaustive discussion about the confusion that enactment of 24 Hen. 8 precipitated.

194. *Id.* at 1001 n.60. In 1829 the Parliament adopted a statute concerning the use of deadly force in self-defense. The statute stated in part "that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner, without felony." 9 Geo. chs. 4, 31, §10 (1829) (quoted in Note, *Criminal Law—Self-Defense—A Duty to Retreat, the Rule Now Hits Home—Commonwealth v. Shaffer, Mass. 326 N.E.2d 880* (1975), 10 SUFFOLK U.L. REV. 100, 102 n.11 (1975).

195. *See* R. PERKINS, *supra* note 192, at 1002.

196. *See id.* at 1001-02.

197. *See id.* at 1001. Justifiable homicides included executing a judicially imposed death sentence, killing an enemy at war, killing while apprehending a felon or preventing his escape, and killing to prevent a felony of surprise or violence. *Id.* at 1001-02.

198. *See id.* at 1001; *see also* Note, *Crimes: Justifiable Homicide; Killing in Necessary Defense of Person*, 13 CORNELL L.Q. 623, 624 n.3. (1927) (discussing the distinction between justifiable and excusable homicide).

199. R. PERKINS, *supra* note 192, at 1001; *see also* Donovan & Wildman, *supra* note 188, at 442-43; Note, *supra* note 144, at 102 n.11.

200. R. PERKINS, *supra* note 192, at 1001.

201. Note, *supra* note 194, at 102 n.11. One commentator noted that "the right to kill in self-defense was slowly established, and is a doctrine of modern rather than medieval law." Beale, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 567 (1903).

202. *See generally* Brown, *supra* note 189, at 583. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 214-15 (1982).

avoid greater societal harm.[203] According to Professor Robinson's theory, the protection of an individual's right to bodily integrity against threatened harm outweighs the risks of violence and harm that an individual causes while trying to defend himself against tortious or criminal acts.[204]

(b) The Limits of Self-Defense

An act of self-defense generally is a complete defense against criminal liability[205] when it complies with four requirements: first, the defender is not the aggressor; second, the defender reasonably believes that his adversary is threatening him with an imminent danger of unlawful bodily harm; third, the defender reasonably believes that he must use force to avoid the danger; and last, the defender uses no more force than is reasonably necessary to defend himself.[206]

The privilege of self-defense is not available to an individual who initiates a conflict with unlawful force. Because a victim lawfully may use force to fend off an aggressor, the aggressor is not in imminent danger of unlawful harm as the privilege requires.[207] If the aggressor initiates a confrontation using nondeadly force and the victim counters by using disproportionately deadly force, the aggressor lawfully may defend himself because the victim's reliance on unreasonable force is unlawful.[208] Similarly, the self-defense privilege is available to an aggressor if after he withdraws from the conflict or reasonably attempts to communicate his withdrawal to the victim, the victim continues to use harm-threatening force against him.[209]

An individual will not receive the self-defense privilege unless

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203. Robinson, *supra* note 202, at 220. Professor Robinson summarized this position by stating that *"triggering conditions* permit a *necessary* and *proportional response." Id.* at 216 (emphasis in original).

204. *Id.* at 214.

205. If a self-defender accidentally injures an innocent third-party, he will not incur criminal liability for that injury unless his conduct was reckless. W. LAFAVE & A. SCOTT, *supra* note 185, at 396.

206. *Id.* at 391. Professor Perkins states the general self-defense rule as follows: "One who is himself free from fault is privileged to use force in the effort to defend himself against personal harm threatened by the unlawful act of another if the force he uses for this purpose is not unreasonable under all the circumstances." R. PERKINS, *supra* note 192, at 995.

207. W. LAFAVE & A. SCOTT, *supra* note 185, at 394-95.

208. *Id.* at 395.

209. *See, e.g.*, State v. Goode, 271 Mo. 43, 48-49, 195 S.W. 1006, 1007 (1917); State v. Broadhurst, 184 Or. 178, 237, 196 P.2d 407, 431 (1948).

he reasonably believes that an aggressor confronted him with an imminent threat of unlawful bodily harm.[210] A threat of future harm generally will not satisfy the imminency requirement because the defender may be able to avoid the harm by resorting to a nonforceful means of protection. For example, the defender may have time to summon law enforcement officers to his aid before the threatened future harm occurs. This requirement of the self-defense privilege reinforces the notion that the value of preventing harm is more important than preserving pride and eliminating fear.

The self-defense privilege will not protect an individual unless he reasonably believes he must use force against an aggressor.[211] Under this standard juries use an objective reasonable person standard in determining whether self-defenders reasonably believed they needed to use force.[212] The Model Penal Code[213] and a few courts[214] advocate an "honest belief" standard. This standard requires only that defenders honestly believe in the necessity of using force to defend themselves regardless of whether the honest belief was reasonable. Thus, the honest belief standard favors self-defenders by shielding them from criminal liability for negligently perceiving the need to use forceful self-defense.[215]

The self-defense privilege allows individuals to use no more force than is reasonably necessary to defend themselves against an aggressor. The self-defender, in response to the aggressor's unlawful attack,[216] may use only an amount of force that relates reasona-

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210. *See, e.g.*, CONN. GEN. STAT. § 53a-19 (1979); WIS. STAT. ANN. § 939.48 (West 1982). Section 3.04(1) of the MODEL PENAL CODE also preserves the imminent harm requirement by allowing defenders to use force to defend against the unlawful attacks only "on the present occasion." MODEL PENAL CODE § 3.04(1) (1962).

211. *See, e.g.*, Beard v. United States, 158 U.S. 550 (1895).

212. R. PERKINS, *supra* note 192, at 994.

213. Section 3.04(1) of the *Model Penal Code* states in pertinent part that "the use of force upon or toward another person is justifiable *when the actor believes* that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." MODEL PENAL CODE § 3.04(1) (1962) (emphasis added).

214. *See, e.g.*, Vigil v. People, 143 Colo. 328, 353 P.2d 82 (1960); State v. Cope, 78 Ohio App. 429, 67 N.E.2d 912 (1946).

215. W. LAFAVE & A. SCOTT, *supra* note 185, at 394.

216. *Id.* at 392. Unlawful force generally means a tortious or criminal act. The *Model Penal Code* defines unlawful force as follows:

"[U]nlawful force" means force, including confinement, which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense (such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic

bly and proportionally to the amount of harm threatened and the interest he seeks to protect.[217] The law distinguishes between deadly and nondeadly force.[218] In certain situations only the use of nondeadly force may be appropriate while other more threatening and potentially dangerous situations might authorize defenders to use deadly force.[219] The self-defense privilege, however, does not permit defenders to counter nondeadly force attacks with deadly force.[220]

(c) Duty to Retreat

The self-defense privilege requirement that defenders use only the amount of force they reasonably believe is necessary to avoid injury raises the question of whether defenders have a duty to retreat from an aggressor's illegal attack and avoid using force if retreat is possible. Historically, law did not require innocent defenders to retreat from a murderous assault.[221] Rather, they could forcefully defend against the murderous assault.[222] If they became entangled in a "chance medley"—a nondeadly quarrel that suddenly turned deadly—law required them to "retreat to the wall" before forcefully defending themselves.[223] Professor Perkins asserts that a substantial minority of American courts failed to recognize the English common law distinction between application of the duty to retreat rule in murderous assault and chance medley situa-

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status) not amounting to a privilege to use the force.
MODEL PENAL CODE § 3.11(1) (1962).

217. Rohinson, *supra* note 202, at 218. For example, less force may be allowable to protect property than to protect life because society places a greater value on life.

218. The *Model Penal Code* defines deadly force as follows:

> "[D]eadly force" means force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force . . . .

MODEL PENAL CODE § 3.11(2) (1962).

219. *See, e.g.*, MODEL PENAL CODE § 3.04 (1962); CONN. GEN. STAT. § 53a-19 (1979); GA. CODE ANN. § 26-902 (Harrison 1983).

220. R. PERKINS, *supra* note 192, at 996; *see, e.g.*, People v. Williams, 56 Ill. App. 2d 159, 205 N.E.2d 749 (1965). Sikes v. Commonwealth, 304 Ky. 429, 200 S.W.2d 956 (1947); *see also* CONN. GEN. STAT. § 53a-19 (1979); GA. CODE ANN. § 26-902 (Harrison 1983); ILL. ANN. STAT. ch. 38, § 7-1 (Smith-Hurd 1972).

221. R. PERKINS, *supra* note 192, at 999-1000.

222. *Id.* at 1004.

223. *Id.* at 1000, 1004.

tions. Consequently, he believes that this misinterpretation of the retreat rule has caused a minority of jurisdictions to apply the chance medley duty to retreat rule to the innocent victims of murderous assaults.[224]

Today American courts almost universally hold that the duty to retreat is not a prerequisite to using nondeadly force in self-defense. The use of deadly force in self-defense, however, has generated more judicial disagreements.[225] The majority of American jurisdictions do not require defenders to retreat, even if they may do so safely, before using deadly force to defend themselves against what they reasonably believe to be an unlawful threatened infliction of death or serious bodily harm.[226] A substantial minority of courts,[227] and some state legislatures,[228] however, have adopted the Model Penal Code's rule of retreat[229] and require defenders to retreat before using deadly force. These jurisdictions do not require defenders to retreat if they cannot do so safely.[230] Nor do they require defenders to retreat if the attack occurs within their home or place of business.[231] These courts, however, sometimes require retreat if the assailant is a co-occupant of the defender's home or place of business.[232] Because a successful retreat prevents harm to both aggressors and defenders, a duty to retreat before the use of deadly force seems to be a desireable limitation on the privilege of self-defense.[233]

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224. *Id.* at 1004.

225. *See, e.g.*, State v. Abbott, 36 N.J. 63, 174 A.2d 881 (1961).

226. W. LAFAVE & A. SCOTT, *supra* note 185, at 395; *see, e.g.*, Brown v. United States, 256 U.S. 335 (1921); People v. Gonzales, 71 Cal. 569, 12 P. 783 (1887).

227. W. LAFAVE & A. SCOTT, *supra* note 185, at 395-96; *see, e.g.*, United States v. Peterson, 483 F.2d 1222 (D.C. Cir.), *cert. denied*, 414 U.S. 1007 (1973); King v. State, 233 Ala. 198, 171 So. 254 (1936).

228. *See, e.g.*, CONN. GEN. STAT. § 53a-19(b) (1979); HAWAII PENAL CODE § 304(5)(b) (1976); N.Y. PENAL § 35.15(2)(a) (McKinney, 1975); 18 PA. CONS. STAT. ANN. § 505(b)(2)(ii) (Purdon 1983); TEX. PENAL CODE ANN. § 9.32(2) (Vernon 1974).

229. MODEL PENAL CODE 3.04(2)(b)(ii) (1962).

230. *See, e.g.*, State v. Abbott, 36 N.J. 63, 174 A.2d 881 (1961).

231. *See, e.g.*, State v. Baratta, 242 Iowa 1308, 49 N.W.2d 866 (1951); People v. Tomlins, 213 N.Y. 240, 107 N.E. 496 (1914).

232. *See, e.g.*, State v. Grierson, 96 N.H. 36, 69 A.2d 851 (1949); *see generally* Comment, *Criminal Law: Privilege of Non-Retreat in the Home Not Applicable if Victim and Accused Co-Occupy Dwelling*, State v. Bobbitt, 415 So. 2d 724 (Fla. 1982), 35 U. FLA. L. REV. 167 (1983).

233. Although Professor Fletcher believes that more states probably will incorporate a duty to retreat into the self-defense privilege to use deadly force, he acknowledges the influence of the principle of autonomy on the laws of self-defense. G. FLETCHER, RETHINKING CRIMINAL LAW 868 (1978). In contrast to the notion that society tolerates the use of force in self-defense as a "lesser evil," *see id.* at 869, the principle of autenomy views forceful self-

2. Defense of Others and Crime Prevention

The privileges to use force to defend other persons and to prevent or terminate the commission of a crime[234] give private citizens additional lawful opportunities to enhance public safety and law enforcement.[235] As with the privilege of self-defense,[236] a rule of reasonableness governs the type and amount of force that a defender may use while exercising these two privileges.[237] The law typically permits defenders to use deadly force only in response to life-threatening aggression.[238] These privileges, for example, do not permit defenders to use deadly force merely to stop a car theft;[239] but they might permit a defender to use deadly force to prevent

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defense as the "absolute right [of the defender] to counteract aggression" against the "vital interests" of his integrity and domain. *Id.* at 860. German courts seem to have embraced the principle of autonomy in self-defense matters by rejecting the duty to retreat in virtually all cases. *Id.* at 865. The principle of autonomy has survived in American jurisprudence in cases concerning self-defense in a defender's home or place of business. *Id.* at 868. Professor Fletcher acknowledges the possibility that as American sentiments about violence change, the absolutist rationale for self-defense may gain prominence in American law. *Id.*

234. The privileges of crime prevention and defense of others overlap in many cases because a defender, by aiding the victim of an unlawful attack, also foils a crime such as assault ormanslaughter. *See* W. LAFAVE & A. SCOTT, *supra* note 185, at 406.

235. *See id.* The power to make a citizen's arrest supplements the self-helper's law enforcement repertoire. At common law, a private citizen could arrest another person in specified circumstances. *See, e.g.*, United States v. Swarovski, 557 F. 2d 40 (2d Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978); State v. Parker, 378 S.W.2d 274 (Mo. App. 1964). This power understandably is less extensive than the arrest power of a police officer since police officers receive special training in handling criminal matters and are responsible for law enforcement. *See* United States v. Hillsman, 522 F.2d 454 (7th Cir.), *cert. denied*, 423 U.S. 1035 (1975); State v. Nolan, 354 Mo. 980, 192 S.W.2d 1016 (1946); State v. Tripp, 9 N.C. App. 518, 176 S.E.2d 892 (1970). Generally, a person may arrest another person for committing a felony or misdemeanor in his presence that results in a breach of peace, People v. Olguin, 187 Colo. 34, 528 P.2d 234 (1974), Banks v. Food Town, Inc., 98 So. 2d 719 (La. App. 1957), if the arresting person acts promptly, Ogulin v. Jeffries, 121 Cal. App. 2d 211, 263 P.2d 75 (1953), or within a reasonable time after the offense, Jackson v. Superior Court, 98 Cal. App. 2d 183, 219 P.2d 879 (1950). These privileges may permit a person to arrest another person for a felony not committed in the arrestor's presence if the arrestor reasonably believed that the arrested person committed the crime. *See, e.g.*, State v. Iverson, 187 N.W.2d 1 (N.D.), *cert. denied*, 404 U.S. 956 (1971). A police officer's call for assistance in making an arrest requires citizens to respond. *See, e.g.*, Moyer v. Meier, 205 Okla. 405, 238 P.2d 338 (1951). The private citizen's authority to make an arrest forcefully in these cases is coextensive with the police officer's authority. *See, e.g.*, Commonwealth v. Fields, 120 Pa. Super. 397, 183 A. 78 (1936).

236. *See supra* notes 185-233 and accompanying text.

237. *See* W. LAFAVE & A. SCOTT, *supra* note 185, at 398, 406.

238. *Id.* at 393, 407; *see also* MODEL PENAL CODE § 3.07(5)(a)(ii) (1962) (delineating the permissible use of deadly force in preventing a crime).

239. *See, e.g.*, Commonwealth v. Emmons, 157 Pa. Super. 495, 497-98, 43 A.2d 568, 569 (1945).

commission of a dangerous felony such as rape or murder.[240] These privileges extend only to persons who reasonably believe that an aggressor imminently threatens to harm another person or commit a crime.[241] Courts will impose criminal liability[242] on defenders who do not satisfy these requirements.

Many states once limited the defense of others privilege to situations in which the defender had a personal or familial relationship with the defended person.[243] Many states today permit defenders to protect any third person.[244] Courts have disagreed, however, concerning the liability of defenders who reasonably mis-

240. *See* W. LAFAVE & A. SCOTT, *supra* note 185, at 406-07; *cf.* RESTATEMENT (SECOND) OF TORTS § 143(2) (1965) (limits the privilege to use deadly force to attempts to prevent dangerous felonies that pose a substantial risk of death or serious bodily harm to the victim).

241. W. LAFAVE & A. SCOTT, *supra* note 185, at 406; *see* MODEL PENAL CODE § 3.07(5)(a)(1962).

242. For a discussion of tort liability for similar acts, see *supra* notes 19-31 and accompanying text.

243. W. LAFAVE & A. SCOTT, *supra* note 185, at 397; *see also* MODEL PENAL CODE § 3.08 (1962).

244. W. LAFAVE & A. SCOTT, *supra* note 185 at 398; *see also* MODEL PENAL CODE § 3.05 (1962). No state, except Vermont, presently requires a person forcibly to defend another person or to prevent a crime. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 56, at 340 (4th ed. 1971); Franklin, *Vermont Requires Rescue: A Comment* 25 STAN. L. REV. 51, 51 (1972). Vermont adopted a statute that imposes a criminal fine on persons who fail to assist another "exposed to grave physical harm." VT. STAT. ANN. tit. 12, § 519 (Equity 1973) (Duty to Aid the Endangered Act). The Vermont Supreme Court, however, has held that this statute does not create a duty to intervene in fights because such intervention would imperil the intervenor. State v. Joyce, 139 Vt. 638, 641, 433 A.2d 271, 273 (1981). Despite the Vermont statute and the arguments that a moral obligation exists to render some assistance to persons in danger, other legislatures and courts have declined to transform these moral obligations into legal duties. *See* W. LAFAVE & A. SCOTT, *supra* note 185, at 183.

Public indignation aroused by infamous displays of public disregard for lawfulness and compassion eventually may fuel more vigorous efforts to create incentives and legal duties to assist fellow citizens. For example, almost twenty years ago an assailant brutally beat and stabbed to death a young woman, Kitty Genovese, "while 38 witnesses watched the killing from the safety of their apartments and failed to call police." D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. U.L. REV. 798, 799 (1975); Dowd, *20 Years After Kitty Genovese's Murder, Experts Study Bad Samaritan*, N.Y. Times, Mar. 12, 1984, at 15, col. 1. More recently, four men attacked and repeatedly raped a woman in a crowded barroom while other patrons allegedly watched and cheered. No one attempted to rescue the victim. Clausen, Press & Taylor, *The Duties of a Bystander*, NEWSWEEK, Mar. 28, 1983, at 79; Kennedy, *A Cause Celebre on Trial*, NAT'L L.J., Mar. 19, 1984, at 1, col. 2. Regrettable incidents like these cry out for some means of encouraging, if not requiring, citizens to assist imperilled victims and to help police enforce laws. Statutory rewards for rescuers and duties to assist others under specified circumstances are possible methods of accomplishing this objective. Presently, however, the privileges that immunize defenders from criminal liability, and "Good Samaritan" statutes, which shield rescuers from civil liability for rendering aid in emergency situations, *see* J. HENDERSON & R. PEARSON, THE TORTS PROCESS 399 (1975), represent the legal boundaries of encouraging or requiring self-help in the criminal context.

construe a confrontation and rush to aid a party in danger of lawful rather than unlawful bodily harm. This situation sometimes occurs when a defender observes a plainclothed police officer forcibly arresting someone or when a defender perceives as an unlawful aggressor a person who lawfully is defending himself against attack. These circumstances sometimes cause well-intentioned defenders to intervene on the behalf of the wrong person. Courts have taken two approaches to this situation.[245] Some courts hold that the defender, as an "alter ego" of the person he seeks to defend, may use defensive force against an aggressor if the attacked person justifiably could have used force to defend himself.[246] Under this rule, courts will hold the defender criminally liable for harm he caused by unknowingly intervening against a plainclothed policeman or inadvertently coming to the aid of an aggressor even though the defender's behavior was reasonable. The Model Penal Code[247] and many new state criminal codes[248] permit defenders to use force in defending another person if they reasonably believe that the person being defended is the victim of an unlawful attack.[249] Thus, courts that follow this view will not impose liability on defenders for mistakenly defending aggressors unless their belief was not reasonable.

If the expansion of the privileges to defend others and to prevent crime reflects a societal decision to encourage persons to assist fellow citizens in danger, the alter ego theory subverts this objective. The alter ego theory imposes an unusually high standard of care on defenders and threatens criminal liability for breach of this standard. Persons aware of potential exposure to criminal liability for mistakenly using force to defend the wrong person during an apparent criminal attack in many instances probably will decide that cautious nonintervention is the most reasonable course of action. The alter ego theory unfairly subjects defenders to criminal liability even if defenders believe they are acting reasonably.[250] Clearly, a privilege to defend others and to prevent crime based upon a reasonable belief standard strikes a better balance between promoting citizen participation in preventing criminal lawlessness and discouraging reckless intermeddling in criminal law

245. W. LAFAVE & A. SCOTT, *supra* note 185, at 398-99.
246. *See, e.g.*, People v. Young, 11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962).
247. MODEL PENAL CODE § 3.05 (1962).
248. W. LAFAVE & A. SCOTT, *supra* note 185, at 399 & n.8.
249. *See, e.g.*, State v. Fair, 45 N.J. 77, 211 A.2d 359 (1965).
250. W. LAFAVE & A. SCOTT, *supra* note 185, at 399.

enforcement.

3. Defense and Recapture of Property

The law permits persons to use reasonable force without incurring criminal liability to protect their property from unlawful trespass and to recapture their property[251] when another person unlawfully carries it away.[252] The scope of these privileges substantially mirrors the tort law privileges of forceful protection[253] and recapture[254] of property. These privileges protect defenders only if they reasonably perceive an immediate threat to the property and reasonably believe that using force is necessary to protect the property.[255] The Model Penal Code slightly relaxes these conditions by requiring defenders to believe honestly, rather than reasonably, that they must use force to defend or recapture their property.[256] This standard seems to reflect more accurately the privileges' practical scope because an honest belief would negate the finding of the specific intent element required for conviction of many crimes.[257] Although defenders might escape liability for one crime under the Model Penal Code's honest belief standard, they still might incur criminal liability for a lesser offense that does not require a showing of specific intent[258] or tort liability to the persons against whom they used force.[259] Thus, the full contours of the defense and recapture of property privileges are observable only against a broad range of potential civil and criminal liability.

As in tort law, an individual may use reasonable force to recapture his real or personal property immediately in response to dispossession.[260] The common law, however, prohibits the use of

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251. The *Model Penal Code* broadens this privilege by permitting defenders to prevent or to terminate unlawful conduct against property in "his possession or in the possession of another person for whose protection he acts." MODEL PENAL CODE § 3.06(1)(a) (1962).

252. W. LAFAVE & A. SCOTT *supra* note 185, at 399.

253. *See supra* notes 19-31 and accompanying text.

254. *See supra* notes 90-106 and accompanying text.

255. W. LAFAVE & A. SCOTT, *supra* note 185, at 399-400.

256. MODEL PENAL CODE § 3.06(1)(1962).

257. *Cf.* W. LAFAVE & A. SCOTT, *supra* note 185, at 399 n.2.

258. *See, e.g.*, Richardson v. United States, 403 F.2d 574 (D.C. Cir. 1968) (although the defendant was not guilty of robbery because he lacked specific intent, he was guilty of a misdemeanor for taking money he mistakenly believed was his. Edwards v. State, 49 Wis. 2d 105, 111-13, 181 N.W.2d 383, 387 (1970).

259. *See supra* notes 19-31 and accompanying text.

260. W. LAFAVE & A. SCOTT, *supra* note 185, at 402; *see also* MODEL PENAL CODE § 3.06(1)(b)(i), (ii)(1962).

force to recapture property if the recapture attempt does not occur soon after the time of dispossession.[261] Despite this common law limitation on recapture, many jurisdictions have demonstrated some tolerance for the use of force in the recapture of property through their disposition of robbery cases that arose from recovery of property and collection of debts.

Although one element of the crime of robbery is intent to steal,[262] many courts regard a bona fida claim of right to the taken property as a factor that negates the intent to steal element of robbery,[263] even though the self-helper resorted to violence or intimidation in taking the property.[264] Judicial sentiment concerning this defense in robbery prosecutions, however, varies according to the basis for the property right claim. Courts carefully scrutinize property right claims particularly in cases concerning the recovery of alleged debts.[265] Courts regularly reject the property right claim defense as justification for forcible takings of property in robbery cases in two situations: first, when the self-helper has taken more money or property of greater value than the amount allegedly owed;[266] and second, when the claim is for an unliquidated

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261. W. LAFAVE & A. SCOTT, *supra* note 185, at 402. *But see* MODEL PENAL CODE § 3.06(1)(b)(ii)(1962) (permits forcible recapture of tangible movable property if the "actor believes that the person against whom he uses force has no claim of right to the possession of the property"). Most states have statutes that prohibit forcible retaking of real property even by a person entitled to possession. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 23 (3d ed. 1964). The Model Penal Code, on the other hand, permits forcible recapture of property when an "exceptional hardship" otherwise might result. MODEL PENAL CODE § 3.06(1)(b)(ii)(1962).

262. W. LAFAVE & A. SCOTT, *supra* note 185, at 692. Robbery is a common law felony that has become a statutory felony in all American jurisdictions. *Id.* Professors LaFave and Scott describe robbery as "larceny-plus" because the crime consists of larceny's six elements—"a (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it—plus two additional requirements: (7) that the property be taken from the person or presence of the other and (8) that the taking be accomplished by force or putting in fear." *Id.*

263. *Id.* at 694; *see, e.g.*, State v. Hardin, 99 Ariz. 56, 406 P.2d 406 (1965); People v. Karasek, 63 Mich. App. 706, 234 N.W.2d 761 (1975). The court in State v. Goldsberry, 160 Kan. 138, 146, 160 P.2d 690, 695 (1945), stated:

> An intent to steal property and bona fide claim of right to take it are incompatible. One who takes property in good faith, under fair color of claim or title, honestly believing that he is its owner and has a right to its possession or that he has a right to take it, is not guilty of larceny even though he is mistaken in such belief. *Id.* (quoting 32 AM. JUR. 936, § 41).

264. *See, e.g.*, Pierce v. Commonwealth, 205 Va. 528, 138 S.E.2d 28 (1964).

265. *See, e.g.*, Commonwealth v. Sleighter, 495 Pa. 262, 266-67, 433 A.2d 469, 471 (1981).

266. *See, e.g.*, State v. Trujillo, 7 Or. App. 236, 489 P.2d 977 (1971); Crawford v. State, 509 S.W.2d 582 (Tex. Crim. 1974); Bass v. State, 151 Tex. Crim. 172, 206 S.W.2d 599 (1947).

amount.[267] In unliquidated amount cases, courts have rejected lack of specific intent defenses against robbery charges when self-helpers have forcibly collected unliquidated claims for tort damages,[268] unliquidated claims for the reimbursement of the purchase price of property when the value of that property was uncertain due to depreciation,[269] unliquidated claims for the purchase price of goods when no one had agreed upon the value of the goods,[270] and unliquidated claims for the cost of a prostitute's services.[271] These decisions exhibit a rational response to the obvious hazards of allowing one party to unilaterally assess the value of an unliquidated claim and then forcibly enforce the claim.[272] In addition, the unliquidated property right claim defense to robbery easily can mask the recapturer's true intent to steal. The potential for abuse and violence favors a judicial rather than a self-help resolution to cases concerning recapture of property to satisfy unliquidated property right claims.

Some jurisdictions are even more critical of the bona fide claim defense to robbery[273] and refuse to recognize a right to forci-

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In *Crawford*, the defendant took an amount clearly greater than the $14 over which he asserted a right to recover. Crawford v. State, 509 S.W.2d at 585.

267. *See* Thomas v. State, 165 Miss. 897, 148 So. 225 (1933).

268. People v. Poindexter, 255 Cal. App. 2d 566, 63 Cal. Rptr. 332 (1967); Henderson v. State, 149 Tex. Crim. 167, 192 S.W.2d 446 (1946).

269. Williams v. State, 317 So. 2d 425 (Miss. 1975) (sales receipt for a pair of shoes is an unliquidated claim after the buyer wears the shoes because this causes them to depreciate in value).

270. State v. Lewis, 121 Ariz. 155, 589 P.2d 29 (1978) (defendant forced the victims at gunpoint to write and cash a $200 check for a camera and calculator that the victims claimed they had not offered to buy).

271. State v. Bonsen, 128 Ariz. 95, 623 P.2d 1251 (1981).

272. One state supreme court justice, fearing abuses of permissive judicial treatment of forcible debt collection concluded: "public policy . . . unequivocally dictates that the proper forum for resolving debt disputes is a court of law, pursuant to legal process—not the street, at the business end of a lethal weapon." People v. Butler, 65 Cal. 2d 569, 577, 421 P.2d 703, 708, 55 Cal. Rptr. 511, 516 (1967) (Mosk, J., dissenting).

273. *See, e.g.*, State v. Ortiz, 124 N.J. Super. 189, 192, 305 A. 2d 800, 802 (1973); Commonwealth v. Sleighter, 495 Pa. 262, 266, 433 A.2d 469, 471 (1981).

In *Sleighter*, the Supreme Court of Pennsylvania adopted a view about self-help that one justice previously expressed in a concurring opinion in Commonwealth v. English, 446 Pa. 161, 163-64, 279 A.2d 4, 5 (1971), which states:

> In these days when crime is rampant and disobedience and defiance of Law and Order are so widespread, it would be folly to permit a person who had an adequate remedy at law to take the law into his own hands and attempt to recover his property or his property claims by force or violence or by any other violation of the law. No matter how worthy a defendant's or any person's objective may be, Law and Order must be preserved. To allow a creditor to resort to violence or force to recover a debt would be an unwarranted Procrustean stretch of a creditor's legal rights.

The *Sleighter* court's willingness to countenance only peacefnl recapture of property, based

bly recapture property despite claims of ownership in the recaptured property.[274] Expressing opposition to forcible recovery of property, one court chastised forcible property recovery as being "utterly incompatible with and [having] no place in an ordered and orderly society such as ours, which eschews self-help through violence."[275]

C. *Citizen Activism and Law Enforcement*

The public's seemingly persistent concern about crime and the ability of organized law enforcement agencies to combat crime effectively sometimes spurs private, supplementary law enforcement and crime prevention activity.[276] Citizens contribute to these adjunct crime fighting efforts individually[277] and as members of organized groups devoted to restoring and preserving safe streets and neighborhoods.[278] Although the American law enforcement structure contains areas that are appropriate for citizen participation, the state has retained the power, with few exceptions,[279] to control the process of determining guilt and innocence and executing punishment. Citizen self-help in the criminal justice system, therefore, rests on a continuum between clearly impermissible and clearly permissible activity. Citizen participation in vigilante, neighborhood watch, and "Guardian Angels" groups represent three types of citizen self-help crime fighting methods that lie in different

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upon a bona fide property right claim, *see* 495 Pa. at 267, 433 A.2d at 471, apparently ignores Pennsylvania's criminal law statutes. In 1973 Pennsylvania enacted a version of the *Model Penal Code*. Section 507(a)(2)(ii)(B) provides that the use of force against another person to recapture tangible movable property is justifiable when the actor "believes that the person against whom he uses force has no claim of right to the possession of the property." 18 PA. CONS. STAT. ANN. § 507(a)(2)(ii)(B) (Purdon 1983) (tracking MODEL PENAL CODE § 3.06(1)(b)(ii)(1962). The facts of *Sleighter* seemed to influence the court's negative attitude toward forcible self-help. In *Sleighter* a jury found the appellant guilty of second degree murder and robbery for beating to death a man who owed him an illegal gambling debt. The court expressed concern that its approval of forcible collection of an illegal obligation only would encourage the use of violence in the collection of such debts. Commonwealth v. Sleighter, 495 Pa. at 267, 433 A.2d at 471.

274. *See, e.g.*, State v. Martin, 15 Or. App. 498, 516 P.2d 753 (1973); Commonwealth v. Dombrauskas, 274 Pa. Super. 452, 459, 418 A.2d 493, 497 (1980); Elliott v. State, 2 Tenn. Crim. 418, 454 S.W.2d 187 (1970).

275. Stato v. Ortiz, 124 N.J. Super. 189, 192, 305 A.2d 800, 802 (1973).

276. *See, e.g., infra* note 300.

277. *See supra* notes 187-275 and accompanying text.

278. *See infra* notes 280-355 and accompanying text.

279. The privilege to use deadly force in specified circumstances represents one of the few instances in which self-helpers may punish a criminal physically. The privilege of self-defense necessarily encompasses the privilege to kill an attacker in self-defense. *See supra* note 219 and accompanying text.

places on this continuum.

1. Vigilantism

Law enforcement officials undoubtedly welcome the prospect of serving a community of "vigilant" citizens who watchfully and lawfully seek to detect and prevent crime. These officials, however, treat "vigilante" action, which typically occurs when citizens of a community band together and violently[280] exercise police power authority in an unlawful manner,[281] as abhorrent to the fair and predictable administration of justice.[282] Society has affixed the label "vigilantism"[283] to these extrajudicial group efforts to enforce criminal laws.

Vigilantes typically regard themselves as enforcers of justice who maintain social order and punish criminals when official law enforcement authorities cannot or will not perform their duties. This philosophy is intrinsically paradoxical because vigilante groups violate the law, often heinously, in the name of law and order.[284] Whether vigilante conduct reflects frustration with inadequacies in the criminal justice system, expedient vengeance, or fundamental disagreement with contemporary behavioral norms and criminal laws, vigilantism aggravates the social ills that crime inflicts upon society.

Professor Burrows has identified the following three historical phases of vigilantism in America: classic vigilantism, neovigilantism, and pseudo-vigilantism.[285] The initial phase—"classic vigilantism"—appeared soon after the American Revolution in the late

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280. W. BURROWS, VIGILANTE! (1976) at x:a.

281. Unlike spontaneously formed lynch mobs, vigilante groups typically have an organized structure and exist for a continuing period of time. Brown, *The American Vigilante Tradition*, in THE HISTORY OF VIOLENCE IN AMERICA 158 (H. Graham & T. Gurr eds. 1969) (Report to the National Commission on the Causes and Prevention of Violence).

282. Vinson v. State, 432 So. 2d 1, 2 (Ala. Crim. App. 1983). Vigilantism is not a uniquely American phenomenon. Vigilante groups have been observed in Spain ("Guerilleros del Cristo Rey"), Cuba ("Committees of Defense of the Revolution"), and Argentina ("Group for Action and Liberty"). W. BURROWS, VIGILANTE! 15 (1976). Brazil's "Esquadrao da Morte" (Death Squad) executes accused criminals it believes society cannot rehabilitate and should not permit to remain free before trial. The Death Squad's membership allegedly consists mainly of off-duty police officers. A 1970 poll indicated that 60% of Sao Paulo's residents favored the squad's activities. *Justica e feita*, 99 VEJA 26, 26-32 (July 29, 1970), *cited in* H. J. Rosenbaum & P. C. Sederberg, *Vigilantism: An Analysis of Establishment Violence*, 6 COMPARATIVE POLITICS 541 (1974).

283. The words "vigilante" and "vigilantism" are American words derived from the French and Latin word "vigilant." A. MADISON, VIGILANTISM IN AMERICA 1 (1973).

284. W. BURROWS, *supra* note 280, at 7.

285. *Id.* at 15-16.

1700s.[286] Classic vigilantism describes the frontier justice afforded cattle rustlers, horse thieves, murderers, thugs, and desperados. Several pragmatic law enforcement considerations that prevailed in the late 1700s, but which no longer exist in contemporary society, cast classic vigilantism in a slightly more respectable light than the vigilante practices of today. First, the isolated nature of frontier communities and the limited number of law enforcement officers available to serve these communities made the pursuit of criminals by law officers difficult and unwise. A chase by law officers in pursuit of criminals, which sometimes lasted days or weeks because of poor transportation, often endangered communities by leaving them unguarded.[287] Second, the expense of pursuing, capturing, trying, convicting, and punishing criminals often strained the economic resources of developing frontier communities. Consequently, the threat of increased taxes motivated the frontier community's biggest taxpayers to organize vigilante groups intended to effect cost efficient justice.[288] Last, rampant corruption and iguorance[289] in the frontier criminal justice system and inadequate prison facilities[290] in frontier towns prevented the justice system from earning the respect and confidence of citizens.[291] Thus, vigilantism reigned as a common method of administering criminal justice in frontier America.

Professor Burrows states that the "neovigilante" era, the second phase in the evolution of American vigilantism, began in 1856 with the establishment of the San Francisco Committee of Vigilance.[292] The Committee of Vigilance consisted of approximately 2000 to 6000 San Francisco citizens, predominantly businessmen,[293] who patrolled streets, held trials, and hung convicted defendants.[294] Neovigilantism, unlike classic vigilantism, was essentially an urban phenomenon directed at minority, ethnic, religious,

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286. *Id.*

287. *Id.* at 18.

288. *Id.* at 18-19.

289. *Id.* at 19.

290. *See* W. GARD, FRONTIER JUSTICE 275 (1949). San Francisco's jail in 1849 was a dismantled brig. *Id.* at 272. Los Angeles law enforcement authorities once chained convicted criminals to a log in an old adobe building, *id.*, and other frontier communities kept criminals in outdoor iron cages. *Id.* Frontier communities also chained prisoners to trees, stakes, stable stalls, poles, and windmills. *See id.* at 273-74.

291. W. GARD. *supra* note 290, at 275.

292. W. BURROWS, *supra* note 280, at 94.

293. *Id.* at 96.

294. *Id.* at 94-125.

and political groups.[295] Neovigilantism undoubtedly was a vehicle of prejudice, intolerance, and hatred, perhaps a reflection of cultural immaturity in urban America at that time.

Professor Burrows labels the contemporary phase of American vigilantism as pseudo-vigilantism—a composite of neovigilantism and classic vigilantism that stems from the racial strife and rising crime rates of the 1960s and 1970s.[296] For example, vigilante groups have formed in Chicano barrios and black communities to eradicate drug trafficking and addiction problems that city police were unable to control.[297] In New York City's Crown Heights district, for example, the Maccabees, "a protective patrol force," organized to protect Hasidic Jews from muggings, beatings, and robberies.[298] More disturbing examples of pseudo-vigilantism have arisen out of the activities of secret vigilante organizations such as the Ku Klux Klan,[299] and the cases which have manifested the secret intentions of law enforcement officials who abused their authority in the name of justice.[300]

Courts emphatically have condemned vigilantism because of the practice's illegal and startlingly violent nature.[301] Contemporary society probably never will condone vigilante justice, but society should heed the message that outbreaks of this behavior sometimes suggest. Although many instances of vigilantism probably reflect extremist behavior, some vigilante activity also may suggest a latent societal feeling of dissatisfaction with the operation of criminal laws and the justice system. If society ignores these messages, widespread vigilantism and community violence, in time, once again could threaten society as it did in the 1960s and 1970s.

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295. *Id.* at 16.

296. *Id.*

297. *See, e.g.*, United States v. Fernandez, 497 F.2d 730 (9th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *Chicago's Black Vigilantes*, NEWSWEEK, Sept. 27, 1971, at 75; Raspberry, *War on Drug Dealers*, Wash. Post., Feb. 9, 1972, at A15, col. 6.

298. W. BURROWS, *supra* note 280, at 256-58.

299. "[A]n absolute evil inherent in any secret order holding itself above the law '[is] the natural tendency of all such organizations . . . to violence and crime.' " United States v. Original Knights of Ku Klux Klan, 250 F. Supp. 330, 335 (E.D. La. 1965), *quoting* REPORT OF THE JOINT SELECT COMMITTEE, n.2, 463 (Minority Report).

300. In United States v. Otherson, 637 F.2d 1276 (9th Cir. 1980), a jury found several members of the United States border patrol guilty of beating, kicking, slapping, and punching an illegal alien. One officer explained their conduct as follows: "[W]e find it necessary to do things like this because the criminal justice system doesn't do anything to these assholes." *Id.* at 1278. The court stated that the "appellants can hardly have supposed their brand of vigilante 'justice' to be legal." *Id.* at 1285 n.16.

301. *See, e.g., id.*

2. Citizen Action Groups

(a) Neighborhood Watch Programs

Neighborhood watch programs currently are popular[302] forms of organized citizen participation in law enforcement that originated in colonial America.[303] Members of neighborhood watch programs contribute to crime prevention and law enforcement by serving as the eyes and ears of the police.[304] Participants in typical watch programs serve as observers of their communities and report suspicious and criminal activity to the police.[305] Unlike vigilante groups, which frequently break the law while apprehending, judging, and punishing criminals, neighborhood watch programs usually fight crime legally through less active measures.[306] The primary functions of local citizens in these programs include maintaining a very conspicuous, concerted effort to monitor neighborhood activity, and reporting crime to the police. More active watch groups conduct routine neighborhood foot and automobile patrols.[307]

Law enforcement officials, mindful of rising crime rates and their own limited crime-fighting resources, understandably welcome and encourage neighborhood watch programs that facilitate police operations.[308] Since the New York City Police Department first sponsored a neighborhood watch program in the late 1970s, the number of citizen participants has grown from 30,000 to 81,000.[309] Over two million Americans now belong to watch programs in approximately 80,000 communities.[310] Recent evaluations

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302. *See infra* note 309 and accompanying text.

303. Wilson & Kelling, *Broken Windows*, ATL. MONTHLY, Mar. 1982, at 29, 36.

304. *Our Neighbors' Keepers*, 69 A.B.A. J. 1805, 1806 (1983).

305. *Id.*

306. Wilson & Kelling, *supra* note 303, at 36. Although citizens who participate in neighborhood watch groups typically fight crime peacefully and passively, some groups have pursued this method of crime-fighting more aggressively. The leader of the citizens' patrol in Bellville, New Jersey, for example, commented that the patrol looks for outsiders and questions and follows unfamiliar visitors. "[W]e ask them their business . . . . If they say they're going down the street to see Mrs. Jones, fine, we let them pass. But then we follow them . . . to make sure they're really going to see Mrs. Jones." *Id.* This type of conduct, in addition to being inhospitable, obviously raises a greater likelihood of a breach of peace than merely reporting suspicious activity to the police.

307. *See Our Neighbors' Keepers, supra* note 304, at 1805.

308. *Cf. infra* note 309.

309. *Our Neighbors' Keepers, supra* note 304, at 1806.

310. *Id.* Another recent study estimated that over five million Americans currently are participating in neighborhood watch programs. *The Best Offense . . .*, THE WILSON QTLY. 136, 136 (Spring 1983).

of the effectiveness of these programs are encouraging. One study strongly suggested that neighborhood watch programs appreciably deter criminal activity.[311] This study found that communities which employed neighborhood watch programs achieved up to an eighty-five percent reduction in crime rates.[312]

The apparent success of neighborhood watch programs weighs strongly in favor of expanding the development of these programs throughout the country. When properly channeled, the community pride and safety consciousness that underlie these programs generate a very effective and lawful self-help crime prevention tool.[313] Law enforcement and government officials effectively can capitalize on this resource by promoting neighborhood watch programs and helping communities design and maintain these programs. Police guidance and cooperation also help to ensure that aggressive neighborhood watch programs do not trigger violence or become vigilante groups.[314]

(b) The Guardian Angels

The "Guardian Angels" is probably the most highly publicized and controversial private citizen's law enforcement organization in the United States.[315] The Angels' active and professed reliance upon lawful self-help privileges and rights to discourage crime and protect the public from criminal activity provokes hearty debates on the merits of self-help's role in crime prevention and law en-

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311. Figgie International, Inc. sponsored the study and Research and Forecasts, Inc. conducted it. *Our Neighbors' Keepers*, *supra* note 304, at 1806.

312. This study evaluated local neighborhood watch programs in Denver, Detroit, Philadelphia, Jacksonville, and Springfield, Mass., and statewide programs in California, Pennsylvania, and Texas. *Id.*

313. Richard Shapiro, director of the New York City Police Department's Urban participation programs, describes the simplicity of the psychology that underlies enthusiastic citizen participation in neighborhood watch programs: "People identify with their neighborhood. If you tell them to protect their family, there's no question. So they extend their family to the neighborhood. Nobody lives in New York City. They all live in neighborhoods." *Our Neighbors' Keepers*, *supra* note 304, at 1806. This enthusiasm is not present in all cases. A study of the effectiveness of Seattle's watch program revealed an initial burst of enthusiasm after which the crime rate decreased, but the crime rato rose again after the enthusiasm dissipated. *The Best Offense . . .*, *supra* note 310, at 137.

314. One observer commented that the common element in successful neighborhood watch programs is "the creation of an alliance among community residents, police officials, and city administrators." *For Neighborhoods the Payoff is Safety*, 69 A.B.A. J. 1805, 1806 (1983).

315. Gardener, *Guardian Angels Get a Mixed Reception*, N.Y. Times, June 21, 1981, § 11, at 1, col. 1.

forcement.[316] The Guardian Angels originated as a small group of youthful citizens who organized in 1978 to patrol the New York City subways.[317] Within four years, however, the Guardian Angels' national membership increased to over 2000,[318] and by late 1982, forty-two Guardian Angels chapters existed throughout the United States and Canada.[319] Observers of the Guardian Angel phenomenon, however, disagree over whether this rapid expansion warrants applause or concern.[320]

All new Guardian Angels' members receive intensive instruction in first aid, cardio-pulmonary resuscitation, and martial arts during the first two and one-half months of training.[321] The Guardian Angels also educates its members about relevant state and local citizen's arrest laws.[322] Upon completing this training, the Angels assign new members to patrol the streets and subways in designated neighborhoods. The organization's policy prohibits its members from carrying weapons while on patrol.[323] The members, however, do carry handcuffs, which they use when making citizen's arrests.[324] As the training in martial arts suggests,[325] the Angels' leadership allows members to use physical force while preventing a crime or apprehending a criminal.[326] This policy has caused government and law enforcement officials to express concern about the propriety and legality of the Guardian Angels' activities.[327]

The Angels' avowed purpose of preventing crime,[328] their con-

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316. *See infra* notes 332-33, 339 & 346 and accompanying text.

317. Robbins, *Effectiveness of Guardian Angels Called Uncertain*, N.Y. Times, Aug. 7, 1981, at A8, col. 2. The organization's success led to the incorporation of the group in 1981 as The Alliance of Guardian Angels, Inc., a tax exempt, nonprofit corporation. Gardener, *supra* note 315, at 1.

318. *See* Narvaez, *Jersey Rules Out Special Inquiry in "Angel" Death*, N.Y. Times, Jan. 5, 1982, at B6, col. 6.

319. McFadden, *Guardian Angels Seized in Protest at Schurz Park*, N.Y. Times, Oct. 4, 1982, at B3, col. 6.

320. Gardener, *supra* note 315, at 17.

321. Gardener, *supra* note 315, at 17. Angels' candidates must receive the recommendation of a current member. Guardian Angels must be at least 16 years old and willing to work two patrols a week. *Id.* Guardian Angels' members cannot have a criminal background. McQueeny, *"Guardian Angels" Get Mixed Reception*, N.Y. Times, Mar. 1, 1981, § 11, at 31, col. 5.

322. Gardener, *supra* note 315 at 17.

323. N.Y. Times, Dec. 19, 1982, § 23, at 3, col. 1.

324. *Id.* For a discussion of the legal ramifications of citizen's arrests, see *supra* note 235 and accompanying text.

325. *See supra* note 321 and accompanying text.

326. Gardener, *supra* note 315, at 17.

327. *See infra* notes 332 & 335-39 and accompanying text.

328. Robbins, *supra* note 317.

spicuous public presence,[329] their willingness to testify at trial, and their policy of using physical force to protect victims and arrest criminals presumably serves as an effective deterrent to criminal activity.[330] Although the Guardian Angels do not advocate lawless conduct and violence as a means of achieving law and order,[331] some government officials unfairly have labelled the Guardian Angels as a vigilante group.[332] Rather, the Guardian Angels seem to be an active and aggressive species of neighborhood watch group,[333] despite their refutation of this classification.[334]

The aggressive nature of their activities, and their willingness to use force when needed to protect crime victims and apprehend criminals deeply concerns government and law enforcement officials. Numerous commentators and government and law enforcement officials have expressed their fears that the Guardian angels may do more harm than good,[335] especially because the Angels

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329. *Id.* The Guardian Angels wear highly visible red berets and custom made T-shirts displaying the Guardian Angel insignia while on patrol. *See Our Neighbors' Keepers*, 69 A.B.A. J. 1805, 1806 (1983).

330. The comments of Jeff Ferguson, who at the age of 16 became the leader of Elizabeth, New Jersey's Guardian Angel chapter, suggest the value that the Angels' see in their willingness to report to self-help defense and crime prevention privileges to fight crime. Ferguson remarked: "You can't have a neighborhood watch group in the ghetto because a person will get a very bad reputation as a rat . . . . It's better for us to take a physical stand because the people here understand that better." Gardener, *supra* note 315, at 17.

331. The occasional instances in which members of the police have arrested and charged Guardian Angels' members with illegal activity do not qualify the Angels as a vigilante group. In several of these reported incidents, the Angels' crime prevention efforts were not grounds for the arrest. In October 1982, for example, the police arrested 24 Angels and charged them with disorderly conduct when they refused to abandon cardboard shacks that they were occupying to protest the needs of homeless people. McFadden, *supra* note 319. *See Guardian Angels in Joliet Arrested for Camping*, N.Y. Times, Sept. 2, 1983, at A10, col. 6; Goldman, *Angels Say Role Riding Subways Hinges on Public*, N.Y. Times, Feb. 17, 1981, at B7, col. 1; *Burglary is Tied to Guardian Angels*, N.Y. Times, Feb. 16, 1981, at 3, col. 2. In a few instances, the police cited Angels for violating the law in connection with performing their crime prevention duties. On February 13, 1981, police arrested ten Guardian Angels and charged them with rioting or inciting a riot as the result of a melee that erupted in a New York subway. Witnesses and melee participants disputed the circumstances of the fight involving Angels, undercover police, and subway passengers. *Eleven Subway "Angels" Held in Melee*, N.Y. Times, Feb. 14, 1981, at 26, col. 3. These isolated episodes fall far short of the type of organizational policy characteristic of vigilante groups. *See supra* notes 280-84 and accompanying text.

332. New York City's Mayor Koch, for example, referrod to the Angels as vigilantes. He later withdrew this remark, probably realizing that he had overstated his concern about the Angels' activity in New York City. *See* Cummings, *Should Subway "Angels" Get a Halo?*, N.Y. Times, Dec. 21, 1980, at E6, col. 3.

333. *See* Wilson & Kelling, *supra* note 303, at 29, 36.

334. *Id.*

335. Elizabeth, New Jersey's Mayor Dunn, for example, painted an unflattering pic-

sometimes use force in their crime-fighting activities. These critics worry primarily that the Angels will become lawbreakers themselves, use force unnecessarily, and aggravate the problem of crime in society.[336] The remarks of a president of New York City's transit police union represent a familiar refrain that Guardian Angels' critics sound: "With their lack of training in the amount of force that can be used in making a civilian arrest, they can wind up with an assault."[337] Other critics fear that the Angels could evolve into a vigilante group.[338] Consequently, many law enforcement officials wish the Guardian Angels would confine their activities to serving as "eyes and ears" of the police.[339]

The criticisms about the Guardian Angels' use of force in crime-fighting seem misdirected. The Guardian Angels, as a rule, exercise only the well-established criminal law self-help privileges of self-defense,[340] defense of others,[341] and crime prevention.[342] Members of the Guardian Angels, because of their training, probably are more familiar with the limits of lawful citizen action than are most citizens.[343] If the Guardian Angels exercise these privileges more frequently than other citizens, they naturally will exceed the bounds of these privileges more often. The criticism that Angels who intervene in criminal activity are more likely than any other intervening private citizen to use force unnecessarily or ex-

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ture of the Guardian Angels. He stated that the Guardian Angels, who established a chapter in his city, would do more harm than good. Mayor Dunn described the Angels as "nothing more than a sophisticated group of young people banded together to form a street gang. Their whole attitude can be looked on as contrary to what an American democratic society expects." Gardener, *supra* note 315, at 1.

336. A director of the New York Civil Liberties Union, for example, maintained that the American criminal justice system traditionally has emphasized delegation of law enforcement duties only to trained professionals in order to prevent volunteer, neophyte crime-fighters from breaking the law. Cummings, *supra* note 332.

337. *Id.*

338. New Haven, Connecticut Deputy Police Chief John Moriarity stated that the angels could become a vigiliante group. N.Y. Times, Dec. 19, 1982, § 23, at 3, col. 1.

339. Trenton, New Jersey's Police Chief John Prihoda, commenting on violent citizen's arrests that Guardian Angels have made, said: "If they're going to get involved physically with a perpetrator, and there's a confrontation between them, then it's a problem. If they'd just be our eyes and ears, a neighborhood watch group . . . that would be fine." Gardener, *supra* note 315. The Guardian Angels' founder and national leader, Curtis Sliwa, previously had expressed his organization's position on this issue as follows: "If we had just wanted to serve as 'eyes and ears,' we could have joined the . . . auxiliary police." Fowler, *"Angels" Refuse Auxiliary Status*, N.Y. Times, Oct. 17, 1980, at B3, col. 5.

340. *See supra* notes 205-33 and accompanying text.

341. *See supra* notes 234-50 and accompanying text.

342. *Id.*

343. *See supra* note 324 and accompanying text.

cessively, however, is baseless speculation. Critics of the Guardian Angels instead should direct their scrutiny toward the scope of the criminal law self-help privileges that the Guardian Angels use in their crime-fighting efforts.[344] If society decides to retract the scope of these privileges, or make them more difficult to comply with, society then lawfully could limit the Guardian Angels' legal authority to conduct their crime-fighting activities. This step, unfortunately, also would limit the ability of all private citizens to prevent criminal activity and to protect themselves, their property, and each other from criminal attack. The Guardian Angels' continued growth reflects, in part, the support of some state and local law enforcement officials,[345] as well as popular support. The Guardian Angels' success in the face of grave concerns about their activities also reflects the lack of legal authority of local and state officials to prohibit, disband, or penalize the Guardian Angels except when the organization's members break the law. The Guardian Angels and similar groups, therefore, probably will remain fixtures of city life. This reality suggests that state and local law enforcement authorities should make strong efforts to ensure that the Guardian Angels understand and comply with the law. These efforts probably would be the surest method of preventing the Guardian Angels from becoming a vigilante organization.

To date, government and law enforcement officials generally have not cooperated with the Guardian Angels.[346] Officials in several cities, including Chicago, Illinois and Stamford, Connecticut have resisted the group's efforts to organize local chapters.[347] In addition to the fears of violence and vigilantism associated with the Guardian Angels, two other factors have contributed to this generally uncooperative spirit. First, Guardian Angels groups, and similar groups, are most likely to organize in communities in which

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344. *See supra* notes 205-75 and accompanying text for a discussion of the following criminal law privileges: Self-defense, defense of others, defense of property, and crime prevention.

345. Bronx District Attorney Mario Merola, for example, has asserted that charges that the Guardian Angels are vigilantes are "nonsense." "The municipal and state governments have not met their obligations to provide the kind of security that's needed on the subway, in the parks or on the streets. How do we say to any citizens who want to do some good that they should not be involved?" Cummings, *supra* note 332.

346. One Guardian Angels' group leader estimated that in late 1982, local police and 38 of 40 Angels' chapters did not cooperate with each other. N.Y. Times, Dec. 19, 1982, at 3, col. 1.

347. Robbins, *supra* note 317; N.Y. Times, Dec. 29, 1982, § 23, at 3, col. 1. Some city administrations, however, have welcomed the Guardian Angels into their communities. Trenton, N.J. and New Orleans, La. are two such cities. *See* Gardener, *supra* note 315.

crime rates are high and citizens perceive that local police and law enforcement officials have been unable to control crime. Law enforcement officials in such communities, aware of citizen frustration and doubts about the quality of their crime prevention efforts, more likely feel an unhealthy sense of competition with or hostility toward aggressive citizen crime-fighting groups like the Guardian Angels.[348] Moreover, groups like the Guardian Angels probably organize in crime-ridden communities out of frustration about the inability of law enforcement officials to prevent crime, and thus, probably lack the desire to cooperate with these officials in many cases. This unfortunate scenario demonstrates the compelling need for city officials and citizen group leaders to acknowledge the mutual advantages of cooperation and to take affirmative steps toward fostering a spirit of cooperation between these groups and law enforcement officials.

The memorandum of understanding between the Guardian Angels and New York City government and law enforcement officials demonstrates the value of open discussion and cooperation between these entities.[349] The memorandum contains a promise by all parties to "work together cooperatively."[350] The Guardian Angels agreed to register with the police department, to wear official identification cards while on duty, and to notify the police department of their patrol routes.[351] The Police Department promised to appoint a liaison officer to work with the Guardian Angels and to provide the Guardian Angels with some training.[352] Similar cooperative efforts between law enforcement officials in other cities and

348. A New York Times editorial summarized this problem: "[A]wareness has grown that the police are unable to prevent much of the crime that engulfs a community. That creates fertile ground for voluntary crime fighters, but it also poisons the atmosphere for their relations with authorities." Editorial, *A Way to Remember Frank Melvin*, N.Y. Times, Jan. 5, 1982, at 14, col. 1.

349. After a lengthy dialogue, New York City officially recognized the Guardian Angels on May 29, 1981, pursuant to a memorandum of understanding that the Guardian Angels leadership, the New York City Police Department,and the New York City Transit Authority jointly executed. *Guardian Angels Get City Recognition*, N.Y. Times, May 30, 1981, at 27, col. 1.

350. *Id.*

351. *Id.* Guardian Angel founder, Curtis Sliwa expressing the Angels' policy toward cooperating with the police, stated: "We will remain independent. City officials should have the right to know where we are, when we are patrolling and who we are. They do not have the right to tell us when and where we do it." Ivins, *Police Will Train Subway "Angels" Under City Plan*, N.Y. Times, Jan. 15, 1981, at B5, col. 1. The Angels earlier had rejected New York City officials' invitation to become an auxiliary police force. Fowler, *supra* note 339, at B3, col. 5.

352. Editorial, *supra* note 348, at 14, col. 1.

local Guardian Angels chapters might allay many of the fears and misunderstandings that prevent these cities from enjoying the beneficial service that aggressive citizen action groups can provide.

The fear that official recognition of Guardian Angels groups may result in vicarious municipal liability for the injury these groups cause is the second obstacle that prevents more fruitful cooperation between the Guardian Angels and city officials.[353] Although prudent, this concern should not prevent city officials and police authorities from developing a cooperative relationship with citizen action groups. Courts are unlikely to hold that a city authorized the member of a citizen crime-fighting group to commit criminal or tortious acts merely by acknowledging the presence of or cooperating with a citizen's group that exercises lawful privileges in an effort to reduce crime.[354] In most cases official recognition of these groups would constitute nothing more than endorsing established rights and laws.[355] If a citizen's group became noted for unlawful conduct, the city should withdraw official recognition for and cease cooperating with the group. Unlawfulness, however, is not a characteristic of the Guardian Angels and the cities should not refuse to develop a fruitful relationship with the Guardian Angels and similar groups. Moreover, this relationship probably would decrease the possibility of these groups' engaging in unlawful conduct.

D. Self-Help Concerning Police and State Action

1. Resisting Unlawful Arrests and Excessive Force

Although the common law permitted persons to use reasonable force to resist unlawful arrests,[356] modern courts and legislatures

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353. *See, e.g.*, Cummings, *supra* note 332. New York City's Mayor Koch refused to give mayoral authorization to the Guardian Angels because he feared that courts might hold the city liable for any judicial claims against the group. *Id.*

354. State use of licensing laws to control and minimize the dangers of handgun use is analagous to municipal recognition of and cooperation with Guardian Angels groups concerning the vicarious liability issue. States do not incur tort liability when the owner of a hardgun injures another person with the gun even though the license granted the gun owner authorized that person to own and lawfully nse the gun. Similarly, mere municipal cooperation with a citizen's group that aggressively exercises criminal law privileges to fight crime should not subject the municipality to liability if a group member injures another person while acting criminally or tortiously.

355. See *supra* notes 205-75 and accompanying text for a discussion of the criminal law privileges that the Guardian Angels use in fighting crime.

356. *See* Queen v. Tooley, 2 Ld. Raym. 1296, 92 Eng. Reprint 349 (1709). For a discussion of the historical development of the common law right to forcibly resist unlawful arrest, *see* Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128 (1969); Comment,

have exhibited an increasing reluctance to condone forceful resistance of unlawful arrest.[357] The foundational principle of this common law privilege is that persons rightfully may resist and protect themselves from any unlawful interference with their fundamental personal liberties.[358] The modern rule governing resisting unlawful arrest modified the common law by prohibiting persons from resisting an arrest that a peace officer made while performing his duties.[359] The Model Penal Code essentially codified this approach.[360]

Several policy considerations provide a sound basis for the judicial and legislative trend toward prohibiting persons from resisting unlawful arrests. Perhaps the predominant force behind

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The Right to Resist an Unlawful Arrest: An Outdated Concept?, 3 TULSA L.J. 40 (1966). The common law rule allowing one to resist unlawful arrest is still controlling in some states. *See* White v. State, 601 S.W.2d 364 (Tex. Crim. App. 1980).

357. Courts in several states have eliminated the common law right to resist unlawful arrest. *See, e.g.*, Miller v. State, 462 P.2d 421 (Alaska 1969); State v. Lockner, 20 Ariz. App. 367, 513 P.2d 374 (1973); State v. Koonce, 89 N.J. Super. 169, 214 A.2d 428 (App. Div. 1965); City of Columbus v. Fraley, 41 Ohio St. 2d 173, 324 N.E.2d 735 (1975). Other states allow the right to resist unlawful arrest only if the resistance is without violence. *See* Lowery v. State, 356 So. 2d 1325 (Fla. App. 1978). Federal constitutional law does not give individuals a right to resist unlawful arrest. United States *ex. rel.* Kilheffer v. Plowfield, 409 F. Supp. 677 (D.C. Pa. 1976). Several state courts have upheld the constitutionality of statutes that abolished the common law right to resist lawful arrest. *See, e.g.*, People v. Curtis, 70 Cal. 2d 374, 450 P.2d 33, 74 Cal. Rptr. 713 (1969) (upholding constitutionality of CAL. PENAL CODE, § 834a (West 1970)); People v. Carroll, 133 Ill. App. 2d 78, 272 N.E.2d 822 (1971) (upholding constitutionality of ILL. REV. STAT. ch. 38, § 7-7 (1971)); State v. Ramsdell, 109 R.I. 320, 285 A.2d 399 (1971) (upholding constitutionality of R.I. GEN. LAWS § 12-7-10 (1970)).

358. *See* Columbus v. Holmes, 107 Ohio App. 391, 152 N.E.2d 301 (1958). See Chevigny, *supra* note 356, at 1136-47 for additional justifications offered to explain the common law right to use force in resisting unlawful arrest.

359. *See* People v. Burns, 18 Cal. Rptr. 921 (1961) (one's constitutional rights are not violated by requiring one to refrain from forcibly resisting any arrest made by a peace officer); Lowery v. State, 356 So.2d 1325 (Fla. App. 1978) (one cannot forcibly resist even an unlawful arrest made by a peace officer); Moore v. Chicago Police Bd., 41 Ill. App. 3d 343, 355 N.E.2d 745, (1976) (one cannot resist an arrest made by a known peace officer even if the arrest is unlawful and without a warrant or probable cause); City of Independence v. Elder, 653 S.W.2d 393 (Mo. App. 1983) (one cannot resist an unlawful arrest made by a person empowered with police authority); State v. Lawrence, 142 N.J. Super 208, 361 A.2d 69, (1976) (one cannot forcibly resist arrest if he knows or has good reason to know that the arrestor is a peace officer engaged in performance of his duties). The justification for this restriction of the right to resist unlawful arrest is that citizens should be law abiding and should accept duly constituted authority even though law enforcement officials sometimes may abuse this authority. These obligations are conducive to maintenance of an orderly society in which an aggrieved person can resort to redress by peaceful means. *Burns*, 18 Cal. Rptr. at 923.

360. MODEL PENAL CODE § 3.04(2)(a)(i) (1962). Section 3.04(2)(a)(i) prohibits persons from using force to resist, lawful or unlawful arrest, if they know that the arrestor is a peace officer.

this trend is the recognition of the dangers inherent in the exercise of this privilege and the numerous effective options and safeguards available to arrested persons. Forcible resistance to arrests threatens several undesirable results. First, it could cause violent confrontations that could injure arrestors, arrestees, and innocent bystanders,[361] and disrupt civil order.[362] Because arresting police officers probably will counter forcible resistance to arrest by using additional force, the threat of a relatively innocuous arrest escalating into a violent, injury causing confrontation is particularly acute.[363] This strong propensity for harm led one court to conclude that the "[u]se of self-help to prevent unlawful arrest presents too great a threat to the safety of individuals and society to be sanctioned."[364]

A second danger inherent in recognizing the privilege to forcibly resist unlawful arrests is that it entrusts the determination of lawfulness to a layperson acting in a threatening situation. The question whether an arrest is unlawful is not an issue that the parties to an arrest can best decide while engaged in a heated street confrontation.[365] Rather, judicial consideration of this issue probably would yield a more proper and peaceful result in most cases. Last, giving citizens a broad right to use force in publicly resisting arrest arguably would cast a public image of law enforcement officials as inadequate and disorderly law enforcers. This image, even if inaccurate, would damage public confidence in law enforcement officials and impair their effectiveness at fighting crime.

The judicial and legislative trend toward prohibiting and severely limiting the common law privilege to use force in resisting an unlawful arrest also has evolved because new remedies, which were unavailable at common law, now offer substantial reparation to victims of unlawful arrests. Unlawful arrest victims now can obtain civil damages, injunctions, or administrative remedies within a reasonable time after unlawful arrests.[366] Procedural safegnards

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361. State v. Koonce, 89 N.J. Super. 169, 214 A.2d 428 (App. Div. 1965).

362. Ivester v. State, 398 So. 2d 926 (Fla. App. 1981); State v. Thomas, 262 N.W.2d 607, 611 (Iowa 1978).

363. Miller v. State, 462 P.2d 421 (Alaska 1969). One commentator observed that the right to resist unlawful arrests has little practical utility because the exercise of this right frequently results in an arrest being made because of the individual's resistance. Comment, *The Right to Resist Unlawful Arrests*, 7 NATURAL RESOURCES J. 119, 125 (1967).

364. Ford v. State, 538 S.W.2d 633, 635 (Tex. Crim. App. 1976).

365. *Id.*; State v. Koonce, 89 N.J. Super, 169, 214 A.2d 428 (App. Div. 1965).

366. *See* Chevigny, *supra* note 356, at 1147; Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). One court noted that the common

and constitutional rights, such as the rights to post bond, to counsel, and to prompt arraignment, and application of the exclusionary rule,[367] substantially alleviate the harm that unlawful arrest

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law rule developed in a time when self-help was a more necessary remedy to resist intrusions upon an individual's freedom:

> [It] was developed largely during a period when most arrests were made by private citizens, when bail for felonies was usually unattainable, and when years might pass before the royal judges arrived for a jail delivery. Further, conditions in English jails were then such that a prisoner had a excellent chance of dying of disease before trial.

Fields v. State, 178 Ind. App. 350, 354, 382 N.E.2d 972, 976 (1978) (quoting Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942)).

367. The exclusionary rule requires state and federal courts to exclude at trial any evidence against a defendant and other evidence derived therefrom that government officers or their civilian deputies or agents acquired in violation of fourth amendment standards. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Ingber, *Defending the Citadel: The Dangerous Attack of "Reasonable Good Faith,"* 36 VAND. L. REV. 1511, 1512 (1983); Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transaction*, 35 VAND. L. REV. 501, 501 n.1 (1982). In Burdeau v. McDowell, 256 U.S. 465 (1921), the United States Supreme Court decisively limited the application of the exclusionary rule to evidence obtained by government agents. *Id.* at 467. The Court stated that,

> the Fourth Amendment protects only against searches and seizures which are made under governmental authority, real or assumed, or under color of such authority. If papers have been seized, even though wrongfully, by one not acting under color of authority, and they afterwards come to the possession of the Government, they may be properly used in evidence.

Id. Thus, *Burdeau* permits prosecutors to use in criminal prosecutions evidence seized by private citizens even though the citizens might have committed a crime to obtain the evidence. *See* Walter v. United States, 447 U.S. 649, 656 (1981); Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971). Today, every federal circuit court has reaffirmed the *Burdeau* philosophy. *See, e.g.*, United States v. Andrini, 685 F.2d 1094 (9th Cir. 1982); United States v. Shuckahosee, 609 F.2d 1351 (10th Cir. 1979), *cert. denied*, 445 U.S. 919 (1980); United States v. Gibbons, 607 F.2d 1320 (10th Cir. 1979); United States v. Keuylian, 602 F.2d 1033 (2d Cir. 1979); United States v. Edwards, 602 F.2d 458 (1st Cir. 1979); United States v. Bomengo, 580 F.2d 173 (5th Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979); United States v. McDaniel, 574 F.2d 1224 (5th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979). Except for Montana, *see* Duran v. Buttrey Food, Inc., 616 P.2d 327, 333 (Mont. 1980) (construing 1972 MONT. CONST. art. II, §11), all state courts follow the *Burdeau* construction of the exclusionary rule in cases concerning evidence obtained in searches made by private citizens. *See* Note, *Intrusion, Exclusion, and Confusion*, 41 MONT. L. REV. 281, 281 (1980); *see, e.g.*, M.J. v. State, 399 So. 2d 996 (Fla. App. 1981); State v. Boynton, 58 Hawaii 530, 574 P.2d 1330 (1978); People v. Sellars, 93 Ill. App. 3d 744, 417 N.E.2d 877 (1981); State v. Bakker, 262 N.W.2d 538 (Iowa 1978); State v. Keyser, 117 N.H. 45, 369 A.2d 224 (1977); People v. Adler, 50 N.Y.2d 730, 409 N.E.2d 888, 431 N.Y.S.2d 412 (1980), *cert. denied*, 449 U.S. 1014 (1980).

The Supreme Court has indicated clearly that deterrence of police misconduct in obtaining evidence is the primary function of the exclusionary rule. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1965); Linkletter v. Walker, 381 U.S. 618 (1960); *see also* Ingber, *supra* note 367, at 1517. Consequently, a pervasive rationale underlying courts' refusals to exclude evidence that private citizens have obtained unlawfully, in addition to the absence of police conduct, is that the exclusion of the evidence effectively would not deter the private conduct. *See, e.g.*, Dyas v. Superior Court, 11 Cal. 3d 628, 632, 522 P.2d 674, 676 (1974). The exclusionary rule probably would be ineffective against private action for two reasons. First, the desire to obtain evidence sufficient to secure a criminal conviction usually does not

motivate private citizens to obtain evidence unlawfully. Second, many private citizens are unfamiliar with the law, and consequently, unaware of the exclusionary rule. *See* W. LAFAVE, SEARCH AND SEIZURE § 1.6 at 112-13 (1978). Many courts and commentators further assert that available criminal and civil sanctions against individuals who unlawfully obtain evidence for a criminal prosecution are adequate deterrents to unlawful private searches and seizures. *See id.* at 113 n.21; *see generally* Recent Development, *Evidence Illegally Obtained by Private Persons Held Admissible in State Civil Action*, 63 COLUM. L. REV. 168, 173 (1963). Additional reasons for not suppressing privately seized evidence include the fears that such a policy would give defendants too much protection or cause citizens to take more drastic self-help measures against criminal activity out of frustration with the criminal justice system. Horvitz v. State, 433 So. 2d 545, 548 (Fla. App. 1983). Proponents of an expanded exclusionary rule argue that by admitting tainted evidence at trial, courts are actually encouraging vigilantism. *See* People v. Superior Court, 157 Cal. Rptr. 716, 730 n.11, 598 P.2d 877, 890 n.11 (1979) (Mosk, J., dissenting); State v. Van Haele, 649 P.2d 1311, 1316 (Mont. 1982) (Sheeby, J., concurring). *But see* Gunter v. State, 257 Ind. 524, 275 N.E.2d 810, 812 (1971).

Evidence obtained in searches by private citizens, however, may be inadmissible under the exclusionary rule if the citizens acted as agents or instruments of the state. *See, e.g.*, United States v. Coleman, 628 F.2d 961 (6th Cir. 1980); Cash v. Williams, 455 F.2d 1227, 1230-32 (6th Cir. 1972); Burdeau v. McDowell, 256 U.S. 465, 467 (1921). Thus, courts will exclude evidence obtained by a private citizen if the citizen received encouragement or direct assistance from government officials in obtaining the evidence. *See, e.g.*, United States v. Gumerlock, 590 F.2d 794 (9th Cir.), *cert. denied*, 441 U.S. 948 (1979); OKC Corp. v. Williams, 461 F. Supp. 540 (N.D. Tex. 1978); People v. Barber, 94 Ill. App. 3d 813, 419 N.E.2d 71 (1981); *but see* United States v. Coleman, 628 F.2d 961 (6th Cir. 1980); United States v. Keuylian, 602 F.2d 1033 (2d Cir. 1979); United States v. Lamar, 545 F.2d 488 (5th Cir.) *cert.denied*, 430 U.S. 959 (1977) (acted pursuant to an express statutory endowment of governmental purpose); United States v. Shuckahosee, 609 F.2d 1351, 1354 (10th Cir. 1979), *cert. denied*, 445 U.S. 919 (1980) (acted after being recruited and compensated by government officers); United States v. Walter, 652 F.2d 788, 792 (9th Cir. 1981); State v. Boynton, 58 Hawaii 530, 574 P.2d 1330 (1978); *but see* United States v. Vlen, 479 F.2d 467 (3d Cir. 1973), *cert. denied*, 419 U.S. 901 (1974), or was in other ways an agent of the state. *See, e.g.*, United States v. Dansberry, 500 F. Supp. 140 (N.D. Ill. 1980) (arrest by police officer outside his jurisdiction is state action); State v. Carter, 267 N.W.2d 385 (Iowa 1978); State v. Filipi, 297 N.W.2d 275 (Minn. 1980); Moore v. State, 562 S.W.2d 484 (Tex. Crim. App. 1978); *but see* People v. Leutkemeyer, 74 Ill. App. 3d 708, 393 N.E.2d 117 (1979), *cert. denied*, 446 U.S. 938 (1980).

The varying judicial conclusions regarding the presence of state action in cases concerning private citizen searches reflect the case-by-case approach courts necessarily apply in these situations. Both the belief of courts about the function of the exclusionary rule and an empirical analysis of instances of this form of self-help may influence the determination of courts about whether the nexus between the state and private citizens presents a sufficient foundation for applying the exclusionary rule to unlawfully obtained evidence. If available criminal and civil sanctions fail to deter widespread private vigilante group seizures of evidence, some courts might grow more inclined to find state action and exclude unlawfully obtained evidence more often. Similarly, if possible, some state courts might follow the Montana court's lead by applying the exclusionary rule to unlawful private searches and seizures. *See* State v. Helfrich, 183 Mont. 484, 600 P.2d 816 (1979). Furthermore, some courts, by embracing the exclusionary rule's preservation of judicial integrity function, *see* Mapp v. Ohio, 367 U.S. 643, 659 (1961), simply might extend the rule's application to evidence obtained in unlawful private searches as an imperative means of keeping criminal proceedings free from the taint of unlawfulness. Courts should reserve these expansions of the exclusionary rule's application until and unless the courts ascertain that presently ex-

causes individuals.[368]

Despite the blossoming judicial hostility toward the right to resist unlawful arrest, courts continue to sustain the right of individuals to use reasonable force in resisting a police officer's use of excessive force in making lawful and unlawful arrests;[369] individuals may invoke the privilege of self-defense to justify resisting a police officer's use of excessive force to make an unlawful arrest.[370] The drafters of the *Restatement (Second) of Torts*, in commenting about the privilege, emphasized that "the [citizen] may defend himself by the use of such force, not because its use is necessary to protect him from the unlawful arrest, but because it is the only way in which he can protect himself from death or serious bodily harm."[371] One court aptly articulated the rationale for this rule as follows: "[A]lthough liberty can be restored through legal process, life and limb can't be repaired in the court room."[372] Thus, the right of individuals to defend themselves against unwarranted infliction of physical injury during unlawful arrests outweighs the threat of "intolerable disorder" that accompanies this form of self-help.[373] Courts have limited the right of individuals to use the self-defense privilege in this context to situations in which no alternative action will protect the arrested person. If arrested individuals know they can avoid an arrester's excessive use of force by submitting to the arrest, the self-defense privilege does not authorize them to resist the arrest forcibly.[374] This sensibly limited self-de-

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isting civil and criminal sanctions are not effective deterrents to increasing incidence of unlawfully obtained evidence against criminal defendants by private citizens.

368. *See* State v. Koonce, 89 N.J. Super 169, 214 A.2d 428 (App. Div. 1965) (self-help is no longer necessary in this era of constantly expanding safeguards for the accused in criminal trials); Ford v. State, 538 S.W.2d 633, 635 (Tex. Crim. App. 1976).

369. *See* State v. Nunes, 546 S.W.2d 759 (Mo. App. 1977); State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

370. *See* State v. Hernandez, 651 S.W.2d 187 (Mo. App. 1983).

371. RESTATEMENT (SECOND) OF TORTS § 65 comment f (1977). Section 65 of the Restatement provides:

> (1) Subject to the statement in Subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that (a) the other is about to inflict upon him an intentional contact or other bodily harm, and that (b) he is thereby put in peril of death or serious bodily harm or ravishment, which can safely be prevented only by the immediate use of such force.

Id.

372. State v. Nunes, 546 S.W.2d 759, 762 (Mo. App. 1977).

373. Ivester v. State, 398 So. 2d 926, 929-31 (Fla. App. 1981).

374. State v. Mulvihill, 57 N.J. 151, 270 A.2d 277 (1970). *See also* RESTATEMENT (SECOND) OF TORTS § 65 comment f (1977). Once the apparent threat or actual use of excessive force has passed, the self-defense privilege does not authorize arrested persons to retaliate

fense privilege and other protections against unlawful arrest,[375] together with the dangers that forcible resistance of unlawful arrest poses,[376] weigh strongly in favor of the judicial and legislative trend toward proscribing the common-law right to use force in resisting unlawful arrest.

2. Escape

The modern trend in judicial and legislative treatment of defenses that prisoners have to escape from official confinement[377] exemplifies another eroding category of self-help. Many courts and legislatures, prior to this trend, recognized the right of prisoners to argue unlawful confinement as a defense to the crime of escape[378] because lawful detention was a precondition to unlawful escape.[379]

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with force against their arrestors. *See, e.g.*, People v. Perez, 12 Cal. App. 3d 232, 90 Cal. Rptr. 521 (1970).

375. *See supra* note 367 and accompanying text.

376. *See supra* notes 361-65 and accompanying text.

377. This discussion uses the term "escape" to mean an unauthorized departure from the custody of law enforcement officials. *See* R. PERKINS, *supra* note 192, at 500. Thus, escape includes conduct ranging from a suspect's flight from a police officer's custodial arrest to a convict's escaping from a penitentiary. *Id.* at 500, 506.

378. *See, e.g.*, Brown v. Cato, 147 Conn. 418, 421, 162 A.2d 175, 177 (1960); State v. Higgins, 338 A.2d 159, 163 (Me. 1975); People v. Alexander, 39 Mich. App. 607, 609, 197 N.W.2d 831, 833 (1972); *see also* Annot., 70 A.L.R.2d 1430, 1433-37. Section 242.6(3) of the Model Penal Code addresses the effect of legal irregularity in detention as follows:

> (3) EFFECT OF LEGAL IRREGULARITY IN DETENTION. Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detainting authority, shall not be a defense to prosecution under this Section if the escape is from a prison or other custodial facility or from detention pursuant to commitment by official proceedings. In the case of other detentions, irregularity or lack of jurisdiction shall bo a defense only if:
>
> (a) the escape involved no substantial risk of harm to the person or property of anyone other than the detainee; or
>
> (b) the detaining authority did not act in good faith under color of law.

MODEL PENAL CODE § 242.6(3) (1962). The Court of Appeals for the Eighth Circuit more clearly defined the term "custody" as follows:

> Although there must be an escape from custody, it is not necessary that the escapee at the time of the escape bo held under guard or under direct physical restraint or that the escape be from a conventional penal housing unit such as a cell or cell block; the custody may be minimal and, indeed, may be constructive.

United States v. Cluck, 542 F.2d 728, 731 (8th Cir.), *cert. denied*, 429 U.S. 986 (1976).

379. *See* R. PERKINS, *supra* note 192, at 502. A precise meaning of "lawful" and "unlawful" custody, however, is not discernible from the numerous cases addressing the escape defeuse of unlawful confinement. *See, e.g.*, Harding v. State, 248 Ark. 1240, 455 S.W.2d 695 (1970); *see also* Annot., 70 A.L.R.2d 1430, 1433-34 n.14. For example, a judicial determination that a prison's conditions violate state and federal constitutional prohibitions against cruel and unusual punishment do not necessarily render custody unlawful. *See* State v. Alcantaro, 407 So. 2d 922, 926 (Fla. App. 1981).

Prisoners also could assert duress and necessity[380] as defenses to escape from lawful and unlawful confinement.[381] Prevailing judicial

380. Courts and commentators have distinguished between the duress and necessity defenses to escape. They recognize necessity as an affirmative justification for a defendant's decision to escape rather than suffer the harm that his conditions of confinement threaten. *See infra* note 381. Prisoners have asserted the necessity defense, for example, arguing that they attempted escape from confinement to avoid injury during a prison fire, People v. Whipple, 100 Cal. App. 261, 279 P. 1008 (1929), or to obtain emergency medical treatment, People v. Martin, 100 Micb. App. 447, 298 N.W.2d 900 (1980). The duress defense, on the other hand, negates the intent element of escape. *See, e.g.*, United States v. Bailey, 585 F.2d 1087, 1098 (D.C. Cir. 1978), *rev'd*, 444 U.S. 394 (1980). Prisoners have asserted the duress defense to escape when they attempted escape because they feared being beaten by prison officials, Esquibel v. State, 91 N.M. 498, 576 P.2d 1129 (1978) (holding that courts should consider the duress defense only when beatings occurred within 48 to 72 hours of escape), or feared being assaulted homosexually by other prisoners, People v. Harmon, 53 Mich. App. 482, 220 N.W.2d 212 (1974). See Annot., 69 A.L.R.3d 678, 694-98, for a discussion of cases which suggest that courts might accept duress and necessity as legitimate defenses for prisoners who escaped to avoid sexual abuse.

Defendants usually assert the duress and necessity defenses successfully only if several conditions existed at the time of escape. *See* People v. Lovercamp, 43 Cal. App. 3d 823, 831-32, 118 Cal. Rptr. 110, 115-16 (1974). First, prisoners must receive specific threats that induce a reasonable and imminent fear of serious physical harm. *See* W. LAFAVE & A. SCOTT, *supra* note 185, at 374, 381. Second, prisoners must exhaust their legal remedies concerning a specific threat of harm, *see* People v. Lovercamp, 43 Cal. App. 3d 823, 831, 118 Cal. Rptr. 110, 115 (1974), or demonstrate that they either did not have the time or opportunity to exhaust available remedies or that doing so would have been futile. *Id.* Third, prisoners must surrender themselves to law enforcement officials as soon as reasonably possible after the conditions justifying their escape have passed. *See id.*; United States v. Bailey, 585 F.2d 1087, 1099-1100 (D.C. Cir. 1978); United States v. Michelson, 559 F.2d 567 (9th Cir. 1977). Last, some courts have held that a prisoner who justifiably attempts to escape under the duress or necessity defenses may not use force or violence against prison officials or other innocent persons while attempting escape. *See* People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974).

381. *See* G. FLETCHER, *supra* note 233, at 829-30; Gardner, *The Defense of Necessity and the Right to Escape from Prison—A Step Toward Incarceration Free from Sexual Assault*, 49 S. CAL. L. REV. 110, 118 (1975); *see, e.g.*, 18 PA. CONS. STAT. ANN. § 309 (defining the duress defense). Section 3.01 of the Model Penal Code contains provisions recoguizing justifiable conduct as an affirmative defense. Section 3.02 defines justifiable conduct as follows:

> (1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
>
> (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

MODEL PENAL CODE § 302 (1962).

attitudes, however, tend to disfavor these three defenses to the crime of escape because this self-help measure tends to jeopardize the orderly administration of prisoner confinement and the safety of law enforcement officers and prisoners.[382] While generally not disputing the legitimacy of any right of escape, courts have curtailed the effectiveness of escape defense by rejecting as illegitimate many of the proffered justifications for escape.[383] Recent case law indicates that courts, faced with the threat of social disruption and physical injury associated with escapes, have been assessing the adequacy of available alternative courses of action that prisoners can take to obtain relief from unjust or extraordinarily hazardous imprisonment.[384] The courts largely agree that prisoners should attempt escape only as a remedy of last resort because existing judicial and administrative procedures protect prisoners in most cases.[385]

Legal custody, from which escape is a crime,[386] may exist even though the law might require law enforcement officials to release the prisoner at a later time.[387] The state bears the burden of proving lawful custody in prosecutions for escape.[388] Courts formerly held confinement unlawful when an aura of illegality or other irregularities tainted the confinement process. In these cases, courts held that the tainted nature of confinement justified escape.[389]

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382. Annot., 70 A.L.R.2d 1430, 1433. *See, e.g.*, Commonwealth v. Stanley, 498 Pa. 326, 446 A.2d 583 (1982).

383. *See* Annot., 70 A.L.R.2d 1430, 1433. *But see* State v. Alcantaro, 407 So. 2d 922 (Fla. App. 1981) (noting some relaxation of the general rule that intolerable living conditions in prisons are not a form of duress that justifies escape).

384. *See, e.g.*, State v. Green, 470 S.W.2d 565 (Mo. 1971), *cert. denied*, 405 U.S. 1073 (1972) (prisoner had available alternative of reporting threats from other prisoners to prison authorities).

385. *See, e.g.*, Dempsey v. United States, 283 F.2d 934 (5th Cir. 1960) (prisoner denied relief because he had never requested available medical aid from prison authorities); People v. Hocquard, 64 Mich. App. 331, 236 N.W.2d 72 (1975) (prisoner denied relief because he had time prior to escape to resort to courts).

386. Escape from the lawful custody of a private person also may be a criminal offense. *See* Johnson v. Sheriff, 90 Nev. 19, 518 P.2d 161 (1974); *see also* Annot., 69 A.L.R.3d 664 (1976).

387. R. PERKINS, *supra* note 192 at 503; *see also* MODEL PENAL CODE § 242.6(3).

388. *See, e.g.*, Farrier v. Faulk, 102 Fla. 886, 136 So. 601 (1931); McGinnis v. State, 460 S.W.2d 690 (Mo. 1970); State v. Jordan, 247 N.C. 253, 100 S.E.2d 497 (1947); *see also* Annot., 70 A.L.R.2d 1430, 1433 n.5 (1960).

389. *See* Annot., 70 A.L.R.2d 1430, 1433 (1960); *see, e.g.*, State v. Leach, 7 Conn. 452, 456 (1829). One court articulated the policy supporting this perspective as follows:

The right to personal liberty is accorded a pre-eminent position under our system of law and government, . . . so that there is something to be said for the view that the citizen improperly deprived of his liberty should be entitled to recover it by any means available to

This view, however, eroded substantially as courts adopted a strict construction of the term "unlawful custody."[390] Courts today have demonstrated care in their criminal escape decisions not to establish a policy that permits or encourages prisoners to decide subjectively whether their imprisonment is legal, or that transforms judicial review of recaptured prisoners' escape defense claims into a retrial of the original proceeding that resulted in incarceration. In harmony with this judicial attitude, courts have adopted the rule that requires prisoners to proceed through established legal channels to challenge the legality of confinement, rather than to attempt escape, when confinement is under color of state law.[391] These courts fear that a more permissive rule would create chaos in prisons and severely hinder law enforcement.[392]

Courts have developed other legal rules designed to persuade prisoners to use established legal procedures in challenging the legality of confinement rather than to attempt escape. For example, courts have refused to allow prisoners to attack collaterally the constitutionality of their imprisonment in escape trials.[393] The federal courts also have held that escapes made during the pendency of proceedings for relief in state court constitute a deliberate bypass or abandonment of available state remedies.[394] Consequently, these escapes constitute failures to exhaust state remedies and disentitle recaptured prisoners to their right to federal habeas corpus relief.[395] Courts, through these rules, clearly have demonstrated a desire to create a policy that persuades prisoners to use judicial

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him, *Nat Coelum,* and it seems hard that one improperly imprisoned should be subjected to further punishment for merely asserting the right to liberty guaranteed him by the Constitution.

Annot., 70 A.L.R.2d at 1432 (1960).

390. *Id.; see* R. PERKINS, *supra* note 192, at 503.

391. *See* Petition of Lynch, 379 Mass. 757, 780, 400 N.E.2d 854, 857 n.2 (1980).

392. *See* In re Estrada, 63 Cal. 2d 740, 745, 48 Cal. Rptr. 172, 178, 408 P.2d 948, 954 (1965); State v. Jackson, 500 S.W.2d 306 (Mo. App. 1973); *cf.* State v. Denmon, 473 S.W.2d 741 (Mo. 1971) (prisoners may not justify forcibly resisting prison officials on grounds of unlawful confinement). Courts similarly have rejected juvenile detainees' assertions that their unlawful confinement justified escape, H v. Murphy, 512 S.W.2d 424 (Mo. App. 1974), or assault of an official, Wintjen v. State, 433 S.W.2d 257 (Mo. 1968).

393. *See, e.g.,* Beaulieu v. State, 161 Me. 248, 253 211 A.2d 290, 293 (1965).

394. *See, e.g.,* Fowler v. Leeke, 509 F. Supp. 544 (D.S.C. 1979), *appeal dismissed without opinion,* 644 F.2d 878 (4th Cir. 1981); *see also* Annot., 61 A.L.R. FED. 938 (1983).

395. *See, e.g.,* Strickland v. Hopper, 571 F.2d 275 (5th Cir.), *cert. denied,* 439 U.S. 842 (1978); Ruetz v. Lash, 500 F.2d 1225 (7th Cir. 1974); United States *ex rel.* Smith v. Jackson, 234 F.2d 742 (2d Cir. 1956); Fowler v. Leeke, 509 F. Supp. 544 (D.S.C. 1979), *appeal dismissed without opinion,* 644 F.2d 878 (4th Cir. 1981); Potter v. Davis, 519 F. Supp. 621 (E.D. Tenn. 1981).

procedures to challenge the legality of their confinement and that dissuades prisoners from attempting escape.

IV. Self-Help in Commercial Transactions

A. Introduction

The process of bargaining and agreeing upon the terms of a contract is essentially a form of self-help that parties commonly employ in commercial transactions. In the most basic of contracts, the contracting parties negotiate the terms of their contractual relationship and establish the private law that governs their relationship.[396] Any contractual agreement, provided it meets certain legal requirements,[397] legally obliges the agreeing parties to fulfill and abide by the terms of the agreement. The failure of either party to comply with a valid contractual agreement entitles the aggrieved party to a judicial remedy. The flexibility of the contract negotiation process, the ability of individuals to structure commercial agreements in a workable manner, and judicial doctrines such as misrepresentation, duress, undue influence, and unconscionability,[398] which encourage individuals to bargain fairly and freely, have made the creation of commercial contracts one of the most prevalent self-help tools in contemporary society. The inherent limitations and ambiguities of language, misunderstandings between contracting parties, changes in circumstances, unanticipated events, and bad faith inevitably cause contractual disputes and force parties to rely on courts to interpret and enforce their contractual rights. Alternatives to judicial resolution of contractual disagreements are available to contracting parties, however, and the parties may either incorporate such alternatives into their con-

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396. Authorities define "contract" in various ways, but generally a contrat is "a transaction involving two or more individuals whereby each becomes obligated to the other, with reciprocal rights to demand performance of what is promised by each respectively." Gardner v. City of Englewood, 282 P.2d 1084, 1088 (Colo. 1955) (*citing* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1817)). The Uniform Commercial Code ("UCC") defines "contract" as "[t]he total legal obligation which results from the parties' agreement as affected by [law]." U.C.C. § 1-201(11) (1977).

397. The requirements of a valid contract are "parties competent to contract, proper subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation." Detroit Trust Co. v. Struggles, 289 Mich. 595, 599, 286 N.W. 844, 846 (1939). For a discussion of the legal requirements of a valid enforceable contract, see J. Murray, Murray on Contracts (2d rev. ed. 1974).

398. *See* J. Murray, *supra* note 397, §§ 350-354, at 735-58 for a discussion of the historical development of the doctrine of unconscionability and related doctrines at common law and under the UCC. These doctrines developed to ensure that parties exercised free will when they entered into contracts. *Id.* §§ 350-351, at 735-40.

tract at the outset of the transaction or elect to use them when the need arises. Although these options do not require judicial intervention, they are additional self-help measures whose legitimacy and legality courts recognize and enforce pursuant to state common law or statutes such as the Uniform Commercial Code ("UCC").[399]

Nonjudicial methods of settling disputes that arise in commercial settings promote smoother business relationships by avoiding courtroom animosity and irritation. These self-help measures also may save disputing parties time and money by facilitating prompt dispute settlement. This part of the Special Project examines several self-help measures available in commercial transactions. Section B reviews liquidated damages provisions and the right to repossession under both the common law and the UCC.[400] Section C then discusses the role of commercial arbitration as an alternative

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399. The American Law Institute and the National Conference of Commissioners on Uniform State Law jointly created the UCC. The UCC's drafters designed it to encourage substantially uniform regulation of commercial transactions throughout the United States. *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS §§ 1-7 (2d ed. 1977); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 1 (2d ed. 1980). The District of Columbia, the United States Virgin Islands, and every state except Louisiana had enacted the UCC with minor variations by 1979. J. WHITE & R. SUMMERS, *supra*, § 1, at 1. *See, e.g., infra* notes 428-475 and accompanying text for judicial treatment of self-help remedies under the UCC.

400. The UCC provisions concerning warehousemen's statutory liens, UCC §§ 7-209 and 7-210 (1977), represent the codification of another self-help alternative to judicial trials that might affect common citizens engaged in commercial transactions. Section 7-102(1)(h) defines a "warehouseman" as "a person engaged in the business of storing goods for hire." U.C.C. § 7-102(1)(h) (1977). Whenever a person warehouses goods that a warehouse receipt covers, the warehouseman acquires a lien in the person's property that the receipt covers and that the warehouseman possesses. U.C.C. § 7-209(1) (1977). The lien secures, among other things, storage, labor, insurance costs, and expenses that the warehouseman incurs in preserving the stored goods. *Id.* Section 7-210 sets forth the procedures for the self-help enforcement of a warehouseman's lien, which warehousemen may exercise in addition to all other rights that the law gives creditors against their debtors. U.C.C. § 7-210(7) (1977). Section 7-210 permits a warehouseman to enforce a lien on goods that a merchant, in the course of his business, stores with the warehouseman by publicly or privately selling the goods without invoking any judicial proceedings. U.C.C. § 7-210(1)-(2) (1977). First, however, the warehouseman must notify all persons known to claim an interest in the goods. U.C.C. § 7-210(1) (1977). Also, the warehouseman must conduct the sale in a "commercially reasonable manner." *Id.* This standard of commercial reasonableness for foreclosure, however, does not apply to the sale of noncommercial storage with a warehouseman. U.C.C. § 7-210(2) and comment 1 (1977). A warehouseman seeking to enforce a lien against an owner of household goods in storage, for example, must comply with the more precise and restrictive procedures set forth in § 7-210(2). A warehouseman's failure to comply with the requirements of § 7-210 may subject him to liability for damages to the person or entity warehousing goods with him. U.C.C. § 7-210(9) (1977). Accordingly, the warehouseman might opt to satisfy his claim against this person or entity by pursuing other remedies permitted by law. U.C.C. § 7-210(7) (1977).

method of settling contractual disputes.

B. Self-Help in Contractual Matters

1. Liquidated Damages Provisions

Liquidated damages provisions incorporated into contracts afford contracting parties a legally enforceable[401] form of prophylactic self-help.[402] Contracting parties that agree to a liquidated damages clause agree that a specific sum expressed in the clause is a just remedy for one party's breach of the contract.[403] Thus, in the event of a breach, the parties can resolve the question of appropriate damages without resorting to litigation unless the liquidated damages clause itself becomes the point of contention.[404]

The common law doctrine of freedom to contract provided the jurisprudential roots for judicial enforcement of liquidated damage clauses.[405] Even at common law, however, courts refused to enforce contractually agreed upon penalty provisions.[406] These courts analyzed three questions in distinguishing enforceable liquidated damage clauses from unenforceable penalty provisions: first, whether the breach caused an uncertain or inestimable amount of damages;[407] second, whether the parties intended to provide for damages as opposed to a penalty for breach of their contract;[408] and last, whether the stipulated damages constituted a reasonable esti-

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401. As early at 1829, courts of law distinguished liquidated damages from penalties in a manner similar to the way in which courts draw this distinction today. *See* C. McCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 147 (1935). Today, courts will not enforce penalty provisions even though the contracting parties ostensibly have agreed to them by incorporating them in their contracts. Courts define a penalty as a contractual provision intended to induce a party to refrain from breaching a contract and to punish the party if the inducement is ineffective. Penalty provisions typically require breaching parties to pay the aggrieved party something of greater value than performance of the contract. *See, e.g.*, Berger v. Shanahan, 142 Conn. 726, 732, 118 A.2d 311, 314-15 (1955).

402. *See, e.g.*, Priebe & Sons, Inc. v. United States, 332 U.S. 407, 411 (1947); Southwest Eng'g Co. v. United States, 341 F.2d 998 (8th Cir.), *cert. denied*, 382 U.S. 819 (1965); Callanan Rd. Improvement Co. v. Colonial S. & S. Co., 190 Misc. 418, 72 N.Y.S. 2d 194 (N.Y. Sup. Ct. 1947).

403. J. MURRAY, *supra* note 397, § 234, at 473.

404. *Id.* at 473-76.

405. *See* J. CALAMARI & J. PERILLO, *supra* note 399, at § 14-31; C. McCORMICK, *supra* note 401, at § 147. Concern for parties' freedom to contract has not restrained courts from refusing to enforce penalty provisions and other provisions they deem unreasonable. *See* Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).

406. J. CALAMARI & J. PERILLO, *supra* note 399, at §§ 14-31.

407. *See* City of Memphis v. Ford Moter Co., 304 F.2d 845 (6th Cir. 1962).

408. *See* Berger v. Shanahan, 142 Conn. 726, 118 A.2d 311(1955).

mate of the potential loss to the aggrieved party.[409] A close analysis of caselaw concerning liquidated damages, however, reveals that the third part of this test usually weighs most heavily in courts' dispositions of these cases, while the first two factors receive only superficial attention.[410] In addition, courts typically judge the reasonableness of estimated potential damages from the time of contracting rather than the time of breach.[411]

Article 2 of the UCC, which governs the sale of goods,[412] specifically authorizes the use of liquidated damages clauses in commercial contracts.[413] Section 2-718(1) provides that "[d]amages for breach by either party may be liquidated."[414] A valid liquidated damages clause under section 2-718(1) is enforceable only if it satisfies two requirements that closely resemble the common law liquidated damage clause requirements. First, the contracting parties must make a fair and reasonable effort to fix just compensation for the anticipated loss that a potential contract breach would cause.[415] The UCC states that unreasonably large liquidated dam-

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409. United States v. Bethlehem Steel Co., 205 U.S. 105, 120 (1907).

410. *See* Central Trust Co. v. Wolf, 255 Mich. 8, 237 N.W. 29 (1931); Callanan Rd. Improvement Co. v. Colonial S. & S. Co., 190 Misc. 418, 72 N.Y.S.2d 194 (N.Y. Sup. Ct. 1947). Courts have upheld clauses labeled "penalties," while invalidating clauses labeled "damages." *See* J. CALAMARI & J. PERILLO, *supra* note 399, § 14-31, at 565-66. For a discussion of liquidated damages provisions under the UCC, see *infra* notes 412-24 and accompanying text.

411. *See* Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947); United States v. Bethlehem Steel Co., 205 U.S. 105 (1907). *But see infra* notes 424-25 and accompanying text.

When no actual loss results from a breach, however, courts sometimes stray from this analysis. *See, e.g.*, Massman Constr. Co. v. City Council, 147 F.2d 925 (5th Cir. 1945). *But see* Southwest Eng'g Co. v. United States, 341 F.2d 998 (8th Cir.) (holding that a liquidated damages clause was enforceable even though the government suffered no actual damages because parties reasonably anticipated damages would result when they made the contract), *cert. denied*, 382 U.S. 819 (1965).

412. U.C.C. § 2-102 (1977). *See id.* §§ 2-105(1), 2-107. Courts increasingly are applying the provisions of Article 2 by analogy to nonsales commercial transactions such as bailments and leases. W. HAWKLAND, SALES AND BULK SALES 4 (3d ed. 1976); J. CALAMARI & J. PERILLO, *supra* note 399, § 1-7, at 16-17.

413. Section 2-718(1) of the UCC, the liquidated damages provision, states:

> (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

U.C.C. § 2-718(1) (1977).

414. *Id.*

415. RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1979); Mellor v. Budget Advisors, Inc., 415 F.2d 1218, 1222 (7th Cir. 1969). Northwestern Motor Car, Inc. v. Pope, 51 Wis. 2d 292, 294-95, 187 N.W.2d 200, 202 (1971). Comment 1 to UCC § 2-718 states that " . . . liquidated damage clauses are allowed where the amount involved is

age estimates will make the clause void as a penalty.[416] In *Coast Trading Co. v. Parmac, Inc.*,[417] for example, a provision for a fifteen percent cancellation charge was not a penalty under the Washington version of section 2-718(1) because the seller actually showed damages substantially in excess of fifteen percent of the contract price.[418] But in *Nu Dimensions Figure Salon v. Becerra*[419] the court held that a clause which required a breaching party to pay an aggrieved party the full contract price even before the parties had performed any services was unconscionable and unreasonable.[420] Between these two extremes courts probably confront many cases in which the reasonableness of a damage estimate presents a much closer question. In these cases, the courts likely will place greater weight on other equitable considerations such as the availability of alternative remedies for the aggrieved party and the relative bargaining strength of the parties at the time of contracting.

The second precondition to enforceability of a liquidated damages clause under the UCC is that the harm a contract's breach causes is difficult to estimate accurately.[421] For example, in *E.C. Ernest, Inc. v. Manhattan Construction Co. of Texas*,[422] the Fifth Circuit enforced a liquidated damages provision in a construction contract that provided for payments of $250 per day for each day of delay. The court reasoned that neither of the parties disputed the conjectural nature of measuring damages and that loss caused by delay in completion of the building was difficult to quantify.[423] The UCC liquidated damages clause requirements differ from the common law requirements in that courts may determine reasonableness of the clause under the UCC at either the time of contracting or the time of breach.[424] Thus, even if the agreed damage

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reasonable in the light of the circumstances of the case."

416. U.C.C. § 2-718(1) and comment 1 (1977). An unreasonably small liquidated damages provision also might be void as a penalty. U.C.C. § 2-718(1) comment 1 (1977); *see* Varner v. B.L. Lanier Fruit Co., 370 So. 2d 61, 62 (Fla. Dist. Ct. App. 1979).

417. 21 Wash. App. 896, 587 P.2d 1071 (1978).

418. *Id.* at 911, 587 P.2d at 1079-80.

419. 73 Misc. 2d 140, 340 N.Y.S.2d 268 (1973).

420. *Id.* at 142-43, 340 N.Y.S.2d at 271-72.

421. Dave Gustafson & Co. v. State, 83 S.D. 160, 165, 156 N.W.2d 185, 188 (1968).

422. 551 F.2d 1026 (5th Cir.), *cert. denied*, 434 US. 1067 (1977).

423. *Id.*

424. If the amount "is reasonable in the light of the anticipated or *actual harm* caused by the breach," courts will uphold the provision. U.C.C. § 2-718(1) (1977) (emphasis added). *See also* J. CALAMARI & J. PERILLO, *supra* note 399, § 14-35, at 569. This provision codifies the approach that some courts have taken in cases in which no damage occurred. *See supra*

figure was not reasonable at the time the parties made the contract, courts will enforce that provision if the figure reasonably approximates the actual damages that the contract breach caused.

Contracting parties can benefit from the use of liquidated damages clauses especially when the potential damages that would result if one party breached the contract would be uncertain and difficult to assess. Additionally, liquidated damages provisions can benefit parties engaged in commercial transactions by protecting their expectation interests and aid courts by providing approximations of the damages that would result if a party breached the contract.[425] Because of the changing nature of contractual relationships and continued concern about adhesion contracts and bargaining inequality, however, courts have continued to play an active role in resolving contractual disputes and enforcing contractual rights.[426] Thus, contracting parties who use liquidated damage clauses as a self-help device must exercise care in drafting their contracts.[427]

2. Repossession

(a) The Common Law and the Uniform Commercial Code

In a typical secured transaction a debtor signs an agreement granting a creditor an interest in the debtor's property. If the debtor defaults under the security agreement, the secured creditor may then repossess[428] the property that serves as security without bringing a judicial action or enlisting the aid of a state official.[429]

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note 411 (discussing enforcement of arbitration clauses in the absence of damages).

425. *See* Sweet, *Liquidated Damages in Calfornia*, 60 CALIF. L. REV. 84, 88-89 (1972); C. MCCORMICK, *supra* note 401, at §§ 146-149.

426. *See* Sweet, *supra* note 425, at 85-89.

427. *Id.* at 89. For an additional discussion of liquidated damages provisions, see Gantt & Breslauer, *Liquidated Damages in Federal Government Contracts*, 47 B.U.L. REV. 71 (1967); Comment, *Liquidated Damages and Penalties Under the Uniform Commercial Code and the Common Law: An Economic Analysis of Contract Damages* 58 NW. U.L. REV. 1055 (1978).

428. This discussion uses the term "repossession" to describe two situations. First, the term denotes an actual repossession of goods, such as when a seller retains a security interest in the goods sold in exchange for the purchasing credit he extends to the buyer. If the buyer defaults on his debt to the seller, the seller can satisfy the debt by taking possession of the goods. Second, this discussion also uses the term "repossession" in reference to the situation in which a creditor, upon a debtor's default, takes possession of property which the debtor pledged as security for the loan. In this situation, however, the creditor never owned the collateral.

429. *See* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1, 5 (1973). The conventional installment contract for the purchase of an automobile illustrates a common repossession

This right to self-help repossession has a common law heritage based on the right to contract freely.[430] At common law the terms of a security agreement generally conferred and defined the scope of the right of a repossession.[431] Courts, however, extended the right of repossession to a secured party even when the agreement did not expressly authorize it.[432] The scope of the right to repossession at common law often depended on the form of security agreement that the parties used.[433] Regardless of the form of security agreement, however, the common law promoted peaceful repossession,[434] but tolerated some uses of force.[435]

Article 9 of the UCC[436] codified the common law right to self-help repossession.[437] Because Article 9 applies to virtually all types of security agreements,[438] it practically eliminates the varying stan-

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situation. If the purchaser fails to make the required payments, the creditor, having a security interest in the automobile, may repossess it.

430. The right to repossess can be traced back through English common law to Greek and Roman times. *See* McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. CAL. L. REV. 58 (1973). Repossession clauses first appeared in the United States in the form of chattel mortgages and conditional sales contracts. *See, e.g.*, Miller v. Steen, 34 Cal. 138 (1867) (conditional sales contract); Meyer v. Gorham, 5 Cal. 323 (1855) (chattel mortgage).

431. At common law, most jurisdictions allowed contracting parties to agree among themselves to their rights and duties in secured transactions. *See* Burke & Reber, *supra* note 429, at 12.

432. *See, e.g.*, Wixom v. Davis, 57 Cal. App. 620, 207 P. 694 (1922).

433. Although courts recognized the right to repossess under chattel mortgages and conditional sales contracts, courts and legislatures treated each form of security agreement differently. *See* McCall, *supra* note 430, at 75-76; Gilmore & Axelrod, *Chattel Security: I*, 57 YALE L.J. 518 (1948).

434. *See, e.g.*, McCarty-Green Motor Co. v. House, 216 Ala. 666, 114 So. 60 (1927); Abel v. M. H. Pickering Co., 58 Pa. Super. 439 (1914).

435. Some courts and commentators believed that creditors could use "necessary force" in repossessing collateral. *See, e.g.*, Silverstin v. Kohler & Chase, 181 Cal. 51, 54,183 P. 451, 452 (1919); L. JONES, THE LAW OF CHATTEL MORTGAGES AND CONDITIONAL SALES § 1339, at 426 (6th ed. 1933); RESTATEMENT (SECOND) OF TORTS, §§ 100-111 (1964).

436. American jurisdictions have enacted different versions of Article 9. These variations are mainly attributable to modifications in Article 9 that local legislators have made, and the differences between the 1972 and 1962 versions of Article 9 that different states have adopted. *See* WHITE & SUMMERS, *supra* note 399, at 1 n.1. The differences between the treatment of repossession under the 1962 and 1972 versions of Article 9 are minor. Section 9-504 of the 1972 Code lightened the burden that the 1962 Code placed on creditors to provide notice prior to dispossessing of collateral. U.C.C. § 9-504 (Appendix II) 1977 (Reasons for 1972 Change).

437. *See, e.g.*, Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672, 675 (W.D. Va. 1972); Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 8-9, 295 A.2d 402, 406 (1972).

438. Section 9-102(2) states that Article 9 "applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security." U.C.C. § 9-102 (1978).

dards of permissible self-help repossession that existed at common law.[439] Indeed, the law of repossession is an area of law to which the UCC's drafters hoped to bring some uniformity and order.[440] Section 9-503[441] authorizes secured parties[442] to take possession of collateral upon a debtor's default. Secured parties must dispose of repossessed collateral in accordance with the rights[443] and procedures[444] outlined in section 9-504.[445] In addition, consistent with the concept of freedom to contract,[446] section 9-503 also permits parties to secured transactions to agree to alternative measures the creditor can take if the debtor defaults.[447]

In light of the common law and section 9-503, courts generally have acknowledged the validity of self-help repossessions made

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439. *In re* United Thrift Stores, Inc., 363 F.2d 11, 14 (3d Cir. 1966).

440. *See* McCall, *supra* note 430, at 76.

441. Section 9-503 of the UCC states:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusuable, and may dispose of collateral on the debtor's premises under Section 9-504.

U.C.C. § 9-503 (1977). Section 9-105(1)(c) defines "collateral" as "the property subject to a security interest, . . . [including] accounts and chattel paper which have been sold." U.C.C. § 9-105(1)(c) (1977).

442. With the exception of transactions listed in § 9-104, Article 9 applies to two types of transactions that create security interests: (1) "to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures," U.C.C. 9-102(1)(a) (1977); and (2) "to any sale of accounts or chattel paper." U.C.C. 9-102(1)(b) (1977).

443. Section 9-504(1) of the UCC provides in pertinent part that "a secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing." U.C.C. § 9-504(1) (1977).

444. Section 9-504(1) also sets forth the apropriate order for applying the proceeds from the disposition. U.C.C. § 9-504(1)(a)-(c) (1977).

445. Section 9-504 also specifies the proper method of distributing surplus proceeds that remain after a debtor satisfies his indebtedness to a creditor, prescribes the proper methods for disposing of repossed collateral and the requirements concerning notification of a debtor about disposal of collateral, describes the possessory rights of the purchasers of collateral, and authorizes the transfer of the secured party's rights and duties to third parties. U.C.C. §§ 9-504(2)-(5) (1977).

446. *Cf.* J. WHITE & R. SUMMERS, *supra* note 399, § 2, at 7 (noting that freedom of contract is the rule rather than the exception under the UCC).

447. *See, e.g.*, McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971). The phrase "[u]nless otherwise agreed" in section 9-503 authorizes parties to secured transactions to retain the right to state expressly in their agreement the form of remedy they would prefer if the debtor defaulted. U.C.C. § 9-503 (1977).

pursuant to expressed contractual provisions.[448] In *Global Casting Industries, Inc. v. Daley-Hodkins Corp.*,[449] for example, a security agreement expressly authorized the creditor to enter the debtor's premises and take possession of several pieces of equipment and machinery.[450] The court upheld the repossession even though the creditor, after discovering that the debtor had changed the lock on the door, used an unauthorized locksmith's key to enter the debtor's premises.[451]

Article 9, however, more severely restricts the permissible methods of taking possession of collateral than did the common law. Although the common law sometimes tolerated a creditor's use of necessary force to repossess collateral,[452] section 9-503 permits force only "if [it] can be done without breach of the peace."[453] The courts have interpreted this provision as prohibiting repossessions that include violence, actual or potential force, intimidation, fraud, or trickery.[454] The UCC's breach of peace language and the judiciary's broad interpretation of this language suggests that courts and legislatures today seek to discourage violent activity by prohibiting self-help repossession that is "fraught with the likelihood of resulting violence."[455]

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448. *See, e.g.*, Nichols v. Tower Grove Bank, 497 F.2d 404 (8th Cir. 1974); McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971); Hunt v. Marine Midland Bank-Central, 80 Misc. 2d 329 363 N.Y.S.2d 222 (1974); Frost v. Mohawk Nat'l Bank, 74 Misc. 2d 912, 347 N.Y.S.2d 246 (1973). Similarly, courts have relied upon the freedom to contract rationale in upholding express repossession agreements in retain installment contracts. *See, e.g.*, Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir.) (installment sales contract authorized truck repossession),*cert. denied*, 419 U.S. 1006 (1974); John Deere Co. v. Catalano, 186 Colo. 101, 525 P.2d 1153 (1974) (upholding an agreement in a retail sales contract that provided for summary repossession of a farm combine for default under a retail sales contract and a security agreement that provided for repossession without notice); Cook v. Lilly, 208 S.E.2d 784 (W. Va. 1974) (upholding a security agreement that authorized repossession of a defaulted mobile home).

449. 105 Misc. 2d 517, 432 N.Y.S.2d 453 (1980).

450. *Id.* at 517-18, 432 N.Y.S.2d at 454.

451. *Id.* at 521, 432 N.Y.S.2d at 456.

452. *See supra* note 435.

453. U.C.C. § 9-503 (1977).

454. *See, e.g.*, Morris v. First Nat'l Bank & Trust Co., 21 Ohio St. 2d 25, 254 N.E.2d 683 (1970) (defining breach of peace as a violation of public order and not just violations of the law); Stone Mach. Co. v. Kessler, 1 Wash. App. 750, 463 P.2d 651 (1970).

455. *See, e.g.*, Morris v. First Nat'l Bank & Trust Co., 21 Ohio St. 2d 25, 29, 254 N.E.2d 683, 686 (1970).

(b) Constitutional Challenges to Self-Help Repossession

Debtors have used due process arguments to attack the legality of self-help repossession and UCC section 9-503.[456] The Supreme Court set the stage for a flood of constitutional challenges to repossession in *Sniadach v. Family Finance Corp.*[457] In *Sniadach* the Court invalidated on due process grounds a prejudgment garnishment procedure that deprived a wage earner of wages without a hearing or the opportunity to defend himself prior to the full judicial trial on the merits of the claim.[458] The Court extended its reasoning in *Sniadach* to the seizure of personal property by state officials under writs of replevin in *Fuentes v. Shevin.*[459] The Court held that the due process clause required the state to give debtors notice and a hearing before depriving them of their property rights.[460]

Following *Sniadach*, debtors typically have attacked the legality of repossession under UCC section 9-503 on fourteenth amendment due process grounds.[461] Because the *Fuentes* procedural requirements of hearing and notice pertain only to state action and not to the conduct of private citizens,[462] a successful due process challenge requires courts to find that repossession constituted state action.[463] In addition to proving state action, aggrieved debtors

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456. *See* Burke & Reber, *supra* note 429, at 5.

457. 395 U.S. 337 (1969). For a comprehensive analysis of the *Sniadach* decision, see McDonnell, *Sniadach, The Replevin Cases and Self-Help Repossession—Due Process Tokenism?*, 14 B.C. INDUS. & COM. L. REV. 437 (1973). McCormick v. First Nat'l Bank, 332 F. Supp. 604 (S.D. Fla. 1971) was the first reported self-help repossession case to challenge the constitutionality of UCC § 9-503. *See also* cases cited *infra* at notes 466-74 and accompanying text.

458. Sniadach v. Family Fin. Corp., 395 U.S. at 341-42.

459. 407 U.S. 67 (1972).

460. *Id.* at 97.

461. The fourteenth amendment provides in pertinent part: "[N]or shall any *State* deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1 (emphasis added). For a brief discussion of the "state action" requirement see *infra* note 1158.

462. *Id.* The Constitution protects citizens only from state actions. Green v. First Nat'l Exch. Bank, 348 F. Supp. 672, 673 (W.D. Va. 1972). The court in *Green* held that "because the operation of the statute involved [§ 9-503] does not require the aid, assistance, or interaction of any state agent, body, organization or function, the *state* has not deprived the plaintiff of his property." *Id.* at 675 (emphasis in original). For a good discussion of state action, see Burke & Reber, *State Action,Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003 (1973).

463. *See, e.g., Greene*, 348 F. Supp. at 675; Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 8, 295 A.2d 402, 405 (1972); Helfinstine v. Martin, 561 P.2d 951, 956-58 (Okla. 1977); *see* Note, *Uniform Commercial Code—Self-Help Repossession Under Section 9-503 Does Not Violate the Fourteenth Amendment*, 4 SETON HALL 629 (1973).

must demonstrate that repossession deprived them of a property interest sufficiently significant to violate the notice and hearing requirements of due process.[464] Although debtors frequently demonstrate that repossession deprived them of a significant property interest, they have enjoyed only limited success in constitutionally challenging creditor conduct of repossession pursuant to section 9-503[465] because courts frequently have refused to hold that repossession constituted state action.[466] In *Benschoter v. First National Bank*,[467] for example, the court held that a creditor's private, prejudgment, self-help repossession of collateral did not constitute state action because no state official participated in the procedure.[468] Similarly, in *Turner v. Impala Motors*,[469] the Sixth Circuit held that mere statutory authorization of repossession through the enactment of UCC 9-503 did not constitute state action.[470] In *Turner*, the debtor relied on *Reitman v. Mulkey*[471] to support his claim that statutory authorization constituted state action. The court distinguished *Reitman* as a case concerning racial discrimination and reasoned that section 9-503 merely codified the com-

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464. *See* Messenger v. Sandy Motors, Inc., 121 N.J. Super. at 17, 295 A.2d at 410.

465. Debtors have been even less successful in attacking § 9-503 on other constitutinal grounds. For instance, in McCormick v. First Nat'l Bank of Miami, 322 F. Supp. 604 (S.D. Fla. 1971), the court rejected a debtor's contention that authorizing a bank to take possession of an automobile without a judicial proceeding under § 9-503 violated the debtor's constitutional right to acquire, possess, and protect property, and the fourth amendment right to be free from unreasonable searches and seizures. *Id.* at 607-08.

466. *See, e.g.*, James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974); Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973); *rev'g*, Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), *cert. denied*, 419 U.S. 1006 (1974); Green v. First Nat'l Bank, 348 F. Supp. 672 (W.D. Va. 1972); Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 295 A.2d 402 (1972). *See generally* Neth, *Repossession of Consumer Goods: Due Process for the Consumer: What's Due for the Creditor*, 24 CASE W. RES. 7 (1972) (arguing that if the stato was not responsible for creating the conditions that resulted in one-sided private lawmaking, consumer creditor contracts are not state action); Note, *Self-Help Repossession: The Constitutional Attack, The Legislative Response, and the Economic Implications*, 62 GEO. L.J. 273 (1973) (arguing that state authorizing or permitting contract clauses with self-help provisions is sufficient proof of state action).

467. 218 Kan. 144, 542 P.2d 1042 (1975).

468. *Id.* at 151, 542 P.2d at 1048.

469. 503 F.2d 607 (6th Cir. 1974).

470. *Id.* at 611. For examples of other cases rejecting this claim, see *supra* note 466. *See* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d at 329; Messenger v. Sandy Motors, Inc., 121 N.J. Super. at 8, 295 A.2d at 405-06. *But see* Boland v. Essex County Bank & Trust Co., 361 F. Supp. 917 (D. Mass. 1973) (holding that state action exists when a creditor repossesses collateral pursuant to the state's version of § 9-503, because the statute "encourages" such action).

471. 387 U.S. 369 (1967).

mon law.[472]

By declining to invalidate the repossession procedures in section 9-503 on constitutional grounds, courts have exhibited wisdom and practicality in handling self-help in commercial transactions. Courts would have intruded improperly into the private parties' freedom of contracting if they had invalidated the repossession procedure that section 9-503 authorizes.[473] This judicial attitude sustains the validity of a self-help remedy that facilitates commercial transactions, helps maintain the relative openness of existing credit structures, and prevents the increasing costs of conducting commercial transactions that might result from the imposition of more formalized methods of remedying defaults in secured transactions.[474] The courts, however, could better promote continued beneficial use of repossession by providing clear, comprehensive, and fair standards that help determine what acts constitute a breach of the peace.[475] These standards would help guide creditors toward compliance with the hazy rules that courts and legislators have established to ensure peaceful self-help repossession.

C. *Commercial Arbitration*

1. The Scope and Mechanics of Commercial Arbitration

Commercial arbitration[476] is a process that parties expressly agree to use[477] to resolve disputes arising in contractual relation-

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472. *Turner*, 503 F.2d at 611-12.

473. *See* Oller v. Bank of Am., 342 F. Supp. 21, 23 (N.D. Cal. 1972).

474. *See* Cook v. Lilly, 208 S.E.2d 784 (W. Va. 1974). For a more detailed study of self-help repossession and due process, see 5 DEBTOR-CREDITOR LAW, ¶ 23-01 (1983); Spak, *The Constitutionality of Repossession by Secured Creditors Under Article 9-503 of the Uniform Commercial Code*, 10 HOUS. L. REV. 855 (1973); Burke & Reher, *supra* note 429; Neth, *supra* note 466; Note, *supra* note 463, at 629.

475. *See supra* notes 453-55 and accompanying text.

476. Parties engaged in commercial transactions use commercial arbitration in almost any context in which they desire private resolution of their dispute. M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION, § 1:01, at 3 (1984). Domke explains that:

> [commercial arbitration] also comprises controversies arising out of building and engineering contracts, agency and distribution arrangements, close corporation and partnership relations, separation agreements, individual employment contracts, license agreements, leases, estate matters, contracts of government agencies and municipal bodies with private firms for construction work, stock exchange transations and controversies in the broad insurance field, reinsurance arrangements, inter-insurance company subrogation claims, and the new development of arbitration of uninsured motorist accident claims.

Id.

477. M. DOMKE, *supra* note 476, § 1:01, at 1. *See, e.g.*, UNIFORM ARBITRATION ACT § 2, 7 U.L.A. 1 (1978) [hereinafter cited as U.A.A.]; 9 U.S.C. § 2 (1976).

ships. The arbitrating parties present their sides of the dispute in a hearing before an impartial third party—an arbitrator—and agree to abide by his decision.[478] Parties to commercial contracts frequently incorporate in their contract an agreement to arbitrate all future disputes that arise out of performance of the contract.[479] In other cases, parties simply agree to arbitration when a dispute arises.[480]

Arbitration permits parties to bypass the judicial process[481] and benefits parties who prefer private resolution of their disputes.[482] Arbitration agreements should define the scope of arbitration by setting forth the issues that the parties which to submit to an arbitrator. An agreement to arbitrate all disputes arising out of a transaction triggers an exclusive process for dispute resolution.[483] An arbitrator is the final judge of law and fact in a dispute unless the disputing parties expressly agree to limit the arbitrator's authority.[484] Parties may structure an arbitration agreement to limit

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478. *See* Chappell, *Arbitrate . . . and Avoid Stomach Ulcers*, 2 ARB. MAG., Nos. 11-12, 6, 7 (1944).

479. The American Arbitration Association, an organization dedicated to promoting and facilitating dispute resolution through arbitration, recommends that parties wishing to arbitrate future disputes arising out of a contract insert the following clause in their commercial contracts:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.

AM. ARBITRATION ASS'N., COMMERCIAL ARBITRATION RULES (1982), *reprinted in* 263 PLI Commercial Practice 211, 212 (1981), G. GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION, 114 App. A, (2d ed. 1977), and M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION, at App. VII (1968) [hereinafter cited as COMMERCIAL ARBITRATION RULES].

480. The American Arbitration Association suggests that parties wishing to submit an existing dispute to arbitration execute the following agreement:

> We, the undersigned parties, hereby agree to submit to arbitration under the Commercial Arbitration Rules of the American Arbitration Association the following controversy: (cite briefly). We further agree that the above controversy be submitted to (one) (three) Arbitrator(s) selected from the panels of Arbitrators of the American Arbitration Association. We further agree that we will faithfully observe this agreement and the Rules and that we will abide by and perform any award rendered by the Arbitrator(s) and that a judgment of the Court having jurisdiction may be entered upon the award.

GOLDBERG, *supra* note 479, at 114 app.

481. U.A.A. § 1. *See* Rome v. Sinai Hosp., 112 Mich. App. 387, 390, 316 N.W.2d 428, 429 (1982); DiPonio v. Henry Ford Hosp., 109 Mich. App. 243, 250, 311 N.W.2d 754, 757 (1981).

482. M. DOMKE, *supra* note 476, § 3.01, at 21.

483. Furnish, *Commercial Arbitration Agreements and the Uniform Commercial Code*, 67 CALIF. L. REV. 317, 325 (1979).

484. *See, e.g.*, Cournoyer v. American Television and Radio Co., 249 Minn. 577, 580,

an arbitrator's powers and use various legal processes to help resolve their dispute.[485] Parties to commercial transactions, for example, sometimes authorize arbitrators to make only advisory rather than binding decisions concerning disputes.[486]

Although courts generally possess only limited authority to review arbitration decisions,[487] courts have reviewed some of their aspects, such as whether an issue is arbitrable in light of the provisions of an arbitration agreement[488] and whether an arbitrator's award comports with the arbitration agreement.[489] A party also may challenge arbitration awards on the following three grounds: (1) an undisclosed relationship existed between an arbitrator and a party that affected the arbitrator's impartiality; (2) an arbitrator was corrupt; and (3) an arbitrator failed to conduct a fair and judicious hearing.[490]

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83 N.W.2d 409, 411 (1957); Meharry v. Midwestern Gas Transmission Co., 103 Ill. App. 3d 144, 146-47, 430 N.E.2d 1138, 1140 (1981); Leechburg Area School Dist. v. Dale, 492 Pa. 515, 521, 424 A.2d 1309, 1312-13 (1981).

485. Note, *The Consequences of a Broad Arbitration Clause Under the Federal Arbitration Act*, 52 B.U.L. REV. 571, 598 (1972).

486. *See* Transpacific Transp. Corp. v. Sirena Shipping Co., 9 A.D.2d 316, 322, 193 N.Y.S.2d 277, 284 (1959), *aff'd*, 8 N.Y.2d 1048, 170 N.E.2d 391, 207 N.Y.S.2d 70 (1960).

Federal and state arbitration statutes have survived numerous constitutional attacks. *See, e.g.*, Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1932) (arbitration does not violate constitutional privileges vesting judicial power in the courts); Finsilver, Still & Moss v. Goldberg, M. & Co., 253 N.Y. 382, 171 N.E. 579 (1930) (arbitration does not deprive parties of due process of law); Berkovitz v. Arbib & Houlberg, Inc., 230 N.Y. 261, 130 N.E. 288 (arbitration strengthens contractual obligations); *see also* Levy v. Superior Court, 15 Cal. 2d 692, 104 P.2d 770 (1940); Brown v. Siang, 107 Mich. App. 91, 104-05, 309 N.W.2d 575, 581 (1981); Somner v. Mackay, 10 N.J. Misc. 644, 160 A.2d 95 (1932).

487. *Recent Developments: Uniform Arbitration Act*, 48 Mo. L. REV. 137, 205 (1983); *see* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960) (illegality of part of contract does not nullify agreement to arbitrate); Judd Constr. Co. v. Evans Joint Venture, 642 P.2d 922, 925 (Colo. 1982) (an arbitrator's decision is a final decision on the merits, tantamount to a judgment); Jaffa v. Schacket, 114 Mich. App. 626, 319 N.W.2d 604 (1982) (errors of fact or misrepresentations of law are not grounds for vacating an arbitrator's award).

488. *See* Stone v. Freezer, 304 N.Y. 649, 107 N.E.2d 509 (1952); Matsner v. Fried, 301 N.Y. 699, 95 N.E.2d 53 (1950).

489. *See* Coast Trading Co., Inc. v. Pacific Molasses Co., 681 F.2d 1195 (9th Cir. 1982).

490. Goldberg, *Arbitration of Claims of Contract Unconscionability*, 56 N.D.L. REV. 7, 20 (1980). *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 436 n.22 (1953) (construing 9 U.S.C. § 10 (Supp. V. 1952)). The scope of judicial review of arbitration awards is very narrow. "If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact." Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1854). *See also*, I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424 (2d Cir. 1974); Federal Commerce & Navigation Co. v. Kanematsu-Gosho Ltd., 457 F.2d 387 (2d Cir. 1972); Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594 (3d Cir.), *cert. denied*, 393 U.S. 954 (1968).

The most noteworthy aspect of private dispute resolution is its inherent flexibility. From procedure to effect, the parties' agreement molds the arbitration.[491] Arbitration, however, is not an amorphous form of dispute resolution. Many industries, for example, provide very specialized arbitration tribunals,[492] and the American Arbitration Association offers a comprehensive set of guidelines for conducting arbitration proceedings.[493] Thus, the form of commercial arbitration proceedings varies significantly depending upon the nature of the underlying controversy and the desires of the disputing parties.[494]

(a) Advantages of Arbitration

Commercial arbitration facially appears to offer disputing parties a less costly method than does the judicial system.[495] Parties should bear in mind, however, that despite widespread publicity emphasizing the high cost of litigation,[496] public funds help to subsidize court costs. In arbitration proceedings, on the other hand, the disputing parties must bear the full cost of paying arbitrators.[497] As disputing parties seek arbitrators who possess greater expertise than those in the past, the cost of arbitration inevitably will grow. Parties to arbitration also may seek the advice of legal counsel during any or all stages of the arbitration process to decide a variety of questions, such as whether to arbitrate, what form of

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491. M. DOMKE, *supra* note 476, at 1.

492. AM. ARBITRATION ASS'N., WIDE WORLD OF ARBITRATION (C. Gold & S. Mackenzie eds. 1978) (including articles on the textile and apparel industry, the construction industry, and the health care industry).

493. *See* COMMERCIAL ARBITRATION RULES, *supra* note 479. *See also* U.A.A., *supra* note 477; Rules for the International Chamber of Commerce Court of Arbitration, *reprinted in* M. DOMKE, *supra* note 476, at app. XIII; Rules for the FCC Court of Arbitration, Pub. L. 291, at 9-21 (1980).

494. The following tripartite classification of international arbitration exemplifies the variation in forms and function of arbitration as a dispute resolution method: (1) nonbinding procedures (in which the award is purely advisory); (2) semi-binding procedures (in which parties may challenge the award but only with heavy fines to the challenger if a court affirms the award); and (3) binding procedures (in which an arbitrator's decision is not reviewable). These three types of arbitration may vary widely in form and procedure. *See* Perlman & Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215, 233-36 (1983).

495. *See* Kreindler, *Choice of Forum-Litigation or Arbitration*, 263 PLI COMMERCIAL LAW AND PRACTICE 9, 11 (1981).

496. *See, e.g.*, N.Y. Times, Apr. 28, 1982, at 24, cols. 4-6 (speech by Lloyd N. Cutler estimating that the amount of money spent on lawyers equalled 1.4% of the gross national product of the United States).

497. *See, e.g.*, COMMERCIAL ARBITRATION RULES, *supra* note 476, at rules 50-51.

arbitration to use, what arbitrator to choose,[498] and how to conduct the arbitration proceedings. Disputing parties also use legal counsel as advocates during arbitration proceedings. Thus, settling disputes through arbitration sometimes, but not always, is less expensive than litigating the same dispute in court.[499]

Arbitration is a more expeditious method of dispute resolution than are judicial trials because disputing parties privately can schedule arbitration proceedings to commence soon after disputes arise. Conversely, complex pretrial discovery procedures and congested court dockets make prompt judicial dispute resolution virtually impossible. When disputes arise during the performance of construction contracts, for example, parties frequently use arbitration because it promotes prompt dispute resolution and avoidance of very costly construction delays.[500]

The parties to arbitration proceedings are free to select the arbitrators. This freedom allows the parties to choose arbitrators with expertise in the controversial subject matter.[501] The use of arbitrators with expertise in the resolution of certain types of disputes ensures expeditious, fair, and accurate dispute resolution.[502] The ability to select expert arbitrators also helps disputing parties to bypass the time consuming process of educating fact finders about technical matters that trial litigants often must employ.[503]

The private nature of arbitration proceedings is another attractive feature of arbitration.[504] Many disputing parties choose arbitration over judicial trials because public trials destroy parties'

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498. *See generally* Roth, *Choosing an Arbitration Panel*, 6 LITIGATION 13 (1980) (discussing factors to consider when selecting an arbitrator).

499. *See* R. COULSON, BUSINESS ARBITRATION—WHAT YOU NEED TO KNOW 7 (1980). The effect on litigtion costs that litigants cause by flooding the judicial system with purely private disputes is immeasurable. *See* address by F. Sander, *Varieties of Dispute Processing*, delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), *reprinted in* 70 F.R.D. 111, (1976).

500. *See* J. O'BRIEN, CONSTRUCTION DELAY, 3-4, 164-69 (1976); *see also* R. COULSON, *supra* note 499, at 7; *supra* note 478.

501. *See* U.A.A. § 3; COMMERCIAL ARBITRATION RULES, *supra* note 479, at rule 14.

502. Judge Learned Hand explained:

> In trade disputes one of the chief advantages of arbitrations is that arbitrators can be chosen who are familiar with the practices and customs of the calling, and with just such matters as what are current prices, what is merchantable quality, what are the terms of sale, and the like.

American Almond Prod. Co. v. Consolidated Peanut Sales Co., 144 F.2d 448, 450 (2d Cir. 1944).

503. *See id.*

504. *See also* notes 1152-55 and accompanying text for a discussion of the advantages of privacy in rent-a-judge proceedings.

ability to preserve the privacy of their disputes[505] by making all judicial dispute resolution procedures matters of public record.[506] As in divorce cases,[507] the sensitive subject matter of many commercial disputes gives parties a strong incentive to seek the private, confidential remedies that arbitration offers. The ability to obtain arbitrators who are expert in the subject matter of a dispute and the confidential, expeditious, and sometimes inexpensive characteristics of arbitration give parties to commercial disputes an effective alternative to litigation for solving their disputes without marring business relationships.

(b) Disadvantages of Arbitration

Although the advantages of commercial arbitration are numerous, several disadvantages also exist. First, the greatest disadvantage is that the scope of judicial review of arbitration awards is very narrow.[508] Parties to arbitration proceedings rarely persuade reviewing courts to overturn an award for errors in fact finding or law application.[509] Thus, parties assume the risk that arbitrators may commit irreversible factual or legal errors in rendering an award by submitting their dispute to arbitration.[510] Second, arbitrators frequently do not write opinions. Thus, they may not always engage in thoughtful analysis of a dispute because they do not have to reveal to the disputing parties the reasoning for their decisions.[511] Third, disputing parties sometimes are unable to obtain discovery of their opponent's case[512] or provisional remedies

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505. Protective orders do provide some relief from the revelation of each party's secrets. *See* FED R. CIV. P. 26(c).

506. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976).

507. *See infra* notes 867-916 and accompanying text (discussing mediation in divorce cases).

508. ARBITRATION 17 (A. Widiss ed. 1979).

509. M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION 2 (1968), *see also* Del Bianco & Assocs. v. Adam, 6 Ill. App. 3d 286, 292-93, 285 N.E.2d 480, 484 (1972), *cert. denied*, 410 U.S. 955 (1973). As a practical matter, parties have no right of appeal from an arbitrator's decision, absent fraud or misconduct.
Kreindler, *supra* note 104, at 13.

510. ARBITRATION, *supra* note 508, at 17. Even gross errors of judgment in law or mistakes of fact will not vitiate an award unless these mistakes or errors are apparent on the face of the award. Garver v. Ferguson, 76 Ill. 2d 1, 10-11, 389 N.E.2d 1181, 1184 (1979).

511. S. LAZARUS, J. BRAY, JR., L. CARTER, K. COLLINS, B. GIEDT, R. HOLTON, JR., P. MATTHEWS, & G. WILLARD, RESOLVING BUSINESS DISPUTES 85 (1965).

512. The Uniform Arbitration Act and Federal Arbitration Act do not have any express provisions for discovery beyond the power of the arbitrator to subpoena the production of documents and witnesses. Brown, *Some Practical Thoughts on Arbitration*, 6 LITIGATION 8, 9 (1980).

such as restraining orders and attachments.[513] Fourth, although the law requires arbitrators to give disputing parties a complete opportunity to present all of their arguments and evidence at the arbitration hearing, arbitration does not afford the parties the full evidentiary and procedural safeguards of traditional trials.[514] Last, although litigation usually is more expensive than arbitration, arbitrating parties still must pay the travel expenses of arbitrators, legal counsel, and court reporters, and the service fee for the agency under whose auspices the arbitrators work.[515]

2. The Federal Arbitration Act

(a) History of the Federal Arbitration Act

In 1925 Congress enacted the United States Arbitration Act ("Federal Arbitration Act" or "Act")[516] in order to encourage businesses to use arbitration and to promote nonjudicial commercial dispute settlement.[517] Congress, in adopting the Federal Arbitration Act, recognized that widespread judicial hostility toward arbitration agreements was a significant impediment to the further development of arbitration as a viable method of resolving disputes.[518] This historical reluctance of courts to yield their jurisdiction to arbitration proceedings[519] denied contractual arbitration clauses the legal and equitable diguity accorded to other contractual provisions. Through the Act, Congress sought to legitimize the arbitration option in the eyes of the commercial world and the courts.

Section 2 of the Federal Arbitration Act provides that:

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513. ARBITRATION, *supra* note 508, at 16.

514. Reisman v. Ranoel Realty Co., 224 Pa. Super. 220, 223-25, 303 A.2d 511, 513-14 (1973); Brown, *supra* note 512, at 9.

515. R. FLEMING, THE LABOR ARBITRATION PROCESS 50 (1965).

516. 9 U.S.C. § 1-14 (1982). Congress first enacted the Federal Arbitration Act on February 12, 1925. Congress adopted chapter 2 on July 31, 1970.

517. H.R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924). *See* W. STURGES, COMMERCIAL ARBITRATION AND AWARDS § 23 (1930). *See* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *cert. dismissed*, 364 U.S. 801 (1960).

518. H.R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924); S. REP. No. 536, 68th Cong., 1st Sess. 2-4 (1924). At common law, courts in England and the United States felt animosity toward arbitration. Thus, they held that arbitration agreements were revocable at will by either party at any time before an arbitrator rendered an award. ARBITRATION, *supra* note 508, at 3. For a history of judicial reluctance to enforce arbitration agreements, see generally, Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132 (1934).

519. *See, e.g.*, Wolaver, *supra* note 518, at 138-40.

> A written provision in any maritime transaction or a contract evidencing a transaction involving [interstate] commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[520]

Section 4 of the Act permits a party to an arbitration agreement to petition a federal district court to order the other party to engage in arbitration.[521] If the district court finds that the disputing parties had entered an agreement to arbitrate and that one party had failed to comply with the agreement, it must order the parties to arbitrate the dispute.[522] In determining whether the dispute falls within the scope of the arbitration agreement, the federal courts typically resolve doubtful cases in favor of arbitration.[523] Subsequent sections of the Act empower federal district courts to confirm arbitration awards[524] and to modify[525] or vacate[526] the award

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520. 9 U.S.C. § 2 (1982). Section 1 of the Act explains that " '[c]ommerce,' as herein defined, means commerce among the several States or with foreign nations." *Id.* at § 1.

521. 9 U.S.C. § 4 (1982).

522. Section 4 recognizes that the party allegedly in default of the arbitration agreement may receive, under some circumstances, a jury trial concerning the making of the arbitration agreement and the failure, neglect, or refusal of the party to perform in accordance with the agreement. 9 U.S.C. § 4 (1982). If the jury finds that "an agreement for arbitration was made in writing and that there is a default in proceeding thereunder," § 4 requires the court to order the parties to proceed with the arbitration. *Id.*

523. *See* Brown, *supra* note 512, at 12. *See, e.g.*, Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711, 714 (7th Cir. 1967) (The court viewed its role in determining whether to order arbitration as " 'ascertaining whether the party seeking arbitration is making a claim which on its face is one governed by the agreement.' "). *Id.* at 714. In Seaboard Coastline R.R. v. National Rail Passenger Corp., 554 F.2d 657, 660 (5th Cir. 1977), for example, the court readily acknowledged that under the terms of the pertinent arbitration agreement the arbitrater had the authority to interpret the scope of the arbitration agreement and its container contract.

524. *See* 9 U.S.C. § 9 (1982). Section 9 provides in pertinent part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at anytime within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected
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> . . . .

525. *See* 9 U.S.C. § 11 (1982). Section 11 permits the court to: (a) correct evident mistakes or miscalculations, (b) limit the award to matters submitted to the arbitrater, or (c) cure imperfections in matters of form that do not affect the merits of the controversy. *Id.*

526. *See* 9 U.S.C. § 10 (1982). The court may vacate an arbitration award under the following circumstances:

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.

on limited grounds.

Despite the unmistakable congressional desire to facilitate commercial arbitration,[527] the Federal Arbitration Act did not immediately cure the arbitration phobia of federal courts. The courts initially interpreted the Act to require them to order arbitration only when an arbitration agreement expressly applied to disputed issues;[528] otherwise, courts stubbornly refused to relinquish their jurisdiction to arbitration.[529] The Second Circuit's opinion in *Kulukundis Shipping Co. v. Amtorg Trading Corp.*[530] marked a turning point in judicial treatment of arbitration clauses and the Federal Arbitration Act.[531] Since *Kulukundis*, the federal courts consistently have endorsed arbitration agreements. The Second Circuit in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*[532] urged a presumption in favor of arbitration as a means of easing court congestion and effecting the original intention of parties to arbitration agreements.[533] In *Robert Lawrence* the court reaffirmed the constitutionality of Congress' creation of "national substantive law" governing arbitration agreements.[534] Accordingly, the court declared that all arbitration agreements of the type previously dis-

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(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id. Subsection (e) of § 10 empowers the court to direct an arbitrater to rehear a dispute when it vacates an award if the time period that the arbitration agreement establishes for the award has not expired. 9 U.S.C. § 10 (e) (1982).

527. *See supra* notes 516-19 and accompanying text.

528. Note, *supra* note 485, at 577.

529. *See id.*

530. 126 F.2d 978 (2d Cir. 1942).

531. Note, *supra* note 485, at 578. *Kulukundis* developed the philosophy on arbitration agreements first articulated by the Second Circuit in *In re* Canadian Gulf Line, Ltd., 98 F.2d 711 (2d Cir. 1938). *See* Sturges & Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROBS. 580, 582-83 (1952).

532. 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960).

533. *Id.* at 410. In The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), the Supreme Court stated that if a contract fixing a particular forum for resolution of all disputes "was made in an arm's-length negotiation by experienced and sophisticated businessmen, . . . absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." *Id.* at 12.

534. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d at 409.

allowed in federal and state courts should be enforceable.[535] Several other courts subsequently have adopted the position that they should resolve in favor of arbitration any doubts or ambiguities arising in arbitration statutes.[536]

The Supreme Court also espoused support for commercial arbitration in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[537] by establishing the doctrine of separability of arbitration clauses from their "container" contracts.[538] The separability of the arbitration clauses permits federal courts to apply the Federal Arbitration Act in diversity cases. In *Prima Paint* the Court examined a contract in which Flood & Conklin sold its multistate paint business to Prima Paint and transferred the business from New Jersey to Maryland.[539] The majority read the statutory phrase "relating to interstate commerce" liberally and rejected the dissent's contention that only contracts for the interstate shipment of goods satisfied the interstate commerce requirement in section 2 of the Act.[540] The Court, therefore, ordered the parties to arbitrate their dispute.[541]

The Court's treatment of the interstate commerce requirement in *Prima Paint* is characteristic of the liberal interpretation this requirement has received in federal courts.[542] Courts consistently have held that "involving [interstate] commerce" embraces, in addition to contracts for interstate shipment of goods, all contracts with substantial interstate elements.[543] The *Metro Industrial Painting Corp. v. Terminal Construction Co.*[544] test for determining whether a contract "involves" substantial interstate activity requires examination of a contract's terms to infer the contracting

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535. *Id.* at 407.

536. *See, e.g.*, Marcy Lee Mfg. Co. v. Cortley Fabrics Co., 354 F.2d 42 (2d Cir. 1965); Younker Bros., Inc. v. Standard Constr. Co., 241 F. Supp. 17 (S.D. Iowa 1965).

537. 388 U.S. 395 (1967).

538. *Id.* at 402-04.

539. *Id.* at 401.

540. *Id.* at 401 & n.7.

541. *Id.* at 406-07.

542. *See, e.g.*, Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711, 713-14 (7th Cir. 1967); Monte v. Southern Del. County Auth., 321 F.2d 870, 872 (3d Cir. 1963); Electronic & Missile Facilities, Inc. v. United States, 306 F.2d 554, 555 (5th Cir. 1962), *rev'd on other grounds*, 374 U.S. 167 (1963).

543. M. Domke, *supra* note 476, at § 4:03, at 31-32. *See* Monte v. Southern Del. County Auth., 321 F.2d 870, 872 (3d Cir. 1963); Fairchild & Co. v. Richmond, Fredericksburg & Potomac R.R., 516 F. Supp. 1305, 1311-12 (D.D.C. 1981); *see also* Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972) (contract need not contemplate shipment of goods to evidence a transaction involving commerce).

544. 287 F.2d 382 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961).

parties' state of mind. The *Metro Industrial* test mandates application of the Federal Arbitration Act if cogent evidence demonstrates that the parties contemplated interstate activity at the time of contracting, or in the course of performance of the contract.[545]

(b) Application of the Federal Arbitration Act in Federal and State Courts

The Federal Arbitration Act does not vest federal courts with jurisdiction over cases concerning arbitration agreements.[546] Parties who bring suits in federal courts under the Act must have an independent basis for federal jurisdiction, such as diversity of citizenship or federal question.[547] When an arbitration clause is part of a contract that contemplates substantial interstate commerce or maritime activity, federal courts almost uniformly evaluate the validity and effect of the arbitration agreement in accordance with the guidelines set forth in the Act.[548] Many state courts have faced the question of whether to apply federal or state law concerning the enforceability of clauses in contracts to arbitrate future disputes that arise during performance of the contract.[549] Even when these disputes concerned a maritime or interstate transaction, some state courts declined to apply the Federal Arbitration Act and to enforce the arbitration clause.[550] In 1984, how-

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545. *Id.* at 387 (Lumbard, C.J., concurring). The North Carolina Supreme Court applied the reasoning of Chief Judge Lumbard in Burke County Pub. Schools v. Shaver Partnership, 303 N.C. 408, 279 S.E.2d 816 (1981). The *Burke* court, in holding that an architectural contract contemplated substantial activity in interstate commerce, reasoned that the Indiana architectural firm would render services for the construction of two schools in North Carolina, representatives of the architectural firm would periodically travel to North Carolina to inspect the construction site, a Michigan firm performed structural engineering design work for the construction project, suppliers shipped construction materials to North Carolina from all over the country, and the plaintiff made payments to the architects from North Carolina. *Id.* at 419-20, 279 S.E.2d at 818.

546. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 637 F.2d 391, 395 (5th Cir. 1981).

547. *See* 9 U.S.C. § 4 (1982). *See also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 637 F.2d 391, 395 (5th Cir. 1981); C.P. Robinson Constr. Co. v. National Corp. for Hous. Partnerships, 375 F. Supp. 446, 448 (M.D.N.C. 1974).

548. *See* Southland Corp. v. Keating, 104 S. Ct. 852, 860 (1984). For further discussion of the Federal Arbitration Act, see Note, *Scope of the United States Arbitration Act in Commercial Arbitration: Problems in Federalism*, 58 NW. U.L. REV. 468 (1963); Note, *Commercial Arbitration in Federal Courts*, 20 VAND. L. REV. 607 (1967).

549. *See, e.g.*, Lesser Towers v. Roscoe-Ajax Constr. Co., 258 F. Supp. 1005 (S.D. Cal. 1966); Deep South Oil Co of Tex. v. Texas Gas Corp. 328 S.W. 2d 897 (Tex. Civ. App. 1959); *see also* M. DOMKE, *supra* note 476, § 4:03, at 32-33.

550. M. DOMKE, *supra* note 476, § 4:03, at 36. *See, e.g.*, Wilson & Co. v. Fremont Cake & Meal Co., 153 Neb. 160, 43 N.W.2d 657 (1950), *cert. denied*, 342 U.S. 812 (1951).

ever, the Supreme Court held in *Southland Corp. v. Keating*[551] that the Federal Arbitration Act applies in both state and federal courts.[552] Thus, state courts must apply the Federal Arbitration Act and enforce agreements to arbitrate future disputes that arise out of the performance or breach of a contract which contemplates substantial interstate commerce or maritime activity.

After capsulizing the history of the Act, the Court in *Keating* articulated three reasons for its holding. First, the Court noted that its holding in *Prima Paint*, which recognized that the Act was a congressional exercise of commerce clause power,[553] "clearly implied" that the Act's substantive rules governed federal and state courts alike.[554] Second, the Court observed that Congress intended the Act to apply in state courts.[555] Congress, the Court reasoned, promulgated the Act to foreclose state legislatures' attempts to undercut the enforceability of arbitration agreements.[556] Thus, the Court felt compelled to hold the Act applicable in state courts to avoid frustrating Congress' power to regulate interstate commerce.[557] Last, the Court decided that the disparate treatment of arbitration clauses in state and federal courts would encourage forum shopping,[558] upon which the federal courts and Congress historically have frowned.[559] Given these policy objectives, the Court

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551. 104 S. Ct. 852 (1984).

552. *Id.* at 859, 861.

553. *Id.* at 858. Congress enacted the Federal Arbitration Act pursuant to its commerce clause powers in article I, section 8 of the United States Constitution.

554. *Id.* at 859 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 420 (1967) (Black, J., dissenting)). The *Keating* Court also stated that its recent holding in Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 103 S. Ct. 927, 942 n.32 (1983), reaffirmed the *Prima Paint* decision. Southland Corp. v. Keating, 104 S. Ct. at 859.

555. Southland Corp. v. Keating, 104 S. Ct. at 859. *See, e.g.*, H.R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924); *Hearings on S. 4212 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. 6 (1923) (remarks of Sen Walsh).

The Court reasoned that because an overwhelming proportion of all civil litigation is in state courts, Congress could not have intended to limit the applicability of the Act exclusively to cases brought in federal courts. Southland Corp. v. Keating, 104 S. Ct. at 860-61.

556. *Id.* at 860.

557. *Id.* at 861.

558. *Id.* at 860. The Kentucky Supreme Court offered a similar rationale for applying the Federal Arbitration Act in state courts. Fite & Warmath Constr. Co. v. MYS Corp., 559 S.W. 2d 729 733 (Ky. 1977). In *Fite & Warmath*, the court confronted a choice between a state common law rule, which permitted revocation of an arbitration agreement at any time prior to a valid award, and the Federal Arbitration Act's rule, which makes arbitration agreements irrevocable. The Kentucky Supreme Court, embracing the policy arguments against forum shopping that the Supreme court articulated in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73-77 (1938), held that the Act applied in Kentucky state courts. *Fite & Warmath*, 599 S.W.2d at 734.

559. *See* Guaranty Trust Co. v York, 326 U.S. 99, 109 (1945); Erie R.R. Co. v.

concluded that the "involving commerce" language in section 2 of the Act makes the Act applicable in both state and federal courts.[560] The *Keating* decision, therefore, represents the Court's largest step toward promoting the goals Congress envisioned when it enacted the Federal Arbitration Act in 1925.

3. The Uniform Arbitration Act and State Law

The enforceability of an arbitration agreement in a contract that does not involve interstate commerce or maritime transactions depends on state arbitration law regardless of whether the litigation occurs in a state or federal court.[561] In 1920 New York enacted the first arbitration act in the United States.[562] The effectiveness of the New York Act and the Federal Arbitration Act prompted the development of uniform laws for commercial arbitration.[563] The American Bar Association approved a version of the Uniform Arbitration Act ("Uniform Act") in 1955.[564] Several states immedi-

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Tompkins, 304 U.S. 64, 74-75 (1938).

560. Southland Corp. v. Keating, 104 S. Ct. at 860. Prior to *Keating* numerous state and federal courts bad suggested that the Act applies to cases brought in both state and federal courts. *See, e.g.*, Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 386 (2d. Cir.) (Lumbard, C.J., concurring), *cert. denied*, 368 U.S. 817 (1961); Pathman Constr. Co. v. Knox County Hosp. Ass'n, 164 Ind. App. 121, 132, 326 N.E.2d 844, 851 (1975); R. J. Palmer Constr. Co. v. Wichita Band Instrument Co., 7 Kan App. 2d 363, 365, 642 P.2d 127, 129 (1982); Fite & Warmath Constr. Co. v. MYS Corp., 559 S.W.2d 729, 734 (Ky. 1977) (applying Act's irrevocability provision contrary to state law permitting revocation of agreements); *see also* Annot., 95 A.L.R. 3d 1145, 1159 (1979) (listing state court decisions that have applied the Act to arbitration disputes concerning a contract which involves commerce).

Some of these courts based their holdings on the desirability of eliminating forum shopping. *See, e.g., supra* note 558. The Florida court in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Melamed, 405 So. 2d 790 (Fla. App. 1981), held that under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, federal statutes are the supreme law of the land and preempt inconsistent state laws. *Id.* at 792. *See also* American Airlines, Inc. v. Louisville & Jefferson County Air Bd., 269 F.2d 811 (6th Cir. 1959). Additionally, some state courts have applied the Act to further the congressional intent of making the benefits of arbitration available to business communities around the country while simultaneously unclogging congested court dockets. *See, e.g.*, Burke County Pub. Schools Bd. of Educ. v. Shaves Partnership, 303 N.C. 408, 422, 279 S.E.2d 816, 824 (1981).

561. Bernhardt v. Polygraph Co. of Am., 350 U.S. 198, 201-02 (1956); Shearson Hayden Stone, Inc. v. Liang, 493 F. Supp. 104, 106 (N.D. Ill. 1980), *aff'd.*, 653 F.2d 310 (7th Cir. 1981); Cook v. Kuljian Corp., 201 F. Supp. 531, 535 (E.D. Pa. 1962).

562. N.Y. CIV. PRAC. LAW §§ 7501-14 (McKinney 1980).

563. M. DOMKE, *supra* note 476, § 4:02, at 29-30. The major difference between the version of the Uniform Arbitration Statute that the ABA adopted and the preexisting statutes was that the ABA's statute contained provisions for the enforcement of future arbitration clauses. *Id.* Today, forty states have arbitration statutes that provide for the enforcement at such clauses. *Id.* at App. I.

564. *Id.* § 4:02, at 22.

ately adopted versions of this act.[565] Today every state except Vermont has adopted some arbitration legislation.[566] These statutes usually resemble the Uniform Act.[567]

The Uniform Act substantially parallels the Federal Arbitration Act. The two acts aply to essentially the same situations.[568] Both acts contain virtually identical provisions[569] for compelling or staying arbitration proceedings,[570] vacating[571] or modifying[572] an award, and entering an order respecting the award.[573] The Acts differ in two main respects. First, the Uniform Act contains several sections setting forth arbitration procedures and regulations.[574] The Federal Arbitration Act, on the other hand, lets the disputing parties agree upon arbitration procedures.[575] Second, the Uniform Act gives state courts jurisdiction to enforce arbitration agreements and to enter judgments concerning arbitration awards.[576] The Federal Arbitration Act, however, does not confer jurisdiction upon federal courts to hear disputes concerning arbitration agree-

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565. Arizona, Florida, Illinois, Maryland, Massachusetts, Minnesota, and Wyoming adopted the Uniform Act either completely or with minor changes. *Id.* § 4:02, at 22.

566. ARBITRATION, *supra* note 508, at 3.

567. The following states have adopted statutes modeled after the Uniform Act: Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Missouri, Minnesota, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Wyoming, and Texas. Recent Development, *supra* note 96, at 139 & n.2.

568. *Compare* 9 U.S.C. § 2 (1982) *with* U.A.A. § 1.

569. Although the provisions of the Uniform Arbitration Act and the Federal Arbitration Act concerning judicial enforcement of arbitration agreements are similar, most state courts, when applying state arbitration law, define the scope of arbitration agreements less liberally than do courts applying the Federal Arbitration Act. *See supra* note 512. Other state courts have assumed greater responsibility for determining whether a dispute falls within the scope of an arbitration agreement. Brown, *supra* note 512, at 12. *See, e.g.*, Roosevelt Univ. v. Mayfair Constr. Co., 28 Ill. App. 3d 1045, 331 N.E.2d 835 (1975). Courts applying state law and the Federal Arbitration Act both allow arbitrators to determine the scope of arbitration agreements. *See, e.g.*, Layne-Minnesota Co. v. Regents of Univ. of Minn., 266 Minn. 284, 123 N.W.2d 371 (1963).

570. *Compare* 9 U.S.C. §§ 3-4 (1982) *with* U.A.A. § 2.

571. *Compare* 9 U.S.C. § 10 (1982) *with* U.A.A. § 12.

572. *Compare* 9 U.S.C. § 11 (1982) *with* U.A.A. § 13.

573. *Compare* 9 U.S.C. § 9 (1982) *with* U.A.A. § 14.

574. *See* U.A.A. §§ 5-7.

575. *See* 9 U.S.C. § 4 (1982).

576. U.A.A. § 17. State courts typically view commercial arbitration favorably. *See, e.g.*, Litchsinn v. American Inter-insurance Exch., 287 N.W.2d 156, 159-60 (Iowa 1980); Quirk v. Data Terminal Sys., 379 Mass. 762, 765-67, 400 N.E.2d 858, 861-62 (1980); Simpson v. Simpson, 194 Neb. 453, 455-56, 232 N.W.2d 132, 136 (1975); Dairyland Ins. Co. v. Rose, 92 N.M. 527, 530, 591 P.2d 281, 284 (1979); *In re* Town of Greybull, 560 P.2d 1172, 1175 (Wyo. 1977). For a further list of state court arbitration cases, see M. DOMKE, *supra* note 476, § 3:01, at 6 (Supp. 1983).

ments in contracts that contemplate interstate commerce or maritime activity. Rather, the party bringing a claim in federal court under the Act must demonstrate independent grounds for federal court jurisdiction.[577]

D. Summary

The use of liquidated damages provisions in commercial contracts and the right of creditors to repossess collateral in secured transactions are two important commercial self-help techniques. Contracting parties that use liquidated damages clauses agree that a specific sum expressed in the clause is a just remedy for one party's breach of the contract. If parties draft these provisions carefully and avoid making them function as contractual penalty provisions against the breaching parties, they can resolve the question of appropriate damages for breach without going to court. The right of repossession under the UCC allows creditors in secured transactions to satisfy a debtor's defaulted obligation by taking possession of the property that secured the transaction and disposing of it without bringing a judicial action. Although the common law tolerated some uses of creditor force to repossess a debtor's property, the UCC prohibits self-help repossession that "is fraught with the likelihood of resulting violence."[578] Businessmen and consumers also should realize that they may submit almost any commercial dispute to arbitration[579] unless a statute or public policy prohibits arbitration of the issue. Disputes frequently arise between parties to commercial transactions. These parties can avoid the time consuming and expensive process of litigating their disputes, by inserting an arbitration clause in the contract that gov-

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577. *See supra* notes 446-48 and accompanying text.

578. Morris v. First Nat'l Bank & Trust Co., 21 Ohio St. 2d 25, 29, 254 N.E.2d 683, 686 (1970).

579. ARBITRATION, *supra* note 508, at 2. Although arbitration is a common method of resolving labor and construction contract disputes, parties also have used it in disputes concerning wills and trusts. George Washington, for example, provided in his will for the arbitration of disputes arising out of that instrument:

> But having endeavored to be plain and explicit in all Denses—even at the expense of prolixity, perhaps of tautology, I hope, and trust, that no disputes will arise concerning them; but if contrary to expectation the case should be otherwise . . ., my will and direction expressly is, that all disputes . . . shall be decided by three impartial and intelligent men, known for their probity and good understanding . . . . which three men thus chosen, shall unfettered by law, or legal constructions, declare their sense of the testator's intention; and such decision, is to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States.

American Arbitration Association, Arbitration News, No. 2 (1963).

erns their transaction.[580] In the past, many courts, out of animosity toward arbitration, often refused to enforce arbitration agreements at common law. Today, state and federal courts, pursuant to state arbitration statutes and the Federal Arbitration Act in the wake of *Southerland Corp. v. Keating*,[581] enforce most arbitration agreements.[582] In addition, the efforts of private organizations, such as the American Arbitration Association,[583] to improve the quality of arbitration suggests that arbitration will play an important and expanding role in the resolution of disputes that arise out of commercial transactions in the United States.[584]

V. Landlord and Tenant Self-Help

A. Introduction

The availability of self-help remedies for resolving disputes between landlords and tenants heavily weighed in favor of landlords at common law. Landlords had the option, upon a tenant's failure to pay rent on time, of utilizing the self-help right of distraint to seize a tenant's personal property to satisfy the overdue rent or simply using self-help eviction to expel tenants from the leased premises. Tenants, on the other hand, enjoyed absolutely no self-help remedies and had very few judicial remedies for the wrongful actions of their landlords. Contemporary American courts and legislatures, however, consistent with the modern trend in America toward consumer protection, significantly have limited landlord self-help remedies, but have expanded the number of tenant self-help remedies. This trend, along with the emergence of speedy judicial remedies for landlord-tenant disputes and state and locally sponsored dispute mediation centers, has helped to relieve society of the violence that frequently accompanied landlord self-help at common law.

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580. Recent Development, *supra* note 487, at 159. *See, e.g.*, Macchiavelli v. Shearson, Hamill & Co., 384 F. Supp. 21, 25 (E.D. Cal. 1974); Bolingbrook Park Dist. v. National Ben Franklin Ins. Co., 96 Ill. App. 3d 26, 30, 420 N.E.2d 741, 744 (1981).

581. 104 S. Ct. 852 (1984).

582. *See supra* notes 516-60 and accompanying text for a discussion of judicial enforcement of arbitration agreements under the Federal Arbitration Act and state law.

583. The American Arbitration Association is a private, nonprofit association that began operating in 1926, one year after the enactment of the Federal Arbitration Act. The Association is independent of industry and trade, and acts as an impartial administrator of arbitrable disputes.

584. The American Arbitration Association reported 645 commercial arbitrations in 1957, 1,588 arbitrations in 1967 and 4,550 in 1977. Letter from Eastman Arbitration Library (May 8, 1978) *(reprinted in* Furnish, *supra* note 92, at 317 n.1).

This part of this Special Project traces the development of landlord and tenant self-help remedies from their origins in common-law England to their modern status as permissible and impermissible methods of dispute resolution in contemporary America. Part B of this section discusses landlord self-help remedies, including the rights of distraint and self-help eviction. Part C traces the emergence of tenant self-help in American jurisdictions, including the right of tenants to make repairs and deduct reasonable costs from rent, and the right to withhold completely payment of rent. Part C also discusses the emergence of state and locally sponsored dispute mediation centers that provide an effective means for resolving landlord-tenant disputes. Part D concludes that the development and treatment of self-help and speedy judicial methods of landlord-tenant dispute resolution have helped to relieve society from the neighborhood violence that often accompanied landlord self-help at common law.

B. Landlord Self-Help

1. Distraint

(a) The English Rule

The common law right of distraint[585] allowed landlords to utilize self-help and seize a tenant's personal property as security for payment of overdue rent.[586] This right arose out of the landlord-tenant relationship itself.[587] The right of distraint differed from a landlord lien because it remained unperfected until the landlord physically seized the property, whereas a lien attached at the beginning of the lease term.[588] At common law, landlords had no right to sell seized chattels, but rather had to place them in a public pound until the tenant satisfied the overdue debt.[589] A 1689

585. The terms "distress" and "distraint" are usable as synonyms. BLACK'S LAW DICTIONARY 426 (5th ed. 1979).

586. 3A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1305, at 493 (repl. 1981).

587. *See* 3 H. TIFFANY, THE LAW OF REAL PROPERTY § 919 (3d ed. 1939). The common law right of distraint originated in England in the feudal tenure relationship that existed between lords and vassals. The lord, as owner of the reversion, could secure rent from the vassal who held the leasehold estate. 2 AMERICAN LAW OF PROPERTY § 9.47, at 473 (A. Casner ed. 1952).

588. 2 W. & M., ch. 5, § 1 (1689). Laying hold to a single chattel or any act or word that indicated an intention to distrain symbolized a seizure of all goods on the demised premises. 2 W. ODGERS & W. ODGERS, THE COMMON LAW OF ENGLAND 894 (2d ed. 1920).

589. 3A G. THOMPSON, *supra* note 586, at 494.

statute[590] gave landlords the right to sell distrained property to pay a rent arrearage.[591]

At common law, several restrictions limited a landlord's right to distrain. First, tenants either must have obtained a lease of the premises or must have gained possession by a specifically enforceable agreement.[592] Second, the amount of rent must have been a sum certain.[593] Third, landlords had to exercise this right during the tenancy or within six months after the term ended if the tenant remained in possession.[594] Last, landlords could not employ this remedy to rent owed on an agricultural lease that had been delinquent for one year or more,[595] nor could they distrain twice for the same rent.[596]

Generally, only landlords with reversionary interests in the property could utilize this remedy[597] since the right of distraint depended upon the relation of tenure.[598] The estates of deceased landlords, however, could distrain for rent that came due during the landlord's lifetime.[599] Furthermore, tenants subletting to others could distrain for rent that subtenants owed unless they had assigned away all their rights in the leased property.[600]

Certain rules governed the distraint procedure. Landlords personally, or by appointed bailiffs,[601] had to distrain between sunrise

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590. *Id.* Sale of Distress Act, 1689, 2 W. & M., ch. 5, § 2.

591. *Id.*; *see* 2 W. ODGERS & W. ODGERS, *supra* note 588, at 894; *see also* Jones v. Biernstein, [1899] 1 Q.B. 470. The common law required the landlord to comply with notice, advertising, and waiting period requirements, and prohibited him from purchasing the goods. *See* 2 W. ODGERS & W. ODGERS, *supra* note 588, at 895.

592. 2 W. ODGERS & W. ODGERS, *supra* note 588, at 889; 3A G. THOMPSON, *supra* note 586, at 494.

593. 2 W. ODGERS & W. ODGERS, *supra* note 588, at 889.

594. *Id.*

595. *Id.* at 890.

596. *Id.* "[A landlord] must not vex his tenant by the exercise upon two occasions of this summary remedy." Bagge v. Mawby, 8 Ex. 641, 649, 155 Eng. Rep. 1509, 1512 (1853).

597. *See supra* note 587 and accompanying text.

598. 2 W. ODGERS & W. ODGERS, *supra* note 588, at 889.

599. A landlord's estate did not enjoy the right of distraint at common law but received it statutorily in 1540. 32 Hen. 8, ch. 37, § 1 (1540). *See* 3 H. TIFFANY, *supra* note 587, at § 919.

600. 2 W. ODGERS & W. ODGERS, *supra* note 588, at 889.

601. A bailiff was an agent of the landlord authorized to exercise the landlord's right of distraint. 3A G. THOMPSON, *supra* note 586, at 502. At common law, delegation of power to a bailiff was an entirely personal matter, but courts eventually required landlords to obtain court authorization before delegating this right. 51 & 52 Vict., ch. 21, § 7 (1888); *see* 2 W. ODGERS & W. ODGERS, *supra* note 588, at 894.

and sunset.[602] Distraining landlords properly could climb a wall or fence and pass through an unlocked door or an open window but could not break open an outer window or door.[603] After a peaceful entry but a subsequent forcible ejection, the distrainor could use whatever force necessary to reenter and complete seizure of the tenant's personal property.[604] Common law distraint, therefore, permitted landlords to breach neighborhood peace while exercising this self-help remedy.

The personal property subject to a landlord's right of distraint included any property found on the leased premises, whether or not the tenant owned it.[605] Since the common law only allowed seizure of chattels as security for overdue rent,[606] landlords only could seize personalty that they could return in its original condition.[607] The common law, however, prevented landlords from distraining certain types of property from their tenants. These exceptions fell into two categories: conditionally privileged goods—property subject to seizure only if other property on the leased premises was insufficient to satisfy the damage—and absolutely privileged goods—property exempt from distraint under all circumstances.[608] A privilege also protected items which third parties brought onto the premises of a tenant who used them in a public trade or business that affected trade and commerce.[609]

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602. 2 W. ODGERS & W. ODGERS, *supra* note 588, at 894.

603. Limiting the distrainor's use of force corresponded with the general public policy of maintaining the King's peace. *See id.*

604. The law also permitted the use of force if a tenant, after a distrainor voluntarily abandoned efforts to seize property after peacefully entering the tenant's leased premises, denied the distrainor reentry to complete the seizure. *See id.*

605. 3 H. TIFFANY, *supra* note 587, at § 920. The right to distrain for rent extended to property that a tenant had removed fraudulently or clandestinely from the leased premises, so that too little property remained on the premises to cover the overdue rent. 2 W. ODGERS & W. ODGERS, *supra* note 588, at 893; *see* 8 Anne, ch. 14 (1709).

606. *See supra* text accompanying notes 585-89.

607. 2 W. ODGERS & W. ODGERS, *supra* note 588, at 891. Consequently, the common law prohibited distrainors from seizing goods such as freshly butchered meat. *Id.* In addition, courts permitted distrainors to seize money if the distrainor returned the original coins after the tenant made deliquent rental payments. *Id.*

608. Common law courts absolutely privileged fixtures from the landlord's right to distraint because they viewed fixtures as part of the leased property. 2 W. ODGERS & W. ODGERS, *supra* note 588, at 891. These courts, however, granted only a conditional privilege from distraint to other property such as beasts of the "plough," sheep, instruments of husbandry, and property of the tenant not in actual use. *Id.* at 893; 3A G. THOMPSON, *supra* note 586, at 493; *see* 52 Hen. 3, ch. 4 (1267) (distress must be reasonable).

609. 2 W. ODGERS & W. ODGERS, *supra* note 588, at 891; 3 H. TIFFANY, *supra* note 587, at § 920. This class of exempt goods included grain a third party left on a delinquent tenant's leased premises for milling or goods left on the premises for resale or safekeeping. 2 W.

Statutory restrictions further limited a landlord's right to distrain. English statutes expressly regulated use of distraint on farming stock,[610] a sublettor's property,[611] and a tenant's clothing, bedding, and tools of trade.[612] Statutes also protected textile manufacturing equipment[613] and gas meters and fittings from seizure.[614] These restrictions on distraint reflected a public policy designed to enhance trade and commerce[615] and the beginning of a growing dissatisfaction with the harshness of this self-help remedy.[616]

ODGERS & W. ODGERS, *supra* note 588, at 891.

610. 56 Geo. 3, ch. 50, § 6 (1816).

611. Law of Distress Amendment Act, 1908, 8 Edw. 7, ch. 53,]§1-2]. Undertenants included persons who had leased property from the original leaseholder and lodgers at an inn or hotel. *See* 3 H. TIFFANY, *supra* note 587; 2 W. ODGERS & W. ODGERS, *supra* note 588, at 892.

612. English statutes privileged from the right of distraint as much as five pounds in value of this property for up to seven days after the landlord demanded possession of the property. Legislators reasoned that taking away a tenant's bed clothes was too harsh a penalty for delinquent rental payments. This statute was an early example of consumer protection. Law of Distress Amendment Act, 1888, 51 & 52 Vict., ch. 21, § 4.

613. 6 & 7 Vict., ch. 40, § 18 (1843).

614. This statute also exempted electric meters and fittings. Gasworks Clauses Act, 1847, 10 & 11 Vict., ch. 15, § 14. This law was an exception to the general rule that a landlord's right to distress extended to property that a tenant did not own. *See supra* note 605.

615. According to one commentator, "[t]he most important class of exemptions from distress [were] those in favor of trade or commerce . . . ." 3 H. TIFFANY, *supra* note 587, at § 920.

616. Courts and commentators eventually viewed the right of distraint as a self-help remedy that gave landlords an "opportunity for injustice and oppression." Consequently, state courts and legislators in the United States have not viewed the right of distraint favorably. *Id.* at § 918; 2 AMERICAN LAW OF PROPERTY, *supra* note 587, at 475. Because of the remedy's harshness, many states excluded distraint from their common law. *See, e.g.*, Folmar & Sons v. Copeland & Brantley, 57 Ala. 588 (1877); Herr v. Johnson, 11 Colo. 393, 18 P. 342 (1888); Crocker v.Mann, 3 Mo. 472 (1834); Bohm v. Dunphy, 1 Mont. 333 (1871); Howland v. Forlaw, 108 N.C. 567, 13 S.E. 173 (1891); Smith v. Wheeler, 4 Okla. 138, 44 P. 103 (1896); *see also* 2 AMERICAN LAW OF PROPERTY, *supra* note 587, at 475. Other states have abolished the remedy altogether by statute. *See, e.g.*, ALASKA STAT. § 34.03.250 (1975); ARIZ. REV. STAT. ANN. § 33-1372 (1974) (distress abolished for residential leases); DEL. CODE ANN. Tit. 25, § 6301 (1974) (distress abolished except for commercial leases); FLA. STAT. ANN. § 713.691 (West Supp. 1983) (distress abolished for residential leases); KY. REV. STAT. ANN. § 383.680 (Bobbs-Merrill Supp. 1982) (distress abolished for residential leases); MINN. STAT. ANN. § 504.01 (West 1947); OR. REV. STAT. § 91.835 (1975) (distress abolished for residential leases); WASH. REV. CODE ANN. § 59.18.230 (Supp. 1983) (distress abolished for residential leases); WIS. STAT. ANN. § 704.11 (West 1981). The UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.205(b) (1972) also has abolished the right of distraint. *See also* RESTATEMENT (SECOND) OF PROPERTY § 12.1 statutory note 5(c) (1976).

(b) The Right of Distraint in Contemporary America

The common law distraint remedy has not gained widespread acceptance in American jurisdictions because it allowed landlords to treat tenants harshly.[617] Some states, however, have enacted statutes that resemble common law distraint,[618] while other jurisdictions give landlords a lien on their tenants' property.[619] The two approaches differ because a landlord's right to distrain remains unperfected until the rent becomes overdue, whereas a landlord's lien becomes effective at the beginning of the lease term.[620] Almost all states have taken one of the following three approaches when dealing with a landlord's right of distraint. One group of state statutes has abolished the right of distraint.[621] A second group of states have passed laws governing a landlord's remedies for overdue rent that courts have held to be nonexclusive remedies.[622] Some of these statutes, therefore, permit landlords to exercise their right of distraint.[623] A third group of states either have no statutes pertaining to distraint[624] and landlord liens or expressly prohibit landlords from seizing a tenant's property to recover overdue rent.[625]

The amount of force courts will permit landlords to use in seizing their tenants' personal property varies among the states that presently allow self-help distraint. A few jurisdictions allow landlords to use whatever force is reasonably necessary to accomplish the seizure.[626] Most jurisdictions that allow distraint, how-

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617. *See infra* note 641 and accompanying text.

618. *See, e.g.*, MD. REAL PROP. CODE ANN. §§ 8-301 to -332 (1974 & Supp. 1981); *see* RESTATEMENT (SECOND) OF PROPERTY § 12.1 statutory note 5(a) (1976).

619. *See, e.g.*, MISS. CODE ANN. § 89-7-51 (1972 & Supp. 1982); *see* RESTATEMENT (SECOND) OF PROPERTY § 12.1 statutory note 5(b) (1976).

620. *See* RESTATEMENT (SECOND) OF PROPERTY § 12.1 statutory note 5 (1976); 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 230[2] (1982).

621. See *supra* note 616, for a list of statutes that abolish the right of distraint.

622. The Oregon courts, however, have ruled that Oregon's statute concerning landlord remedies provides a nonexclusive remedy that leaves common law distraint intact. Smith v. Chipman, 220 Or. 188, 348 P.2d 441 (1960). *See generally* 3A G. THOMPSON, *supra* note 586, at § 1305.

623. *See, e.g.*, COLO. REV. STAT. § 38-20-102 (1973); N.J. STAT. ANN. §§ 2A:33-1 to -23 (1952 & Supp. 1983). *See generally* RESTATEMENT (SECOND) OF PROPERTY § 12.1 statutery note 5 (1976). One commentator described the continued existence of self-hlep in this area as "the sole surviving relic in modern statutery law of the absolutism incident to the ancient feudal doctrine governing land tenures." 3A G. THOMPSON, *supra* note 586, at 496.

624. States that make no statutory provision for distraint include Connecticut, Hawaii, Idaho, Massachusetts, Michigan, Montana, New Hampshire, New York, North Dakota, Ohio, Rhode Island, South Dakota, Vermont, and Wyoming. *See* RESTATEMENT (SECOND) OF PROPERTY § 12.1 statutory note 5(c) (1976).

625. See *supra* note 616 for statutes that expressly abolish the practice of distraint.

626. *See infra* notes 681-86 and accompanying text.

ever, require landlords to distrain peacefully.[627] Colorado, for example, gives residential apartment landlords a lien on certain nonexempted personal property and a right to distrain peaceably to recover overdue rent.[628]

After a landlord has distrained a tenant's personal property, most states specify a method of selling these goods to ensure that a landlord obtains the best available price.[629] Landlords must reimburse their tenants with any money received from the sale that exceeds the amount of unpaid overdue rent.[630] Landlords must follow carefully the statutory procedural requirements for distraint because excessive distraint often will render a landlord liable to the tenant for damages.[631] For example, violation of these procedures may give a tenant an action against the landlord for trespass to the distrained goods.[632]

Many states give landlords of land leased for agricultural purposes a lien or distraint right on crops when a tenant fails to pay rent on time.[633] These landlord rights in a tenant's crops sometimes are superior to the liens of all other creditors[634] and may cause tenants difficulty in securing credit from other sources.[635] In these jurisdictions, therefore, landlords enjoy "uniquely monopolistic" bargaining power over their agricultural tenants.[636]

Today, most jurisdictions do not allow true self-help because they require a public official, such as a sheriff or constable, to conduct all seizure of a tenant's personalty.[637] Under a Texas distraint statute, for example, landlords or their agents must apply to a justice of the peace for a distraint warrant.[638] Upon issuance of the

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627. *See supra* text accompanying notes 601-04.

628. COLO. REV. STAT. § 38-20-102 (1973).

629. *See, e.g.*, Cahill v. Lee, 55 Md. 319 (1881); Richards v. McGrath, 100 Pa. 389 (1882); *see* 3A. G. THOMPSON, *supra* note 586, at 500.

630. 2 W. ODGERS & W. ODGERS, *supra* note 588, at 895.

631. 3A G. THOMPSON, *supra* note 586, at 501-02.

632. *Id.* at 501.

633. *See, e.g.*, DEL. CODE ANN. tit. 25, § 6715 (1974 & Supp. 1982); FLA. STAT. ANN. §§ 83.08-.19 (West 1964 & Supp. 1983); GA. CODE ANN. §§ 61-401 to -412 (1979); *see* RESTATEMENT (SECOND) OF PROPERTY § 12.1 statutory note 5 (1976).

634. *See* 2 R. POWELL, *supra* note 620, at 307.

635. *Id.* at 309; *see, e.g.*, TEX. REV. CIV. STAT. ANN. art. 5227 (Vernon 1962 & Supp. 1975); 2 AMERICAN LAW OF PROPERTY, *supra* note 587, at 475.

636. *Id.*

637. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 5227 (Vernon 1962 & Supp. 1975).

638. TEX. REV. CIV. STAT. ANN. art. 5227 (Vernon 1962 & Supp. 1975). For a general discussion of Texas distress procedures, see Potter & Soules, *Distress Warrant and Trial of Right of Property Under the 1981 Texas Rules*, 12 ST. MARY'S L.J. 693 (1981).

warrant, a public officer conducts the seizure.[639]

The Uniform Residential Landlord and Tenant Act ("URLTA"), which twenty-five jurisdictions partially have adopted, expressly abolishes distraint for rent.[640] A growing minority of states also have taken this position.[641] Several factors are responsible for current disenchantment with the right of distraint. First, distraint allows landlords to treat tenants harshly.[642] Second, harsh treatment of tenants, especially in residential contexts, runs counter to the recent trend in law toward consumer protection.[643] Last, distraint contradicts public policy since it favors a unique class of creditors.[644]

(c) Constitutionality of Distraint

The constitutional restrictions in the due process clause restrict landlord self-help remedies in the United States. Two Supreme Court decisions questioned the constitutionality of a landlord's use of self-help on procedural due process grounds.[645] In *Fuentes v. Shevin*[646] the Court examined Florida's statutory replevin procedures and held that creditors could seize goods to protect security interests prior to a final court adjudication of the dis-

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639. *See* Potter & Soules, *supra* note 638; 2 AMERICAN LAW OF PROPERTY, *supra* note 587, at 475.

640. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.205 (1972). The National Conference of Commissioners on Uniform State Laws drafted the Uniform Residential Landlord and Tenant Act in 1972. The group's objective is to "promote uniformity in state laws" where desirable and practical. Although the Commissioners recommended general adoption of the URLTA throughout the United States, as they do all uniform acts, 14 U.L.A. iv (1980), only thirteen juristictions have enacted a version of it as state law. 7A U.L.A. 319 (Supp. 1984).

641. *See supra* note 616.

642. 2 AMERICAN LAW OF PROPERTY, *supra* note 587, at 475.

643. *See infra* text accompanying notes 737-40.

644. *See supra* text accompanying notes 633-36.

645. *See* Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337 (1969). In *Sniadach* respondent finance corporation alleged petitioner owed it a debt of $420.00. Respondent had $63.18 of petitioner's wages under its control, and in accordance with Wisconsin statutory procedures, stated that it would hold half that amount as payment for the debt. The finance company said that it would pay the other half to the petitioner as subsistence allowance. Petitioner challenged the garnishment proceedings under the fourteenth amendment due process clause, alleging that the garnishment proceedings did not give her adequate notice and opportunity for a hearing before seizure of her wages. *Sniadach*, 395 U.S. at 338.

646. 407 U.S. 67 (1972). Appellants, purchasers of household goods under conditional sales contracts, challenged the constitutionality of Florida's replevin laws. The statute permitted creditors to obtain a writ of replevin by ex parte application to a court clerk without hearing or prior notice to the debtors. *Id.* at 69-70.

pute if the creditors had tested their claims at a fair prior hearing.[647] This holding precipitated a number of cases that held state distraint statutes unconstitutional.[648] Courts, applying *Fuentes*, held these laws invalid because they permitted landlords to take tenants' property without due process.[649] For example, in *Shaffer v. Holbrook*[650] a federal district court held that West Virginia's summary distraint procedure violated the due process clause of the fourteenth amendment.[651] The state law in *Shaffer* allowed a justice of the peace to issue a distraint warrant to the sheriff of the county where the tenant leased property[652] based solely on a landlord's sworn affidavit alleging overdue rent.[653] The tenant in *Shaffer* received no notice or hearing prior to the seizure, and the landlord could have auctioned the goods to satisfy the rent arrearage unless the tenant contested the validity of the default and furnished a security bond.[654] The court stated that the absence of a hearing prior to distraint deprived the tenant of property without due process.[655] Furthermore, the court stated that any available postseizure remedies were insufficient to protect an aggrieved tenant's rights.[656]

Two years after *Fuentes*, in *Mitchell v. W.T. Grant Co.*,[657] the Supreme Court upheld the constitutionality of a Louisiana seques-

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647. The Court noted, "We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing." *Id.* at 96.

648. *See, e.g.*, Hall v. Garson, 468 F.2d 845 (5th Cir. 1972); Johnson v. Riverside Hotel, Inc., 399 F. Supp. 1138 (S.D. Fla.1975); Adams v. Joseph F. Sanson Inv. Co., 376 F. Supp. 61 (D. Nev. 1974); Barber v. Rader, 350 F. Supp. 183 (S.D. Fla. 1972); MacQueen v. Lambert, 348 F. Supp. 1334 (M.D. Fla. 1972); Shaffer v. Holbrook, 346 F. Supp. 762 (S.D. W. Va. 1972); Dielen v. Levine, 344 F. Supp. 823 (D. Neb. 1972); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972); Brooks v. LaSalle Nat'l Bank, 11 Ill. App. 3d 791, 298 N.E.2d 262 (1973); Van Ness Indus., Inc. v. Claremont Painting & Decorating Co., 129 N.J. Super. 507, 324 A.2d 102 (1974); State *ex rel.* Payne v. Walden, 190 S.E.2d 770 (W. Va. 1972).

649. *See* RESTATEMENT (SECOND) OF PROPERTY § 12.1 reporter's note 12 (1976).

650. 346 F. Supp. 764 (S.D. W. Va. 1972).

651. *Id.* at 766.

652. W. VA. CODE § 37-6-12 (1966).

653. *Id.*

654. Shaffer v. Holbrook, 346 F. Supp. at 766.

655. *Id.* at 766.

656. *Id.*

657. 416 U.S. 600 (1974). Raspondent seller sued petitioner for the overdue balance a buyer owed on personal property purchased under an installment contract. As in *Fuentes*, state law allowed the creditor to obtain a writ to repossess the goods without notice to debtor. The Court distinguished *Fuentes*, however, on the ground that the Louisiana sequestration statute, unlike the Florida replevin law, required the creditor to submit an affidavit and the courts to participate in the issuance of the writ. *Id.* at 616.

tration law.[658] The *Mitchell* decision severely undercut the force of *Fuentes* because the Court held that postponement of judicial inquiry is not a violation of due process when dealing with property rights if the statute provides an adequate opportunity for an ultimate judicial determination of liability.[659] This decision, in contrast with *Shaffer*, seems to permit landlords to use self-help distraint as long as their tenants can later challenge the seizure. Most decisions striking down state distraint and landlord lien statutes came shortly after *Fuentes* but before *Mitchell*.[660] After *Mitchell* few courts followed the *Fuentes* precedent, especially when the applicable statute allowed completely private self-help.[661]

2. Self-Help Eviction

(a) The English Rule

Early English common law gave landlords[662] almost unbridled authority to utilize self-help and to repossess leased premises from a holdover tenant.[663] Landlords could enter the premises and use force short of death or bodily harm[664] to repossess their property. Only persons with claims or rights in the property could exercise this remedy legally.[665] Loose enforcement of this rule, however, encouraged persons, as a matter of common practice, to dispossess tenants "by the strong arm" even when they possessed no rights in the property.[666] The breaches of peace that resulted from this practice induced the Crown to protect tenants' possession of real

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658. *Id.* at 619.

659. *Id.* at 611.

660. *But see, e.g.*, Johnson v. Riverside Hotel, Inc., 399 F. Supp. 1138 (S.D. Fla. 1975); Merlin v. Sabrina, 393 F. Supp. 152 (W.D. Pa. 1975).

661. *See* RESTATEMENT (SECOND) OF PROPERTY § 14.1 statutory note 7 (1976). At least one court has indicated that statutes which allow a private landlord to take a tenant's property without resort to the judicial process, a sheriff, or other public official, are not likely to violate the fourteenth amendment because completely private self-help does not constitute state action. *See* Cook v. Lilly, 208 S.E.2d 784 (W. Va. 1974).

662. The right to use self-help was available to anyone entitled to possession of the land, not just those with landlord status. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 3.15 (1956); *see* 1 L. PIKE, HISTORY OF CRIME IN ENGLAND 247 (1973).

663. 2 *J. Taylor*, A TREATISE ON THE AMERICAN LAW OF LANDLORD & TENANT § 786 (8th ed. 1887); *see* 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 280 (3d ed. 1927).

664. 1 F. HARPER & F. JAMES, *supra* note 662; *see* Annot., 6 A.L.R.3d 177, 181 (1966).

665. *See supra* note 586, 2 J. TAYLOR, *supra* note 663; *see also* Note, *Landlord-Tenant Law—Abolition of Self-Help Repossession*—Berg v. Wiley, 264 N.W.2d 145 (Minn. 1978), 5 WM. MITCHELL L. REV. 535, 535 (1979).

666. 1 *L. Pike, supra* note 662, at 249. Early English courts realized that the law "allowed disseised owners too large a licence for the due maintenance of the peace." 3 W. HOLDSWORTH, *supra* note 663, at 280.

property[667] by giving tenants the assize of novel dissessin.[668] This summary remedy gave unjustly dispossessed plaintiffs an opportunity to regain possession as quickly as possible.[669] This judicial remedy stopped the proliferation of forcible entry and dispossession in England for some time.[670]

As the procedure for bringing a cause of action in England became increasingly complex,[671] however, the advantages assize of novel disseisin created diminished, and violent dispossessions again became commonplace.[672] In 1381 Parliament enacted the Forcible Entry Act[673] to alleviate this lawlessness. The Act sought to protect a tenant's possession of leased property by making forcible entry a criminal offense.[674] Dispossessed holdover tenants, however, received no civil remedy for damages under the Act because holdover tenants technically had no legal right to possession of the premises and suffered no legally cognizable injury when a person deprived them of possession.[675] Later decisions, however, held that

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667. The history of legal protection of possession is discussed in Comment, *Defects in the Current Forcible Entry and Detainer Laws of the United States and England*, 25 UCLA L. REV. 1067, 1068-71 (1978).

668. Neither personal service nor formal pleadings were required for the dispossessed party to avail himself of this remedy. The only question put to the jury was whether a landlord dispossessed a tenant unjustly. Maitland, *The Beatitude of Seisin* (pts. 1-2), 4 L.Q. REV. 24, 28, 35-36 (1888); *see* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 48 (2d ed. 1923); Comment *supra* note 667, at 1068-69 n.10.

669. *See* 2 F. POLLOCK & F. MAITLAND, *supra* note 668, at 47-48.

670. Comment, *supra* note 667, at 1069.

671. *See* Maitland, *supra* note 668, at 291; *see also* Comment, *supra* note 667, at 1069 n.12.

672. Plummer, *Introduction* to FORTESCUE ON THE GOVERNANCE OF ENGLAND at 21. "Not a little of the blame for this state of things should rest upon the judges who, by allowing the utmost license to mendacious pleadings, had made the assize of novel disseisin anything but the festinum remedium which it still was in the days of Edward I." Maitland, *supra* note 668, at 291.

673. Although the assize of novel disseisin was the first statutory attempt to regulate self-help repossession, many commentators feel that the Forcible Entry Act of 1381 signaled the demise of this repossession remedy. *See* 3 W. HOLDSWORTH, *supra* note 663, at 280; Comment, *supra* note 667, at 1070 n.13; Annot., *supra* note 664, at 181.

674. Forcible Entry Act, 1381, 5 Rich. 2, ch. 8. Courts have credited this Act with giving rise to the expression that "possession is nine points of the law." *See* Goffin v. McCall, 91 Fla. 514, 519, 108 So. 556, 558 (1926).

675. Annot., *supra* note 664, at 181; *see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 23, at 123 (4th ed. 1971). In Taunton v. Costar, 101 Eng. Rep. 1060 (K.B. 1797), the court felt the disallowance of a civil remedy was "too plain for argument. Here is a tenant . . . whose term expired upon a proper notice to quit, and because he holds over in defiance of law and justice, he now attempts to convert the lawful entry of his landlord into a trespass . . . . There is not the slightest pretence for considering [the landlord] as a trespasser in

while forcibly entering landlords were not liable to tenants for trespass, tenants and their families did have an action for assault and battery for forcible eviction.[676] Few English courts recognized this distinction between forcible entry and forcible eviction,[677] and *Hemmings v. Poke Stoges Golf Club, Ltd.*[678] expressly abrogated it.[679]

The Forcible Entry Act also limited landlords' use of force during repossession.[680] The statute allowed only persons with a claim of right in the property to enter onto it.[681] Moreover, the statute prohibited entry "with strong hand" or with a "multitude of people," and allowed entry only in a "peaceable and easy manner."[682] The courts interpreted this langnage to permit a landlord to use "no more than necessary force" during self-help repossession.[683] More than necessary force included breaking open house doors, threatening physical injury to persons in possession, going onto the premises armed with weapons or accompanied by a large number of people, and entering a tenant's premises in other violent ways.[684] Because the statute required holdover tenants to show that landlords used force calculated to prevent tenant resistance when they entered their tenants' premises to support a forcible entry claim, trespass alone would not support an indictment for this claim.[685] Thus, landlords entered peacefully when they entered through an open window, used a key, lured a tenant out of posses-

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this case . . . ." *Id.* at 1060-61.

676. *See, e.g.*, Newton v. Harland, 133 Eng. Rep. 490 (C.P. 1840) (landlord liable for assault); Hillary v. Gay, 172 Eng. Rep. 1243 (Ex. 1833) (landlord liable for forcible eviction); *see also* Comment, *Landlord-Tenant Law: Abolition of Self-Help in Minnesota*, 63 MINN. L. REV. 723, 725 n.9 (1979); Annot., *supra* note 664, at 181.

677. *See, e.g.*, Lows v. Telford, 1 App. Cas. 414 (1876); Harvey v. Brydges, 153 Eng. Rep. 546 (Ex. 1845); *see* Comment, *supra* note 676, at 725 n.9.

678. [1920] 1 K.B. 720 (1919). Before *Hemmings* overruled *Newton*, some American jurisdictions accepted the *Newton* rule. Annot., *supra* note 664, at 181.

679. Hemmings v. Stoke Poges Golf Club, Ltd., [1920] 1 K.B. at 734.

680. Forcible Entry Act, 1381, 5 Rich. 2, ch. 7.

681. *Id.*

682. *Id.*

683. Harvey v. Brydges, 153 Eng. Rep. 546, 548 (Ex. 1845); *see* Taunton v. Costar, 101 Eng. Rep. 1060, 1060 (K.B. 1797); 1 F. HARPER & F. JAMES, *supra* note 662, at 255; Annot., *supra* note 664, at 181. This rule protected tenants from physical harm but not from a landlord's entry onto the premises. Comment, *Landlord Eviction Remedies Act—Legislative Overreaction to Landlord Self-Help*, 18 WAKE FOREST L. REV. 25, 28 (1982); *see supra* note 674 and accompanying text.

684. HALSBURY'S LAWS OF ENGLAND ¶ 863, at 508 (4th ed. Lord Hailsham 1976).

685. *Id.*; *see supra* note 674 and accompanying text.

sion, or merely threatened to damage chattels.[686] Eventually, courts held that any force which caused damage was forcible and improper.[687]

A series of other statutes regulating a landlord's right to use self-help in repossessing leased property followed the Forcible Entry Act of 1381.[688] Parliament enacted these statutes further to squelch forcible entries that continued despite the Forcible Entry Act.[689] These acts gave certain persons the right to damages as compensation for injuries sustained during a landlord's forcible entry.[690] Today, however, English law still allows landlord reentry with reasonably necessary force.[691]

(b) American Approaches to Self-Help Eviction

American courts have not resolved uniformly whether a landlord can employ self-help to repossess leased premises from a holdover tenant.[692] All American jurisdictions[693] have enacted legislation concerning recovery of leased premises from holdover tenants.

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686. HALSBURY'S LAWS OF ENGLAND, *supra* note 684, at 508.05.

687. *See, e.g.*, Hemmings v. Stoke Poges Golf Club, Ltd., [1920] 1 K.B. 720, 734 (1919) (held for landlord who used no more force than necessary and caused no damage).

688. *See* 21, Jac. 1, ch. 15 (1623); 8 Hen. 6, ch. 9 (1429); 4 Hen. 4, ch. 8 (1402).

689. As stated in the preamble of 4 Hen. 4, ch. 8 (1402), "[D]aily the great Persons of the Realm do make forcible Entries into other Mens Lands, and put out the Possessors of the same . . . and so by such forcible Entries and Maintenance, the Land-Tenants and Possessors be utterly disinherited and undone . . .;" This act further provided that courts could sentence offenders to one year in jail and award damages to dispossessed tenants. To establish a forcible entry claim, plaintiffs had to prove that a person forcibly entered their premises and seized the tenants' goods. *Id.*

690. Subsequent statutes expanded the class of tenants that have standing to sue for forcible entry and the remedies available under this cause of action. In 1429 Parliament enacted a statute that imposed criminal sanctions for both forcible detainer and forcible entry. 8 Hen. 6, ch. 9 (1429). The difference between the two offenses is temporal, depending on whether a person uses force to gain entry or to retain possession once that person has entered the premises. Newsom v. Damron, 302 Ky. 79, 82, 193 S.W.2d 643, 644 (1946). This statute also increased civil remedies to include restituion and damages. *See* Comment, *supra* note 676, at 725 n.10. Finally, in 1623 Parliament passed a statute that added tenants for a term of years to the class of tenants entitled to the civil remedies created in the 1402 and 1429 acts. 21 Jac. 1, ch. 15 (1623). Previously, damages were available only to dispossessed freeholders.

691. Comment, *supra* note 667, at 1070-71.

692. *See* Comment, *supra* note 683, at 29; RESTATEMENT (SECOND) OF PROPERTY § 14.1 statutory note 7 (1976); Annot., *supra* note 664, at 177.

693. For a list of statutes addressing landlord eviction remedies (including laws of the Canal Zone, the District of Columbia, Puerto Rico, the Virgin Islands, and positions of the Model Residential Landlord-Tenant Code (1969) and the Uniform Residential Landlord and Tenant Act (1972)), see RESTATEMENT (SECOND) OF PROPERTY § 14.1 statutory notes (1976).

"Forcible Entry and Detainer" and "Summary Proceedings" are the titles legislatures typically have given to these statutes.[694] Although many of these statutes give landlords summary judicial remedies without expressly prohibiting self-help,[695] a state court construction of the term "forcible entry" often determines the availability of extrajudicial dispute resolution.[696] For example, Michigan's forcible entry and detainer statute does not prohibit expressly self-help repossession even though it gives landlords a summary judicial remedy.[697] A Michigan Supreme Court case, however, held that a landlord's use of deception to gain entry was not peaceable within the meaning of the statute.[698] This decision implied that the Michigan statute permits only peaceful self-help.[699] Landlords in Michigan, therefore, have little practical access to a self-help eviction remedy even though the state statute does not exclude this remedy expressly. This indirect exclusion of self-help eviction and wide disagreement over the definitions of "peaceable self-help,"[700] "forcible entry,"[701] and other commonly used terms make imprecise any general categorization of states' treatment of self-help repossession. These statutes, however, are separable into the following three categories: (1) a small minority that follow the

694. *See* RESTATEMENT (SECOND) OF PROPERTY § 14.1 statutory note 2 (1976). *Compare* R.I. GEN. LAWS §§ 34-19-1 to 34-10-11 (1969) (Forcible Entry and Detainer) *with* MICH. COMP. LAWS ANN. §§ 600.5701-.5759 (West Supp. 1983) (Summary Proceedings to Recover Possession of Realty). "Summary Proceedings" statutes unsually provide landlords with a remedy to recover possession of leased premises that functionally is more efficient than the common law ejectment remedy. Forcible entry and detainer statutes, on the other hand, evolved from early English statutes and common law. *See supra* notes 661-91 and accompanying text. Because these two types of statutes have different historical backgrounds, the procedures a tenant must follow for bringing an action vary depending upon the type of statute in force in the tenant's jurisdiction. *See* RESTATEMENT (SECOND) OF PROPERTY § 14.1 statutory note 2 (1976).

695. *See, e.g.*, PA. STAT. ANN. tit. 68, §§ 250.501-.511 (Purdon 1965 & Supp. 1983); UTAH CODE ANN. §§ 78-36-1 to 78-36-11 (1953). *But see* R.I. GEN. LAWS § 34-18-17 (Supp. 1980) (expressly prohibits a landlord's use of self-help eviction).

696. *See* RESTATEMENT (SECOND) OF PROPERTY § 14.1 statutory note 7, at 5 (1976).

697. MICH. COMP. LAWS ANN. §§ 600.5701-.5759 (West Supp. 1983).

698. Pelavin v. Misner, 241 Mich. 209, 217 N.W. 36 (1928). In *Pelavin* the landlord went to his apartment building with another man whom the landlord represented as a prospective real estato buyer to the wife of one of his tenants. The landlord asked the tenant's wife, the only occupant of the premises at the time, to show the "purchaser" a defective walkway on the outside of the building. After she innocently complied, the landlord closed and locked the door, and refused to let her reenter. *Id.* at 210-11, 217 N.W. at 36.

699. *Id.* at 209, 217 N.W. at 36.

700. *See* Comment, *supra* note 683, at 30; Comment, *supra* note 676, at 727; Annot., *supra* note 664, at 189-94; *see also infra* notes 714-22 and accompanying text.

701. *See* Comment, *supra* note 676, at 727-28; RESTATEMENT (SECOND) OF PROPERTY § 14.1 statutory note 7 (1976).

English rule and permit landlords to use reasonably necessary force[702] during self-help repossession;[703] (2) a majority that only allow peaceful self-help;[704] and (3) a growing minority that completely prohibit self-help repossession.[705]

States following the English rule[706] permit landlords to use force that reasonably is necessary to repossess the leased premises from a holdover tenant.[707] The number of jurisdictions retaining this rule has declined rapidly during the past two decades, and today these states constitute a very small minority.[708] The forcible entry and detainer statutes[709] in these English rule states subject landlords to criminal, but not civil, liability, when their conduct is beyond the scope of reasonably necessary force.[710] Courts in these jurisdictions, however, still may hold a landlord liable in tort for injury to the tenant's person or property.[711]

The majority of American jurisdictions allow landlords to utilize peaceful self-help.[712] State courts and legislatures have abolished forcible entry to prevent violent confrontations between landlords and tenants.[713] Courts applying this general rule define "peaceable self-help" in a variety of ways.[714] Some jurisdictions define it as nonviolent entry.[715] In these states, a landlord's use of a

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702. *See supra* notes 682-91 and accompanying text.

703. *See infra* notes 706-11 and accompanying text.

704. *See infra* notes 712-22 and accompanying text.

705. *See infra* notes 723-29 and accompanying text.

706. *See supra* text accompanying notes 702-05

707. *See supra* note 691 and accompany text.

708. *Compare* Annot., *supra* note 664, at 182-85 *with* RESTATEMENT (SECOND) OF PROPERTY § 14.1 statutory note 7 (1976). In 1966 fifteen states followed the English Rule, including a few states, such as Rhode Island, that have since abolished self-help eviction altogether. *See* R.I. GEN. LAWS § 34-18-17 (Supp. 1980); Annot., *supra* note 664, at 183. Pennsylvania and Wyoming are two states that still retain the traditional "no more than necessary force rule." Overdeer v. Lewis, 1 Watts & Serg. 90 (Pa. 1841); Welch v. Rice, 61 Wyo. 511, 159 P.2d 502 (1945).

709. Although most states lable their statutes "Forcible Entry and Detainer," forcihle entry techically is distinct from forcible detainer. Forcible entry concerns the manner in which a landlord enters a tenant's premises, while forcible detainer concerns what landlords do after they enter their tenants' premises. Newsom v. Damron. 302 Ky. 79, 82, 193 S.W.2d 643, 644 (1946).

710. Welch v. Rice, 61 Wyo. 511, 159 P.2d 502 (1945).

711. Adams v. Adams, 7 Pa. 160 (1869).

712. *See, e.g.*, Krasner v. Gurley, 252 Ala. 235, 40 So. 2d 328 (1949); Winn v. State, 55 Ark. 360, 18 S.W. 375 (1892); Levy v. McLintock, 141 Mo. App. 593, 125 S.W. 546 (1910); Paddock v. Clay, 138 Mont. 541, 357 P.2d 1 (1960); Heironimus v. Duncan, 11 Tex. Civ. App. 610, 33 S.W. 287 (1895); *see* W. PROSSER, *supra* note 675, at 124.

713. *See* W. PROSSER, *supra* note 675, at 123.

714. *Id.* at 124.

715. *See, e.g.*, Fort Dearborn Lodge No. 214, I.O.O.F. v. Klein, 115 Ill. 177, 3 N.E. 272

key to enter his rental property and remove the tenant's possessions[716] does not constitute forcible entry. Most states originally adopted statutory language similar to that in England's Forcible Entry Statute of 1381.[717] Courts interpreted the limitation on entry "with strong hand" and "multitude of people"[718] to prohibit only the use of actual force.[719] Today's statutes often contain language easily construed to include more than violent action within their definition of "forcible entry."[720] Courts purporting to permit peaceable self-help repossession have held that very minimal uses of force may equal forcible entry within the meaning of their statutes.[721] Some courts have interpreted these peaceful self-help statutes to allow landlords to enter the premises of holdover tenants only when these tenants consent.[722] This narrow definition of "peaceable" denies landlords any realistic opportunity to avoid using the judicial system to regain possession of their premises.

The third view American jurisdictions have taken expressly forbids all self-help and requires landlords to use the judicial remedies that statutes provided to regain possession of leased property.[723] Proponents of this so called "modern rule"[724] perceive that even peaceable self-help eviction creates too great a potential for violence between landlords and tenants.[725] In these jurisdictions, a

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(1885); Liberty Indus. Park Corp. v. Protective Pkg. Corp., 71 Misc. 2d 116, 335 N.Y.S.2d 333 (1972); *see* Comment, *supra* note 683, at 30.

716. Liberty Indus. Park Corp. v. Protective Pkg. Corp. 71 Misc. 2d 116, 335 N.Y.S.2d 333 (1972).

717. *See* Comment, *supra* note 676, at 727 n.26.

718. Forcible Entry Act, 1381, 5 Rich. 2, ch. 7; *see supra* notes 680-82 and accompanying text.

719. *See* comment, *supra* note 676, at 727 n.26.

720. *See* RESTATEMENT (SECOND) OF PROPERTY § 14.1 statutory note 7 (1976).

721. *See, e.g.*, Adelhelm v. Dougherty, 129 Fla. 680, 176 So. 775 (1937) (entrance with aid of locksmith); Buchanan v. Crittes, 106 Utah 428, 150 P.2d 100 (1944) (use of a passkey); McNeil v. Higgins, 86 Cal. App. 2d 723, 195 P.2d 470 (1948) (entrance through an open window).

722. *See, e.g.*, Jordan v. Talbot, 55 Cal. 2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961); Adelhelm v. Doughtry, 129 Fla. 680, 176 So. 775 (1937); Reeder v. Purdy, 41 Ill. 279 (1866): Casey v. Kitchens, 66 Okla. 169, 168 P.812 (1917); *see* W. PROSSER, *supra* note 675, at 124.

723. Annot., *supra* note 664, at 186-89.

724. *See* Note, *supra* note 665, at 536; Annot., *supra* note 664, at 186.

725. RESTATEMENT (SECOND) OF PROPERTY § 14.2 (1976) provides: "(1) If the controlling law gives the landlord, . . . a speedy judicial remedy for the recovery of posssession . . .[he] may [not] resort to self-help to recover possession . . . unless the controlling law preserves the right of self-help." In the official comment to this section the Restatement drafters reasoned that since the original purpose of self-help repossession was to give landlords the ability to recover leased premises promptly, the existence of speedy judicial remedies eliminated the need for self-help. Moreover, eliminating self-help decreased the danger of landlord-tenant confrontation. *Id.* § 14.2 comment a.

tenant can recover damages from a landlord for using self-help to enter and regain possession of leased premises regardless of whether the landlord's entry was forcible or peaceable.[726] A growing number of states[727] have adopted this position, and it has the endorsement of the drafters of the *Restatement (Second) of Property*[728] and other notable commentators.[729]

(c) Constitutionality of Self-Help Eviction

The constitutional arguments weighing against the validity of statutes that give landlords a right of self-help repossession seem more compelling than those made against the constitutionality of the right of distraint because housing generally is more important for human welfare than is personal property.[730] In *Lindsey v. Normet*,[731] however, the Supreme Court refused to hold that possession of one's home was a fundamental interest warranting strict scrutiny of an Oregon forcible entry and detainer statute.[732] Justice White, writing for the Court, refuted the tenants' argument that a state could not interfere with an individual's need for decent shelter without showing a superior state interest:[733]

The Restatement also provides that if the law of the jurisdiction does not preserve the right of self-help repossession, any agreement between landlords and tenants to the contrary is void as against public policy. *Id.* § 14.2(2). Although California has adopted this approach, *see* Jordan v. Talbot, 55 Cal. 2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961), the majority of states have not. *See* RESTATEMENT (SECOND) OF PROPERTY § 14.2 reporter's note 5 (1976).

726. One great advantage of the modern rule is that it eliminates the problem of drawing lines between forcible and peaceable entry. The lack of uniformity in law among states allowing self-help inevitably leads to inconsistent resolutions to the problems that arise in identifical fact situations. *Compare* Liberty Indus. Park Corp. v. Protective Pkg. Corp., 71 Misc. 2d 116, 335 N.Y.S.2d 333 (1972) *with* Buchanan v. Crites, 106 Utah 428, 150 P.2d 100 (1944) (in both cases the landlords used keys to enter the leased premises but the courts inconsistently assessed liability).

727. *See, e.g.*, Kassan v. Stout, 9 Cal. 3d 39, 507 P.2d 87, 106 Cal. Rptr. 783 (1973); Mason v. Hawes, 52 Conn. 12 (1884); Malcolm v. Little, 295 A.2d 711 (Del. 1972); Adelhelm v. Dougherty, 129 Fal. 680, 176 So. 775 (1937); Berg v. Wiley, 264 N.W.2d 145 (Minn. 1978); Bass v. Boetel & Co., 191 Neb. 733, 217 N.W.2d 804 (1974); Edwards v. C.N. Investment Co., 27 Ohio Misc. 57, 272 N.E.2d 652 (Shaker Heights Mun. Ct. 1971); Price v. Osborne, 24 Tenn. App. 525, 147 S.W.2d 412 (1940); Nelson v. Swanson, 177 Wash. 187, 31 P.2d 521 (1934).

728. RESTATEMENT (SECOND) OF PROPERTY § 14.2 (1976).

729. *See* UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT §§ 4.207, 4.301(c) (1972).

730. *See* Lindsey v. Normet, 405 U.S. 56 (1972); Weitzman, *The Impact of Repair and Deduct Legislation: An Economic Analysis*, 11 CLEARINGHOUSE REV. 985, 989 (1978).

731. 405 U.S. 56 (1972).

732. *Id.*; OR. REV. STAT. §§ 105.105-.160 (1975) (Oregon forcible entry and detainer statute).

733. Lindsey v. Normet, 405 U.S. at 73-74.

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent . . . . [T]he assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.[734]

The Court further held that the unique characteristics of the landlord-tenant relationship differentiated eviction litigation from other cases and justified limiting the issues at trial to a tenant's default.[735] The Court's treatment of the Oregon forcible entry and detainer statute, while dealing with a summary judicial eviction remedy rather than a self-help remedy, implies that courts need not scrutinize self-help eviction any closer than they do landlords' use of self-help distraint.[736]

C. *Tenant Self-Help*

The trends and future of self-help in the landlord-tenant area seem closely tied to the general trend in American jurisprudence toward consumer protection. Historically, landlords were the beneficiaries of all major self-help remedies in landlord-tenant law.[737] At common law tenants had a right to replevin[738] but no true self-help remedies for grievances against their landlords. This historical imbalance is traceable to the extensive protection traditionally given landowners and to laissez-faire economics.[739] Common law courts applied caveat emptor as strongly to leases in land as they did to other contracts.[740] The bargaining position of tenants in the United States increased, although not to the point of equality,

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734. *Id.* at 74.

735. *Id.* at 72-73. The Court invalidated a requirement in the Oregon statute that compelled an appealing tenant to post a bond double the amount of rent allegedly due. The statute also stipulated that a tenant would forfeit this bond if he lost the appeal. *Id.* at 74-75.

736. See *supra* note 661 and accompanying text for a discussion which suggests that pure landlord self-help might not satisfy the state action requirement that is a prerequisite to a fourteenth amendment due process violation.

737. See *supra* text accompanying notes 584-616 & 662-91 for a discussion of the history of distraint and self-help eviction.

738. Replevin was a common law action available to tenants that authorized them to apply to a sheriff to retake distrained property from landlords until judicial dispostion of the landlord-tenant dispute. Tenants had to post a bond as security for this property. 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 283-87 (3d ed. 1927).

739. *See* Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

740. *See* Backman, *The Tenant as a Consumer? A Comparison of Developments in Consumer Law and in Landlord/Tenant Law*, 33 OKLA. L. REV. 1, 4-5 (1980).

when the doctrine of caveat emptor and other economic policies favoring landlords[741] lost judicial and public support in most jurisdictions.[742] This shift in bargaining power and the general trend toward consumer protection resulted in a decrease of landlord self-help remedies and an increase of tenant self-help remedies.[743]

Although tenants have not received as much protection as general consumers in the past,[744] some commentators argue that the social purposes and policies behind consumer protection apply strongly to tenants.[745] First, both tenants and general consumers usually enter commercial transactions for personal, family, or household purposes.[746] Second, both tenants and general consumers have relatively weak bargaining positions when compared to landlords or business enterprises that often are able to offer their products on a take-it-or-leave-it basis.[747] Third, landlords and business enterprises significantly over-match both tenants and general consumers in commercial expertise concerning most leases and business transactions.[748] Last, tenants and consumers typically enter into transactions to satisfy consumption needs, whereas landlords and business enterprises usually enter business transactions to make a profit.[749] The similarities between the commercial position of tenants and general consumers suggest that both deserve similar protective measures.[750]

Changes in the availability of landlord and tenant self-help remedies are evidence of the influence of consumer protection on landlord-tenant law. The traditional landlord remedies of distraint and self-help eviction have undergone substantial erosion since the

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741. *Id.* at 5.

742. *See generally* Backman, *supra* note 740, at 1-11 (comparing the historical development of tenants' rights with the development of consumers' rights generally). Government regulation of the rental housing industry and the advent of the implied warranty of habitability are evidence of this shift.

743. *See infra* notes 751-76 and accompanying text.

744. Backman, *supra* note 740, at 5-9.

745. *Id.* at 3-4.

746. *See* Consumer Credit Protection Act § 103(h), 15 U.S.C. § 1602(h) (Supp. 1976); UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.301(14) (1972).

747. *See* Backman, *supra* note 740, at 3.

748. *Id.* The overwhelming imbalance in expertise between landlords and tenants usually does not exist when a landlord is not an institutionalized business. Many landlords, on the other hand, own only one rental unit and deal with leases, repairs, and other rental issues as often as their average tenants.

749. Backman, *supra* note 740, at 4.

750. *Id.* Broad consumer protection enactments, however, exempt leases of real property from coverage. *Id.* at 4 n.20.

common law days of "all necessary force."[751] Conversely, a tenant's ability to utilize self-help has increased.[752] The URLTA, for example, allows tenants to engage in rent application, in which they personally repair minor defects in the leased premises and deduct the cost from their rent.[753] The Act limits the amount deductible to the lesser of one half of one month's rent or $100.[754] Similarly, the Act allows tenants to deduct the cost of utility service from their rent payments if their landlords have promised to supply utilities, but have failed to do so.[755] The *Restatement (Second) of Property* also allows rent application.[756]

At common law, landlords had no obligation to make any repairs on the leased premises during the lease term.[757] The implied warranty of habitability[758] and the passage of statutes that address this issue[759] in a majority of American jurisdictions, however, has placed a duty on landlords to make certain repairs. In these jurisdictions, tenants, after giving their landlords proper notice of a defect in the leased premises, may deduct from their rent reasonable costs incurred in repairing the defect.[760] Three factors generally affect a tenant's ability to use this self-help method. First, the landlord must have a duty to repair defects in the leased premises.[761] Second, the tenant must give the landlord notice and reasonable time to repair the defect.[762] Last, the tenant's expenditures and subsequent deductions must be reasonable.[763] Determining reason-

751. *See supra* notes 683-87 and accompanying text.

752. *See* Backman, *supra* note 740, at 11-44.

753. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.103 (1972); *see, e.g.*, Ficker v. Diefenbach, 34 Or. App. 241, 578 P.2d 467 (1978).

754. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.103(a) (1972).

755. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.104 (1972).

756. RESTATEMENT (SECOND) OF PROPERTY § 11.2 (1976) (section entitled "Application of Rent to the Elimination of Default").

757. 2 R. POWELL, *supra* note 620 ¶ 230[3], at 326.

758. For a full discussion of the shift from the doctrine of caveat empter to the creation of the implied warranty of habitability, see Comment, *Implied Warranty of Habitability in Lease of Furnished Premises for Short Term: Erosion of Caveat Emptor*, 3 U. RICH. L. REV. 322 (1969).

759. *See* Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 6 (1979); *infra* notes 760-62 and accompanying text.

760. RESTATEMENT (SECOND) OF PROPERTY § 11.2 (1976).

761. 2 R. POWELL, *supra* note 620 ¶ 230[3], at 326; RESTATEMENT (SECOND) OF PROPERTY § 11.1 (1976).

762. 2 R. POWELL, *supra* note 620 ¶ 230[3], at 326; RESTATEMENT (SECOND) OF PROPERTY § 11.1 (1976).

763. 2 R. POWELL, *supra* note 620 ¶ 230[3], at 326; RESTATEMENT (SECOND) OF PROPERTY § 11.1 (1976).

ableness in these cases requires consideration of a variety of factors, including age and condition of the building and the conditions of other buildings in the vicinity.[764]

Some of these rent application statutes are short and simply written,[765] while others contain detailed procedures that tenants must follow closely to receive a rent reduction.[766] Other state statutes deny tenants the right to deduct costs of repairs from rent and instead provide summary judicial procedures to accomplish the desired result.[767]

Some American jurisdictions recently have given tenants the right to withhold rent completely to induce landlords to make repairs.[768] An advantage of this remedy over rent application is that tenants avoid the time, trouble, and expense of making repairs. A disadvantage of this remedy is that landlords are free to decide how to repair defects. When a landlord fails to make requested repairs within a reasonable amount of time,[769] the *Restatement* proposes that tenants, after proper notice to their landlords, should place rent that subsequently becomes due in escrow until the landlord makes the requested repairs or until the lease terminates, whichever comes first.[770] The *Restatement* also requires tenants to notify their landlords that they have made rental payments into an escrow account when they become due.[771]

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764. 2 R. POWELL, *supra* note 620 ¶ 230[3], at 327; RESTATEMENT (SECOND) OF PROPERTY § 11.1 (1976).

765. *See,e.g.*, CAL. CIV. CODE § 1942 (West 1954 & Supp. 1984); MONT. CODE ANN. § 70-24-406 (1983); N.Y. REAL PROP. LAW § 235-a(1) (McKinney Supp. 1983); N.D. CENT. CODE § 47-16-13 (1978). Powell cites the New York statute as a typical simple rent application law. 2 R. POWELL, *supra* note 620 ¶ 230[3], at 327. The statute states that "[i]n any case in which a tenant shall lawfully make a payment to a utility company pursuant to the provisions of . . . [the] public service law, such payment shall be deductible from any future payment of rent." N.Y. REAL PROP. LAW § 235-a(1) (McKinney Supp. 1983).

766. *See, e.g.*, HAWAII REV. STAT. § 521-64 (1976) & Supp. 1982; MASS. GEN. LAWS ANN. ch. 111, § 127B (West 1983); UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.103 (1972); *see* 2 R. POWELL, *supra* note 620, at ¶ 230[3], at 328-29 n.74 (setting forth the text of a detailed rent application statute).

767. *See, e.g.*, WASH. REV. CODE ANN. § 59.18.110 (Supp. 1983); *see* 2 R. POWELL, *supra* note 620 ¶ 230[3], at 328-30.

768. *See* 2 R. POWELL, *supra* note 620 ¶ 230[3], at 330.1; RESTATEMENT (SECOND) OF PROPERTY § 11.3 (1976).

769. See 2 R. POWELL, *supra* note 620, at ¶ 225 for a discussion of the circumstances that put a landlord in default.

770. RESTATEMENT (SECOND) OF PROPERTY § 11.3 (1976).

771. *Id.* The following statutes codify the Restatement's requirements for rent withholding: ALASKA STAT. § 34.03.190(a)(3)(1975); ARIZ. REV. STAT. ANN. § 33-1365 (1974); CONN. GEN. STAT. ANN. §§ 47a-14a to 47a-14g (West Supp. 1984); DEL. CODE ANN. tit. 25, §§ 5901-5907 (1974); FLA. STAT. ANN. §83.60 (West Supp. 1983); KAN. STAT. ANN. § 58-2561

A majority of American jurisdictions have adopted a variation of the *Restatement* position that only requires tenants to notify the landlord of the reasons for withholding rent while allowing them to retain possession of the unpaid rent subject to an order requiring them to deposit the money with a court.[772] Some jurisdictions require tenants to place unpaid rent in a court-administered escrow account as soon as the tenant withholds payment.[773] Under the *Restatement*, a tenant also has the option of changing from rent withholding to rent application.[774] Under the rent application option, however, the *Restatement* would prohibit tenants from using previously escrowed rental payments to make repairs.[775] These self-help alternatives, together with tenants' judicial remedies, diverge significantly from traditional common law rules that obligated landlords only to provide tenants with possession of the leased premises.[776]

In addition to rent application and withholding, other relatively recent self-help remedies have emerged as alternatives to judicial proceedings to resolve landlord-tenant disputes. An increased use of mediation is the most prominent of these alternative methods.[777] Mediation has taken a variety of forms ranging from "neighborhood justice centers"[778] to projects designed solely for

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(1983); KY. REV. STAT. ANN. § 383.645 (Bobbs-Merrill Supp. 1982); MD. REAL PROP. CODE ANN. § 8-211 (1981); MASS. GEN. LAWS ANN. ch. 111, §§127A - 127K (West 1983); MINN. STAT. ANN. § 566.20 (West Supp. 1984); MO. ANN. STAT. §§ 441.500-.640 (Vernon Supp. 1984); NEB. REV. STAT. § 76-1428 (1981); N.J. STAT. ANN. § 2A:42-74 to 2A:42_84 (West Supp. 1983); N.Y. MULT. DWELL. LAW §§ 302-a, 309 (McKinney 1974 & Supp. 1983); N.Y. REAL PROP. ACTS. LAW §§ 769-782 (McKinney 1979 & Supp. 1983); OHIO REV. CODE ANN. § 5321.07 (Page 1981); OR. REV. STAT. § 91.810 (1975); PA. STAT. ANN. tit. 35, § 1700-1 (Purdon 1977); R.I. GEN. LAWS § 45-24.3-19 (1980); TENN. CODE ANN. §§ 66-28-501 to 66-28-502 (1982); VT. STAT. ANN. tit. 12, § 4859 (1973); VA CODE § 55-248.25 (1981 & Supp. 1983); WIS. STAT. ANN. § 280.22 (West Supp. 1975). *See also* MODEL RESIDENTIAL LANDLORD-TENANT CODE §§ 3-301 to 3-307 (1969); UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.105 (1972).

772. 2 R. POWELL, *supra* note 620 ¶ 230[3], at 330.2; *see, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). Tenants potentially could abuse this approach unless courts required them to deposit unpaid rent in an escrow account with the court. Otherwise, tenants could use and earn money from the withheld rental payments during the time required to adjudicate the dispute.

773. 2 R. POWELL, *supra* note 620 ¶ 230[3], at 330.1.

774. RESTATEMENT (SECOND) OF PROPERTY § 11.3 comments b-c (1976).

775. *Id.*

776. *See* Chase, *The Property-Contract Theme in Landlord and Tenant Law: A Critical Commentary on Schoshinski's American Law of Landlord and Tenant*, 13 RUTGERS L.J. 189, 199 (1982) (quoting R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT 116 (1980)).

777. *See* Backman, *supra* note 740, at 42.

778. *See* McGillis *Neighborhood Justice Centers and the Mediation of Housing-Re-*

the purpose of resolving landlord-tenant disputes.[779] Commentators have cited numerous reasons for the recent expansion in the number and type of alternative landlord-tenant dispute resolution devices. First, judicial resolution of these disputes is often intolerably time consuming because housing disputes typically require immediate attention and swift action.[780] Second, litigation is very expensive compared to the often small amounts of money at stake in a dispute[781] and the relatively low cost of many nonjudicial remedies.[782] High litigation costs often persuade landlords and tenants to abandon their claims rather than pay the disproportionate cost of obtaining a judicial remedy.[783] Last, even when landlord-tenant

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lated Disputes, 17 URB. L. ANN. 245 (1979). This article surveyed six mediation dispute processing projects concerning their handling of housing disputes. These so-called neighborhood justice centers dealt with a wide range of legal issues, including landlord-tenant disagreements. Of the six projects discussed, the landlord-tenant caseload ranged from 11.5% to 22% of all disputes addressed. An important issue raised was whether issues that affect people other than the disputants, such as conditions of the common areas or rent changes, are better left to individuals rather than tenant associations. Of course, when no tenant association exists, individual tenants should be able to handle these matters themselves. At least one community, however, has decided to exclude disputes that affect a significant number of people from neighborhood mediation. *Id.* at 268.

The Atlanta Neighborhood Justice Center Project employs a fairly typical dispute resolution procedure. The subject matter of disputes that the Justice Center handles includes both civil and criminal matters. *Id.* at 258. After the Justice Center receives notice of a dispute, whether by referral of neutral parties or by initiative of the disputing parties, it then holds a mediation hearing in an informal, relaxed atmosphere, occasionally in the disputants' local neighborhoods. *Id.* Mediators are volunteers who come from diverse socioeconomic backgrounds. The American Arbitration Association instructs these mediaters about the process of dispute resolution. *Id.* at 259.

Mediaters usually begin mediation hearings by explaining the mediation process to the disputing parties. The disputing parties then present their sides of the dispute. The mediator attempts to holp the parties perceive clearly the issues that underly their dispute and reach a mutual resolution te the dispute. *Id.* After reaching a settlement, the mediator records the settlement's terms on a project form and has the parties sign it. *Id.*

779. *See* Ebel, *Landlord-Tenant Mediation Project in Colorado*, 17 URB. L. ANN. 279 (1979). The Colorado Landlord-Tenant Mediation Project uses procedures for referral of disputes, selection and training of mediators, and conduct of hearings that are similar to those used in other mediation projects. *Compare id.* at 281-86 (the Colorado Landlord-Tenant Mediation Project) *with* McGillis, *supra* note 778, at 158-60 (the Atlanta Neighborhood Justice Center). The Colorado Project emphasizes flexible and creative solutions to housing disputes unavailable to typical court litigants. For example, if a dispute concerns eviction of a tenant, mediators attempt to convince the landlord to allow their tenant a reasonable amount of tune to find alternative housing. If the disputants are unable to reach an agreement, the mediator advises them of other available remedies. *Id.* at 281-84.

780. Ebel, *supra* note 779, at 280.

781. The importance of many housing disputes is neither the expense of minor repairs nor the cost of one month's rent, but rather the speed with which disputing parties can settle their disagreements.

782. *See* Ebel, *supra* note 779, at 280-81.

783. *Id.*

disputes reach court dockets, judges usually lack "the time, inclination, and authority" to fashion creative solutions to the problem.[784] These and other reasons[785] have led to an increased rejection of judicial dispute resolution in favor of more efficient and effective nonjudicial remedies.

D. *Analysis*

The question necessarily arises whether the trend in contemporary America toward increasing tenant self-help remedies and decreasing landlord self-help remedies benefits society. The *Restatement (Second) of Property* and the URLTA both take the position that society benefits from the decline of landlord self-help remedies such as the right of distraint and self-help eviction.[786] Dean Prosser also argues that the current majority view denying landlords the right of forcible entry clearly is desirable and notes that few things are more likely to lead to violence than allowing landlords to throw their tenants out by force.[787] He also recognizes the danger of violence in jurisdictions purporting to allow peaceful landlord self-help.[788] Other commentators have argued that the seemingly innocuous act of padlocking the door of a leased dwelling in the tenant's absence creates an imminent threat of violent confrontation between landlord and tenant.[789] Although many jurisdictions responded to these concerns by abolishing some land-

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784. *Id.*at 281.

When confronted with the massive volume of cases typically found in the landlord-tenant area, courts are often required to act upon the basis of incomplete and filtered evidence. It is no wonder, then, that courts are seldom able to do more than simply enter a monetary judgment for the plaintiff or defendant.

Id.

785. Many landlords and tenants also feel confused and intimidated by the judicial system and therefore decide not to resolve their disputes through formal legal action. *Id.* at 279-81.

786. *See* UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT §§ 4.103, .104, .205, .301 (1972); RESTATEMENT (SECOND) OF PROPERTY §§ 12.1, 14.1-.3, statutory notes and comments (1976).

787. W. PROSSER, *supra* note 675, at 123.

788. *Id.*

789. Earnhardt, *Peaceful Padlocking in a Perfect World: Commentary and Rebuttal,* 13 N.C. CENT. L. J. 195, 203-06 (1982). This commentator presents a number of hypothetical situations in which he attempts to demonstrate problems with allowing "peaceful" self-help eviction. In defending a recently enacted ban on self-help eviction in North Carolina, the author demonstrates that a "lockout attempt, whether done face to face or like a thief in the night when the occupant is away, can be a provocative act." *Id.* at 206. His central thesis is that peaceful self-help sounds good in theory but is difficult to apply safely in the real world.

lord self-help remedies, the advent of speedy judicial remedies that are readily available to landlords and incoming tenants arguably have eliminated the need for most harsh landlord action such as self-help eviction.[790] Thus, although courts and legislators significantly have limited the legality of landlord self-help, speedy judicial remedies have filled the void left by this trend and have ensured that landlords can protect the property they lease.

Although most commentators support the modern trend in America toward expansion of tenant self-help,[791] one commentator has criticized this trend as possessing the potential to reduce the availability of low income housing.[792] According to this argument, repair and deduct statutes, which allow tenants to repair defects in leased premises and deduct the costs of repair from rent under certain circumstances, will reduce the net income of landlords.[793] Under this theory, rental property in the worst condition would be least profitable because the cost of repair would be very high.[794] Thus, repair and deduct statutes will cause landlords of low income property to lose profits and either abandon these investments altogether or increase rent.[795] Consequently, this commentator concludes that these self-help statutes will lead to a reduction in the quantity of low cost rental housing.[796]

This criticism of repair and deduct statutes contains several analytical flaws. First, several questionable pure market assumptions that comprise the foundation of this criticism may not be valid in today's housing market.[797] Second, available statistical evidence shows that the current repair and deduct legislation has not led to detectable increases in average rates of rent and that these statutes have had no adverse effect whatsoever on the quality of housing available.[798] Last, this argument refuses to consider

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790. RESTATEMENT (SECOND) OF PROPERTY § 14.2 comment a (1976).

791. *See supra* notes 740-50 and accompanying text.

792. *See* Weitzman, *supra* note 730, at 987.

793. *Id.*

794. *Id.*

795. *Id.*

796. *Id.*

797. *Id.* at 986. This argument rests on several assumptions about the housing market, including the following: that consumers have full knowledge of conditious and rental levels in all available apartments, that consumers have a wide variety of rental housing alternatives from which to choose, that equal bargaining power exists between landlords and tenants, that both landlords and tenants act in what they perceive to bo their own best interests, and that neither landlords nor tenants possess monopoly power in the housing market. *Id.*

798. *Id.*at 989-90.

whether giving tenants these self-help remedies may be advantageous to landlords and society in general.[799] In the absence of a tenant's entitlement to deduct repair costs or withhold rent for a landlord's default, landlords in run-down areas sometimes are reluctant to repair defects in or improve their property.[800] The universal application of a deduct and repair law, however, could give landlords the incentive needed to maintain their leased property and, as a result, help raise property values of rental property and surrounding neighborhoods.

The right to repair and deduct and other tenant self-help remedies especially should benefit unsophisticated residential tenants who earn low levels of income. These tenants, who often are ignorant of and intimidated by the judicial system, and who usually cannot afford to pursue formal judicial remedies,[801] should enjoy a greater ability to maintain and repair inexpensively through self-help the property they lease. More sophisticated and affluent tenants, on the other hand, should enjoy access to both inexpensive self-help and speedy but costly judicial methods of maintaining the quality of their leased property. State and locally sponsored dispute mediation centers,[802] however, because they provide expedient, reasonably priced, and creative methods of settling landlord-tenant disputes,[803] offer probably the best method of dispute resolution.

Thus, the emergence of speedy judicial remedies for landlords and incoming tenants, the increase in self-help remedies for tenants, and the advent of state and locally sponsored dispute mediation centers, overall have benefited society significantly by helping it to avoid the neighborhood violence that frequently accompanied landlord self-help at common law.[804]

E. Summary

The time and expense parties incur in resolving disputes in our judicial system have motivated society to search for more efficient methods of dispute resolution. Thus, society has accepted

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799. *See* R. POWELL, *supra* note 620 ¶ 230[3], at 330-330.1; *supra* notes 751-67 and accompanying text.

800. Weitzman, *supra* note 730, at 989. Landlords fear that if they make these improvements they will be unable to retrieve their investment. *Id.*

801. *See supra* notes 782-85 and accompanying text.

802. *See supra* notes 778-85 and accompanying text.

803. *See id.*

804. *See supra* notes 604 & 663-90 and accompanying text.

self-help as one alternative to resolving landlord-tenant disputes through formal judicial procedures. American courts and legislatures, however, have looked disfavorably upon forms of self-help that create potentially violent confrontations between landlords and tenants. Consequently, a majority of jurisdictions have limited or abolished most forms of landlord self-help. Tenant self-help remedies, on the other hand, have expanded significantly in most jurisdictions primarily because most state courts and legislatures have perceived that these remedies address more compelling problems than did traditional forms of landlord self-help, and because these remedies seem less likely to cause neighborhood violence. Moreover, the overwhelming bargaining power many residential landlords traditionally have enjoyed over their tenants has weighed strongly in favor of expanding tenant self-help remedies. This trend in landlord and tenant self-help, along with the development of speedy judicial landlord and incoming tenant remedies and the emergence of state and locally sponsored dispute mediation centers, has helped to relieve society of the neighborhood violence that frequently accompanied landlord self-help at common law.

VI. Family Law

A. Antenuptial Agreements

1. Introduction

Self-help in the area of family law deals primarily with resolving the unfortunate consequences of marriage dissolution. The traditional adversarial divorce process is deficient because it discourages cooperation between the parties in drafting the marriage dissolution agreement. Moreover, court proceedings usually exacerbate the emotional conflict between husband and wife. The judicially imposed divorce settlement, therefore, often is incongruous with the parties' needs, desires, and expectations. Recently, however, courts and legislatures increasingly bave begun to recognize and enforce nonjudicial alternatives to the traditional adversarial divorce.

This part of the Special Project concentrates on two self-help methods that can provide divorcing couples with greater control over their marriage dissolution, thereby decreasing the trauma and minimizing the hostility and divisiveness which accompany the traditional divorce process. Subsection one discusses antenuptial agreements, which are contractual agreements that couples enter

prior to marriage. The agreements provide solutions to the questions of support and distribution of property upon termination of the marriage. Subsection two discusses divorce mediation, which is a self-help alternative that enables couples to avoid the judicial process entirely. Generally, mediation is a cooperative process whereby the divorcing parties, with the help of a neutral mediator, negotiate the terms of their divorce agreement. Couples are using each of these self-help methods with greater frequency to make the divorce process easier. This part of the Special Project will attempt to describe these methods and will evaluate their impact in the area of family law.

2. Antenuptial Agreements Contingent Upon Divorce—Traditional Reasoning Versus Current Realizations

An antenuptial agreement contingent upon divorce is a predrafted contract that regulates the disposition of property and resolves the questions of support payments upon the divorce of the parties.[805] Parties develop antenuptial agreements to plan realistically for the possibility of a divorce, to limit alimony or property rights, and to minimize or foreclose litigation.[806] Antenuptial agreements are similar to the general self-help contractual provisions that this Special Project previously has discussed[807] in that they, too, provide for possible future occurrences.[808] Courts, however, traditionally have viewed these contracts as void per se on public policy grounds.[809] Several justifications support this conclusion.

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805. Clark, *Antenuptial Contracts*, 50 U. COLO. L. REV. 141, 159 (1979). Couples make antenuptial contracts both in contemplation of death and divorce. Typically, an older man and younger woman who are about to marry enter an antenuptial agreement. Usually each has been married previously. The agreement limits the rights each will have upon the death of the other. *Id.* at 141. *See also* Comment, *Antenuptial Contracts Determining Property Rights Upon Death or Divorce*, 47 UMKC L. REV. 31, 44-45 (1978). This section of the Special Project, however, focuses on antenuptial agreements contingent upon divorce.

806. Casenote, *Antenuptial Contracts Governing Alimony or Property Rights Upon Divorce*: Osborne v. Osborne, 24 B.C.L. REV. 469, 478 (1983).

807. *See supra* notes 396-98 and accompanying text.

808. Parties may modify or revoke antenuptial agreements with their full and free consent if they do not infringe upon the rights of third persons by such actions. The parties must express clearly their intent to modify or revoke the antenuptial agreement, and courts will not accept readily a party's claim of oral rescission. 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTE- NUPTIAL CONTRACTS, 90-104 to 90-105 (rev. ed. 1983). For a number of illustrative model antenuptial agreements, including agreements regarding the amendment or cancellation of antenuptial agreements, see *id.* at 90-3 to 90-23.

809. *See, e.g.*, Whiting v. Whiting, 62 Cal. App. 157, 216 P. 92 (1923); Norris v. Norris, 174 N.W.2d 368 (Iowa 1970); Caldwell v. Caldwell, 5 Wis. 2d 146, 92 N.W.2d 356 (1958). *See also* 2 A. LINDEY, *supra* note 808, at 90-33 to 90-34; Clark, *supra* note 805, at 148; Swisher,

Typically, courts determined that the agreements promoted and facilitated separation or divorce.[810] Some courts emphasized the state's interest in preventing a spouse from becoming a ward of the state,[811] while others concluded that the contracts commercialized the marriage relationship.[812] Since 1970, courts in an increasing number of jurisdictions have abandoned this traditional view and have recognized the validity of antenuptial contracts.[813] Moreover, some states statutorily have recognized these agreements.[814] The primary reason for this trend is that in a society in which divorce is prevalent,[815] prospective spouses have a legitimate interest in planning for such an occurrence.[816]

Divorce Planning in Antenuptial Agreements: Toward a New Objectivity, U. RICH. L.REV. 175, 177 (1979); Casenotes, *supra* note 806, at 469; Comments, *Antenuptial Contracts Contingent Upon Divorce Are Not Invalid Per Se*, 46 MO. L. REV. 228, 229 (1981); Note, *Antenuptial Contracts to Circumvent Equitable Distribution in New Jersey Under the Revised Divorce Act*, 12 RUTGERS L. REV. 283, 292 (1981).

810. *See infra* notes 817-31 and accompanying text.

811. *See infra* notes 832-56 and accompanying text.

812. *See infra* notes 857-63 and accompanying text.

813. Swisher, *supra* note 809, at 183; Casenote, *supra* note 806, at 469. *E.g.*, Barnhill v. Barnhill, 386 So. 2d 749, 751 (Ala. Civ. App. 1980); Newman v. Newman, 653 P.2d 728 (Colo. 1982); Parniawski v. Parniawski, 33 Conn. Supp. 44, 47-48, 359 A.2d 719, 720-22 (1976); Burtoff v. Burtoff, 418 A.2d 1085 (D.C. Cir. 1980); Posner v.Posner, 233 So.2d 381, 385 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972); Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982); Volid v. Volid, 6 Ill. App. 3d 386, 391-92, 286 N.E.2d 42, 47 (1972); Matlock v. Matlock, 223 Kan. 679, 683, 576 P.2d 629, 633 (1978); Ferry v. Ferry, 586 S.W.2d 782, 786 (Mo. Ct. App. 1979); Buettner v. Buettner, 89 Nev. 39, 45, 505 P.2d 600, 604 (1973); Freeman v. Freeman, 565 P.2d 365, 367 (Okla. 1977); Unander v. Unander, 265 Or. 102, 107, 506 P.2d 719, 721 (1973); *see also* Moore, *The Enforceability of Premarital Agreements Contingent Upon Divorce*, 10 OHIO N.U.L. REV. 11, 11-12 (1983).

814. *See, e.g.*, MINN. STAT. ANN. § 519.11(1) (West Supp. 1984); N.Y. DOM. REL. LAW § 236(b)(3) (Consol. 1981-1982); WIS. STAT. ANN. § 767.255(11) (West 1981). Unfortunately, most divorce laws only generally provide for distribution upon divorce and rarely specifically consider antenuptial agreements contingent upon divorce. Note, *For Better or For Worse . . . But Just in Case, Are Antenuptial Agreements Enforceable?*, 1982 U. ILL. L.F. 531, 543-44.

815. In 1981 there were 109 divorced persons for every 1000 married people in the United States. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, P-2 PUB. No. 374, POPULATION PROFILE OF THE UNITED STATES 1981 28 (1982). Courts currently grant divorces at the rate of 1,200,000 per year. Wall St. J., Dec. 23, 1982, at 1, col. 1. In 1960, in comparison, 35 divorced people existed for every 1000 married people, and American courts granted approximately 393,000 divorces that year. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 39 (102d ed. 1981).

816. *See, e.g.*, Newman v. Newman, 653 P.2d 728, 732 n.4 (Colo. 1982) (Noting the frequency of divorce, the court explained that although divorce property division laws are flexible, it is not imprudent for parties to remove uncertainty about property disposition in the event of divorce.); Posner v. Posner, 233 So. 2d 381, 384 (Fla. 1970) (Recognizing that divorce is "a commonplace fact of life," the court noted that it was fair to assume that prospective spouses might want to agree upon the disposition of their property in the event of divorce.), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972).

(a) The Agreements Tend to Encourage Divorce

The primary argument supporting the traditional rule voiding antenuptial agreements contingent upon divorce is that antenuptial contracts induce divorce, thereby contravening the state's interest in preserving marriage.[817] Courts have noted, however, that little evidence exists to support this conclusion.[818] To the contrary, some courts and legal commentators have rejected the traditional public policy concern and argue that antenuptial agreements defining parties' expectations and responsibilities in the event of divorce may promote marital harmony, not divorce.[819] The Arizona Court of Appeals[820] has suggested that allowing a couple to contract between themselves recognizes an equality between husband and wife that stabilizes the marriage.[821] Further, one justice of the Wisconsin Supreme Court noted in *Fricke v. Fricke*[822] that even if an antenuptial agreement encourages one party to seek divorce because it favors that party, it necessarily would deter the other spouse from desiring a divorce.[823] One commentator, in response to the argument that these agreements induce divorce, has suggested that refusing to enforce an antenuptial contract may have the un-

817. *See, e.g.*, Cohn v. Cohn, 209 Md. 470, 475, 477, 121 A.2d 704, 706, 707 (1956) (court refused to enforce what it termed a "buy out" provision providing that the wife would receive $5000 rather than alimony by reasoning that the agreement induced separation); Crouch v. Crouch, 53 Tenn. App. 594, 604, 385 S.W.2d 288, 293 (1964) (court reasoned that if a contract limiting the husband's liability were enforceable, he could "through abuse and ill treatment of his wife force her to bring an action for divorce and thereby buy a divorce for a sum far less than he would otherwise have to pay"); Fricke v. Fricke, 257 Wis. 124, 127-28, 42 N.W.2d 500, 502 (1950) (An antenuptial contract "invites dispute, encourages separation, and incites divorce proceedings."); *see also* Casenote,*supra* note 806, at 479; Comment, *supra* note 805, at 229-30.

818. *See* Volid v. Volid, 6 Ill. App. 3d 386, 391, 286 N.E.2d 42, 46 (1972); Unander v. Unander, 265 Or. 102, 106, 506 P.2d 719, 720 (1973); Clark, *supra* note 805, at 149; Moore, *supra* note 813, at 13; Comment, *supra* note 809, at 230. *See also* Comment, *supra* note 805, at 48.

819. Volid v. Volid, 6 Ill. App. 3d at 391, 286 N.E.2d at 46 (1972); Clark, *supra* note 805, at 149; Moore, *supra* note 813 at 19-20; Zolla & Strick, *Prenuptial Agreements and Freedom of Contract in California*, CAL. ST. B.J., Jan. 1981, 27; Comment, *Antenuptial Agreements and Divorce in Georgia*: Scherer v. Scherer, 17 GA L. REV. 231, 239 (1982); Note *supra* note 809, at 297; Comment, *supra* note 809, at 230-31.

820. Spector v. Spector, 23 Ariz. App. 131, 531 P.2d 176 (1975).

821. In *Spector*, the court noted that men and women have a relatively equal status under the law, which lessens the need for a protective shield around women. *Id.* at 137, 531 P.2d at 182. The court explained that because marriage today closely resembles a partnership, the court should not deprive spouses of their right to contractually divide their property in the event of divorce. *Id.*

822. 257 Wis. 124, 129, 42 N.W.2d 500, 502 (1950) (Brown, J., dissenting).

823. *Id.* at 130, 42 N.W.2d at 503. *See also* Comment, *supra* note 819, at 234 n.19.

desired consequence of actually deterring some people from marrying.[824] This commentator, citing a recent census which states that 1,589,000 unmarried couples live together in the United States,[825] suggested that a significant percentage of these couples avoid marriage because of the potential financial consequences of divorce.[826]

Proponents of antenuptial contracts also note that society has altered its views toward marriage and that courts should recognize this change when construing antenuptial agreements.[827] Most state legislatures also have recognized that society does not benefit from preserving a broken marriage.[828] Therefore, these states have adopted no-fault divorce provisions.[829] The trend toward facilitating divorce leaves little reason to oppose antenuptial agreements,[830] because such agreements hardly can be more conclusive to this activity than the rather minimal grounds for divorce that

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824. Moore, *supra* note 813, at 13. Justice Brown in his dissent in *Fricke* noted that "[p]ublic policy does not require that an elderly woman desiring marriage must remain single if she cannot find a man who is willing to leave everything to chance and put his property at the disposal of the court, if someday a court thinks it proper to grant a divorce." 257 Wis. at 132, 42 N.W.2d at 504; Moore, *supra* note 813, at 13 n.16.

825. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, MARITAL STATUS AND LIVING ARRANGEMENTS 5 (1982).

826. Moore, *supra* note 813, at 13. *See also* Casenote, *supra* note 806, at 478 ("[I]n at least some instances, but for the antenuptial contract there would be no marriage.").

827. Marriage is not the inviolate, enduring relationship it once was, because an increasing number of marriages now end in divorce. *See supra* note 815. *See also* Zolla & Strick, *supra* note 819, at 26.

828. *See* Clark, *supra* note 805, at 149; Moore *supra* note 813, at 13-14; Swisher, *supra* note 809, at 184; Zolla & Strick, *supra* note 819, at 26-27; Comment, *supra* note 809, at 230. *See also* Posner v. Posner, 233 So. 2d 381, 384 (Fla. 1970) (recognizing that the sanctity of marriage concept has eroded greatly in the last several decades), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972); Unander v. Unander, 265 Or. 102, 105, 506 P.2d 719, 721 (1973) (recognizing the state's policy that a marriage between spouses who cannot reconcile their differences is not worth preserving).

829. All but two states have enacted some form of no-fault divorce legislation. *See* Moore, *supra* note 813, at 13 n.19. When an Illinois no-fault measure becomes effective on July 1, 1984, South Dakota will be the only state without a no-fault provision. Gest, *Divorce: How the Game is Played Now*, U.S. NEWS & WORLD REP., Nov. 21, 1983, at 39. Under the no-fault statutory ground for divorce, fault on the part of either spouse is not necessary. Rather, the court can grant the divorce on the grounds of irreconcilable differences or upon a showing by either party that the marriage is irretrievably broken. *See* Moore, *supra* note 813, at 13.

830. Moore, *supra* note 813, at 14. Clark, *supra* note 805, at 149; Comment, *supra* note 809, at 230. *See also* Zolla & Strick, *supra* note 819, at 26 (noting that the *Posner* decision recognized that modern notions of divorce had changed, leaving the traditional rule without a purpose).

states with no-fault provisions require.[831]

(b) The Agreements Interfere with the Spousal Duty of Support

A second policy argument supporting the traditional approach that disfavors antenuptial agreements is that they interfere with the husband's duty to support his wife.[832] Critics maintain that enforcing antenuptial agreements increases the number of divorced women who depend upon the state for support, thereby increasing the state's financial burden.[833] Critics contend that this marital obligation is so important to the public weal that the state should not place it within the parties' private contractual control.[834]

Admittedly, the state may have an interest in reducing the number of "wards of the state." Courts, however, should not void all antenuptial agreements on this ground, because the "ward of the state" rationale is open to criticism on several grounds. First, most wives do not depend upon their husbands for support,[835] a majority of married women now work outside the home,[836] and women now comprise more than half of all college students.[837] Courts, therefore, should not presume that divorced women will be dependent financially upon the state.[838] The Illinois Court of Appeals noted in *Volid v. Volid*[839] that many married women cur-

831. Clark, *supra* note 805, at 149.

832. Traditionally, courts have recognized the duty of a husband to support his wife. *See, e.g.*, Williams v. Williams, 29, Ariz. 538, 544, 243 P. 402, 404 (1926) (husband has an unmodifiable duty to support his wife); Norris v. Norris, 174 N.W.2d 368, 370 (Iowa 1970) (antenuptial contract relieving husband of duty to pay alimony is contrary to the public interest). *See also* Notes, *supra* note 814, at 537; Comment, *supra* note 809, at 231-32.

833. *See* Moore, *supra* note 813, at 15; Comment, *supra* note 809, at 232; Comment, *supra* note 805, at 47.

834. *See* Swisher, *supra* note 809, at 189. Courts also have emphasized the public interest in supporting this marital obligation. In *In re* Marriage of Newman, 44 Colo. App. 37, ——, 616 P.2d 982, 984 (1980), the court specifically stated that the public interest in enforcing the husband's legal obligation to support his wife outweighs the desires of the parties to agree contractually to their obligations in the event of divorce. *Id.* The Oregon Supreme Court noted in Reiling v. Reiling, 256 Or. 448, 450, 474 P.2d 327, 328 (1970), *overruled*, 265 Or. 102, 506 P.2d 719 (1973), that the "state has a paramount interest in the adequate support of its citizens, and, therefore, the husband's duty of support, either before or after divorce, should not be left to private control." *Id.*

835. *See* Note, *supra* note 814, at 539-40.

836. *See* H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS 726 (3d ed. 1980); Moore, *supra* note 813, at 16.

837. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 159 (101st ed. 1980).

838. *See* Moore, *supra* note 813, at 16. *See also* Note, *supra* note 814, at 540; Comment, *supra* note 805, at 49; Comment, *supra* note 819, at 240.

839. 6 Ill. App. 3d 386, 28 N.E.2d 42 (1972).

rently develop career skills and successfully enter the business world. In addition, the court stated that if a woman has the requisite training, is healthy, and can match her skills with the needs of the market, then alimony is not necessary.[840] Furthermore, in *Holliday v. Holliday*[841] a Louisiana Supreme Court justice noted that antenuptial agreements usually provide for the wife to maintain the same control over her property as she had before the marriage. The court reasoned that women today are capable of financial independence and need not be wholly dependent on either their husbands or the state.[842]

Second, the state's interest in preventing a spouse from becoming a ward of the state is no greater in a divorce action than in a situation in which one spouse predeceases the other,[843] and many jurisdictions enforce antenuptial agreements contingent upon death.[844] The Nevada Supreme Court specifically noted in *Buettner v. Buettner*,[845] that a different rationale should not apply if the parties agree on the amount of support due the wife in the event of divorce.[846] Allowance of only judicial determinations of the financial rights of a divorced spouse does not comport with allowing parties to provide contractually for a widowed spouse.[847] Moreover, commentators urge that legislatures and courts should be consistent when enacting and construing laws that deal with similar matters.[848]

Third, antenuptial contracts which do not provide adequate support to an economically dependent spouse probably achieve

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840. *Id.* at 391, 286 N.E.2d at 46-47; *see also* Moore, *supra* note 813, at 16; Note, *supra* note 814, at 540-41; Comment, *supra* note 805, at 49.

841. 358 So. 2d 618 (La. 1978) (Calogero, J., dissenting).

842. *Id.* at 621-22 (Calogero, J., dissenting). In Unander v. Unander, 265 Or. 102, 506 P.2d 719 (1973), the Oregon Supreme Court held that courts should enforce antenuptial contracts unless this enforcement deprives a spouse of support that he or she cannot secure alone. The court, therefore, formulated an approach that recognizes the rights of parties to contract freely, while preserving the state's right to invalidate the contract when necessary to ensure adequate financial support for its citizens. *Id.* at 107-08, 506 P.2d at 721-22. *See also* Comment, *supra* note 805, at 49.

843. *See* Moore, *supra* note 813, at 15. *See also* Comment, *supra* note 805, at 50.

844. *See* Moore, *supra* note 813, at 12, 15; Comment, *supra* note 805, at 50; *see also* Note, *supra* note 809, at 297.

845. 89 Nev. 39, 505 P.2d 600 (1973).

846. *Id.* at 44, 505 P.2d at 603; Moore, *supra* note 813, at 19.

847. *See* Note, *supra* note 809, at 297-98.

848. Klarman, *Marital Agreements in Contemplation of Divorce*, 10 U. MICH. J.L. REF. 397, 411 (1977). One commentator has noted that since contracts promote stability in other areas, no reason exists to presume that they promote discord in marriage. *See* Comment, *supra* note 805, at 47.

that end because of material nondisclosure, fraud, or duress and, therefore, courts should not enforce them.[849] Courts generally require that antenuptial agreements make fair and reasonable provision for the spouse.[850] Absent such a provision, courts demand that one spouse provide full and frank disclosure of his financial worth to the other spouse, or that the other spouse possess adequate knowledge independent of disclosure.[851] In *Buettner*,[852] for example, the court enforced an antenuptial agreement but warned that it would not enforce any such contract that was unconscionable, or which one of the parties obtained through fraud, duress, or misrepresentation.[853]

Last, one commentator has stated that recent legislative actions have eviscerated the argument that courts should invalidate these agreements because they infringe upon the spousal duty of support.[854] The Uniform Marriage and Divorce Act ("Uniform Act") expressly seeks to minimize the requirement of spousal support.[855] Several legislatures have adopted the Uniform Act or a substantially similar law.[856]

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849. Moore, *supra* note 813, at 15. If an antenuptial agreement does not provide adequate support to an economically dependent spouse, those courts that recognize these agreements probably would deem it unconscionable or violative of the reasonable support standard and refuse to enforce the contract. *See* Comment, *supra* note 809, at 232.

850. *See, e.g.*, Eule v. Eule, 24 Ill. App. 3d 83, 320 N.E.2d 506 (1974) (noting that the trend is to uphold antenuptial agreements if they are fair and reasonable); *see also* Parniawski v. Parniawski, 33 Conn. Supp. 44, 359 A.2d 719 (1976); Belcher v. Belcher, 307 So. 2d 918 (Fla. Dist. Ct. App. 1975).

851. 2 A. LINDEY, *supra* note 808, at 90-52.

852. 89 Nev. 39, 505 P.2d 600 (1973).

853. *Id.* at 45, 505 P.2d at 604; Moore, *supra* note 813, at 16.

See also Clark, *supra* note 805, at 145. To allow for changes in the parties' circumstances subsequent to the execution of an antenuptial contract, some courts impose the additional requirement that the agreement be "just and fair" at the time of the divorce. These courts refuse to enforce antenuptial agreements if the circumstances of the parties at the time of the dissolution differ so significantly from their circumstances at the time of the marriage that enforcement of the contract would be unjust. *See e.g.*, McHugh v. McHugh, 181 Coun. 482, 489, 436 A.2d 8, 12 (1980); Scherer v. Scherer, 249 Ga. 635, ____, 292 S.E. 2d 662, 666 (1982).

854. Note, *supra* note 814, at 539.

855. The draftsmen of the proposed Uniform Marriage and Divorce Act urged that legislatures abolish alimony except in certain circumstances. Note, *supra* note 814, at 539 n.49. According to the draftsmen, a court should have discretion to award alimony only when the spouses have no unemancipated children, when the wife's age or health forecloses the likelihood that she will be able to remarry or support herself, or when the property available for distribution to the wife does not reflect her contributions to the marriage. *Id.* Under any other circumstances, the draftsmen felt that the property settlement should provide sufficiently for the wife's economic welfare. *Id. See* R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS (1969).

856. Note, *supra* note 814, at 539. In practice, courts award alimony payments to only

(c) The Agreements Commercialize Marriage Relationships

A third argument against enforcing antenuptial agreements contingent upon divorce is that the contracts commercialize marriage relationships and denigrate the status of marriage in our society.[857] For example, the North Carolina Supreme Court has stated that antenuptial agreements reduce the marital relationship to a " 'barter and sale'."[858] Moreover, proponents of antenuptial agreements argue that courts already have recognized the utility of contracts in the marriage relationship[859] by generally enforcing antenuptial agreements that settle property rights upon death.[860] Similarly, courts have recognized separation agreements that parties construct in contemplation of divorce which settle the parties' property rights.[861] Proponents of antenuptial agreements also have noted that a major aim of no-fault divorce statutes is to make the termination of marriages more amicable.[862] Therefore, any legal device, albeit contractual, that contributes to a peaceful, nonlitigious settlement of property and support issues is consistent with this goal.[863]

3. Summary

An increasing number of courts and legislatures have reevaluated the traditional arguments against antenuptial agreements contingent upon divorce and have concluded that the contracts are not void per se.[864] The decisions of these courts recognize that in a

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14% of all divorced women. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS SPECIAL STUDY SERIES, PUB. NO. 112, CHILD SUPPORT AND ALIMONY: 1978, at 1 (1980), *cited in* Moore, *supra* note 813, at 16 n.38.

857. Casenote, *supra* note 806, at 479; Comment, *supra* note 809, at 231; Comment, *supra* note 805, at 45. *See, e.g.*, Whiting v. Whiting, 62 Cal. App. 157, 167, 216 P. 92, 96 (1923) (antenuptial agreements are a menance to the marriage relation); Fricke v. Fricke, 257 Wis. 124, 126, 42 N.W.2d 500, 501 (1950) (The contracts treat marriage relationships with as little dignity as courts accord commercial relationships.). *See also* Swisher, *supra* note 809, at 189-90.

858. Sprinkle v. Ponder, 233 N.C. 312, 317, 64 S.E.2d 171, 175 (1951).

859. Comment, *supra* note 805, at 47-48.

860. *Id. See supra* notes 844-48 and accompanying text.

861. 2 A. LINDEY, *supra* note 808, at 31-18; Comment, *supra* note 805, at 48. Proponents of antenuptial contracts also have noted that injecting contractual principles into the marriage does not destroy its dignity and sacredness. Marriage itself if a contract, and surely such terminology does not erode the dignity of the institution. *Id.* at 47.

862. Moore, *supra* note 816, at 14-15.

863. *Id.* at 15. *See* Clark, *supra* note 805, at 149 (Antenuptial contracts "will reduce the hostility and destructiveness of a divorce if one should occur.").

864. Zolla & Strick, *supra* note 819, at 26. *See also* Note, *supra* note 814, at 562; Casenote, *supra* note 806, at 503.

society that readily accepts divorce, couples have a significant interest in planning for the financial consequences of such an occurrence.[865] Jurisdictions that continue to void antenuptial agreements governing property or alimony rights in the event of divorce should recognize that, in view of the social changes in the past two decades, these agreements have a legitimate and logical role in the marriage relationship. These jurisdictions instead insist on disregarding the needs and desires of prospective spouses and rely on traditional ideals that no longer apply to today's society.[866]

B. Divorce Mediation

Divorce mediation is a relatively new practice by which married couples resolve their disputes and negotiate the terms of their marriage dissolution while working with a mediator.[867] Although some states have enacted statutes that govern mediation,[868] the majority of divorce mediation is voluntary for both parties. Conciliation courts, mediation organizations, or individuals working singly or in teams most often provide this service,[869] and many mediators have behavioral science training or specialized training in mediation.[870]

The goals of mediation are threefold: (1) to create an equitable, legally sound, and mutually acceptable divorce agreement; (2) to avoid the expense and trauma that accompany litigation; and (3) to minimize hostility and postdissolution controversy.[871] Al-

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865. Casenote, *supra* note 806, at 503.

866. Moore, *supra* note 813, at 20.

867. *See* Bahr, *Mediation is the Answer*, FAM. ADVOC., Spring 1981, at 32, 32-33; Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107, 107 (1982); Note, *Family Law—Attorney Mediation of Marital Disputes and Conflict of Interest Considerations*, 60 N.C.L. REV. 171, 171 (1981).

868. *See* Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 32 (1982). For example, California law provides for mandatory mediation of child custody issues before adversary proceedings. CAL. CIV. CODE § 4607 (West Supp. 1984). Other states have established judicially administered mediation services without making mediation mandatory. *See, e.g.*, MICH. COMP. LAWS ANN. § 552.513 (West Supp. 1983).

869. *Id.* at 32-33.

870. Note, *supra* note 867, at 174. American Arbitration Association ("AAA") mediators undergo approximately 35 hours of training with the AAA. Mediators for the Dispute Settlement Center in Chapel Hill, North Carolina, originally received 40 hours of training from the Community Relations Service of the United States Department of Justice. Currently, the Dispute Settlement Center conducts its own weekend training sessions. *Id.* at 174 n.26.

871. *See* Bahr, *supra* note 867, at 32. *See also* Gold, *Mediation in the Dissolution of Marriage*, ARB. J., Sept. 1981, at 9, 11; Pearson, *Child Custody: Why Not Let the Parents Decide?*, 20 JUDGES J., Winter 1980, at 4, 5 ("Mediation is a cooperative dispute resolution

though similar to arbitration,[872] mediation is simply an aid to negotiation whereby the mediator, while remaining neutral, actively discusses the issues and makes suggestions for the divorce agreement[873] The third-party mediator, however, unlike the arbitrator, has no authority to impose a settlement on the parties.[874]

Although a lawyer may involve himself directly in the process as a mediator or as a part of a mediating team,[875] a layman mediator usually monitors the negotiations.[876] Nevertheless, the lawyer may play an important role in this self-help process, even if he does not participate directly on the mediating team, by serving as an impartial advisor to both parties, as a legal advisor to one party, or as a member of an interdisciplinary team.[877] The attorney also may become involved in the mediation process by suggesting mediation to a couple seeking a divorce or by helping the parties select a third-party mediator. The lawyer, however, must guard against potential ethical problems that may arise during mediation. Section VII of this Special Project will discuss more fully the attorney's role in the mediation process and its attendant conflicts.[878]

1. Criticisms of the Traditional Adversarial Divorce

The traditional adversarial legal system is an inappropriate means of terminating many marriages. Critics maintain that the adversarial process exacerbates conflicts, increases trauma, and en-

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process in which a neutral third party tries to keep contesting parties talking until they reach a settlement of their differences."); Silberman, *supra* note 867, at 107 ("[M]ediation contemplates a neutral third party who will guide the parties towards a resolution of their marital disputes, outside of, or preliminary to litigation.").

872. See discussion of mandatory arbitration clauses *supra* at note 479 and accompanying text.

873. *See* Meroney, *Mediation and Arbitration of Separation and Divorce Agreements*, 15 WAKE FOREST L. REV. 467, 470 (1979).

874. McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 238 (1981); Riskin, *supra* note 868, at 29 (1982); Silberman, *supra* note 867, at 107-08.

875. Riskin, *supra* note 868, at 36-37; *see also* Note, *supra* note 867, at 174-75.

876. Riskin, *supra* note 868, at 36-37; Note, *supra* note 867, at 173.

877. Riskin, *supra* note 868, at 38-39. The most obvious ethical problem arises in cases in which the lawyer attempts to act as an impartial advisor to both parties. A lawyer must exercise independent professional judgment on behalf of his client; failure to do so is a violation of the Code of Professional Responsibility. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1981); *see also* Riskin, *supra* note 868, at 38. If one lawyer advises both couples, therefore, he risks sanction by the appropriate bar association.

878. *See infra* notes 922-1122 and accompanying text.

courages divisiveness.[879] Litigation also may create previously nonexistent conflicts between the parties.[880] Further, critics contend that most attorneys who work in the family dispute context function as advocates whose sole purpose is to protect their clients' interests.[881] Attorneys often direct their client to seek specific legal goals rather than to assess the total family situation or individual responsibilities.[882] This approach by the attorney minimizes the possibility of a continuing, cooperative, postdissolution relationship between the parties.[883]

The traditional adversarial procedure often leaves the parties dissatisfied with the final settlement. During divorce negotiations the attorney may replace his client's views with his own rather than merely advising his client.[884] As a result, the parties may feel little duty to adhere to the divorce decree.[885] The parties, therefore, may ignore the agreement or return to court to contest it, thereby contributing to court congestion.[886] Further, many divorced parents refuse to comply with child visitation and support agreements. A 1971 study of 105 divorced families found that within two years after the divorces occurred, the courts had intervened in eighty-three percent of the cases.[887]

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879. *See* Bahr, *supra* note 867, at 32. The adversarial system often fails to meet the needs of a family who desires a continuing relationship after the divorce. Gold, *supra* note 871, at 9. This process "usually increases trauma and escalates conflict." Herrman, McKenry & Weber, *Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement*, ARB. J., Mar. 1979, at 17, 18. Even parties who seek a reasonable and fair settlement find that the adversarial process alters their noble intentions. Meroney, *supra* note 873, at 469; *see also* Pearson, *supra* note 871, at 6; Pickrell & Bendheim, *Family Disputes Mediation—A New Service for Lawyers and Their Clients*, 15 ARIZ B.J. 33 (Oct. 1979); Steinberg, *The Therapeutic Potential of the Divorce Process*, 62 A.B.A. J. 617 (1976).

880. Note, *supra* note 867, at 171.

881. Herrman, McKenry & Weber, *supra* note 879, at 18. By the time a couple seeks legal aid, they are often bitter and vindictive. An attorney under these circumstances, therefore, easily may resort to pure advocacy and pursue the same goals that he would pursue in a commercial breach of contract case—to obtain the largest settlement possible for the wife, or to reduce the award as much as possible if he represents the husband. This limited view of the lawyer's role in these matters will not benefit even his own client. Meroney, *supra* note 873, at 469-70 n.16 (citing Pilpel & Zavin, *Separation Agreements: Their Function and Future*, 18 LAW & CONTEMP. PROBS. 33, 36 (1953)). Some critics also claim that attorneys lack the necessary training to deal with the psychological and interpersonal aspects of a divorce. Herrman, *supra* note 879, at 18; Pearson, *supra* note 871, at 6.

882. Herrman, McKenry & Weber, *supra* note 879, at 18.

883. *Id.*

884. Steinberg, *supra* note 879, at 619.

885. Jenkins, *Divorce California Style*, STUDENT LAW., Jan. 1981, at 31, 31; Pearson, *supra* note 871, at 6.

880. Jenkins, *supra* note 885, at 31.

887. Pearson, *supra* note 871, at 6 (citing Cline & Westman, *The Impact of Divorce in*

Divorce litigation also often has a devastating effect on children of the marriage,[888] especially when friction between the parents prolongs the conflict or when the children become the focus of the divorce dispute.[889] Moreover, courts are ill-equipped to determine the best interest of the child.[890] Judges complain that they must make difficult character evaluations when deciding which parent will receive custody of the child.[891] One commentator has noted that even experienced judges often sacrifice important family values in the interests of the "structural imperatives of the judicial system."[892] These writers argue that judges are less capable of determining the best interests of the child than are the parents, because in most cases the parents will have more knowledge of the child's needs and desires.[893] These scholars also assert that private dissolution of marriages is an attractive alternative because it would minimize the parents' feelings of embarrassment and inadequacy and would reduce the adverse effects of the conflict on the child.[894] Finally, they maintain that quick resolution of domestic disputes is the optimal result.[895] Without timely and efficient conclusions, uncertainty and delay in the proceedings can deny children the stability that they need as soon as practicable.[896]

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the Family, 2 CHILD PSYCHOLOGY & HUMAN DEV. 78-83 (1971)).

888. Gold, *supra* note 871, at 11. Continued parental conflict is the most damaging aspect of divorce for children. This conflict divides their loyalties and can make the necessary transition to life with just one parent even more difficult. *Id.*; *see also* Pearson, *supra* note 871, at 6; Zumeta, *Mediation as an Alternative to Litigation in Divorce*, 62 MICH. B.J. 434, 434 (1983).

889. Pearson, *supra* note 871, at 6.

890. Spencer & Zammit, *Mediation-Arbitratin: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911, 918.

891. Pearson, *supra* note 871, at 6. Courts have difficulty determining relevant elements to weigh when making custody decisions and have relied on a variety of presumptions. *See* Spencer & Zammit, *supra* note 890, at 916-17. The judicial standards in this area are vague and judges often arbitrarily impose their own values. *See* Winks, *Divorce Mediation: A Nonadversary Procedure For the No-Fault Divorce*, 19 J. FAM. L. 615, 652 (1980-1981). For a critical discussion of the discretionary powers of the judge in child custody cases, see Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 268-70 (1975). *See, e.g.*, Beck v. Beck, 175 Neb. 108, 111-12, 120 N.W.2d 585, 589 (1963) (court found wife guilty of adultery and, therefore, declared her an unfit custodian as a matter of law); Vanden Heuvel v. Vanden Heuvel, 254 Iowa 1391, 1399, 121 N.W.2d 216, 220 (1963) (except in exceptional circumstances, the mother is the best person to care for children of tender years).

892. Spencer & Zammit, *supra* note 890, at 939.

893. *Id.* at 918.

894. *Id.* at 919.

895. *Id.*

896. *Id.* The child's-sense-of-time guideline would require decisionmakers to act with "all deliberate speed" to maximize each child's opportunity either to restore stability to an

Commentators have expressed additional criticisms of the traditional adversary divorce. First, judges may review the cases only cursorily because of crowded court dockets and the resulting pressure to consider cases quickly.[897] Second, judges have the power to affect substantially the course of couples' lives by their subjective evaluation of those couples during their brief encounter with the court.[898] Last, judges' decisions may become biased if the judges are unable to understand and appreciate parties who have life styles different from their own.[899]

2. Advantages of Divorce Mediation

Divorce mediation, in addition to reducing the flood of divorce litigation,[900] offers distinct advantages to the participating parties. These advantages include a reduction in the hostilities that develop in the divorce context, decreased likelihood that parties will breach their agreements, an improvement in the adverse effects which children endure, and a lessening of time and economic commitments to achieve the desired result.

Mediation reduces the hostility that traditional adversarial divorce often creates.[901] Because of its procedural flexibility, mediation enables the parties to consider a broader range of issues relating to their divorce, including concerns that may prove to be more important to the parties than the problems which they raised in their complaint.[902] The mediation process more effectively edu-

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existing relationship or to facilitate to "replace" old ones. Procedural and substantive decisions should never exceed the time that the child-to-be-placed can endure loss and uncertainty. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 42 (1973).

897. Meroney, *supra* note 873, at 469.

898. *Id.*

899. *Id.* One commentator has noted the presence of "patronizing paternalism toward the marrying and divorcing population which often leads to punitive authoritarianism against those who do not share middle class values." Levy, *Introduction, A Symposium on the Uniform Marriage and Divorce Act*, 18 S.D.L. REV. 531, 532 (1973).

900. *See supra* note 815.

901. Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219, 219 (1982); Meroney, *supra* note 873, at 486; Silberman, *supra* note 867, at 108; Note, *supra* note 867, at 172.

902. McEwen & Maiman, *supra* note 874, at 239. Professor Riskin has determined that mediation is "potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants." He also has noted that the source of these advantages is that "mediation is less hemmed-in by rules of procedure or substantive law and certain assumptions that dominate the adversary procedures." Riskin, *supra* note 868, at 34.

cates each party about the other's needs[903] and allows them to settle their differences amicably and to continue their relationship on terms more favorable than the adversary process offers.[904] Mediation also avoids conflict because the process requires each party to state his or her demands in the presence of the other party and the neutral mediator rather than through his or her attorney. This procedure avoids the problems that can arise when a party deals only with his attorney and, therefore, is more likely to take an extreme or unreasonable position.[905] Finally, if the parties do not reach a settlement through mediation, they may initiate arbitration or litigation with a greater understanding of the other party's position, which should minimize their hostility.

Parties who voluntarily and responsibly negotiate their own divorce settlement are more likely to remain satisfied with and comply with its terms than parties who choose to litigate their dispute. Therefore, these parties are less likely to initiate costly postdissolution litigation concerning the agreement.[906] Mediated agreements better serve the parties' interests, because the parties are more aware of their particular needs than the courts.[907] A study of the first 200 cases which the Los Angeles County conciliation court mediated found that only fourteen percent of these cases returned to court.[908] Mediated agreements, therefore, appear to provide stability in postdissolution relationships.

Mediated custody agreements also offer substantial advantages over court-imposed arrangements. Parents generally have more knowledge than judges about their own capabilities and the needs and interests of their particular family.[909] Moreover, mediation shields children from the psychologically damaging strain of

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903. Riskin, *supra* note 868, at 34.

904. McEwin & Maiman, *supra* note 874, at 239. One commentator has noted that mediation "clears the air so people can cooperate more afterward." Jenkins, *supra* note 885, at 32. Another commentator has determined that individuals taking part in mediation generally report a better relationship with their former spouse. *See* Zumeta, *supra* note 888, at 435.

905. Crouch, *supra* note 901, at 220.

906. Note, *supra* note 867, at 172. Parties are more likely te comply with the agreement because they developed it by exploring fully all options and alternatives. Therefore, they have answered all their questions and feel a sense of completion. *See* Gold, *supra* note 871, at 13. *See also* Riskin, *supra* note 868, at 33; Zumeta, *supra* note 888, at 435.

907. *See* Jenkins, *supra* note 885, at 32; Zumeta, *supra* note 888, at 435.

908. Jenkins, *supra* note 885, at 32.

909. Winks, *supra* note 891, at 650; Note, *supra* note 867, at 172; Spencer & Zammit, *supra* note 890, at 918.

the adversarial procedure.[910] Mediation also provides a more suitable framework for informal alteration of the custody arrangement as the child grows older, or the parents remarry, move, or change careers.[911] Finally, one commentator has noted that "[t]o the extent that mediation leads to greater parental adjustment, reduces levels of interparental conflict, and increases time that parents can devote to their children, children become better adjusted."[912]

Mediation also provides the parties with a more expeditious[913] and less expensive[914] method of divorce. Generally, parties who mediate their disputes pay less than parties who choose to litigate their settlement, even though those mediating must pay the costs of mediation and legal representation.[915] Divorce mediation also can provide a savings of time and money to the courts, thereby prompting the important public interest in relieving crowded court dockets.[916]

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910. Note, *supra* note 867, at 172. *See supra* notes 888-89 and accompanying text. The number of children in divorce-affected households is increasing. In 1956 361,000 children's parents divorced. Approximately one million children annually experience their parent's divorce. Simons, *The Invisible Scars of Children of Divorce*, 7 BARRISTER 14, 15 (1980), *cited in* Note, *supra* note 867, at 172 n.14.

911. Winks, *supra* note 891, at 651.

912. Pearson, *supra* note 871, at 6. Mediation agreements result in more joint custody agreements as opposed to the more conventional mother-only awards. Also, mediation agreements lead to a higher rate of visitation by the noncustodial parent. *Id.* at 7; Zumeta, *supra* note 888, at 435, 440.

913. Mediation usually proceeds more rapidly than litigation. Gaughan, *Taking a Fresh Look at Divorce Mediation*, TRIAL, Apr. 1981, at 39, 41; *see also* Riskin, *supra* note 868, at 33, 34; Silberman, *supra* note 867, at 108. Divorce dissolution is more expeditious because parties avoid backlogged court calendars. Also, in Colorado, judges require an average of 9.8 hours to resolve a contested custody case. In contrast, mediators devote an average of 5.4 hours to each case Pearson, *supra* note 871, at 10.

914. Bahr, *supra* note 867, at 34-35; Crouch, *supra* note 901, at 220; Jenkins, *supra* note 885, at 32; Pearson, *supra* note 871, at 10;
Riskin, *supra* note 868, at 33-34; Silberman, *supra* note 867, at 108; Winks, *supra* note 891, at 648; Zumeta, *supra* note 888, at 436; Note, *supra* note 867, at 172.

915. Brigham Young University Professor Stephen Bahr conducted a study and determined that parties who mediate spend approximately $150 less than parties who litigate. Bahr, *supra* note 867, at 34. *See also* Zumeta, *supra* note 888, at 436.

916. Pearson, *supra* note 871, at 10. A 1978 study of the Los Angeles Family Conciliation Court found that it had resolved 747 cases at a projected net savings to the county of $175,044. *Id. See also* Note, *supra* note 867, at 173. Courts should welcome the mediation alternative because it will relieve their dockets of cases that arguably belong elsewhere. Meroney, *supra* note 873, at 485; *see also* Note, *supra* note 867, at 173. In California the problem of court delay is particularly apparent. The stato legislature recently enacted a law requiring "mandatory mediation" of child custody issues in divorce cases prior to an adversary hearing. CAL. CIV. CODE § 4607 (West Supp. 1984); *see also* Riskin, *supra* note 868, at 32; Zumeta, *supra* note 888, at 434.

3. Summary

Divorce mediation offers substantial benefits to divorce-seeking couples and avoids the traditional adversarial process. Mediation, however, will not always be an appropriate method of dissolving a marriage,[917] because the process requires the mutual trust of the parties.[918] Moreover, couples must have the motivation and the emotional and intellectual abilities to be capable of ignoring their differences long enough to cooperate and develop equitable divorce settlements.[919] Nevertheless, for parties willing to ignore fault and emphasize fairness and mutual trust, divorce mediation is a self-help alternative that can benefit the entire family and minimize the hostility often present in the traditional divorce process.[920] To maximize the benefits of mediation, however, attorneys must become more involved in the process.[921]

VII. The Role of the Legal Profession

A. Alternatives to Litigation: The Attorney's Role and the Legal Profession's Reaction

1. Introduction

The concept of legal self-help encompasses all methods of resolving legal disputes that do not entail the costly retention of a lawyer or the lengthy litigation process. To conclude that all alternatives to litigation require an absolute separation from the legal profession, however, is mistaken. Individuals may choose one of several different methods of resolving legal conflicts which do not involve courtroom procedures but that actively involve lawyers in the process. One such method is mediation.[922] Because of its

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917. Gold, *supra* note 871, at 13; Meroney, *supra* note 873, at 486; Pearson,*supra* note 871, at 10; Riskin, *supra* note 868, at 33; Winks, *supra* note 891, at 643.

918. The most important element for successful mediation is trust, because without trust the agreement cannot stand. Meroney, *supra* note 873, at 486; Winks, *supra* note 891, at 644.

919. Meroney, *supra* note 873, at 486. *See* Gold, *supra* note 871, at 13.

920. Meroney, *supra* note 873, at 486.

921. Riskin, *supra* note 868, at 35, 41.

922. This section of the Special Project concentrates on the mediation process because courts and bar associations have addressed problems that pertain to the individual lawyer's role and the legal community's reaction to mediation more than they have explored the benefits and shortcomings of other litigation alternatives in which lawyers participate. *See, e.g.*, Levine v. Levine, 56 N.Y.2d 42, 436 N.E.2d 476, 451 N.Y.S.2d 26 (1982); N.Y.C.B.A. Comm. on Professional Ethics, Formal Op. 80-23 (1982); Colo. B.A. Ethics Comm., Formal Op. 47 (1972), *reprinted in* 1 Colo. Law. 59 (1972).

unique combination of involving lawyers in the process yet resolving legal disputes outside of the judicial arena, mediation offers lawyers the opportunity to promote and upgrade the vital, necessary alternatives to the slow, expensive, and frustrating litigation process.

In the past, mediation was a relatively unpopular form of dispute resolution. Because of escalating legal fees, overcrowded dockets, and emotionally draining courtroom encounters, however, the public increasingly perceives mediation as a viable alternative to formal litigation.[923] The number of dispute resolution centers in the United States consequently has grown from approximately three in 1971 to over one hundred and eighty in 1982.[924] The legal community has had a mixed response to the increase in this type of dispute resolution alternative. While local bar associations do not oppose the mediation programs openly,[925] attorneys utilize the process infrequently.[926]

Leaders in the legal community, however, strongly advocate lawyer support of and participation in the mediation process.[927] At a 1982 American Bar Association ("ABA") meeting, Chief Justice Warren E. Burger recognized the delays, expense, and trauma that accompany the traditional system of courtroom litigation and stated that an increase in mediation and arbitration would enhance the American justice system.[928] Justice Burger attributed the legal community's apprehension of informal dispute resolution mechanisms both to attorneys' legal education, which emphasizes litigation rather than mediation, and to their fear of losing business.[929] While the Justice did not suggest that informal dispute resolution should replace the existing legal system, he did warn that something must occur to deal with the " 'avalanche' of [untried] lawsuits . . . ."[930] Noting the advantages of mediation as an alternative to the traditional courtroom, Burger argued that medi-

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923. *See* Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 31 (1982). Note, *Family Law—Attorney Mediation of Marital Disputes and Conflict of Interest Considerations*, 60 N.C.L. REV. 171, 171 (1981).

924. *Alternative Dispute Resolution: Bane or Boon to Attorneys?*, 8 A.B.A. DISPUTE RESOLUTION 1, 14 (1982) [hereinafter cited as *Bane or Boon*].

925. *Id.*

926. Note, *supra* note 923, at 173.

927. *See Bane or Boon, supra* note 924, at 14; *Chief Justice Burger Urges Mediation*, 8 A.B.A. DISPUTE RESOLUTION 1, 16 (1982).

928. *Chief Justice Burger Urges Mediation, supra* note 927, at 1, 16.

929. *Id.* at 16.

930. *Id.* (quoting Chief Justice Burger).

ation soon would win the support of the legal profession and the general public because the alternative resolution system offers qualified experts in specialized legal areas, less stress to the parties in conflict, and reduced cost to the clients.[931]

The ABA also has supported alternative dispute resolution mechanisms.[932] Former ABA President David R. Brink envisions the American justice system eventually achieving a stage in its development in which unrepresented citizens can take their legal problems "to the most appropriate dispute resolution process ranging from conciliation, mediation, arbitration, factfinding, ombudsperson to small claims court, a private lawyer, a traditional court or whichever of a number of bar-sponsored private or public agencies can resolve that person's problem."[933] Mr. Brink characterized attorneys' roles in the legal process as "counselors, problem solvers, and deliverers of prompt, appropriate, and affordable justice" and encouraged attorneys to contribute to the development of alternative dispute resolution forums.[934] An ABA panel recommended that attorneys should participate in alternative forms of dispute resolution and characterized the new development of such programs as a "boon to attorneys."[935] Recognizing that such alternative mechanisms could "provide attorneys with a new vision of their role in problem solving," the panel noted that the "movement toward alternatives will continue."[936] One panel member observed that lawyers must support this change in the legal system by promoting its development, or the government will react to a "justly frustrated citizenry" by shaping this imminent legal revolution with or without the legal profession's support.[937] These calls for a reevaluation of the lawyers' role in dispute resolution are consonant with the ethical duties of the legal profession.[938] By promoting mediation and other nonjudicial processes, lawyers encourage the simplification and improvement of the currently overburdened system.[939] Plainly, the time has come for attorneys to invite alter-

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931. *Id.*

932. The ABA publishes the Dispute Resolution booklet on a quarterly basis. *See* 8 A.B.A. DISPUTE RESOLUTION 1, 1 (1982).

933. *Bane or Boon, supra* note 924, at 14 (quoting ABA President David R. Brink).

934. *Id.*

935. *Id.*

936. *Id.*

937. *Id.* (quoting Canadian Bar Ass'n President A. William Cox).

938. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1981) ("A Lawyer Should Assist in Improving the Legal System.").

939. *See supra* notes 927-28 and accompanying text. *See also* MODEL CODE OF PROFES-

native dispute resolution processes and self-help counseling into their practices.

2. Reasons for Lawyer Participation in Mediation

Regardless of whether lawyers feel compelled ethically to engage in mediation or the legal profession or the government participates in it, lawyers still should use mediation in their practices for several reasons. First, it can improve the legal system.[940] Second, the public's increasing demand for mediators exceeds the current supply of nonattorney mediation services.[941] Some lawyers view this increasing need for mediators as a "threat" to potential business and thus feel obligated to become involved in the mediation process to protect their "turf."[942] Other attorneys, however, see the current popularity of mediation as an opportunity to refine and expand their roles as mediators—a role this group views as a natural extension of a lawyer's duties.[943]

Third, if attorneys currently would support and practice mediation, then the legal community could formulate its role within the mediation process at the early stages of alternative dispute resolution development. Fourth, because of the significant legal consequences that often accompany mediation decisions,[944] and the complex legal documents frequently necessary in the mediation process,[945] the mediator should have some type of law background. Thus an attorney may be an ideal mediator, particularly if he serves as both mediator and legal advisor. Last, the goal of alternative dispute resolution mechanisms is to complement and enhance the current lawyer-operated legal system.[946] If lawyers participate in mediation, therefore, they will understand better how society could combine mediation and the court system to achieve optimal results.

In addition to these specific reasons why lawyers should en-

SIONAL RESPONSIBILITY EC 8-2 (1981) (Lawyers should help improve "legal procedures . . . whenever experience indicates a change is needed."). Current problems of litigation should signal to attorneys that the legal system needs supplementary programs to help resolve private disputes.

940. *See supra* notes 938-39 and accompanying text.

941. Note, *supra* note 923, at 175.

942. *See* Riskin, *supra* note 923, at 52.

943. *See* Rich, *The Role of Lawyers: Beyond Advocacy*, 1980 B.Y.U. L. REV. 767, 775.

944. *Id.*

945. *See id.*

946. *See Chief Justice Burger Urges Mediation, supra* note 927, at 1. Callner, *Boundaries of the Divorce Lawyer's Role*, 10 FAM. L.Q. 389, 396 (1977).

gage in and encourage the development of self-help through mediation, reasons of fairness to the disputing parties also should coax attorneys into the mediation process, if not for themselves, then for the sake of their clients. One of the most unfair aspects of traditional courtroom litigation is the cost. The tremendous legal fees that litigants incur often exceed the benefits of having individual representation.[947] Mediation fees can be more reasonable because the parties split the associated costs. The issue still arises, however, as to whether individual representation and its concomitant advocacy for one side of a legal controversy is superior to having a lawyer mediate between two adverse positions and, therefore, is worth the additional expense. Ethical Consideration 5-15 of the Model Code of Professional Responsibility[948] states that "a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation."[949] Some situations in which the parties' interests potentially differ could terminate in a court of law, but this possibility often does not justify the higher legal fees that such parties must pay for individual representation. Attorney mediation offers a cheaper and more flexible alternative, and after mediation begins, if conflicts occur that temporarily halt the process, then the parties still have reserved the right to employ additional attorneys if necessary. If no conflicts emerge, then the parties avoid duplicating legal expenses and incur only the less expensive mediation fee.[950] Another unfair by-product of the traditional litigation process is the animosity that the adversarial nature of the courtroom causes. Mediation alleviates much of this animosity by bringing the parties together through a mediator rather than driving them further apart with two unyielding advocates.[951] Finally, the public often perceives legal representation as a high-priced, self-perpetuating sham. Mediation offers the legal community an opportunity to serve the public more effectively at lower costs, thus fostering a more stable and trusting relationship between the legal community and the public.[952] Mediation does not solve every problem of the traditional adversarial approach; however, it does provide a viable alternative to proliferating litigation

947. Note, *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1303-04 (1981).

948. *See infra* note 1003.

949. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15 (1981).

950. *See* note, *supra* note 947, at 1309-10.

951. *Id.* at 1310.

952. *See id.*

and overcrowded courts.[953]

3. Arguments Against Lawyer Participation in Mediation

Even though the leaders of the legal community support mediation and inducements exist to encourage lawyer participation in the process, in 1981 attorneys accounted for only fifteen percent of the mediators in this nation.[954] The legal community is skeptical of this type of alternative dispute resolution process for several reasons: 1) mediation and traditional legal processes that attorneys use to solve conflicts are incompatible; 2) mediation impairs attorneys' economic position; 3) lawyers cannot address adequately the emotional aspects inherent in some types of mediation; 4) non-attorney mediators in fact are practicing law illegally; and 5) attorney mediators potentially violate legal ethics.

(a) Incompatibility of Mediation and Traditional Dispute Resolution Practices of Attorneys

Because attorneys often view their clients as disputants in an adversarial battle that can be resolved only by applying general principles of law to the facts behind the dispute,[955] their approach to problem solving suggests incompatability with mediation.[956] Attorneys often characterize any disagreement between individuals as an "all or nothing" situation, not as an opportunity for disputants to compromise.[957] Several explanations exist for this adversarial attitude. First, the practice of law attracts this "all or nothing" per-

953. " '[N]either the federal nor the state court systems are capable of handling all the burden placed upon them.' . . . [T]he appellate case load per judgeship since 1950 has increased 16 times as much as the population increased." *Chief Justice Burger Urges Mediation, supra* note 927, at 1, 1, 16 (quoting Chief Justice Burger); *see supra* text accompanying notes 928-31.

954. Note, *supra* note 923, at 173 n.22.

955. Riskin, *supra* note 923, at 44.

956. *Id.* at 43; *see infra* note 1051 and accompanying text.

957. Riskin, *supra* note 923, at 44. As some commentators have noted:

> When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. Your ego becomes identified with your position. . . . As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties.

R. FISHER & W. URY, GETTING TO YES 5 (1981). Traditional legal education instills in attorneys the "hard position" as opposed to the more amicable "soft position." The "hard position" embraces the following doctrines: (1) Participants are adversaries, (2) the goal is victory, (3) entrench yourself in your position, (4) search for the single answer, and (5) insist on your position. *See id* at 9; *see also infra* note 961 and accompanying text.

sonality because application of the law to the facts often presents clear-cut, yes-or-no answers to client disputes.[958] Second, a client's preconceived notion that an attorney is a zealous advocate who pursues only his client's best interests at the expense of any conflicting cause frequently reinforces this attitude.[959] Third, this hard line attitude yields profitable results in courtroom litigation for both attorneys and clients.[960] Because an attorney who behaves aggressively generally dominates one that represents his client in a more subdued manner,[961] clients with staunch advocates representing them often win their suits and, therefore, willingly pay these attorneys handsomely for the victories. This inherent reward system perpetuates attorneys' adversarial roles. Fourth, because lawyers can rely upon the general principles of law to give either a yes or no answer to a conflict, they enjoy some degree of proficiency in predicting outcomes of disputes.[962] Fifth, the adversarial system also simplifies the role of attorneys by limiting their choices and decisions. Traditionally, educators have taught advocates that they "may assert any claim on behalf of a client except one based on fabricated evidence or one empty of any substance at all. Short of this extremity, . . . advocate[s] . . . ha[ve] no choices to make."[963] Last, the highly competitive, adversarial law school environment encourages and cultivates this attitude.[964]

Unfortunately, in following this one-sided approach attorneys often fail to recognize the meritorious points of the opposition, become less attuned to maximizing social good, and become skeptical of mediation.[965] Attorneys, therefore, doubt the ability of lay mediators to comprehend and resolve the technical legal problems which arise in mediation,[966] and fear that clients will doubt the ad-

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958. *See* Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 248 (1974); Riskin, *supra* note 923, at 47. This adversarial personality conflicts with mediation, in which the parties pursue a mutually heneficial solution to a unique situation that usually is not solvable by the application of general principles of law. *Id.* at 44.

959. *See* Callner, *supra* note 946, at 396; Riskin, *supra* note 923, at 44, 47; Note, *supra* note 923, at 173; *infra* text accompanying note 1051.

960. Riskin, *supra* note 923, at 47.

961. *See* R. FISHER & W. URY, *supra* note 957, at 8-10. ("[P]ursuing a soft friendly form of positional bargaining makes you vulnerable to someone who plays a hard game of positional bargaining. In positional bargaining, a hard game dominates a soft one.").

962. Riskin, *supra* note 923, at 47.

963. G. HAZARD, ETHICS IN THE PRACTICE OF LAW 67 (1978).

964. Riskin, *supra* note 923, at 48; *see* Boyer & Cramton, *supra* note 958, at 261-62; *supra* text accompanying note 929.

965. Riskin, *supra* note 923, at 44.

966. *See* Rich, *supra* note 943, at 775 (1980).

vocacy ability of a lawyer who also acts as a mediator.[967] Attorneys also may be uncomfortable with a role that so blatantly conflicts with the traditional views and training of attorneys.[968] The changing views of legal education and the subsequent reverberations in the legal community as law students graduate and become practicing attorneys, however, provide hope that society will develop a more multi-dimensional approach to legal problems,[969] and that self-help modes such as mediation will become compatible with traditional legal methods of resolving disputes.

(b) Mediation Impairs Attorneys' Present and Future Economic Status

A second justification for attorneys' aversion to mediation is that the competition between lawyer and non-lawyer mediators and the propensity not to litigate mediated cases combine to reduce lawyers' total income by lessening their number of clients and billable hours.[970] Many attorneys feel threatened by mediation because it not only has reduced their present practices immediately, but it also will continue to diminish their future client base for several reasons. First, attorneys fear that if mediation is successful, parties will avoid conflicts subsequent to the mediation process, thereby reducing the future need for traditional legal services.[971] Second, if an attorney agrees to serve as a mediator, he can lose those parties as future clients because ethical considerations may preclude him from representing either party in subsequent actions.[972] Last, attorneys are afraid their support of mediation might damage their images as aggressive client representatives and thereby encourage potential clients to employ more dedicated advocates.[973]

Although these economic concerns seem justifiable, the detrimental economic effects that mediation actually has on attorneys are minimal. Although persons who use mediation rather than litigation pay a smaller fee per case,[974] incorporating mediation into law practices does not necessarily yield less overall attorney reve-

967. Riskin, *supra* note 923, at 42; *see supra* text accompanying note 959.
968. Note, *supra* note 923, at 173; *see supra* text accompanying note 929.
969. *See infra* note 1122.
970. Riskin, *supra* note 923, at 48-49; *see supra* text accompanying note 929.
971. Riskin, *supra* note 923, at 49.
972. *Id. see infra* note 1026.
973. *See supra* text accompanying notes 959-67.
974. *See supra* text accompanying note 931.

nue.[975] Because of their excessive workloads, many attorneys must refuse to represent clients. If mediation requires less attorney time, therefore, attorneys could allocate the extra hours to other fee-generating activities.[976] Furthermore, being versed in mediation skills could expand and diversify a lawyer's clientele by making him accessible and affordable to those people who can afford the smaller mediation fee but otherwise would be unable to pay the regular legal fees and expenses.[977] With minimal economic detriment to attorneys, therefore, mediation could further the societal goal of helping those people whom the American legal system previously ignored if attorneys or the government incorporated this type of self-help through alternative resolutions systems into the traditional legal systems.[978]

(c) Attorneys Receive Inadequate Training for Mediation Practice

A third problem that limits attorney support of mediation is the common belief that attorneys lack adequate knowledge to practice mediation.[979] Few of today's practicing lawyers received mediation training during their legal education.[980] Although the opportunity to learn about the mediation process heretofore has been almost nonexistent, law schools recently have provided their students with limited exposure to the mediation process.[981] Training in mediation, however, remains a much-neglected subject in this nation's law schools.[982] The problem of lawyers being inadequately prepared to engage in mediation, therefore, is self-perpetuating and will hamper the development of mediation as an alternative means of resolving disputes until legal educators realize the important function it could fulfill in the legal system of this country.

Additionally, continuing legal education programs for lawyers interested in mediation are rare. Although mediation seminars are more prevalent than in the past, individual attorneys still bear the burden to initiate and foster interest in programs to help develop

975. Riskin, *supra* note 923, at 53.
976. *Id.*
977. *Id.* at 53-54.
978. *See id.* at 58.
979. *Id.* at 43, 49; Note, *supra* note 923, at 175.
980. Riskin, *supra* note 923, at 49. *see infra* note 1122.
981. Riskin, *supra* note 923, at 49 n.124.
982. *Id.* at 49.

mediation skills.[983] Such development is particularly difficult because most "lawyers neither understand nor perform mediation nor have a strong interest in doing either."[984] Even within the group of interested lawyers, therefore, attendance at mediation seminars is low, especially because of the normally busy schedules of most attorneys.

Lawyers' mediation skills are also inadequate because attorneys lack "sufficient counseling skills to adequately control discussions with such potential for emotional volatility."[985] If anything, legal training teaches attorneys to be aggressive agitators, not level-headed, neutral mediators. As one commentator has indicated in a marriage counseling context, danger exists in allowing a lawyer to mediate:

> Unless the attorney has extensive psychological training and clinical experience, he should not attempt to engage in intensive marriage counseling. He is a counselor at law and not a marriage counselor. There is a substantial difference. The counseling skills required of a lawyer and of a psychologist are not identical.[986]

An attorney, however, may gain understanding of and sensitivity towards the emotional and psychological needs of mediation participants by attending training sessions or through comediation with a trained counselor.[987] The former, however, takes valuable time from the attorney, and the latter may increase the clients' costs of mediation.[988]

(d) Non-Attorney Mediators Are Practicing Law Illegally

Another reason for attorneys' hesitancy to support the development of mediation is that Canon Three of the Model Code of Professional Responsibility dictates an affirmative duty for lawyers to assist the prevention of the unauthorized practice of law.[989] Non-lawyer mediators, in giving advice and counsel to mediation participants, often closely approach the practice of law without a license,[990] and several state bar associations have addressed this

983. *Id.* at 50.
984. *Id.* at 43.
985. Note, *supra* note 923, at 175.
986. Callner, *supra* note 946, at 393.
987. Note, *supra* note 923, at 175.
988. *Id.*
989. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 3 (1981).
990. State statutes prohibit such activity. "[T]he nonattorney mediatior is not allowed to give any type of legal advice because of state statutes prohibiting the unauthorized practice of law." Note, *supra* note 923, at 174.

controversial issue. The North Carolina Bar ruled that contract drafting by a non-attorney is equivalent to engaging in the unauthorized practice of law.[991] The North Carolina Bar further noted that advice concerning the "advisability of and legal effect of entering into such an agreement also constitutes the unauthorized practice of law."[992] Additionally, both the Minnesota[993] and Nevada[994] Bars have found that a lay mediator had practiced law without a license when he represented himself to divorcing couples as a competent advisor on how to use pleadings, forms, and other necessary court documents and also counseled the couples on their legal rights.[995] These three opinions illustrate that lay mediators sometimes engage in the unauthorized practice of law, at least in the eyes of the legal profession; non-lawyer mediators, however, normally are neutral observers from whom mediating parties do not expect legal counseling.[996] Courts, therefore, should not label the conduct of all lay mediators as the unauthorized practice of law simply because some lay mediators dispense legal advice.[997] An attorney's concern in these situations is the risk that a disciplinary committee might find he had violated Canon Three's prohibition against assisting another in the unauthorized practice of law if the attorney associates with non-lawyer mediators who convey that attorney's legal advice to mediating parties. This fear was realized in one situation that the Los Angeles County Bar addressed, when it precluded an attorney from working as a legal advisor because he probably aided non-attorney mediators in giving their clients unauthorized legal advice.[998]

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991. *Council Action/Committee Reports, Unauthorized Practice of Law*, 27 N.C.S.B.Q. 4, 5 (1980), *quoted in* Note, *supra* note 923, at 174 n.27.

992. *Id.* at 7.

993. Minnesota State Bar Ass'n v. Divorce Reform, Inc., (Minn. Dist. Ct. 1975), *reprinted in Minnesota Bar Wins Sweeping Victory Against a Lay Practitioner of Divorce Law*, 39 UNAUTH. PRAC. NEWS 187, 188 (1975) [hereinafter cited as *Minnesota*].

994. State Bar of Nev. v. Brandon (Nev. Dist. Ct. 1972), *reprinted in Nevada Divorce*, 37 UNAUTH. PRAC. NEWS 32, 32 (1973) [hereinafter cited as *Nevada*].

995. *Id.* at 37; *Minnesota, supra* note 993, at 190-91. Whether the drafting of legal documents goes beyond the clerical function must be considered. *Nevada supra* note 994, at 33.

996. Note, *supra* note 923, at 174.

997. *See, e.g.*, N.Y.C.B.A. Comm. on Professional Ethics, Formal Op. 80-23 (1982) ("[I]t is possible for laymen to perform certain divorce mediation activities without exercising professional legal judgments and without engaging in the unauthorized practice of law").

998. L.A. County B.A. Comm. on Legal Ethics, Formal Op. 270 (1982) (concerning a marriage counselor who communicated to the parties the legal aspects of a particular conflict) *discussed in* Silberman, *Professional Responsibility Problems of Divorce Mediation*,

These rulings indicate the legal community's need for explicit standards against which courts can judge the conduct of lay mediators to ascertain whether their conduct constitutes the unauthorized practice of law. In the absence of these needed guidelines, legal community opposition to mediation and other alternative forms of dispute resolution easily can argue against such alternatives. The fear of violating Canon Three by assisting someone in practicing law without a license is legitimate, and detractors of mediation can cite capricious bar association rulings such as those in Minnesota, Nevada, and California to support their arguments. One critic also has observed that the legal community's desire to maintain monopoly-like control over cases which are suitable for alternative dispute resolution mechanisms frequently motivates allegations that lay mediators illegally practice law.[999] Arguably, lawyers censure these non-attorney mediators, not for the public's protection and best interests but, rather, to perpetuate unnecessary litigation that mediation could handle more efficiently and effectively. If practical alternatives to traditional legal practices are a desirable goal, then the bar must take innovative steps rather than continue to make reflexive and unreasoned charges of unauthorized law practice.[1000]

(e) Attorneys as Mediators May Violate Professional Ethics

A final argument that legal community opposition to mediation presents is that attorneys who participate in mediation may violate professional ethics.[1001] The guidelines that the ABA and state bar associations set forth inadequately define the attorneys' role in mediation.[1002] The growing prevalence of mediation in our society will force these organizations to address the difficult ethical considerations that continuously confront attorneys who participate in mediation and to provide guidelines indicating acceptable conduct for mediating attorneys.

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16 FAM. L.Q. 107, 125 (1982).

999. *See, e.g.*, Silberman, *supra* note 998, at 124.

1000. *See, e.g., id.* at 128.

1001. *Id.* at 108.

1002. *See infra* notes 1003-04 and accompanying text.

B. *The Attorney's Role in the Mediation Process: Ethical Concerns*[1003]

Attorney participation in mediation and other dispute resolution alternatives will benefit the American legal system only if the developers of these alternatives carefully plan the evolution of the lawyers' role in these processes to conform attorney actions to important rules of legal ethics. The mediation process best illustrates the ethical problems that attorneys encounter when using non-litigation dispute resolution mechanisms. Attorneys assume several roles in the mediation process: (1) sole mediators, (2) joint mediators, or (3) non-mediators. Each of these roles requires its own set of ethical guidelines. Participation in the mediation process, therefore, requires an attorney to identify her level of participation and to examine the applicable ethical issues. Although mediation is growing in popularity and attorney mediators are more prevalent, however, the ethical boundaries of attorneys' roles unfortunately remain vague and undefined.[1004] The problem of inadequate ethical guidelines to direct the behavior of attorney mediators has discouraged the legal community from participating in the mediation process. The following discussion will isolate the ethical problems that accompany each attorney role in the mediation process, cite existing rules of legal ethics that pertain to these concerns, and explore possible guidelines for proper ethical behavior in each situation.

1. Attorneys as Sole Mediators

A sole mediator serves as a neutral third party who attempts to facilitate an agreement between conflicting parties.[1005] Sole mediators may not enforce a ruling that is against the will of the

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1003. This section of the Special Project will first discuss Ethical Considerations ("EC") and Disciplinary Rules ("DR") under the ABA's Model Code of Professional Responsibility ("Code"), the general form of which presently is in effect in many states. The ABA strictly enforces DR's but not EC's. Next this Section will analyze the same concerns under the Model Rules of Professional Conduct ("Rules") which the ABA House of Delegates adopted on August 2, 1983. The ethical analysis in this Section focuses principally on divorce mediation and marriage counseling because attorneys participate in mediation most frequently in these areas.

1004. The Code "gives no guidelines on the permissible dimensions of extra-legal counseling services." Callner, *supra* note 946, at 392. "[N]owhere in the rules or comments [of the ABA's Model Rules] does the ABA recognize or endorse the variety of alternative dispute resolution mechanisms embraced in the concept of mediation." Silberman, *supra* note 998, at 119.

1005. *See* Silberman, *supra* note 998, at 107.

parties but may participate actively in the mediation process.[1006] A mediator's strong influence in the outcome of a mediation necessitates that he adhere to the strictest ethical standards. Two specific practices of mediators present particularly controversial ethical problems. First, attorneys who are sole mediators arguably concurrently practice two occupations—mediation and law. Second, as a sole mediator, an attorney is in a position to represent two clients with conflicting interests—a situation that could impair the attorney's independent professional judgment and violate the attorney-client privilege.

(a) The Practice of Two Professions

Generally an attorney may practice law and another profession simultaneously.[1007] No provision in the Code explicitly prohibits such action.[1008] Ethics committees displeased with the absence of such a restriction have imposed a committee-created rule that prohibits attorneys from simultaneously practicing law and a second occupation which relates to the practice of law.[1009] Courts initially applied the rule strictly and prohibited attorneys from practicing law and related occupations simultaneously.[1010] Recent courts, however, have not interpreted it so narrowly and have allowed lawyers to engage concurrently in law and related occupations.[1011] An attorney who performs this dual career function, however, must adhere to the following qualification:

1006. Hazard, *supra* note 963, at 63; Riskin, *supra* note 923, at 29.

1007. Callner, *supra* note 946, at 395.

1008. H. DRINKER, LEGAL ETHICS 221 (1953); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972).

1009. *See, e.g.*, N.Y.S.B.A. Comm. on Professional Ethics, Formal Op. 206 (1971) (distinguishing between unrelated occupations such as operating shopping centers, retail stores, and manufacturing plants and related occupations such as marriage counseling, accounting, and operating real estate brokerage firms). The ethical obstacles that arise if a lawyer practices law and engages in a related occupation can be significant. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972). "It may be impossible to know whether the lawyer's work for another person is performed as part of the practice of law or as a part of his other [related] occupation. . . ." *Id. See also* H. DRINKER, *supra* note 1008, at 221-22. The ABA committee had several reasons for enacting the rule. First, lawyers dividing their efforts between two occupations cannot remain knowledgeable of current developments in both areas. Second, if an attorney practices in a law-related area, he is presenting himself as a specialist in that area. Third, the demands of a law practice require an attorney's full time attention. Last, dual occupations mislead the public. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972).

1010. *See, e.g.*, ABA Comm. on Professional Ethics, Informal Op. 41 (1961).

1011. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972); *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1248 (1972).

> If the second occupation is so law-related that the work of the lawyer in such occupation will involve, inseparably, the practice of law, the lawyer is considered to be engaged in the practice of law while conducting that occupation. Accordingly, he is held to the standards of the bar while conducting that second occupation from his law offices.[1012]

Thus, if an attorney is the sole mediator in a marriage dispute, for example, he essentially assumes the role of a marriage counselor, which the Standing Committee on Professional Ethics considers a law-related occupation.[1013] The Code's ethical standards, therefore, arguably apply to attorneys who practice marriage mediation. Under this analysis, a "second occupation" of marriage mediator may subject an attorney to close review from the bar for any signs of suspicious or unethical conduct.[1014]

(b) Canon Five Considerations

One ethical standard that the typical attorney marriage mediator may violate while representing two conflicting sides in the marriage mediation process is Canon Five of the Code, which provides: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."[1015] Various bar associations, however, disagree about whether this canon permits or prohibits a lawyer from being a divorce mediator.

(1) Canon Five Prohibits an Attorney From Being a Marriage Mediator

The Colorado Bar Association ruled that lawyers should not represent both parties in a divorce case if any possibility of conflict exists.[1016] It based its ruling upon DR 5-105, which prevents an at-

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1012. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972); *see* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1248 (1972).

1013. Callner, *supra* note 946, at 395; *see, e.g.*, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972).

1014. ABA Comm. on Professional Ethics, Informal Op. 775 (1965).

1015. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1981).

1016. Colo. B.A. Ethics Comm., Formal Op. 47 (1972), *reprinted in* 1 COLO. LAW. 59, 60 (1972). The Code also adopts this position:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a clientwill be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> . . . .
>
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

torney from accepting a case if the interest of another client might impair the attorney's independent judgment. Cases in which a divorce does not contain the seeds of conflict are rare, and the Colorado Bar Committee, therefore, concluded that few instances exist in which an attorney ethically could serve as a marriage mediator.[1017] The Committee, however, did not explain how it arrived at its decision.

Similar to the Colorado Bar's ruling, the Washington State Bar[1018] and the New Hampshire Bar[1019] recently held that an attorney divorce mediator violated DR 5-105.[1020] Likewise, the Wisconsin Bar found that an attorney ethically could not serve as a divorce mediator because the process placed the attorney in an "unresolved conflict position."[1021] The attorney in this instance offered to mediate between various divorcing couples and proposed to "(1) educate the parties as to their legal rights and responsibilities, (2) mediate any disputes which may arise in the course of the settlement negotiations and (3) draft a separation agreement and related documents and appear in court to process the divorce."[1022] Additionally, the mediator suggested that each party obtain separate counsel to review the final agreement. The Wisconsin Bar Committee held that the attorney, by promising to "educate" his clients, falsely represented that he was protecting each party's best interest, a role that legal advisors traditionally assume.[1023] The Committee noted the conflicts inherent in a divorce proceeding and reasoned that the attorney mediator's proposal probably would culminate in litigation.[1024] Since this result was not in the best interests of the parties, the attorney had failed to fulfill a promise he made in his position of attorney mediator.[1025] The Committee recognized that EC 5-20 of the Code[1026] allows attor-

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MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) & (C) (1980) (footnotes omitted).

1017. Colo. B.A. Ethics Comm., Formal Op. 47 (1972), *reprinted in* 1 COLO. LAW 59, at 60 (1972).

1018. Wash. S.B.A. Code of Professional Responsibility Comm., Informal Op. 385 (1980).

1019. N.H.S.B.A. Ethics Comm. (1982), *reprinted in* 8 N.H.L. WEEKLY 385 (1982).

1020. See *supra* note 1016 for text of DR 5-105.

1021. Wis. S. B. Standing Comm. on Professional Ethics, Formal Op. E-79-2 (1979), *reprinted in* 53 WIS. B. BULL. No. 1, at 61 (1980).

1022. *Id.*

1023. *Id.*

1024. *Id.*

1025. *Id.*

1026. A lawyer is often asked to serve as an impartial arbitrator or mediator in mat-

neys to act as mediators if they do not represent either party subsequently.[1027] Even though the attorney agreed not to represent either party in subsequent litigation, however, the Committee ruled that the proposed agreement extended the attorney's authority beyond the scope that EC 5-20 contemplated and beyond the activities that attorneys normally perform.[1028]

The opinions of the Colorado, Washington, New Hampshire, and Wisconsin bar association ethics committees typify state bar associations committee decisions prohibiting attorneys from serving as divorce mediators. Advocates of this view maintain that the

> interests of the partners to a troubled marriage differ, regardless of the protestations to the contrary by the parties themselves. Situations in which their interests are identical are so rare as to be considered exceptional. The Code states that a lawyer should avoid representing not only currently conflicting but even potentially conflicting interests. . . . Partners of a deteriorating marriage fall within the broad prohibition of conflict.[1029]

The Code, however, does not indicate the degree of conflict that must exist among the parties before an attorney can no longer adequately represent each individual side of a controversy. The Code also fails to specify how a decision-making body, whether it be a bar association committee or a court, should analyze the presence of conflict.[1030] Because of the Code's silence concerning the requisite degree of conflicts, ethics committees have reached different decisions about whether an attorney ethically can be a marriage mediator. Ultimately, the legal field totally lacks any clear standards of conduct for attorneys to follow.

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ters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-20 (1981).

1027. Wis. S. B. Standing Comm. on Professional Ethics, Formal Op. E-79-2 (1980), *reprinted in* 53 WIS. B. BULL. No. 1, at 61 (1980).

1028. *Id.*

1029. Callner, *supra* note 946, at 394 (footnotes omitted). "Several courts and ethics committees contend that the interests in . . . [divorce] cases will *always* be in actual conflict despite any superficial harmony." Note, *supra* note 947, at 1311(emphasis in original) (citing authorities that support this view).

1030. With the absence of these Code provisions, courts can choose from many alternative methods to analyze whether an attorney represents two clients with particularly conflicting interests. A court could examine whether such a conflict exists from the perspective of the attorney, the parties, or a third party. The court could base its observations on the subjective beliefs of the mediator or on what the reasonable prudent person in that position would believe.

(2) Canon Five Permits an Attorney to Become a Marriage Mediator

Other state bar associations have ruled that attorneys ethically can serve as divorce mediators. The Oregon Bar, for example, reasoned that attorney mediators do not violate the Code because they do not "represent" either party in the mediation process.[1031] Although the difference between representing both parties and representing neither party probably is illusory,[1032] if attorneys represent both parties in mediation, they arguably assume the traditional attorney functions of protecting the parties' interests, dispensing legal advice, drafting agreements, and processing agreements through court.[1033] If attorneys represent neither party, however, they are less likely to violate ethical rules because they engage in a more restricted group of functions.[1034] The Oregon Committee noted several limitations on the role of attorney mediators. First, attorneys can give impartial legal advice only in the presence of both parties. Second, attorneys can draft agreements but must suggest that the parties allow outside counsel to review the documents. Third, attorneys must not represent either party in subsequent litigation. Last, attorneys must inform each party that they represent neither party, and the parties must consent to the arrangement.[1035] Proper consent requires complete disclosure by the attorney and the ability on the part of the parties to understand the involved risks:[1036]

> If the lawyer can satisfy the court that the client knowingly and intelligently consented after full disclosure, the court will not readily overturn the consent in he absence of substantial harm to the client.
>
> When confronted by individual layclients, however, courts will probe in depth to determine whether the consent was freely and intelligently given. Such consents are typically construed against the attorney.[1037]

The New York State Bar, recoguizing that the functions of mediators differ from those of advocates, has ruled that although attorneys may not represent both parties in a divorce, they can act

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1031. Or. B.A. Comm. on Legal Ethics, Proposed Op. 79-46 (1980), *discussed in* Silberman, *supra* note 998, at 112.

1032. N.Y.C.B.A. Comm. on Professional Ethics, Formal Op. 80-23 (1982); *See* Silberman, *supra* note 998, at 116.

1033. *See* Silberman, *supra* note 998, at 116.

1034. *See id.*

1035. Or. B.A. Comm. on Legal Ethics, Proposed Op. 79-46 (1980), *discussed in* Silberman, *supra* note 998, at 112.

1036. Note, *supra* note 947, at 1311-12.

1037. *Id.* at 1312 (footnotes omitted).

as mediators in that situation.[1038] In *Levine v. Levine*,[1039] the New York Court of Appeals refused to set aside a divorce agreement that an attorney representing both parties drafted because: (1) the parties freely agreed to the document after fully understanding its terms, (2) the agreement was fair to both parties, and (3) the discussions preceding the agreement did not evidence unfair conduct.[1040] The court thus implied that it would have voided the agreement if the attorney mediator had not treated his clients in a neutral and fair manner.[1041] Although the court did not explicitly label the attorney as a mediator, it significantly recognized that the role of attorneys encompasses non-adversarial aspects.[1042]

The Boston Bar also has addressed the ethical questions confronting a lawyer who served as a divorce mediator and drafted the resulting agreement.[1043] The Boston Bar Committee condoned mediation by an attorney if he refrained from subsequently representing either party and also apprised the couple of the potential ethical conflicts accompanying his participation in mediation and the alternative courses of action they could pursue to resolve their differences.[1044] The Committee, however, recognized that attorney mediators still must confront several potential problems. First, parties of unequal power do not receive the protection of separate counsel. Second, the clients may question the attorney's neutrality. Last, the mediation agreement lacks finality if the parties become displeased with the result and consult outside attorneys.[1045] Although the Committee believed that these considerations were important, it countenanced the attorney's role as mediator because the problems inherent in traditional dispute resolution mechanisms presented even greater obstacles.[1046]

1038. N.Y.S.B.A. Comm. on Professional Ethics, Formal Op. 258 (1972), *reprinted in* 44 N.Y.S.B.J. 556, 557 (1972).

1039. 56 N.Y.2d 42, 436 N.E.2d 476, 451 N.Y.S.2d 26 (1982).

1040. *Id.* at 48-49, 436 N.E.2d at 478-79, 451 N.Y.S.2d at 28-29.

1041. *Id.* at 49, 436 N.E.2d at 479, 451 N.Y.S.2d at 29. "[T]he idea that lawyers can provide neutral advice when consulted by disputants is . . . well established." Rich, *supra* note 943, at 778; *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-3 (1981).

1042. *See* Silberman, *supra* note 998, at 119.

1043. Boston B.A. Comm. on Ethics, Formal Op. 78-1 (1978), *discussed in* Silberman, *supra* note 998, at 111-12.

1044. *Id.* at 112.

1045. *Id.*

1046. *Id.*

(c) Canon Four Considerations

Canon Five does not present the only set of ethical rules that attorneys who practice sole mediation must follow. Lawyers who practice mediation also must comply with Canon Four, which generally requires the attorney to preserve the "confidences" and "secrets" of his clients.[1047] In extrajudicial situations, the lawyer cannot divulge to any person confidences and secrets that either party reveals to him during mediation. Furthermore, Canon Four and the attorney-client privilege, an evidentiary rule, prevent a lawyer from revealing to any court a client "confidence," which is information that the attorney acquires while communicating with his client.[1048] In certain circumstances, however, a tribunal may compel the attorney to disclose to the court a client "secret,"[1049] which is not a "communication" because it is information that the lawyer discovers in his professional relationship with his client.[1050]

Bar associations have required that the attorney mediator abide by Canon Four. The Colorado Bar, denouncing attorney mediation for divorces, held that any attorney divorce mediator probably would violate his Canon Four obligation to preserve his clients' confidences and secrets by representing both parties.[1051] The

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1047. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1981) "A Lawyer Should Preserve the Confidences and Secrets of a Client."

1048. *See id.* at DR 4-101; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 88-89 (2d ed. 1972). *But see infra* note 1054 and accompanying text (such communications are not confidential if they occur when a third party is present).

1049. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1981).

1050. *Id.* at DR 4-101(A).

1051. Colo. B.A. Ethics Comm., Formal Op. 47 (1972), *reprinted in* 1 COLO. LAW. 59 (1972). The Colorado Bar also held that such dual representation violates the lawyer's duty under Canon 7 to represent his client zealously. *Id.* at 60. The Committee addressed the interplay between Canons Four and Seven in a divorce mediation context. The Committee, in recognizing the conflicts of interests inherent in divorce mediation situations, stated that if the attorney attempts to represent both parties, he will have to compromise positions on conflicting issues, thus failing to represent zealously each client to the best of his ability. Attorneys zealously representing each party also should use all available information to benefit their client. Confidences or secrets that one spouse reveals most probably would constitute such information. The attorney mediator, therefore, must decide whether to use that information for the benefit of one spouse in accordance with Canon Seven, or whether he should preserve the other spouse's confidences as Canon Four provides.

In addition to Canons Four and Seven, which the Committee noted, attorneys serving as divorce mediators might violate Canon Six, which requires competent representation by attorneys. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1981). Withholding advantageous information or violating client confidences certainly exceeds the boundaries of competent representation. The application of Canon Six and Seven to attorney mediators is questionable, however, because ethics committees have ruled that attorney mediators do not "represent" mediating parties. *See, e.g.*, Or. B.A. Comm. on Legal Ethics, Proposed Op. 79-

New Hampshire Bar voiced similar concerns over the interplay between the attorney-client privilege and a Canon Four violation within a mediation context.[1052] The concern centered upon the perceived problem that the attorney-client privilege would not apply to the mediation process because the attorney engaging in mediation was not acting as an attorney. Because the attorney mediator could not rely on the attorney-client privilege to shield certain discourses between himself and the mediating parties, judicially mandated disclosure of that information arguably could force the attorney mediator to violate Canon Four.[1053] Courts generally have held that attorney-client communications are not confidential if the client makes them in front of third parties.[1054] The presence of both parties during mediation, therefore, arguably impairs the confidentiality of the discussions. The current trend, however, allows information to remain confidential if the client shows he had a reasonable expectation of confidentiality.[1055] Mediating parties clearly desire the communications to be confidential. The attorney mediator, therefore, must advise the mediating parties of the distinctions between secrets and confidences. The mediating parties then should designate clearly the information they intend to be confidential. This method would allow attorney mediators to avoid violations of their duties under Canon Four.

(d) Canon Nine Considerations

Even if conflicting interests do not emerge during the mediation process and the lawyer follows Canons Four and Five, an attorney mediator still could violate Canon Nine of the Code if the attorney creates an appearance of professional impropriety. Such a situation can arise in a divorce mediation context in which the interests inherently conflict.[1056] The New Hampshire Bar has ruled

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46 (1980), *discussed in* Silberman, *supra* note 999, at 112. Because Canons Six and Seven clearly apply only to attorneys "representing" clients, these Canons should not apply to attorney mediators. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981).

1052. N.H.S.B.A. Ethics Comm. (1982), *reprinted in* 8 N.H.L. WEEKLY 385 (1982).

1053. *Id.*

1054. E. J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 202 (1980); *see, e.g.*, United States v. Blackburn, 446 F.2d 1089 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017 (1972).

1055. *See, e.g.*, United States v. Bigos, 459 F.2d 639, 643 (1st Cir.), *cert. denied*, 409 U.S. 847 (1972) ("While . . . the presence of a third party commonly destroys the privilege, it does so only insofar as it is indicative of the intent of the parties that their communication not be confidential.").

1056. Callner, *supra* note 946, at 394-395. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1981) ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety."). Although an attorney who mediates a divorce is not representing either

that to avoid violating Canon Nine an attorney who had represented both parties previously should not serve as a divorce mediator for the couple.[1057] An attorney may negotiate a settlement with an unrepresented spouse, but the attorney first must inform the unrepresented spouse of his right to seek counsel and that the attorney represents only the other spouse.[1058]

2. Attorneys as Joint Mediators

Attorneys who believe they lack adequate counseling skills for participation as sole mediators may engage in the process as joint mediators. A joint mediation team usually consists of a trained counselor and attorneys. This team can provide the mediating parties with access to both psychological and legal advice. Additionally, counseling mediators can serve as models to help attorney mediators develop counseling skills.

Attorneys who participate in joint mediation confront ethical obstacles similar to those that attorneys acting as sole mediators encounter.[1059] Attorneys serving as joint mediators must comply with Canon Three, which encourages lawyers to help prevent the unauthorized practice of law.[1060] The Oregon Bar Committee acknowledged that Canon Three presented grave ethical problems for lawyers who work with counselors at mediation services.[1061] The Committee found that DR 3-103,[1062] which prohibits a lawyer from forming a law-related partnership with a non-lawyer, precluded

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party, his status as an attorney may influence the mediating parties and observers to believe that he is protecting both parties' interests. As a result the parties or observers may question the neutrality of his position, thus creating the appearance of ethical improprieties. For example, *X* and *Y* walk into mediating service; they expect a mediator to see them. *Z* enters and introduces himself as an attorney. The parties understandably might assume the mediator also is serving as their legal counsel, thus creating the appearance of impropriety if conflicts should evolve. If *Z* clarifies from the start that he does not represent either party and fully explains the mediation process, then *Z* avoids any Canon Nine violations.

1057. N.H.S.B.A. Ethics Comm. (1982), *reprinted* in 8 N.H. L. WEEKLY 385 (1982).

1058. Callner, *supra* note 946, at 395.

1059. Silberman, *supra* note 998, at 128.

1060. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 3 (1981) ("A Lawyer Should Assist in Preventing the Unauthorized Practice of Law."). The Code also dictates that a "lawyer shall not aid a non-lawyer in the unauthorized practice of law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101(A) (1981).

1061. Or. B.A. Comm. on Legal Ethics, Proposed Op. 79-46 (1980), *discussed in* Silberman, *supra* note 998, at 130-31. The Committee based its decision ont he rationale that the general public needed protection from the unauthorized practice of law. *Id.*

1062. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-103 (1981). ("A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.").

counselors and attorneys working at a mediation service from forming a partnership.[1063] The Committee stated, however, that joint mediation is ethical if each team member played a specific, designated role in the process.[1064] The Oregon Bar Committee obviously felt that if the mediation service clearly communicated the structure of the team to the public, then mediating parties would not mistake counselor mediators for attorneys and the entire process would be less deceptive.[1065] The Committee also recognized the potential fee splitting problem that the Code addresses in DR 3-102, which states that most attorneys cannot divide their legal fees with non-lawyers.[1066] The Oregon Bar, however, approved the mediation service because the payment plan specifically designated a billable amount to each member of the mediation team.[1067] This method of billing provided parties with a clear understanding of the services the program offered and the fee it charged for each, thereby reducing the likelihood of misrepresentation by the service to the public.

If the courts or the various bar associations characterized the work of joint mediators as the practice of mediation and not the practice of law, then mediators would not violate Canon Three because non-lawyer mediators would not be practicing law. If courts label mediation as the practice of law, however, then mediators who participate in joint mediation could avoid violating Canon Three by ensuring that the program clearly discloses to the public the available services and the fee which each team member receives. Because the joint mediation team offers a beneficial service to the public, courts should endorse the program if parties freely enter joint mediation with a clear understanding of the specific services it offers and their right to separate legal counsel if they deem it desirable.[1068]

1063. Or. B.A. Comm. on Legal Ethics Proposed Op. 9-46 (1980), *discussed in* Silberman, *supra* note 998, at 131.

1064. *Id.*

1065. *See id.*

1066. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102 (1981).

1067. Although the mediation team charged an hourly rate of $60.00, the attorney and the mediator received a specified rate of $25.00 an hour with the remainder covering the service's overhead expenses. Or. B.A. Comm. on Legal Ethics, Proposed Op. 79-46 (1980), *discussed in* Silberman, *supra* note 998, at 130.

1068. Silberman, *supra* note 998, at 134.

3. Attorneys as Impartial Legal Advisors in Mediation

Even when attorneys do not function as mediators, they often participate indirectly in the mediation process. Parties often require legal counseling both during and after mediation. A typical mediation situation, for example, begins with a professionally trained counselor meeting with a divorcing couple. If the parties reach an agreement, the mediation counselor will solicit an impartial legal advisor to answer the parties' legal questions and draft the final agreement. If the process required each mediating party to obtain separate legal counsel, many of the benefits that mediation has over a traditional dispute resolution system would dissipate.[1069] Retention of mediation's benefits at a price that allows parties to afford the legal advice necessary to reach an informed agreement, therefore, requires the mediator to ask an impartial legal advisor who represents neither party to provide neutral advice to both.

Impartial legal advisors must confront ethical problems similar to the ones that single and joint mediating attorneys encounter.[1070] The New York City Bar, for example, has examined whether a non-mediating attorney ethically could participate in a divorce mediation program.[1071] Specifically, the Committee analyzed whether a lawyer could: (1) join the mediating team, (2) give impartial legal advice to the parties, or (3) draft a divorce or settlement agreement after the parties approved its terms.[1072]

In analyzing the situation, the Committee examined several relevant Code provisions. Although the Committee recognized that DR 5-105[1073] permits a lawyer to represent clients whose interest do not conflict, it noted that divorce proceedings addressed interests that inherently conflicted and, therefore, suggested that DR 5-105 does not apply to divorce mediation.[1074] The New York City Bar Committee also cited EC 5-20, which provides that a lawyer may serve as a mediator,[1075] but noted that the Code did not specify which activities constituted mediation.[1076] The Committee recognized that an unlimited variety of factual situations arise in a

1069. *See supra* note 931, and accompanying text.
1070. Silberman, *supra* note 998, at 135.
1071. N.Y.C.B.A. Comm. on Professional Ethics, Formal Op. 80-23 (1982).
1072. *Id.*
1073. *See supra* note 1016.
1074. *See supra* notes 1017, 1021 & 1029 and accompanying text.
1075. *See supra* note 1026.
1076. N.Y.C.B.A. Comm. on Professional Ethics, Formal Op. 80-23 91982).

divorce context which would determine the type of legal advice that the divorcing couple would seek in the mediation process.[1077] The Committee decided that the lawyer impartially may advise mediating parties if the factual situation requires only minimal legal evaluation, but felt that if the facts necessitated complex legal analysis then mediation "virtually [cannot] achieve a just result free from later recriminations of bias or malpractice, unless both parties are represented by separate counsel."[1078] As a result, the Committee established extremely detailed criteria that it would use on an ad hoc basis to ascertain whether an attorney ethically could render impartial legal advice to mediating parties if a mediator solicited such action.[1079] Furthermore, an attorney may not participate impartially in the mediation process unless the parties give informed consent.[1080]

The New York City Bar also examined the problem of a lawyer who assists a lay organization in the "unauthorized practice of

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1077. *Id.*

1078. *Id.*

1079. The Committee established the folowing criteria:

[1. T]he lawyer may *not* participate in the divorce mediation process where it appears that the issues between the parties are of such complexity or difficulty that the parties cannot prudently reach a resolution without the advice of separate and independent legal counsel . . . .

[2. T]he lawyer must clearly and fully advise the parties of the limitations on his or her role and specifically, of the fact that the lawyer represents neither party and that accordingly, they should not look to the lawyer to protect their individual interests or to keep confidences of one party from the other . . . .

[3. T]he lawyer must fully and clearly explain the risks of proceeding without spearate legal counsel and thereafter proceed only with the consent of the parties and only if the lawyer is satisfied that the parties understand the risks and understand the significance of the fact that the lawyer represents neither party . . . .

[4. A] lawyer may participate with mental health professionals in those aspects of mediation which do not require the exercise of professional legal judgment and involve the same kind of mediation activities permissible to lay mediators . . . .

[5. L]awyers may provide impartial legal advice and assist in reducing the parties' agreement to writing only where the lawyer fully explains all pertinent considerations and alternatives and the consequences to each party of choosing the resolution agreed upon . . . .

[6. T]he lawyer may give legal advice only to both parties in the presence of the other . . . .

[7. T]he lawyer must advise the parties of the advantages of seeking independent legal counsel before executing any agreement drafted by the lawyer . . . .

[8. T]he lawyer may not represent either of the parties in any subsequent legal proceedings relating to the divorce.

N.Y.C.B.A. Comm. on Professional Ethics, Formal Op. 80-23 (1982) (emphasis in original).

1080. *See* Va. S.B. Comm. on Legal Ethics, Informal Op. 400 (1979); Md. S.B.A. Comm. on Ethics, Informal Op. 80-55A (1980).

law."[1081] Disciplinary Rule 2-103(D) permits an attorney to affiliate with certain types of lay organizations.[1082] An attorney who wishes

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1081. N.Y.C.B.A. Comm. on Profesisonal Ethics, Formal Op. 80-23 (1982). A lawyer who helps a layman practice law usually violates DR 3-101. An attorney who serves as a joint mediator also can violate Canon Three. *See supra* notes 1060-68 and accompanying text.

1082. DR 2-103(D) states:

A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, or may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide nonprofit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes, or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its members or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial

to participate impartially in a mediation program, therefore, must decide whether an organization falls within the restrictive meaning of DR 2-103(D). Mediation services do not satisfy the descriptions of an organization under DR 2-103(D) (1)-(3).[1083] To constitute an "organization" under DR 2-103(D), therefore, a mediation service must comply with subsection (D) (4) of the rule, which requires the service to recommend, furnish, or pay for the legal services to its members or beneficiaries.[1084] The New York City Bar Committee concluded that mediating parties were beneficiaries of the mediation service because the city had created it to offer professional guidance that would benefit divorcing couples.[1085] The Committee also indicated that to fall within the meaning of an "organization" under DR 2-103(D)(4), the mediating service must satisfy the Committee's detailed summation of the section's other requirements.[1086] Although the purpose of the rule is to protect society

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results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D) (1981).

1083. A mediation service is not a "legal aid office or public defender office," DR 2-103(D)(1); a "military legal assistance office," DR 2-103(D)(2); or a "lawyer referral service operated, spousored, or approved by a bar association." DR 2-103(D)(3).

1084. *See supra* note 1082.

1085. A more realistic evaluation of DR2-103(D) would not have classified mediating parties as beneficiaries and thus would have precluded consideration of a mediation service as a DR 2-103(D) organization: "The rule clearly was not designed with divorce mediation in mind, and efforts to fit mediation programs under its rubric just do not work." Silberman, *supra* note 998, at 141.

1086. The Committee summarized the conditions of DR 2-103(D)(4), as applied to the divorce mediation program, as follows:

(1) The organization must derive no profits from the rendition of legal services. . . .

(2) A lawyer must not initiate or promote the divorce mediation program for the primary purpose of providing financial or other benefit to the lawyer and the purpose of the program must not be to procure legal work or financial benefit for lawyers—outside of the legal services program of the organization. . . .

(3) The beneficiary of the divorce mediation program . . . is recognized as the client of the lawyer in the matter. . . .

(4) Beneficiaries of the divorce mediation program are free to select counsel other than those furnished or selected by the program, and the program provides appropriate relief for any beneficiary who claims that representation by the lawyer furnished by the program would be unethical, improper or inadequate under the circumstances of the matter involved, and provides an appropriate procedure for seeking such relief. . . .

(5) The lawyer does not know or have reason to know that the divorce mediation program is in violation of applicable laws, rules of court or other legal requirements governing its legal service operations. . . .

(6) The lawyer does not know or have reason to know that the divorce mediation program has failed to file, at least annually, with the appropriate disciplinary authority, a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its

against the possibility that lay organizations will exert excessive control over lawyers, committees qualify DR 2-103(D) to apply only if a lawyer's affiliation with the organization hinders his independent professional judgment on behalf of his client.[1087] An attorney need not comply with DR 2-103(D), therefore, unless the mediation service interferes with the lawyer's professional judgment.

4. The Attorney's Role in Mediation Under the Model Rnles of Professional Conduct

(a) Rule 2.2

Similar to the Code, the ABA's newly adopted Model Rules of Professional Conduct ("Rules")[1088] fail to define the specific ethical boundaries of attorneys who participate in the mediation process as mediators, joint mediators, or non-mediators. Although the Rules recognize the attorney's role as an "intermediary between clients" in rule 2.2,[1089] they provide inadequate gnidance concerning the ethical considerations that lawyers who participate in mediation typically encounter. Rule 2.2 fails to state specifically whether its requirements apply to mediation, although the unofficial comments to rule 2.2 do mention mediation services.[1090] The

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legal service activities.

N.Y.C.B.A. Comm. on Professional Ethics, Formal Op. 80-23 (1982).

1087. *See id.*

1088. *See supra* note 1003.

1089. Rule 2.2 states:

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragrah (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983).

1090. The Comment states:

comment to rule 2.2, which lists informal arbitration, mediation,

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A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentialy conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

The Rule does not apply to a lawyer acting as arbitrator or *mediator* between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are enterpreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to *mediation*, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

CONFIDENTIALITY AND PRIVILEGE

A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

Since the lawyer is required to be impartial between commonly represented clients, intermediation is unproper when that impartiality cannot be maintained. For ex-

and common representation as forms of intermediation, notes that the type of case dictates which process the attorney should choose.

Decisionmaking bodies, whether courts or bar associations, could interpret the comment in two ways. First, they could deem informal arbitration, mediations, and common representation as distinctive processes, unable to occur simultaneously.[1091] This interpretation would lead to the conclusion that, because of the repeated references to common representation, the drafters of official rule 2.2 intended the rule to govern common representation and not mediation. The alternative theory, premised on the assumption that the vague working of the comment was an oversight, suggests that mediation and common representation are not mutually exclusive forms of intermediation and can occur concurrently.[1092] This interpretation would indicate that rule 2.2 governs mediation—a likely conclusion because the comment mentions mediation twice, first listing mediation as a form of intermediation and second, stating that mediation between conflicting clients is an example of intermediation. In addition, the comment to rule 2.2 justifies the intermediary role by noting that attorneys can reduce unnecessary representation, legal expenses, and litigation for each party by offering clients a choice between intermediation and the traditional form of representation.[1093] Although the comment is vague, its references to mediation indicate that the drafters probably intended

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ample, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

CONSULTATION

In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions that when each client is independently represented.

WITHDRAWAL

Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

Id. at Rule 2.2 comment (emphasis added).

1091. *See supra* text accompanying notes 1031-33, 1038, 1043.

1092. *See supra* notes 1039-42 and accompanying text.

1093. *See supra* note 931 and accompanying text. These results are justifications that the ABA repeatedly has offered for mediation. *Burger Urges Mediation*, *supra* note 927, at 16.

to include the process of mediation within the meaning of rule 2.2.

Once courts and bar associations assume that rule 2.2 authorizes attorney participation in mediation, they likely will question whether it contemplated divorce mediation. Predictably, the Rules do not state a clear position on divorce mediation. Earlier versions of the comments to the Rules noted that "under some circumstances a lawyer may act as an intermediary between spouses in arranging the terms of an uncontested separation or divorce settlement," but the adopted version of the Rules does not contain this passage.[1094] Such a deletion certainly implies that the ABA does not want attorneys to participate in divorce mediation.

Although the comments to rule 2.2 envision an intermediation process that resolves potentially conflicting interests, they observe that attorneys contemplating intermediation should know that if it fails, additional costs, embarrassment, and recrimination often result.[1095] In fact, if litigation is imminent or the parties are antagonistic toward each other, the lawyer cannot assume dual representation.[1096] This view is consistent with rule 1.7, which prohibits a lawyer from representing a client if the representation conflicts with another client's interests.[1097] Both rules 1.7 and 2.2, however, fail to indicate whether they govern divorce mediation. Arguably the rules leave an attorney's decision to participate in divorce mediation cases in his discretion. They provide no evaluative standards to guide the attorney's decision,[1098] however, and this problem perpetuates a lack of uniformity in state bar association committee decisions. While some committee rulings suggest that rules 1.7 and 2.2 prevent an attorney from serving as a divorce mediator[1099] other rulings imply that divorce mediation by attorneys is ethical.[1100] Only a clear indication of the ABA's view will resolve these conflicting committee rulings and provide guidance to mediating attorneys.

If rule 2.2 governs mediation, then its provisions can enable a lawyer to ascertain which attorney roles in the mediation process the ABA deems ethical. The comment to rule 2.2 states that a law-

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1094. ABA Comm'n on Evaluation of Professional Standards, Rule 5.1, at 94 (Discussion Draft 1980), *quoted in* Silberman, *supra* note 998, at 121.

1095. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 comment (1983).

1096. *Id.*

1097. *Id.* at Rule 1.7.

1098. Silberman, *supra* note 998, at 120-21. The Code similarly offers no guidelines. *See* N.Y.C.B.A. Comm. on Professional Ethics, Formal Op. 80-23 (1982).

1099. *See, e.g., supra* notes 1016-21, 1029 and accompanying text.

1100. *See, e.g., supra* notes 1031, 1038, 1043-44 and accompanying text.

yer acts as an intermediary if he represents two or more parties with potentially conflicting interests.[1101] The comment's repeated references to an intermediary who "represents" the parties suggest that the Rules reject the committee decisions which hold that mediators do not represent the parties.[1102] If attorney mediators "represent" the mediating parties as rule 2.2 suggests, then arguably the lawyer may have to perform the traditional functions of an attorney, including protecting the parties' interests, giving legal advice, drafting documents, and processing agreements through the courts.[1103] If bar associations adopt this view, then a mediator no longer will serve merely as a neutral third party who facilitates the mediation process.[1104]

Although rule 2.2 does not address specifically the intermediary's duty to maintain his client's confidences, the comment suggests that an attorney serving as an intermediary must adhere to rule 1.6, which prohibits a lawyer from revealing information that relates to his client's representation.[1105] Such a prohibition probably applies only to instances of common representation. Additionally, the comment to rule 2.2 states that the attorney-client privilege does not apply to common representation.[1106] Neither rule 2.2 nor its comment, however, addresses whether the attorney-client privilege protects statements that parties make during mediation. Nor does the comment state whether mediating parties have the right to diligent representation, even though the comment specifically grants such a right to commonly represented parties under rule 1.3.[1107] Similarly, rule 2.2 and its comments do not address the scope of a mediator's authority or restrict his conduct. If the ABA wants practicing attorneys to follow rule 2.2 consistently, then it must alter its ethical provision to distinguish clearly between common representation and mediation.

1101. *See supra* note 1090.

1102. *See supra* notes 1031, 1043-44 and accompanying text.

1103. *See supra* text accompanying note 1033.

1104. *See id.*

1105. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). *See supra* note 1047 and accompanying text. Rule 1.6 does not recognize confidences and secrets individually as does the CODE, *see supra* note 1048 and accompanying text, but applies to all information relating to representation.

1106. *See supra* text accompanying note 1054.

1107. *See supra* note 1051 and accompanying text.

(b) Other Pertinent Provisions

Although rule 2.2 represents the ABA's largest reform that addresses the ethical concerns of attorney mediators, other sections of the new Rules also pertain to mediation. Rule 1.2(c) provides that "[a] lawyer may limit the objectives of the representation if the client consents after consultation."[1108] This rule arguably gives the attorney significant discretion in defining his relationship with his client.[1109] Although the rule anticipates that mediation limits the attorney's objectives of representation, further interpretations by the ABA are necessary to determine fully its scope. Moreover, in recognizing attorneys' roles as advisors, rule 2.1 provides that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[1110] These moral and social considerations predominate the field of counseling and represent an indispensable component of the mediation process. By stating that an attorney should incorporate these considerations into his counseling technique, the rule implicitly endorses attorney mediation. Additionally, the comment to rule 2.1 notes that "purely technical" legal counseling by an attorney sometimes does not meet the client's needs.[1111] Thus, a lawyer should inform the client of relevant moral and ethical considerations. The comment also recognizes that the Rules limit the actions of an attorney who serves in theexpanded capacity of being a mediator, a counselor, and an advisor: "Matters that go beyond strictly legal questions *may* also be in the domain of another profession," and, if necessary, the attorney properly should refer his client to other services.[1112] Although it does not explicitly sanction the counseling functions of mediation, therefore, rule 2.1 does recognize implicitly the lawyer's role in providing non-legal advice.

Another pertinent provision is rule 5.5, which prohibits lawyers from engaging in or assisting others to participate in the unauthorized practice of law.[1113] The comments to rule 5.5, however, provide that the rule "does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employ-

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1108. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(c) (1983).

1109. Any agreement that the attorney and client reach must comply with the MODEL RULES OF PROFESSIONAL CONDUCT and other law. *Id.* at Rule 1.2 comment (1983).

1110. *Id.* at Rule 2.1.

1111. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 comment (1983).

1112. *Id.* at Rule 2.1 comment (emphasis added).

1113. *Id.* at Rule 5.5.

ment requires knowledge of law . . . ."[1114] The comments further state that social workers are one type of nonlawyer which this exception contemplates.[1115] The occupational similarities between social workers and lay mediators, therefore, suggest that attorneys ethically could advise lay mediators under rule 5.5. The rules, however, do not state clearly whether the attorney could give legal advice directly to mediating parties.

The Rules, therefore, fail to provide adequate ethical guidance to attorneys who participate in mediation. As the number of mediating parties who utilize attorneys in the process continues to increase, the urgent public need for the ABA to develop appropriate procedures for attorney mediators to follow will grow in concomitant degrees. Amendments to and ethics committees' interpretations of the rules will define further the role that attorneys play in mediation. The likelihood that the ABA will produce such guidelines, however, probably will coincide directly with the persistence with which attorneys who participate in mediation demand them.

5. *Lange v. Marshall*

Because the Rules and Code inadequately address the ethical considerations that govern the role of attorneys in the mediation process, the courts must create their own standards of proper professional conduct to apply in professional malpractice suits against attorneys who participate in mediation proceedings. In *Lange v. Marshall*[1116] a former client brought a civil malpractice suit against her previous attorney for negligent representation. Plaintiff and her former husband separately had approached defendant, a close personal friend of the divorcing couple, requesting representation in the divorce case.[1117] Defendant refused to serve as an advocate but agreed to represent them jointly in a mediation process.[1118] Plaintiff alleged "that defendant failed to: (1) inquire as to the financial state of [plaintiff's husband] and advise plaintiff; (2) negotiate for a better settlement for plaintiff; (3) advise plaintiff she would get a better settlement if she litigated the matter; and (4) fully and fairly disclose to plaintiff her rights as to marital property, custody and maintenance."[1119] Although the court found that

1114. *Id.* at Rule 5.5 comment.
1115. *Id.*
1116. 622 S.W.2d 237 (Mo. Ct. App. 1981).
1117. *Id.* at 237.
1118. *Id.* at 237-38.
1119. *Id.* at 238.

it "appeared" defendant had served as a mediator, the court did not specify the criteria that it used to determine mediator status, nor did the court decide what conduct for an attorney mediator is ethically appropriate.[1120] The court avoided these issues by ruling that even if defendant was negligent, plaintiff failed to prove that she sustained any damage as a proximate result of that negligence.[1121] The significance of the *Lange* decision lies in its illustration of the urgent need for the various branches of the legal community to clarify the ethical standards of conduct that lawyers who engage in mediation procedures should follow.

6. Summary

Despite the ethical pitfalls awaiting attorneys who participate in mediation processes, members of the legal profession must not abandon their role in mediation and other alternative dispute resolution procedures to return to the safe harbor of litigation. Such a choice would be an egregious abdication of their professional and ethical obligations. Attorneys and the courts should endeavor to develop and refine the desirable and permissible role of lawyers in nonadversarial processes. No inherent conflict exists between the attorney as an advocate in one situation and as a counselor and healer in another. Until courts and the ABA delineate the guidelines more clearly, the attorney may continue to participate in mediation with minimal risk of professional impropriety by observing a few basic rules. By fully disclosing his function, obtaining the participating parties' consent, and providing fair, honest, accurate, and impartial legal advice, the attorney should be able to avoid transgressing the rules of professional ethics. Meanwhile, the profession should watch for and analyze instances of commendable and valuable services to clients that technically violate the rules of professional responsibility. Such analysis should provide the profession with clues to defining and refining the principles that govern the attorney's role in alternative dispute resolution processes.[1122]

1120. *Id.* at 238 & n.2.

1121. *Id.* at 238-39.

1122. Legal education along with professional experience will shape the profession's attitudes toward alternative dispute resolution and will influence attorneys' perceptions of their role in these processes. Only a small percentage of American law schools offer mediation and alternative dispute resolution training. *See* Riskin, *supra* note 923, at 48. Currently, popular teaching methods and curricula reinforce the development of the adversarial nature of the legal profession. *See, e.g.*, Smith, *A Warmer Way of Disputing: Mediation*

VIII. Alternative Methods of Dispute Resolution

A. Introduction

The tremendous growth in the amount of litigation in state and federal courts during the last few decades, and the accompanying problems of clogged court dockets and long trial delays, have induced states to create and individuals to seek alternative methods of dispute resolution. Two prominent nonjudicial methods of dispute resolution that have achieved considerable popularity in recent years are state reference procedures, more commonly known as rent-a-judge procedures, and ombudsmen complaint and problem handling offices. State rent-a-judge statutes typically authorize parties to select, pay, and have their disputes resolved by a referee. Ombudsman's offices, on the other hand, generally are administrative bodies that governmental entities, nongovernmental institutions, and media organizations create to handle and resolve in an impartial manner the complaints which constituents and individuals bring against them.

This part of the Special Project first considers state rent-a-judge programs. Part B highlights the procedures parties typically must follow to resolve a dispute in a rent-a-judge proceeding. It then discusses the advantages of rent-a-judge procedures to disputing parties and to the judicial system. Finally, part B analyzes potential constitutional due process, equal protection, and first amendment challenges to these procedures. Part C then discusses the expanding role of governmental, institutional, and media ombudsmen and the benefits and problems of using ombudsmen as complaint and problem handlers.

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and Conciliation, 26 Am. J. Comp. L. 205, 215 (Supp. 1978), *quoted in* Riskin, *supra* note 923, at 48. To introduce alternative dispute resolution theories and methodologies into law schools, legal educators will have to modify their schools curricula, design new courses, and adjust teaching methods. *See Harvard Curriculum to Include Dispute Settlement*, 8 A.B.A. Dispute Resolution 2 (1982). Without these modifications, law schools will continue to produce attorneys who lack the essential skills for successfully practicing nonadversarial dispute settlement. *See* Gee & Jackson, *Current Studies of Legal Education: Findings and Recommendations*, 32 J. Legal Educ. 471, 482 (1982). Attorneys who feel uncomfortable performing these services because of their educational background are unlikely to advocate the development of these processes by the legal profession. The law schools alone are not responsible for the emphasis on adversarial skills, however, the bar examiners—who rarely test students on nonadversarial skills, Brown, *A Memorandum on Nonadversarial Law Practice and Preventive Law*, 6 J. Legal Prof. 39, 44 (1981)—must share the responsibility. Clearly, any appreciable shift in professional perspective away from adversarial proceedings toward alternative dispute resolution will require cooperation from the law schools and the established bar.

B. Rent-a-Judge

1. The Rent-a-Judge Procedure

The rapidly expanding amount of litigation conducted in United States courts has placed an enormous strain on the judicial system's ability to process cases expeditiously.[1123] As a result, parties increasingly have become interested in seeking nonjudicial resolutions to their conflicts. Several states, including California where the problem of court delay is particularly acute,[1124] have given litigants the option of seeking relief through a statutory case reference procedure.[1125] For example, California's reference procedures, more commonly known as rent-a-judge procedures,[1126] authorize parties to take their cases before retired judges that they personally select and pay. The California statute has authorized these retired judges to render decisions that have the effect on disputing parties of trial court judgments.[1127] Rent-a-judge procedures, therefore, are not really nonjudicial alternatives but rather an accommodation within the judicial system that allows disputing parties to bypass the judicial system.

The California rent-a-judge statute is representative of several

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1123. *See* S. REP. No. 117, 95th Cong., 2d Sess, 7-10, 15-19 (describing the recent increase in the federal docket caseload), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3569, 3570-73, 3578-82; Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592 (1981). *See generally* Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567 & n.2 (1975) (projecting, at current rates, a million cases a year in courts of appeals by the early twenty first century); Hufstedler, *The Future of Civil Litigation*, 1980 UTAH L. REV. 753. For a discussion on state court backlog see Church, *Civil Case Delay in State Trial Courts*, 4 JUST. SYS. J. 166, 169-70 (1978); *see* Boyum, *A Perspective on Civil Delay in Trial Courts*, 5 JUST. SYS. J. 170 (1979). Docket crowding problems also arise because of the increasing complexity of litigated cases that results in longer trials. Janofsky, *The "Big Case"—A "Big Burden" on Our Courts*, 1980 UTAH L. REV. 719.

1124. The average civil suit in California Superior Courts takes aproximately 3.5 to 4.5 years to reach a trial calendar. Note, *supra* note 1123, at 1592. The Los Angeles Superior Court has an estimated 73,000 case five year backlog. Christensen, *Private Justice: California's General Reference Procedure*, 1982 A.B.FED'N. RESEARCH J. 79, 102; Myers, *Rent-A-Judge in California*, 131 NEW L.J. 1042, 1043 (1981).

1125. CAL. CIV. PROC. CODE §§ 638-45 (West 1976). At least five other states have statutory provisions similar to the California general reference statute: New York (N.Y. CIV. PRAC., LAW §§ 4301-4321 (McKinney Supp. 1980), Oregon (OR. REV. STAT. §§ 17.705-.990 (1979)), Rhode Island (R.I. GEN. LAWS §§ 9-15-1 to -21 (1969); R.I. R. CIV. P. 53), South Carolina (S.C. CODE ANN. §§ 15-31-10 to -150 (Law. Co-op. Supp. 1980)), Washington (WASH. REV. CODE ANN. §§ 4.48.010-.100 (1979)). Myers, *supra* note 1124, at 1044; Note, *supra* note 1123, at 1595 & n.16.

1126. *See, e.g.*, Hill, *Rent-a-Judge*, Wall St. J., Aug. 6, 1980, at 1; Yates, *States's Rent-a-Judge Plan Offers Speedy Justice*, Chi. Tribune, Dec. 14, 1980, § 3, at 22.

1127. Note, *supra* note 1123, at 1592-93. *See also* Christensen, *supra* note 2, at 79.

other currently existing state reference procedures. It allows courts, with the consent of disputing parties, to submit an entire case to a referee who the disputing parties mutually agree upon for final disposition of all legal and factual issues.[1128] While the California statute does not require referees to possess any special qualifications,[1129] other state statutes do require referees to possess certain qualifications.[1130] Under California's procedure, parties frequently choose retired judges to referee their disputes.[1131] Because retired judges normally possess acknowledged judicial skills and, in many instances, expertise in the substantive area of law at issue, their selection usually enhances the likelihood of a fast and fair trial.[1132] The parties usually agree to pay referees compensation that ranges from about $50 to $100 an hour or $300 to $1,000 a day.[1133] Parties generally split referees fees equally but independently bear other costs of resolving their dispute.[1134]

Rent-a-judge proceedings are similar to traditional judicial trials and follow rules of civil procedure and evidence.[1135] Unlike traditional trials, however, the parties and referee in California rent-a-judge proceedings jointly agree upon the time and place of the proceedings.[1136] California also allows these parties to exclude both the public and the press from the proceedings.[1137] After completion of a rent-a-judge proceeding, a referee must file with a trial court separate statements containing findings of fact and conclusions of law. A referee's decision becomes a judgment of the trial

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1128. CAL. CIV. PROC. CODE § 638(1) (West 1976).

1129. Christensen, *supra* note 1124, at 81; Note, *supra* note 1123, at 1597. Although section 640 of the CAL. CIV. PROC. CODE empowers courts to select a referee if the parties do not agree, in practice the parties usually select the referee. Christensen, *supra* note 1124, at 81. The parties may select up to three referees to hear their case. CAL. CIV. PROC. CODE § 640 (1976).

1130. For example, Connecticut authorizes referee trials, CONN. GEN. STAT. ANN. § 52-434 (West Cumm. Supp. 1981); however, only retired trial judges designated by the chief justice of the state supreme court may serve as referees in adversarial proceedings. Christensen, *supra* note 1124, at 108, 108 n.125.

1131. *Id.* at 81.

1132. *Id.*

1133. *Id.* at 83; Gnaizda, *Rent-A-Judge: Secret Justice for the Priviliged Few*, 66 JUDICATURE 6, 11 (1982); Note, *supra* note 1123, at 1598. If the parties cannot come to an agreement, the statute empowers the courts to set reasonable compensation rates for the referee. CAL. CIV. PROC. CODE § 1023 (West 1980).

1134. Note, *supra* note 1123, at 1598 n.23.

1135. Christensen, *supra* note 1124, at 81; *see* Myers, *supra* note 1124, at 1042.

1136. Christensen, *supra* note 1124, at 81, 83.

1137. *Id.*, at 81-82; Note, *supra* note 1123, at 1598.

court when the referee files these statements with a court clerk.[1138] The parties may take exception to the judgment by moving for a new trial before a trial court judge. If the trial judge denies this motion, the losing party can appeal the final judgment to an appellate court.[1139]

2. Advantages of the Rent-a-Judge Procedure

Rent-a-judge procedures offer disputing parties substantial advantages over traditional trials. The most obvious advantage to parties is the opportunity for speedier dispute resolution, particularly in jurisdictions suffering from overcrowded court dockets. Although the precise amount of time that litigants save in a rent-a-judge trial is uncertain, parties who elect this option generally resolve their disputes much faster than those who seek places on a court calendar.[1140] For example, one case in which the attorneys expected a two-and-one-half year contest at a cost of $250,000 in attorney fees required only four months to resolve in a rent-a-judge proceeding and cost only $50,000.[1141] This time saving results from the parties' freedom to select referees who can hear their cases immediately and the inherent scheduling flexibility that allows referees to run efficient proceedings and avoid long continuances.[1142] This scheduling flexibility benefits all participants in rent-a-judge proceedings because, unlike participants in judicial proceedings who must follow court-imposed deadlines and timetables,[1143] rent-a-judge proceeding participants are statutorily per-

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1138. CAL. CIV. PROC. CODE § (West 1976).

1139. Christensen, *supra* note 1124, at 81; Myers *supra* note 1124, at 1042; Note, *supra* note 1123, at 1598-99.

1140. Note, *supra* note 1123, at 1599.

1141. *See* Janofsky, *supra* note 1123, at 725; Hill, *supra* note 1126, at 1; *Retired Judges Hired to Decide Lawsuits in Private*, N.Y. Times, Oct. 26, 1980, at A25, col. 1 [hereinafter cited as *Retired Judges*]; *see also* Christensen, *supra* note 1124, at 83 (predicting that rent-a-judge procedures may reduce the time required to litigate cases for years to months or even weeks).

But see Myers, *supra* note 1124, at 1043. In a controversy between the California Attorney General's Office and a number of oil companies, the parties never achieved their objective of obtaining a speedy trial. The referee they chose already was busy with another dispute and a year elapsed before he was free to try their case. The lawyers expected their hearing to last no more than two days because they already had submitted extensive briefs to the referee. Nevertheless, the referee ordered both sides to read into the record all of the administrative records that he was to consider. The procedure took nineteen days and caused both parties to incur enormous expense. *Id.*

1142. Note, *supra* note 1123, at 1599. For example, a referee also may decide to hold the hearings at night or on weekends.

1143. Christensen, *supra* note 1124, at 81, 83.

mitted to schedule trial time tables at their own convenience.[1144] The accelerated disposition of the controversy also contributes to the quality of the judgments by giving the referees fresher evidence on which to base their decisions.[1145]

The ability of parties to select referees who possess expertise in the subject matter of the litigation under rent-a-judge statutes helps to improve the quality and efficiency of trials.[1146] The ability to select judges according to their expertise is particularly helpful in litigation, such as product deficiency claims, that requires analysis of highly technical apparatus. These statutory provisions give parties greater assurance that referees will adjudicate their disputes competently[1147] and expeditiously.[1148] The presence of specially selected referees also should reduce trial time because the parties often would not need to present basic explanatory material that judges frequently request when they have limited knowledge of the litigation's technical subject matter.[1149] The substantial reduction in the amount of time spent preparing, trying, and appealing cases should decrease overall litigation costs.[1150] In this regard, one attorney noted that the rent-a-judge procedure had "saved 80% of the delays, 80% of the legal fees and 80% of the aggravation" associated with trying cases in the judicial system.[1151]

The privacy of rent-a-judge proceedings is another advantage that these statutes give disputing parties. The rent-a-judge procedure provides no mechanism for giving the public or press notice of the times or places of trials.[1152] In many cases, the parties may prefer this feature because they desire to keep the hearing and findings private.[1153] Recently, a well-known television personality and his employer referred a contract dispute to a referee through the

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1144. *Id.*

1145. Note, *supra* note 1123, at 1601.

1146. Note, *supra* note 1123, at 1599.

1147. A referee who is familiar with the subject matter of a dispute is less likely to analyze the evidence erroneously than a referee whose initial exposure to that subject matter comes during the proceedings. Note, *supra* note 1123, at 1599.

1148. Christensen, *supra* note 1124, at 83.

1149. One reference procedure user observed: "Sometimes judges are not sophisticated in a certain area. I prefer not to start with the basics, but to get right to the heart of the matter." *Id.* at 83-84.

1150. Christensen, *supra* note 1124, at 84; Note, *supra* note 1123, at 1599. *But see supra* note 1141.

1151. Christensen, *supra* note 1124, at 84 (citing Hill, *supra* note 1126, at 12); *see* Gnaizda, *supra* note 1133, at 11.

1152. Christensen, *supra* note 1124, at 84.

1153. *Id.*

California rent-a-judge statute and stipulated that the referee not disclose the time or place of the hearing.[1154] In that case, and probably in many other cases, the rent-a-judge procedure gave the parties a dispute resolution option that probably facilitated a prompt settlement without causing the embarrassment and negative publicity that often attends traditional trials.[1155]

The users of rent-a-judge procedures may not be its only beneficiaries, especially if this procedure gains broader popularity. Because rent-a-judge trials divert cases from court dockets to private referees, disputes resolved through these procedures should help to unclog overcrowded court dockets. Consequently, litigants should enjoy less crowded court calendars with earlier trial dates.[1156] In addition, rent-a-judge trials spare states the expense of judicial trials because these parties privately pay referees' fees and other expenses they incur in the dispute resolution process.[1157]

3. Constitutional Objections to Rent-a-Judge Procedures

Despite the question whether rent-a-judge procedures constitute state action[1158] and the apparent advantages these procedures

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1154. Note, *supra* note 1123, at 1600; Hill, *supra* note 1126, at 15; *Retired Judges, supra* note 1141, at A25, col. 1. *See* Myers, *supra* note 1124, at 1043.

1155. Note, *supra* note 1113, at 1599-1600.

1156. Note, *supra* note 1123, at 1600. *See also* Weisman, *Shortcut to Trial: Use of Orders of Reference and Judges Pro Tem*, 3 A. BUS. TRIAL LAW REP. 3 (1980). *But see* Christensen, *supra* note 1124, at 84-85; Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 113-14 (1976) (the "[p]rice of an improved scheme of dispute processing may well be a vast increase in the number of disputes being processed.").

1157. Note, *supra* note 1123, at 1600.

1158. Before reaching the substantive merits of first amendment, due process, and equal protection challenges to rent-a-judge procedures, courts must determine whether these procedures consitute "state action." *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 451 (1978). The fourteenth amendment protects individuals against state infringment of due process and equal protection liberties. U.S. CONST. amend. XIV, §1. The Supreme Court, through the fourteenth amendment, *see, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925), also protects individuals against state infringement of their first amendment free speech liberties. The first amendment and the fourteenth amendment due process and equal protection clauses, however, only protect individuals from the actions of state governments, not those of private individuals and entities. *See* McCoy, *Current State Action Theories, the* Jackson *Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions*, 31 VAND. L. REV. 785 (1978); Burke & Reber, *State Action, Congressional Power, and Creditor's Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 1034 (1973). Absent a finding of state action, rent-a-judge procedures would be unassailable on federal due process, equal protection, and first amendment grounds. Other commentators who have discussed state statutorily created rent-a-judge procedures failed to mention this state action issue. *See* Christensen *supra* note 1124; Note, *supra* note 1123.

offer disputing parties, critics have assailed these statutes as unconstitutional. The costliness of rent-a-judge trials, they argue, precludes the poor from using these procedures in violation of the fourteenth amendment due process and equal protection clauses.[1159] The critics further contend that the private nature of

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These commentators, by discussing constitutional challenges to rent-a-judge procedures, implicitly presumed that these procedures constituted state action. Most courts probably would agree with this presumption in light of current, but confusing, judicial analysis of state action issues. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1148-49 (1978); Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967); McCoy, *supra*, at 788.

Although courts and commentators largely agree that the question whether any particular challenged activity constitutes state action is answerable "[o]nly by sifting facts and weighing circumstances," Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), case law and commentary concerning state action issues reveal numerous identifiable circumstances and factors that tend to support findings of state action. *See generally*, J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*, at 451-75 & 1979-80 Pocket Part, 54-57; L. TRIBE, *supra*, at 1147-74; McCoy, *supra*, *passim*; and Reber & Burke, *supra*, *passim*. Arguably, a state legislature's passage of a rent-a-judge procedure statute alone qualifies as state action because the government has recognized the legitimacy of, if not encouraged, rent-a-judge procedures. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*, at 461; L. TRIBE, *supra*, at 1147; *see also* Lugar v. Edmonson Oil Co., 457 U.S. 922, 934-35 (1982) (holding that a statutory procedural scheme concerning prejudgment attachments of property obviously was the product of state action). *But see* Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (holding that a state statute which authorized creditor self-help techniques did not convert the creditor's statutorily authorized activities into state action). Additionally, public function and mutual contacts concepts of state action support a finding that rent-a-judge proceedings are state action. *See* J. NOWAK, J. ROTUNDA & J. YOUNG, *supra*, at 456-60, 464-68. The following cases contain discussion and analyses of the public function test: Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946). The statutory authorization and definition of a proceeding that is almost identical to traditional trials and which receives the judicial imprimatur of the state creates a sufficiently strong nexus to government that reasonably seems to constitute state action. *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) and Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (discussing the degree of entanglement between private actors and government necessary to classify the challenged activity as state action).

Although some state rent-a-judge procedures arguably could constitute state action, neither courts nor commentators have intimated an answer to this question for the variety of rent-a-judge programs that states have enacted. *See* Note, *supra* note 1123, at 1594-99. Undoubtedly, some rent-a-judge procedures, which would be lawful dispute resolution methods if characterized as private action, would fail under constitutional scrutiny if characterized as state action. If courts adopt a liberal analysis of state action issues under which any governmental authorization or encouragement of private procedure is state action, *see, e.g.*, L. TRIBE, *supra*, at 1171-74 they will impede the efforts of states to formulate effective dispute resolution alternatives to judicial litigation. Under constitutional scrutiny, courts might invalidate or modify the attractive characteristics of rent-a-judge procedures, such as private proceedings. This judicial reformation of rent-a-judge proceedings into the image of formal judicial trials inevitably would undercut their foundational policies and diminish their practical utility.

1159. Christensen, *supra* note 1124, at 90-93; *see* Gnaizda, *supra* note 1133, at 11;

the trials may infringe upon the public's first amendment right[1160] of access to judicial proceedings.[1161] Prevailing constitutional doctrine, however, suggests that courts will reject these equal protection and due process arguments. Courts faced with the first amendment right of access argument, however, must answer two difficult questions before resolving the access issue. First, they must decide whether the right of access to criminal trials also applies to civil trials, and second, if this right applies to civil trials, whether it also should extend to private rent-a-judge proceedings.

(a) Equal Protection

Critics argue that the rent-a-judge statutes improperly discriminate between wealthy and low income litigants because only wealthy litigants can afford the costs of these procedures.[1162] These critics contend that wealthy litigants reap all the inherent advantages of rent-a-judge trials while low income litigants must endure the disadvantages of the traditional judicial system. This de facto legislative classification, they argue, determines which judicial resources are available to different economic classes of litigants, and offends the equal protection clause.[1163]

This equal protection challenge appears doomed to fail because strict scrutiny review of these statutes is inappropriate for several reasons. First, the Supreme Court never has acknowledged a right of access to the civil court system.[1164] In *Boddie v. Connecticut*,[1165] for example, the Court stated that "access for all individuals to the courts is [not] a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment.

Note, *supra* note 1123, at 1601-08.

1160. Gnaizda, *supra* note 1133, at 11; Note, *supra* note 1123, at 1608-10; *see* Christensen, *supra* note 1124, at 90.

1161. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) (plurality opinion) (core purpose behind first amendment guarantees of speech, press, assembly, and petition is freedom of communication about government functions).

1162. Note, *supra* note 1123, at 1601-02. *See* Christensen, *supra* note 1124, at 91-92. Indigents, for example, who cannot afford to pay private counsel for legal services would be unable to hire a referee. Note, *supra* note 1123, at 1601.

1163. U.S. CONST. amend. XIV § 1; Note, *supra* note 1123, at 1602-03; Gnaizda, *supra* note 11 at 11. For a comprehensive discussion of the equal protection doctrine see L. TRIBE, *supra* note 1158, at 991-1135 (1978).

1164. Christensen, *supra* note 1124, at 92; Note, *supra* note 1123 at 1603. *See* Boddie v. Connecticut, 401 U S. 371 (1971) (the Court invalidated the application of state filing fee requirement to indigents seeking divorce as unconstitutional but refused to recognize a general right of access to the courts).

1165. 401 U.S. 371 (1971).

. . ."[1166] Second, neither the language of rent-a-judge statutes nor their application evidence an intentional effort to discriminate against low income litigants.[1167] Last, the Court repeatedly has held that legislative classifications based solely upon wealth are not suspect.[1168] Indeed, the Court has approved access to advantages resulting from a person's financial situation. In abortion-funding cases, for example, the Court has held that although indigent women enjoy the right to have abortions, the government has no obligation to finance them.[1169]

Some rent-a-judge critics argue that courts should subject these statutes to intermediate level scrutiny because low income litigants constitute at least a semisuspect class. Rent-a-judge statutes would be unconstitutional under intermediate level scrutiny unless a state could demonstrate a substantial relationship between its important governmental interest in creating the procedure and the de facto, wealth based classification the procedure contains.[1170] This position is weak because the Supreme Court has never held that state action containing a wealth based classification deserves intermediate level scrutiny,[1171] and because the courts probably would agree that the state's interest in reducing court calendar backlogs and providing alternative dispute resolution mechanisms justifies the incidental unequal treatment of low income litigants.[1172] Thus, courts faced with equal protection chal-

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1166. *Id.* at 382-83.

1167. Note, *supra* note 1123, at 1602. *See* Christensen, *supra* note 1124, at 92; Washington v. Davis, 426 U.S. 229, 239-41 (1976).

1168. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 323 (1980); Maher v. Roe, 432 U.S. 464, 471 (1977); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973); Dandridge v. Williams, 397 U.S. 471 (1970).

1169. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977). *See* Note, *supra* note 1123, at 1602 n.54 ("Considered in light of the abortion-funding cases alone, the use of privately paid referees by a privileged few cannot be subjected to strict scrutiny. Poor plaintiffs litigating in state courts have not been compelled to make a choice comparable to that of the pregnant indigents in *McRae* and *Maher*, who were forced by their poverty to relinquish their right to one protected activity altogether. At least the indigents unable to attain reference are not expelled from the court system entirely.").

1170. *See* Christensen, *supra* note 1124, at 92; Note, *supra* note 1123, at 1603-06.

1171. Christensen, *supra* note 1124, at 92; Note, *supra* note 1123, at 1604.

1172. *But see* Note, *supra* note 1123, at 1606 ("Requiring a substantial relationship between the state's interest in easing overcrowded dockets and a classification of parties based on wealth would probably invalidate a litigant-financed reference system. While overburdened courts are a major problem for many states, allowing only wealthy litigants to opt out of the courts does not substantially advance the cause of decreasing docket load. First, reference may not actually reduce overall docket load appreciably . . . . [Second], cases that reference removes from the docket are only those in which the parties can afford to pay extra for referees. They are not necessarily complex or difficult to process.").

lenges to rent-a-judge statutes probably will defer to the states' determination that these statutes relate rationally to some legitimate state objective and uphold their constitutionality.

(b) Due Process

Critics of rent-a-judge programs also argue that these programs violate due process because they inherently favor plaintiffs.[1173] These critics contend that the private payment of the referees induces the referees to favor plaintiffs to encourage plaintiffs to bring them more business.[1174] These critics rely primarily on *State ex rel. McCleod v. Crowe*[1175] and *Shrewsbury v. Poteet*,[1176] two state supreme court decisions which held unconstitutional on due process grounds statutes that permitted justices of the peace and magistrates to collect fees for trying or settling civil and criminal cases even if payment did not depend upon the case's outcome.[1177] The due process problems that infected *Crowe* and *Shrewsbury*, however, are not present in rent-a-judge proceedings. In hearings before justices of the peace and magistrates, plaintiffs have complete control over bringing an action. Defendants in these cases, on the other hand, involuntarily must appear before the decisionmaker. Thus, justices of the peace and magistrates who collect privately paid fees sometimes may have a genuine inducement toward favoring a plaintiff.[1178] The parties to rent-a-judge trials, on the other hand, share equally the responsibility of selecting, paying, and appearing voluntarily before a referee.[1179]

Rent-a-judge critics maintain that despite these distinctions referees nonetheless may tend to rule in favor of frequent users of the rent-a-judge system to induce these parties to use the system again in the future.[1180] A judge, however, who earns a reputation for bias is unlikely to gain the consent of both parties to a controversy.[1181] Furthermore, the contention that infrequent users of

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1173. Christensen, *supra* note 1124, at 90-91; *see* Note, *supra* note 1123, at 1607-08.
1174. Christensen, *supra* note 1124, at 90-91.
1175. 272 S.C. 41, 249 S.E.2d 772 (1978).
1176. 202 S.E.2d 628 (W. Va. 1974).
1177. *See* Christensen, *supra* note 1124, at 90-91; Note, *supra* note 1123, at 1607-08.
1178. *See* Shrewsbury v. Poteet, 202 S.E.2d at 631.
1179. Christensen, *supra* note 1124, at 91.
1180. Note, *supra* note 1123, at 1608.
1181. Christensen, *supra* note 1124, at 91. Moreover, "[a]ny temptation to decide in favor of frequent users of the procedure and against one-time users is likely to be substantially dissipated by the knowledge that today's one-time user may become tomorrow's frequent user." *Id.*

rent-a-judge procedures will not perceive the biases of perspective referees[1182] unfairly assumes that lawyers who represent these parties in the rent-a-judge proceedings will fail to investigate a prospective referee's past decisions and reputation for fairness. The potential for this type of attorney incompetence should not be a sufficient basis for courts to determine that rent-a-judge proceedings violate due process.[1183]

(c) The First Amendment Right of Access to Judicial Proceedings

A third constitutional objection to private rent-a-judge trials is that the ability of parties to exclude the press and public from these proceedings infringes the press' and public's right of access to judicial proceedings.[1184] This argument potentially is the rent-a-judge critics' strongest suit even though the Supreme Court has not recognized explicitly a public right to attend civil trials.[1185] The court, however, laid the foundation for this argument in *Richmond Newspapers, Inc. v. Virginia*[1186] when it held that the first amendment implicitly guarantees the public the right to attend criminal trials.[1187] Courts must answer two questions before granting the press and the public a first amendment right to attend rent-a-judge proceedings. First, whether the first amendment right of access to criminal trials should guarantee the press and public a fundamental right to attend civil trials. Second, if courts extend this right to civil trials, they must decide whether private rent-a-judge proceedings are sufficiently similar to civil trials to warrant extension of the access right to these proceedings.

1182. *See id.*; Note, *supra* note 1124, at 1608 ("[T]heir opponents, the one-time customers, would not be aware of the subtle systematic bias working against them.").

1183. Christensen, *supra* note 1124, at 91.

1184. *See id.* at 93; Gnaizda, *supra* note 1133, at 11; Note, *supra* note 1123, at 1608-09; Lewis, *A Public Right to Know About Public Institutions: The First Amendment as a Sword*, 1980 SUP. CT. REV. 1, 20 & nn. 150-51; Fenner & Koley, *Access to Judicial Proceedings To* Richmond Newspapers *and Beyond*,16 HARV. C.R.-C.L. L. REV. 415, 430 (1981); Note, Richmond Newspapers, Inc. v. Virginia: *A New But Uncertain "Right to Access"*, 32 SYRACUSE L. REV. 989, 1028 n. 190 (1981).

1185. *See* Note, *Trial Secrecy and the First Amendment Right of Public Address to Judicial Proceedings*, 91 HARV. L. REV. 1899 (1978). *But see* Christensen, *supra* note 1124, at 93; Gnaizda, *supra* note 1133, at 11; Note, *supra* note 1123, at 1609.

1186. 444 U.S. 555 (1980).

1187. *Id.* at 580.

(1) Applicability of the Right of Access to Civil Trials

In holding that the first amendment implicitly guarantees the press and the public a right of access to criminal trials, the Supreme Court suggested that this right also would apply to civil trials. Chief Justice Burger based his plurality opinion in *Richmond Newspapers* upon the Anglo-American tradition of open courtrooms in criminal trials.[1188] He further articulated important public policy objectives that open courtrooms and public scrutiny of proceedings promote, such as ensuring that the courts function properly and fairly[1189] and providing an "outlet for community concern, hostility, and emotion."[1190] Although the *Richmond Newspapers* plurality conceded in a footnote that the question of the public's right to attend civil proceedings was not before the court,[1191] the same footnote also observed that "historically both civil and criminal trials have been presumptively open."[1192] Justice Stewart, concurring, stated less equivocally that "the First . . . Amendment clearly give[s] the press and the public a right of access to trials . . . , civil as well as criminal."[1193] Justice Stewart justified this statement by characterizing a trial courtroom as a public forum in which individuals traditionally have engaged in first amendment activity.[1194] In addition, he emphasized that

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1188. *Id.* at 564-69.

1189. *Id.* at 569.

1190. *Id.* at 571.

1191. *Id.* at 580 n.17.

1192. *Id.*

1193. *Id.* at 599 (Stewart, J., concurring) (footnote omitted).

1194. Justice Stevens, however, emphasized in the following statement that the first amendment right of access to civil trials would not be absolute:

> But this does not mean that the First Amendment right of members of the public and representatives of the press to attend civil and criminal trials is absolute. Just as a legislature may impose reasonable time, place, and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public. Cf. *Sheppard v. Maxwell*, 384 U.S. 333. Much more than a city street, a trial courtroom must be a quiet and orderly place. Compare *Kovacs v. Cooper*, 336 U.S. 77, with *Illinois v. Allen*, 397 U.S. 337, and *Estes v. Texas*, 381 U.S. 532. Moreover, every courtroom has a finite physical capacity, and there may be occasions when not all who wish to attend a trial may do so. And while there exist many alternative ways to satisfy the constitutional demands of a fair trial, those demands may also sometimes justify limitations upon the unrestricted presence of spectators in the courtroom.

Id. at 600 (footnotes omitted). Justice Stevens added that "preservation of trade secrets, for example, might justify the exclusion of the public from at least some segments of a civil

courtrooms, even more than city streets, sidewalks, and parks, are places "where representatives of the press and of the public are not only free to be, but where their presence serves to assure the integrity of what goes on."[1195] Thus, based upon the Court's comments in *Richmond Newspapers*, the public and the press probably will enjoy a first amendment right to attend civil trials in the future.

(2) Applicability of the Right of Access to Rent-a-Judge Proceedings

Although one commentator has argued that if courts apply the *Richmond Newspapers* first amendment right of access to civil trials they also should apply it in rent-a-judge proceedings,[1196] the distinctions between rent-a-judge proceedings and civil trials, and the implications of this application of the access right arguably weigh against this argument. This commentator argued that rent-a-judge courts are "functionally" identical to trial courts even though parties privately fund rent-a-judge proceedings.[1197] This commentator emphasized that rent-a-judge referees are less accountable to the public than are trial judges because trial judges bind the general public with their decisions while rent-a-judge referees bind only the parties to a dispute and their decisions have little if any precedential value.[1198] After noting that rent-a-judge decisions sometimes have widespread public impact, this commentator concluded that if the argument for giving the public "a first amendment right of access to supervise governmental functions has any force, it is even more compelling in matters in which the public is affected and governmental authority[1199] is exercised by those who, but for public scrutiny, would have no other accountability."[1200]

Despite superficial similarities between civil trials and rent-a-judge proceedings, several differences between these two methods of adjudicating disputes strongly suggests that the press and public should not enjoy an absolute constitutional right to attend rent-a-judge proceedings even if courts expand this right to cover civil

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trial." *Id.* at n.5.

1195. *Id.* at 600.

1196. Note, *supra* note 1123, at 1608-10.

1197. *Id.* at 1610.

1198. *Id.* at 1610-12.

1199. *See supra* note 1158 for an analysis of whether rent-a-judge proceedings constitute state action.

1200. Note, *supra* note 1123, at 1610.

trials. First, unlike state funded civil trials, rent-a-judge parties privately pay their referees and all expenses of the proceedings.[1201] Second, rent-a-judge parties choose mutually agreed upon referees to resolve their disputes[1202] while litigants in civil trials have little, if any, ability to select the judges that hear their cases. Third, unlike judgments in civil trials that are binding precedent upon the public in future cases, rent-a-judge decisions, like arbitration awards, generally bind only the disputing parties and have very little precedential value.[1203] Last, the Anglo-American tradition of open courtrooms that has given the press and public the relatively unrestricted freedom to attend civil and criminal trials[1204] does not also underlie the development of rent-a-judge procedures. Rather, rent-a-judge procedures developed as novel, privately funded alternatives to formal civil trials designed to unclog congested court calendars and to provide disputing parties with an expeditious, effective, inexpensive, and private method of resolving disputes.[1205] Moreover, if courts extend the right of access to rent-a-judge proceedings they would destroy the private nature of these proceedings—a characteristic that is partially responsible for the growing popularity of these dispute resolution tribunals. Thus, courts should not grant the press and the public an absolute first amendment right to attend rent-a-judge proceedings.

Because allowing the press and public to attend rent-a-judge trials would not harm several important characteristics of these proceedings, such as inexpensiveness and expeditiousness, and because the public probably does have an interest in observing the resolution of certain disputes,[1206] the public and the press should receive a qualified right of access to these proceedings. One commentator proposed a palatable solution to this problem.[1207] This commentator suggests that when parties decide to settle their dispute in a rent-a-judge proceeding, "a presumption should arise that the case contains matters of public interest and that the trial should be open to the public."[1208] The parties to rent-a-judge proceedings then should bear the burden of demonstrating that the

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1201. *See supra* notes 1133-34 and accompanying text.
1202. *See supra* note 1128 and accompanying text.
1203. Note, *supra* note 1123, at 1611 & nn. 106-07, 1612-13.
1204. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-69 (1980).
1205. *See supra* notes 1140-57 and accompanying text.
1206. Christensen, *supra* note 1124, at 97-98.
1207. *Id.* at 99.
1208. *Id.*

public has no compelling interest in observing the proceeding "and that they have legitimate reasons for secrecy."[1209] If the parties fail to satisfy this burden, they should bear an additional burden of giving the press and the public suitable notice of the times and places of the proceeding.[1210] This presumptive right of access is palatable because it probably would result in the holding of public proceedings when the resolution of disputes has important societal implications and only a minimal need for secrecy, and conversely, in the holding of private proceedings when disputes do not significantly affect society and the need for privacy is important to the parties.

4. Policy and Practical Objections to Rent-a-Judge Procedures

Rent-a-judge critics supplement their attack on the constitutionality of these procedures with policy arguments decrying these programs as intrinsically unfair. These policy arguments, which often resemble the constitutional objections to rent-a-judge procedures, may persuade legislatures to enact laws designed to remedy the social infirmities in these programs even though they probably can withstand constitutional attack. Commentators have criticized rent-a-judge programs as unfair because they offer swift, efficient, and private remedies only to disputing parties who are able to afford the cost of hiring a referee, while less affluent parties must suffer inconvenient delays in the judicial system.[1211] California Supreme Court Chief Justice Bird, for example, denounced the rent-a-judge program as "a quasi-private judicial system for the wealthy"[1212] that allows affluent disputing parties "to play by different rules"[1213] in settling their disputes.

Supporters of rent-a-judge proceedings advocate that these procedures are available to any party whose claim is sufficiently large to justify the procedures' expense.[1214] Moreover, rent-a-judge proponents present evidence that resolving disputes through rent-a-judge proceedings frequently is less expensive than traditional

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1209. *Id.*

1210. *Id.*

1211. *Id.* at 94.

1212. Coulson, *Rent-A-Judge: Private Settlement for the Public Good*, 66 JUDICATURE 7 (1982); Gnaizda, *supra* note 1133, at 11; Hager, *'Rent a Judge' Procedure Draws Interest, Criticism*, L.A. Times, December 22, 1981. Some lawyers have called the rent-a-judge program "legal apartheid." Coulson, at 7 (citing L.A. Times, December 22, 1981).

1213. Gnaizda, *supra* note 1133, at 11.

1214. Christensen, *supra* note 1124, at 94.

trials.[1215] Some rent-a-judge proponents more cavalierly argue that these procedures are not unfair merely because some people financially cannot afford them.[1216] The judicial system, they argue, contains similar inequities. Wealthy litigants, for example, arguably have an advantage in court because they can afford more and better legal representation than lower income litigants.

Rent-a-judge programs also potentially threaten to lower the quality of judging in the judicial system. The potential for earning lucrative wages as a private referee[1217] might lure judges away from the judicial system especially if legislatures do not pass statutory limitations on referees' salaries and prevent the demand for competent referees from driving up rent-a-judge fees. Consequently, refereeing could become an enticing alternative to serving as a judge, especially for jurists whose reputation for competence and fairness would allow them to charge premium refereeing fees. At this early stage in the development of rent-a-judge procedures, the reality and scope of this threat is speculative at best. The present ability of judges to earn lucrative salaries as private attorneys presents a similar threat to the quality of judges in the judicial system.[1218] The trappings of judgeships, including prestige, authority, and challenging work, probably help to minimize the flow of competent judges from the bench to private practice. Refereeing disputes, unlike practicing law, however, could give referees some of the same satisfaction judges experience while presiding over trials. Thus, the monetary and professional attraction of refereeing may jostle the ranks of judges somewhat more than the allure of private practice. In light of these concerns, state legislatures may need to design and modify rent-a-judge procedure statutes with an eye toward maintaining a balance of competence between the judges and referees who resolve disputes in judicial and rent-a-judge proceedings.

1215. *Id.* at 84, 94; *see supra* notes 1150, 1151 and accompanying text.

1216. Christensen, *supra* note 1124, at 95; *see also* Myers, *supra* note 1124, at 1044 (quoting Joseph A. Wapner, former presiding judge at the Superior Court in Los Angeles: "If the rich get something the poor can't, that's not different from anything else in our society, the poor don't drive Mercedes either.").

1217. *See supra* note 1133.

1218. *See generally* Flaherty, Judges are Militant, Bitter Over Pay, NAT'L L.J., April 16, 1984 at 1, col. 1.

5. Summary

Undoubtedly, rent-a-judge procedures offer an attractive alternative to dispute resolution in the judicial system. Litigants using rent-a-judge procedures enjoy prompt, private, and convenient proceedings, potential time and expense savings, and the opportunity to try their cases before a referee with expertise in the subject matter of litigation. The future success of rent-a-judge procedures, however, probably depends more upon their benefit to society in general rather than just their benefit to individual disputing parties. Although proponents of rent-a-judge procedures proclaim that they help unclog overcrowded court dockets, critics of these procedures deny that they have any significant impact on court congestion.[1219] For example, rent-a-judge critics estimate that in Los Angeles County, California, where litigants file more than 230,000 new cases every year, rent-a-judge proceedings annually absorb only two percent of this case load.[1220] According to this estimation, the average filing to trial period for most cases would decrease only 15 days, from 59 to 58.5 months.[1221] These estimates probably do not reflect accurately the potential for growth in the level of participation in rent-a-judge proceedings that could develop as the public becomes more aware of this alternative dispute resolution mechanism. If rent-a-judge proceedings do not relieve court congestion more significantly in the future, however, the other advantages of rent-a-judge programs alone might be unable to withstand the constitutional and social policy attacks on the procedures. If, however, rent-a-judge procedures appreciably soothe the problem of court backlogs, the courts and legislatures probably would embrace these procedures as legally acceptable and necessary adjuncts to the judicial system.

1219. Gnaizda, *supra* note 1133, at 12-13.

1220. *Id.* Gnaizda derived this percentage by first assuming that parties will refer 500 cases each year. He then gave each case a weight ten times that of all civil cases tried because he assumed that rent-a-judge cases probably are more complex than most civil cases. *Id.* Christensen estimated that cases referred to private judges each year in Los Angeles County account for only about 2¼% of all tried civil cases and only 1¼% of all tried cases. He calculated the percentage assuming that 8,800 civil cases and 6,900 domestic relations cases go to trial each year (11% of the cases filed annually), and that parties refer 200 cases to private judges annually. Christensen, *supra* note 1124, at 102.

1221. Gnaizda, *supra* note 1133, at 12-13.

C. The Ombudsman

1. The Role of the Ombudsman

In 1809 the Swedish government created the office of ombudsman, an administrative body that helped disgruntled citizens resolve complaints about specific government practices and policies.[1222] The use of ombudsmen did not become popular in the United States until the mid-1960s.[1223] The duties of ombudsmen include providing information to citizens with complaints or problems, referring them to appropriate governmental agencies or departments, helping them formulate complaints, forwarding their complaints to appropriate offices, and monitoring the governmental actions taken in response to their complaints.[1224] The following common characteristics of ombudsmen making them particularly good at resolving citizens' problems and complaints: independence from the political influences of governmental bodies,[1225] impartiality concerning the complaints and problems they handle,[1226] expertise concerning the governmental body for whom they handle citizens' complaints, universal accessibility to citizens, and the power to make problem solving recommendations and publish their findings.[1227]

Although governments typically do not empower ombudsmen

1222. W. GELLHORN, OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES 194 (1966).

1223. Verkuil, The *Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845, 845 (1975). Professor Walter Gellhorn is credited with popularizing the concept of an ombudsman in the United States. *Id.* at 845, 861. Two of his books remain the definitive works on this subject. *See* W. GELLHORN, *supra* note 1222; W. GELLHORN, WHEN AMERICANS COMPLAIN/GOVERNMENTAL GRIEVANCE PROCEDURES (1966). For further reading on the ombudsman see S. ANDERSON, OMBUDSMAN PAPERS: AMERICAN EXPERIENCE AND PROPOSALS (1969), D. ROWAT, THE OMBUDSMAN: CITIZEN'S DEFENDER (2d ed. 1968), and ESTABLISHING OMBUDSMAN OFFICES: RECENT EXPERIENCE IN THE UNITED STATES (S. Anderson & J. Moore eds. 1972).

1224. *See* Cramton, *A Federal Ombudsman*, 1972 DUKE L.J. 1, 3.

1225. An ombudsman for government agencies should be independent of the government and partisan politics. Cramton, *supra* note 1224, at 4. For example, in Nebraska an ombudsman cannot hold elected office or participate in partisan political activities. NEB. REV. STAT. § 81-8, 242 (1976).

1226. The ombudsman is not an advocate or a government adversary, but rather a mediator or an intermediary who recommends changes in administrative structure and procedure to remedy individual or general problems within the system. *See* Broderick, *One-Legged Ombudsman in a Mental Hospital: An Over-the-Shoulder Glance at an Experimental Project*, 22 CATH. U.L. REV. 517, 522 (1973). Although attorneys possibly could fill the role of ombudsman because of their training and work experience, professional ethical concerns may inhibit them from acting in this capacity. *See supra* notes 1003-1115 and accompanying text.

1227. S. ANDERSON, *supra* note 1223, at 3-4.

to change official decisions,[1228] policy, and regulations, their authority to recommend corrective action[1229] to decisionmakers enables ombudsmen to offer significant benefits to conflicting parties. By facilitating dispute resolution between disgruntled citizens and government, ombudsmen may spare citizens the typical discomfort, frustration, and expense of resolving problems and litigating disputes with bureaucratic organizations.[1230] Thus, citizens with complaints about administrative mistakes and abuses of power[1231] should have an incentive to turn to ombudsmen because ombudsmen frequently facilitate dispute resolution and because using ombudsmen does not preclude citizens from resorting to a legal remedy at a later time.[1232] In some instances, however, dispute resolution by ombudsmen is the only road to relief because legal technicalities or sovereign immunity from suit may preclude a citizen from obtaining a judicial remedy.[1233]

Governmental bodies similarly benefit from the services of ombudsmen. The ombudsman process instills within citizens a feeling of confidence and goodwill toward government,[1234] supplants more expense problem solving techniques such as litigation,[1235] and enables governmental bodies to identify and remedy efficiently and inexpensively their functional problems.[1236] These advantages of ombudsman programs have encouraged governments,[1237] and other institutions[1238] such as large corporations,[1239]

1228. *See* Cramton, *supra* note 1224, at 8.

1229. *See* Frank, *State Ombudsman Legislation in the United States*, 29 U. MIAMI L. REV. 397, 399 (1975).

1230. *Id.* at 398-99.

1231. *Id.*

1232. *Id.*

1233. *Id.*

1234. Cramton, *supra* note 1224, at 8.

1235. Frank, *supra* note 1229, at 398-99.

1236. *Id.*

1237. *See* Bingham, *Ombudsman: "The Dayton Model"*, 41 U. CIN. L. REV. 807 (1972); Frank, *supra* note 1229; Wyner, *Complaint Resolution in Nebraska: Citizens, Bureaucrats and the Ombudsman*, 54 NEB. L. REV. 1 (1975).

1238. *See, e.g.*, Broderick, *supra* note 1226; Foegen, *An Ombudsman as Complement to the Grievance Procedure*, 23 LAB. L.J. 289 (1972) (labor disputes); Hannigan, *The Newspaper Ombudsman and Consumer Complaints: An Empirical Assessment*, 11 LAW & SOC'Y REV. 679 (1977) (consumers); King, *The Consumer Ombudsman*, 79 COM. L.J. 355 (1974) (consumers); Moore, *Ombudsman and the Ghetto*, 1 CONN. L. REV. 244 (1968) (the poor); Regan, *When Nursing Home Patients Complain: The Ombudsman or the Patient Advocate*, 65 GEO. L.J. 691 (1977) (nursing homes); Silbert & Sussman, *The Rights of Juveniles Confined in Training Schools and the Experience of a Training School Ombudsman*, 40 BROOKLYN L. REV. 605 (1974) (juveniles in training schools); Warren, *Ombudsman Plus Arbitration: A Proposal for Effective Grievance Administration Without Public Employee*

prisons,[1240] and universities[1241] to create ombudsman offices. Citizens' use of ombudsmen to resolve problems and complaints they have with government probably yields better results than appealling to legislators because legislators often lack the expertise, funds, personnel, power, and impartiality needed to resolve the individual problems of their constituents.[1242] Ombudsmen also probably decrease the caseload burden on trial courts because they offer potential litigants a less expensive and less stressful avenue of relief.

2. State and Local Government Ombudsmen

State[1243] and local governments[1244] in the United States have

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Unions, 29 LAB. L.J. 562 (1978) (labor organizations).

1239. Several large American corporations including Chrysler, RCA, Xerox, and Chase Manhattan Bank have established ombudsman programs. Warren, *supra* note 1238, at 563-64. Ford Moter Company has seven consumer appeals boards throughout the United States that handle over 5,000 complaints a year. Taylor, *When Business Tries to Regulate Itself*, U.S. NEWS & WORLD REPORT, 65, 66, May 17, 1982. The Major Appliance Consumer Action Panel ("MACAP") handles nearly 2,000 consumer complaints each year, 70% of which focus on poor performance of appliances or shoddy repair jobs by dealers. *Id.* MACAP officials typically resolve complaints within two and one half months. *Id.*

Virginia Knauer, the White House consumer adviser, is trying to encourage other industries to establish complaint-handling offices. *Id.* at 67. More than 85% of the nation's top 500 companies have toll free telephone numbers to handle customer complaints. *Id.* According te American Telephone & Telegraph officials, at least half of the 1.6 billion "500" phone calls in 1981 concerned customer service. *Id.*

1240. Tibbles, *Ombudsmen for American Prisons*, 48 N.D. L. REV. 383 (1972); Note, *The Penal Ombudsman: A Step Toward Penal Reform*, 3 PAC L.J. 166 (1972).

1241. *See* Stieber, *Resolving Campus Disputes: Notes of a University Ombudsman*, 37 ARB. J. June 1982, at 5. Verkuil, *supra* note 1223, at 850-51.

1242. Frank, *supra* note 1229, at 398-99.

1243. In 1967 Hawaii became the first state to establish its own ombudsman's office. Wyner, *supra* note 1237, at 2. Currently, four states have enacted ombudsman statutes. *See* ALASKA STAT. §§ 24.55.010-.340 (1978); HAWAII REV. STAT. §§96-1 to -19 (1976); IOWA CODE ANN. §§ 601g:1-23 (West 1975 and West Supp. 1983-84); NEB. REV. STAT. §§81-8,240 to 8,254 (1981). These statutes follow the classic Swedish model. *See* W. GELLHORN, *supra* note 1222, at 194-255. Nine states have established ombudsman offices by executive order: Colorado, Florida, Maine, Missouri, New Jersey, New Mexico, New York, Oregon, and Tennessee. XI INTERNATIONAL OMBUDSMAN INSTITUTE, OMBUDSMAN AND OTHER COMPLAINT-HANDLING SYSTEMS SURVEY 27-28 (July 1, 1981-June 30, 1982) [hereinafter cited as OMBUDSMAN INSTITUTE]. Additionally, some states have statutory provisions for specialized offices. *See, e.g.*, KAN. STAT. ANN. § 75-5231 (Supp. 1973) (correctional institutions).

1244. In 1971 Dayton, Ohio established the first local ombudsman. In the program's first year, the ombudsman succeeded in resolving almost 3,000 complaints (15 complaints a day) about the city's public services. Approximately 42 % of the calls for assistance came from the poor, who typically complained of deficiencies in basic municipal housing services. The ombudsman received phone calls, kept a log of the progress of research, completed cases, and reviewed the results. The Dayton ombudsman made a substantial impact upon the operation of municipal public services. In the first year, for example, the City Manager

experimented with the use of ombudsmen as dispute handlers.[1245] The proliferation of model ombudsman statutes and advisory statements about ombudsmen reflect a growing recognition that government ombudsmen are legitimate dispute handlers. In 1965 the Harvard Student Legislative Bureau drafted the first model ombudsman statute.[1246] Two years later, Professor Walter Gellhorn composed a model statute entitled the "Annotated Model Ombudsman Statute."[1247] Soon thereafter, the American Assembly, a Columbia University conference, urged the establishment of ombudsman offices in state and local governments,[1248] and the American Bar Association ("ABA") suggested twelve essential characteristics of an ombudsman statute.[1249] Finally, in a joint effort, the ABA Ombudsman Committee and the Yale Law School Legislative Services Bureau suggested a comprehensive statute using the Gellhorn and ABA models as guidelines.[1250] These proposals supplied ample guidance for the legislators who drafted many of the currently effective ombudsman statutes.[1251]

Although government ombudsmen function at both state and

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overhauled the municipal water department and the Board of City Commissioners authorized welfare benefits for couples without children. For a complete description of the "Dayton Model," see Bingham, *supra* note 1237.

1245. Despite the ABA House of Delegates recommendation in 1969 that the federal government implement an experimental ombudsman program, no official federal ombudsman exists. The United States Senate considered the possibility of a federal ombudsman office in 1966. *See Hearings on S. Res. 190 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966). Congress currently is contemplating passage of a statute creating a federal criminal procedure ombudsman. The proposed act outlines the responsibilities, salary, and tenure of this ombudsman. In an article commenting about the proposed act, the author argued that a federal ombudsman would be an effective mechanism for enforcing constitutinal and other limitations on police practices. Davidow, *Criminal Procedure Ombudsman Revisited*, 73 J. CRIM. L. & CRIMINOLOGY 939 (1982).

National governments that have created ombudsman offices include: France, North Ireland, Israel, Jamaica, Denmark, Fiji, Finland, Mauritius, Netherland, Norway, Papua, New Guinea, Philippines, Sweden, and Tanzania. INTERNATIONAL OMBUDSMAN INSTITUTE, OMBUDSMAN OFFICE PROFILES: A COMPARATIVE ANALYSIS OF OMBUDSMEN OFFICES (April 16, 1982).

1246. Frank, *supra* note 1229, at 399.

1247. *Id.* See OMBUDSMEN FOR AMERICAN GOVERNMENT? 159-73 (S. Anderson ed. 1968) for a reprint of Gellhorn's model.

1248. THE AMERICAN ASSEMBLY, THE OMBUDSMAN: REPORT OF THE THIRTY-SECOND AMERICAN ASSEMBLY (1967).

1249. See Frank, *supra* note 1229, at 400-01, for a reprint of the ABA resolution.

1250. *Id.* at 444.

1251. The ABA Ombudsman Committee, for example, mailed a copy of its Model Ombudsman Statute for State Governments to the state legislative reference bureaus, libraries, and other interested persons. Frank, *supra* note 1229, at 401.

local levels of government, the duties and power of these officials typically are the same. Government ombudsmen review a variety of citizens' complaints including: complaints about inadequate administrative procedures and laws, inappropriate administrative activities and decisions, and official misconduct.[1252] As an officer of the legislature that created its office, an ombudsman's jurisdiction normally is limited to reviewing that government's administrative agencies and departments.[1253] Ombudsman statutes usually empower the ombudsman to request information from government agencies, issue subpoenas, and examine pertinent records or documents.[1254] If a government agency within an ombudsman's jurisdiction refuses to comply with an ombudsman's proposed solution to a specific complaint or general recommendation concerning an agency's policies and practices, that ombudsman may report his findings and recommendations directly and publicly to the legislature.[1255]

Although one of an ombudsman's primary objectives is to help complaining citizens circumvent bureaucratic red tape,[1256] ombudsman offices, especially offices that serve large numbers of citizens, sometimes suffer from the bureaucratic maladies that historically have plagued governments. Ombudsmen probably can function more effectively when government limits their jurisdiction to governmental bodies with smaller constituencies. Thus, local governments are fertile ground for the growth of the ombudsman's role in the United States.[1257]

1252. *See* Wyner, *supra* note 1237, at 16. A legislatively established ombudsman, however, also might serve in a dispute resolution capacity between a complaining citizen and a nongovernmental entity. For example, an ombudsman might handle consumer complaints, *see infra* notes 1270-73 and accompanying text, and disputes between private citizens. *See* Wyner *supra* note 1237, at 16.

1253. *See, e.g.*, NEB. REV. STAT. §81-8,245 (1976). The Nebraska statute directs its ombudsman to focus on administrative acts that might be:

1. Contrary to law or regulation;
2. Unreasonable, unfair, oppressive or inconsistent with the general course of an administrative agency's judgments;
3. Mistaken in law or arbitrary in ascertainment of facts;
4. Improper in motivation or based on irrelevant considerations;
5. Unclear or inadequately explained when reasons should have been revealed; or
6. Inefficiently performed.

Id. at §81-8,146.

1254. *See, e.g., id.* at §§ 81-8,240(1) and -8,245.

1255. Tibbles, *supra* note 1240, at 387.

1256. Foegan, *supra* note 1238, at 289.

1257. In 1972, The Ombudsman Committee Report to the American Bar Association listed only three functional community ombudsman programs: Dayton, Ohio, Seattle-Kings

The prospects for increasing interest in the development of local ombudsmen are significant not only because the job might be more manageable than that of state ombudsmen, but also because citizens have a greater voice in local government than they do in state and federal government. With the cooperation of the local government, citizenry, news media, and local business, local ombudsmen could become invaluable institutions of community service. At this level, funding by private businesses and foundations, local organizations, and the government could cultivate public confidence in the political independence and impartiality of ombudsmen and stimulate continued community support and involvement in these programs.[1258] Coincidentally, heightened community participation in ombudsman programs probably would make the task of ombudsmen easier because they would be performing in an atmosphere of cooperation. The ombudsman programs that American cities have created in recent years have received favorable review.[1259] Greater public awareness of these positive responses undoubtedly will fuel the growth of ombudsmen as local government complaint-handlers.

3. The Institutional Ombudsman

The notion that governmental ombudsmen probably function most effectively when handling citizen disputes with local governments and small constituencies, suggests that smaller nongovernmental institutions also could benefit by using ombudsmen to handle complaints leveled against them. Institutional use of ombudsmen to perform services similar to those that governmental ombudsmen render,[1260] has increased in popularity over the past fifteen years.[1261] The types of institutions that presently use ombudsmen to handle complaints about their services vary in size

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County, Washington, and Newark, New Jersey. Frank, American Bar Association Ombudsman Committee Development Report 15-16 (June 30, 1972) (unpublished manuscript). Dallas, Texas, Montgomery County, Maryland, and Philadelphia, Pennsylvania have established ombudsmen programs in their school systems. *Id.* at 16. Several other cities and counties recently have created ombudsman programs, including: Anchorage, Alaska, Detroit, Michigan, Flint, Michigan, Wichita, Kansas, Berkeley, California, Lexington-Fayette County, Kentucky, New York, New York, and Jamestown, New York. OMBUDSMAN INSTITUTE, *supra* note 1243, at 19-21. Some communities had an ombudsman but later discontinued the program. *Id.* at 19 (*e.g.*, Atlanta).

1258. *See* Bingham, *supra* note 1237, at 807-08.

1259. *See, e.g., id.* at 809-10; Lincoln Star, January 21, 1972, editorial page.

1260. *See supra* note 1252 and accompanying text.

1261. Verkuil, *supra* note 1223, at 850.

and function. For example, one recent study shows that at least 100 colleges and universities in the United States have established ombudsmen offices. The increased use of institutional ombudsmen is especially visible in large, tax supported schools that have experienced rapid growth in the past few decades.[1262] Most of these schools created ombudsman offices in the late 1960s in response to the many serious administrative problems that then were testing academia.[1263] Today, college and university ombudsmen are frequently the first school officers to address the problems and complaints associated with matters ranging from tenure denials to student anxiety over course offerings and grades.[1264]

The use of ombudsmen in prisons is becoming an increasingly popular means of supplementing judicial review of prisoner complaints about improper action or inaction of prison officials[1265]—particularly in cases concerning relatively minor, yet irritating, day-to-day problems. The prisoner complaints that ombudsmen typically handle include dissatisfaction with parole procedures, prisoner transfer and classification, legal matters, and medical treatment.[1266] In addition, prison ombudsmen also could handle prisoner complaints about racial and religious discrimination by prison officials.[1267] Prison ombudsmen serve prisoners in three ways. First, they can help resolve specific problems that prison officials could not or would not resolve on their own. Second, because prison ombudsmen are independent of the correctional system they can address sensitive problems or field complaints that prisoners would rather not raise with prison officials for fear of retaliation. Last, these ombudsmen can use the knowl-

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1262. Ombudsman Directory, 1981, San Jose State University, *cited in* Stieber, *supra* note 1241, at 6. Eastern Montana College established the first campus ombudsman in October 1966. In 1967, Michigan State University became the first major university to adopt this idea.

1263. *See, e.g.*, FACT FINDING COMMISSION ON COLUMBIA DISTURBANCES (Cox Commission), CRISIS AT COLUMBIA UNIVERSITY (1968), *cited in* Verkuil, *supra* note 1223, at 850.

1264. *Id.* At Michigan State University, 1,000 students seek the ombudsman's assistance annually. Stieber, *supra* note 1241, at 10.

1265. In 1971 the Philadelphia prisons experimented with an ombudsman and the Maryland Legislature established an Inmate Grievance Commission. That same year, California became the first state to pass legislation providing for a correctional ombudsman, but Governor Reagan vetoed the bill. Many states currently use correctional institution ombudsmen: Colorado, Connecticut, Delaware, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, North Carolina, Oregon, South Carolina, Virginia, and Wisconsin. OMBUDSMAN INSTITUTE, *supra* note 1243, at 35-38. Numerous commentators have called for broader nse of prison ombudsmen. Davidow, *supra* note 1245.

1266. *See* Note, *supra* noto 1240, at 168-71.

1267. *Id.*

edge they obtain through interaction with prisoners and prison officials as a basis for making recommendations to improve the correctional system as a whole.[1268] Conversely, this knowledge also would enable ombudsmen to help protect prison officials from unfounded allegations of dereliction.[1269]

4. The Media Ombudsman

Media ombudsmen, unlike governmental and institutional ombudsmen, do not handle complaints about the institution or governmental body that established their offices. Rather, media ombudsmen facilitate dispute resolution between two other parties such as consumers and merchants.[1270] By the mid-1970s over 300 newspapers and television news programs featured an ombudsman service for individuals with complaints about businesses and governmental agencies.[1271] Through their capacity to publish accounts of citizens' complaints and their ability to capture and command the attention of large public audiences, media ombudsmen successfully have sensitized businesses and governmental agencies to specific complaints about and general problems with their operations.[1272] Businesses and government agencies also should benefit from the efforts of media ombudsmen. When fairness and dispute resolution are principal concerns of ombudsmen the businesses and agencies that are targets of citizens' complaints can learn to serve and cultivate goodwill with their clients and constituents more effectively.

As overzealous advocates of any position, however, media ombudsmen risk legal liability in business tort and defamation lawsuits.[1273] The overzealousness of media ombudsmen also could

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1268. *Id.* at 184.

1269. *Id.* at 189.

1270. The consumer ombudsman, which the Swedish government created in 1971, handles disputes between consumers and merchants. King, *supra* note 1238, at 355. The consumer ombudsman acts as a watchdog over business practices, scrutinizing the accuracy and truthfulness of advertising, overseeing market practices and contractual agreements, and working closely with consumer protection agencies. *Id.* at 357. Although organizatins such as the Better Business Bureau perform similar services for American consumers, the concept of a government created consumer ombudsman's office has not gained any measurable acceptance in the United States. *Id.* at 360.

1271. *See* Hannigan, *supra* note 1238, at 681.

1272. An interview of the users of a Canadian newspaper's ombudsman service indicated that almost 75 percent of the people interviewed who previously had used the ombudsman service stated that they would use it again if they had another problem. *Id.* at 694.

1273. *Cf.* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 765 (4th ed. 1971). For a dis-

undermine their effectiveness in resolving disputes. If media ombudsmen demonstrate bias in the process of resolving disputes, they probably will aggravate the dispute to a greater extent than governmental and institutional ombudsmen because media ombudsmen sometimes air the dispute resolution process to large public audiences and because the complaint targets might view them as interlopers. The actions of government ombudsmen, on the other hand, probably are less likely to exacerbate disputes between governmental bodies and their constituents, even if their efforts are critical of government, because the government previously created and empowered these ombudsmen to perform this dispute resolution function. Businesses and governmental agencies, on the other hand, are more likely to treat media ombudsmen with hostility because they neither created or empowered these ombudsmen nor requested their services.

5. Summary

American society generally has responded favorably to the expanded use of ombudsmen as a method of handling disputes and complaints between individuals and consumers on one hand, and businesses, governmental entities, and nongovernmental institutions on the other. Ombudsmen served disputing parties as impartial third parties who facilitate dispute resolution. Utilizing ombudsmen is generally a much faster, less stressful, and less expensive method of resolving disputes and complaints than using more traditional techniques, such as petitioning congressmen and filing lawsuits. Institutional and governmental ombudsmen also benefit the entities that establish them by building public confidence and trust for the institutions and governmental entities they serve. Although ombudsmen occasionally exacerbate disputes by acting partially or overzealously, the overriding benefits governmental, institutional, and media ombudsmen provide society should make the ombudsman's office an increasingly important forum for dispute resolution in the future.

IX. Conclusion

This Special Project has examined the individual's opportunity within contemporary American society to prevent and cure legally redressable injuries by means other than civil and criminal

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cussion of media liability, see Wade, *The Tort Liability of Investigative Reporters*, 37 Vand. L. Rev. (1984).

litigation. The self-help measures on which this article has focused illustrate the variation in the origins and development of existing self-help practices, and the diversity in the measures that the law recognizes as permissible and tolerable self-help conduct. Self-help, once the law of the land, gradually has been supplanted in many respects by the increasing sophistication of the organized criminal and civil justice systems which have become the hallmark of American society. Under this scheme, the government has assumed enormous responsibilities and burdens as peacekeeper, guardian of public safety and order, arbiter of disputes, and enforcer of the laws. This Special Project, however, demonstrates that the state is not the only actor in the play. The citizens may participate more actively by exercising numerous self-help rights, privileges, and remedies. To be sure, self-help alternatives pose the troubling prospects of lawlessness. Yet, the Special Project has proposed that the societal and personal benefits of many forms of self-help favor the inclusion of self-help as an ingredient in the evolution of the American legal system. The thoughtful and reasoned examination by scholars, judges, lawyers, legislators, and citizens of the potential contributions and hazards of self-help can ensure that self-help will develop as a productive and positive component of American society.

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