The Private Law of Self-Help

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Individuals regularly take steps to protect themselves, their property, and their broader legal interests. They carry pepper spray, have guard dogs, and install fences. Such measures are colloquially deemed methods of self-help. Yet, despite its ubiquity, self-help as a legal concept has been chronically understudied. Consequently, American private law is missing a doctrinally coherent and prescriptively useful framework for self-help. As a matter of legal theory, this conceptual void is problematic in and of itself; the doctrinal incoherence stemming from this analytical gap decreases the law's stability and undermines its predictability.

But the concern is not merely theoretical. The magnitude of intentional and collateral damage incurred due to this conceptual void has grown intolerable. Corporate-scale and technologically automated unilateral actions have only heightened the need for a theory of self-help. By contextualizing self-help within the civil recourse system, this Article provides the much-needed conceptual framework for a private law of self-help. It relies on the New Private Law research framework and on Civil Recourse Theory to delineate the bounds, purposes, and requirements of self-help in modern society.

This Article provides an intensional *framework of self-help that may be used in ex ante decision-making. In so doing, it displaces the descriptively- and prescriptively-lacking* extensional *ex post method of determining the lawfulness of particular self-help measures. The Article also frames self-help as a substantive body of law with its own prescriptive judgements, even in cases of first impression. Thus, the Article provides a normatively useful and prescriptively necessary alternative to the status quo in which self-help is commonly seen as a vacuous or meaningless concept.*

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INTRODUCTION

Self-help is everywhere in life and in law.[1] Self-help doctrines appear in contracts,[2] property,[3] torts,[4] criminal procedure,[5] and even constitutional law.[6] This ubiquity is also reflected in the law school curriculum. In contracts, for example, students might learn that the Uniform Commercial Code ("UCC") gives creditors the right to engage in self-help through unilateral repossessions.[7] In property, students might read about the right to engage in self-help by retrieving one's stolen goods from a thief.[8] In torts, students may notice that privacy

[1] Adam B. Badawi, *Self-Help and the Rules of Engagement*, 29 YALE J. ON REGUL. 1, 1 (2012) ("Self-help is a ubiquitous, yet understudied, concept."); Richard A. Epstein, *The Theory and Practice of Self-Help*, 1 J.L. ECON., & POL'Y 1, 3 (2005) ("Instances of self-help . . . are socially ubiquitous."); Celia R. Taylor, *Self-Help in Contract Law: An Exploration and Proposal*, 33 WAKE FOREST L. REV. 839, 841 (1998) ("The situations in which self-help may be invoked and the actions which may be taken are as varied as human imagination and ingenuity.").

[2] *See infra* note 7.

[3] *See infra* note 8.

[4] *See infra* note 9.

[5] Steven H. Hazel, *Privacy Self-Help*, 36 BERKELEY TECH. L.J. 305, 336 (2021) (noting that "citizens who fail to engage in reasonable forms of self-help — such as installing fencing, affixing roof panels, or securely disposing of garbage — forfeit constitutional [Fourth Amendment] protection").

[6] David S. Rubenstein, *Self-Help Structuralism*, 95 B.U. L. REV. 1619, 1621 (2015) (noting that "constitutional self-help" refers to when "one arm of government takes otherwise impermissible action to redress another arm's constitutional wrong.").

[7] U.C.C. § 9-609 (AM. L. INST. & UNIF. L. COMM'N 2010), ("After default, a secured party . . . may take possession of the collateral . . . without judicial process, if it proceeds without breach of the peace.").

[8] *See* VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 121 (13th ed. 2015) (noting that the doctrine of "fresh pursuit" allows reasonable self-help force when there is "prompt discovery of the dispossession, and prompt and persistent efforts to recover the chattel." The doctrine has been extended to allow reasonable force when repossessing assets that were taken by "force or fraud," though it nonetheless requires that the pursuit be "fresh."); *see also* Badawi, *supra* note 1, at 6 ("[T]hose who have their property stolen may use self-help to retrieve it without being subject to criminal liability.").

plaintiffs are legally required to have "engaged in self-help" by concealing that which was later made public.[9]

Given the prevalence and importance of self-help in legal doctrines, one would expect the concept to be thoroughly studied and therefore well-understood. At the very least, one would expect to find a doctrinally coherent and prescriptively useful definition of self-help. That, unfortunately, is far from the case.[10] As one commentator noted, "[g]iven the pivotal role of self-help, it is surprising how little attention has been paid to defining its contours and providing theoretical justification."[11] Despite these known and notable gaps in legal theory, the "legal scholarship on self-help is meagre."[12] The scholarship that does exist frequently disagrees on fundamental principles of theory and doctrine.[13] There is even little agreement on whether self-help exists as a single unified legal concept in the first place.[14]

Unfortunately, the lack of a unified and coherent definition of self-help is cause for immediate and growing concern for two reasons.

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[9] Hazel, *supra* note 5, at 339 ("Generally, courts sort private facts from public ones by asking whether the plaintiff engaged in self-help.").

[10] *See* Badawi, *supra* note 1, at 43("[W]hether and how to permit self-help . . . have not been analyzed in systematic detail."); Craig Dolly, *The Electronic Self-Help Provisions of UCITA: A Virtual Repo Man?*, 33 J. MARSHALL L. REV. 663, 671 (2000) ("Surprisingly there has been little public debate over [self-help's] use until recently."); Catherine M. Sharkey, *Trespass Torts and Self-Help for an Electronic Age*, 44 TULSA L. REV. 677, 681 (2009) ("Tort theorists, it is fair to say, have spent little time contemplating self-help."); Taylor, *supra* note 1, at 845 ("Given the long history of self-help in our society and its frequent use, it seems curious that the topic generates little commentary.").

[11] Sharkey, *supra* note 10, at 679 ("Given the pivotal role of self-help, it is surprising how little attention has been paid to defining its contours and providing theoretical justification.").

[12] Zoë Sinel, *De-Ciphering Self-Help*, 67 U. TORONTO L.J. 31, 33 (2017) ("[T]he legal scholarship on self-help is meagre.").

[13] *See, e.g.*, David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 11 (2014) ("Some formulations [of self-help] require a unilateral 'attempt to redress a perceived wrong,' while others extend to such speculative ex ante measures as locking the door of one's car or walking home on a well-lit street.").

[14] *See* Badawi, *supra* note 1, at 43 (noting that self-help is currently a "patchwork of self-help rules"); Pozen, *supra* note 13, at 4 ("Across the United States, *doctrines* have been developed to regulate such *'self-help' behavior* in criminal justice, property, contracts, torts, and other areas of private law. In public international law, a whole subfield is devoted to the *self-help issue*." (emphasis added)).

The first relates broadly to the rule of law, which requires "laws and precedents to be . . . capable of guiding conduct."[15] To accomplish this, "rule of law" requires that individuals have "[a]dvance notice of the law's requirements."[16] Without defining self-help, the law is currently failing to provide such adequate notice of its requirements. That is especially troublesome in cases where the law encourages and even requires[17] individuals to engage in self-help. Without clearly defining the bounds of self-help, the law places individuals in danger of crossing the line into unlawful vigilantism.

To promote efficiency[18] and individual autonomy,[19] the law emboldens individuals in certain circumstances to make unilateral decisions and take extra-judicial acts. At the same time, the law prohibits and punishes unilateral, extra-judicial acts that cross the line into vigilantism.[20] Society, after all, does not allow "taking the law into one's own hands."[21] Individuals, then, are expected to distinguish *ex ante* between lawful acts of self-help and unlawful acts of vigilantism without a clear definition between the two.

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[15] Steven J. Burton, *The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication*, 35 CARDOZO L. REV. 1687, 1702 (2014) ("Rule of Law requires laws and precedents to be (1) capable of guiding conduct, which requires that they be transparent, coherent, reliable, and workable, both inside and outside of the courthouse; and (2) at least minimally or colorably justified on a continuing basis for the present and future.").

[16] David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 180 (2018).

[17] *See* Hazel, *supra* note 5, at 336.

[18] Dolly, *supra* note 10, at 671 ("American courts were sophisticated enough to recognize that self-help was an efficient alternative to traditional judicial remedies . . . .").

[19] Pozen, *supra* note 13, at 49 ("When individual actors are allowed to take unilateral measures to remedy the wrongdoing of others . . . it may . . . promote autonomy . . . ."); Taylor, *supra* note 1, at 847 ("Other factors influencing a party's decision to use self-help are more subtle and include psychological components of control and autonomy.").

[20] In the Cambridge Dictionary's entry for *vigilantism*, for example, the examples given include: "We do not want to live in a society which tolerates vigilantism;" "[w]e encourage respect for the law and discourage vigilantism;" "[t]he killing is another example of the type of mob violence and vigilantism infecting the country." *Vigilantism*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/vigilantism (last visited Oct. 24, 2024) [https://perma.cc/UM85-MYA9].

[21] Sinel, *supra* note 12, at 34 ("Self-help . . . is not equivalent to taking the law into one's own hands . . . .").

How is this fair? It is not. Without offering a clear definition of self-help, the law places individuals in legal jeopardy each and every time they engage in extra judicial actions. In other words, the law is failing to give individuals adequate notice, leading to injustices that mirror violations of due process. Despite doctrinal differences,[22] the very same rule-of-law goals of due process are present in this private law context.[23] Here, too, the law should give fair notice through sufficiently informative definitions, providing individuals the opportunity to conform their self-help behavior to the law.[24]

[22] Self-help's lack of definition does not directly expose this private law concept to constitutional scrutiny. *See* David Frisch, *§ 9-503 Constitutionality — United States Constitution*, *in* LAWRENCE ANDERSON ON THE UNIFORM COMMERCIAL CODE § 9-503:160 (3d. ed. 2023) ("Self-help repossession and subsequent sale is constitutional and does not involve state action, and therefore due process limitations on judicial procedure for the recovery of property do not apply to self-help repossession under UCC § 9-503."). *But see* Parks v. "Mr. Ford," 556 F.2d 132, 147 (3d Cir. 1977) (noting that "[n]on-consensual conflict resolution, as I have sought to explain, is a function closely related to sovereignty and should thus be subject to constitutional restraint," but nonetheless concluding that "in the absence of a close nexus between the state and the contract in question, it would seem that action taken pursuant to a contractual right is not state action").

[23] In constitutional law, similar principles are protected by the "vagueness test" which "'guarantee[s] that every citizen shall receive *fair notice* of conduct that is forbidden[' and] 'offers citizens the opportunity to conform their . . . conduct to that law.'" Gallegos v. State, 123 Nev. 289, 293 (2007) (emphasis added) (citations omitted). Why should self-help fail to live up to this standard?

[24] Self-help, as described here, falls squarely in the realm of private law as opposed to public law, the latter of which includes the doctrines of self-defense in criminal law. Self-help, by definition, forms part of "*the discretionary decisions that individuals make in structuring their lives*" vis-à-vis others, rather than the government. Thomas W. Merrill, *Private and Public Law*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 575, 575 (Andrew S. Gold, John C. P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2020). The importance of this distinction is discussed in Part II *infra*.

Although the exact nature of the distinction between public and private law is beyond the scope of this Article, the following working definitions are sufficiently definite for the purposes of this analysis of self-help: functionally speaking, "private law can be said to be the law that supports private ordering" while "public law is the law that generates public goods that must be collectively supplied because they cannot be adequately supplied through private ordering." *Id.* at 578. For a discussion of various other possible distinctions between public and private law, see *id.* at 576-77.

The second reason for concern is the growing destructive capacity of individual actors. The rapidly evolving landscape of disruptive technologies and social norms has exponentially increased the amount of intentional and collateral damage that may be caused by self-help gone wrong.[25] Without a clear limiting factor, individuals and corporations will, for the sake of helping themselves, push — and ultimately cross — the boundary line of what the law allows, possibly causing massive amounts of unlawful destruction. Not only that, but technology often allows for automation, scaling up unilateral responses which further multiply the degree and likelihood of harm.

Take "remote repossession," as an example, whereby a future autonomous vehicle may drive itself away as a form of self-help repossession in the case of default.[26] This form of technological self-help is rife with danger. Valuable goods or even children may be inside the vehicle.[27] The autonomous car may cause property damage on its way out or may even crash "into oncoming traffic."[28]

A company experiencing a ransomware attack may attempt to "hack back" in order to "monitor intruders" or "retrieve . . . stolen files."[29] In

Note, however, that ideas related to self-help have been applied in the context of constitutional law, but "[t]he extension of self-help to public law arguably raises additional complications." Pozen, *supra* note 13, at 12.

[25] Take the CrowdStrike cyber-crisis of July, 2024, as litmus test for the fragility of global systems against individual and unilateral actions. If an accidental software-update-gone-awry triggered by a single company — by a single software engineer — was able to cause as much as "$15 billion" of "financial losses" to industries across the world, just imagine what a rogue vigilante company or individual would be able to do when engaging. *Fortune 500 Firms to See $5.4 Bln in CrowdStrike Losses, Says Insurer Parametrix*, REUTERS (July 24, 2024), https://www.reuters.com/technology/fortune-500-firms-see-54-bln-crowdstrike-losses-says-insurer-parametrix-2024-07-24/ (explaining that a faulty CrowdStrike automatic update "crashed computers powered by Microsoft's Windows operating system, disrupting internet services across the globe").

[26] Rebecca Crootof, *Remote Repossession*, 73(9) DEPAUL L. REV. 369, 373 (2024).

[27] There are actual cases of repossession where children were inside the vehicle. *See, e.g.*, Chapa v. Traciers & Assocs., 267 S.W.3d 386 (Tex. App. 2008).

[28] Crootof, *supra* note 26, at 373.

[29] Alice M. Porch, *Spoiling for a Fight: Hacking Back with the Active Cyber Defense Certainty Act*, 65 S.D. L. REV. 467, 478-79 (2020).

so doing, it risks disrupting utility networks, hospitals, or even "drag[ging] the United States into an international conflict."[30]

These examples demonstrate that technology has granted individuals and corporations the ability to *unilaterally* shape the world. [31] A single hacker may *unilaterally* shut down hospital computer systems.[32] A corporation may *unilaterally* shut off internet services to an active warzone.[33] These unprecedented powers of *unilateral* action have raised the stakes of defining self-help and its boundaries with unlawful vigilantism.

Given these critical observations, it makes sense to wonder how we got here. Doesn't "self-help" already have a definition? Hasn't some judge or restatement created a definition of self-help that can solve these problems?

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[30] Sam Parker, *Shot in the Dark: Can Private Sector "Hackbacks" Work?*, 13 J. NAT'L SEC. L. & POL'Y 211, 221 (2022) ("If Sony retaliates against any North Korean-based server, all bets are off. North Korea is likely to respond with an attack against Sony's networks, but Pyongyang may not necessarily draw much of a distinction between an attack coming from an American company versus the American government."); Nicholas Winstead, *Hack-Back: Toward a Legal Framework for Cyber Self-Defense*, AM. UNIV. CTR. FOR SEC., INNOVATION, & NEW TECH. (June 26, 2020), https://www.american.edu/sis/centers/security-technology/hack-back-toward-a-legal-framework-for-cyber-self-defense.cfm [https://perma.cc/24RY-PJ5L].

[31] *See generally* João Marinotti & Asaf Lubin, Cyber Vigilantes (draft on file with the authors) (analyzing case studies of self-help measures taken by technology companies). *See, e.g.*, Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69, 103 (2005) ("[D]igital self-help by copyright holders . . . threaten privacy more when they send a message to users' computer or even *take control of a user's computer*." (emphasis added)).

[32] Pat Eaton-Robb, *Cyberattack Keeps Hospitals' Computers Offline for Weeks*, ASSOCIATED PRESS (Aug. 18, 2023), https://apnews.com/article/cyberattack-hospitals-offline-e409a66fcb0d3c7da81595c68901ebd1 [https://perma.cc/7KNQ-ATGX]. Note that ransomware attacks have become significantly easier for individuals or small groups of hackers to engage in because of the rise of ransomware-as-a-service ("RAAS"). *What is Ransomware-as-a-Service (RaaS)*, IBM, https://www.ibm.com/topics/ransomware-as-a-service (last visited Oct. 25, 2024) [https://perma.cc/3M7P-AEYU].

[33] Although further investigation negated the claim that Elon Musk's Starlink shut off access to the internet in Crimea, statements by the company and Musk himself demonstrate that Starlink would have the technical ability to do so. Aleksandra Wrona & David Emery, *Did Elon Musk Turn Off Starlink Access in Crimea to Disrupt Ukrainian Attack?*, SNOPES (Sept. 14, 2023), https://www.snopes.com/news/2023/09/14/musk-internet-access-crimea-ukraine/ [https://perma.cc/9J6X-LUZV].

Unfortunately, lay definitions of self-help offer little to no assistance in finding the necessary boundary between lawful and unlawful acts of self-help. Merriam-Webster's dictionary, for example, merely defines self-help as "the action or process of bettering oneself" or, more to the point, "overcoming one's problems without the aid of others."[34] No limiting principle is offered. Other dictionaries are no better.[35] Therefore, the lay and legal definitions of self-help must necessarily diverge. And so they have. Unfortunately, even the legal definitions of self-help have so far failed to address the issues raised in this Article.

The Legal Information Institute ("LII"), for example, defines self-help as "a form of redress outside the regular legal process, under which one takes matters into one's own hands and uses lawful means in an attempt to protect or restore a legal right."[36] The LII further notes that "[a]s long as it does not involve unlawful actions or a breach of the peace, self-help is legal."[37] Definitions such as this may be practically helpful but are ultimately circular in reasoning. By defining self-help as those actions which are lawful, this approach lacks any prescriptive principle through which the distinction between self-help and vigilantism can be found. In questions of first impression where no precedent or statute is on point, this definition of self-help leaves us empty handed.

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[34] *Self-help*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/self-help (last visited Oct. 25, 2024) [https://perma.cc/P644-WRJX] (noting also that self-help frequently refers to "the coping with one's personal or emotional problems without professional help"). In popular media, "self-help" has a close relationship with "self-improvement," both of which have come to refer to the genre of mental-health, wellness, or life coaching advice found in popular literature. *See, e.g.*, Anna Katharina Schaffner, *The 12 Best Self-Improvement Books*, PSYCH. TODAY (Dec. 30, 2021), https://www.psychologytoday.com/us/blog/the-art-self-improvement/202112/the-12-best-self-improvement-books (using the terms "self-help books" and "self-improvement books" interchangeably).

[35] *See, e.g.*, *Self-help*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/self-help (last visited Oct. 25, 2024) [https://perma.cc/AX5Z-N2UK] ("[T]he activity of you yourself providing what you need to help you solve a problem . . . .").

[36] *Self-help*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/self-help (last visited Oct. 25, 2024) [https://perma.cc/5TQR-9H4E].

[37] *Id.*

LII's working definition of self-help also fragments and outsources the required line-drawing to each external substantive area of law. Self-help in the context of contract remedies would be defined solely for *that* purpose. Self-help in the context of copyright would be defined solely for *that* purpose. And so on. Once such delegation occurs, there is no longer any unifying principle of self-help. Rather, in this conceptualization, self-help becomes a miscellaneous category into which the various areas of law dump their sanctioned extra-legal modes of redress. This is what I term "the dumpster analysis" of self-help, in which the concept resembles a trash heap of leftover doctrines that share nothing except their relation to extra-judicial unilateral modes of redress. Scholarship on the dumpster analysis has noted that the list of actions which would fall into this miscellaneous category of self-help is "so long and the behaviour(s) identified so heterogeneous that self-help becomes a meaningless, empty concept."[38]

Furthermore, the complete reliance on external bodies of law to define self-help make this approach *extensional*, rather than *intensional*.[39]

[38] Sinel, *supra* note 12, at 33.

[39] *See Intension and Extension*, ENCYC. BRITANNICA, https://www.britannica.com/topic/intension (last visited Oct. 25, 2024) [https://perma.cc/WX3Y-YC98]. Discussions of the intension-extension dichotomy are particularly prevalent in fields such as philosophy, formal logic, and even cognitive science. *See, respectively*, Max Black, *Carnap's Semantics*, 58 PHIL. REV. 257, 257 (1949); Roman Suszko, *An Essay in the Formal Theory of Extension and of Intension*, 20 STUDIA LOGICA 7, 7 (1967); Anthony S. Maida & Stuart C. Shapiro, *Intensional Concepts in Propositional Semantic Networks*, 6 COGNITIVE SCI. 291, 297 (1982).

Nonetheless, this distinction has been and continues to be insightful in legal analysis. *See, e.g.*, Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PENN. L. REV. 2097, 2101-2102 (2012) (noting that analyzing legal concepts as *intensions* is "at least a good analogy if not the correct analysis."); João Marinotti, *Escaping Circularity: The Fourth Amendment and Property Law*, 81 MD. L. REV. 641, 647 (2022) [hereinafter Marinotti, *Escaping Circularity*] (noting that intensional definitions provide private law with doctrinal anchors tied to "perceptual salience, social practice, and shared expectations"); Juan F. González Bertomeu & Maria Paula Saffon, *The Mix of Latin American Populist Constitutionalism*, 16 LAW & ETHICS HUM. RTS. 137, 144 n. 32 (2022) (arguing that "[c]onceptual stretching" in law "entails increasing the number of cases included in the concept (its extension) and reducing the set of attributes that define it (its intension) to the point that the category is no longer appropriate in its original form because the new set of cases only marginally fit it and are sufficiently different from the original ones").

As this Article argues, an *extensional* approach to self-help suffers from the inability to normatively address the needs of an evolving society.[40] *Extensional* definitions of self-help are ill-equipped to guide us into a socially and technologically evolving world because they lack a robust and flexible coherent internal paradigm. At a time when individuals and corporations have significantly heightened technological abilities to unilaterally change the world, it is imperative that judges, legislators, corporations, and individuals have access to a clear, conceptually coherent, and *intensional* boundary line against vigilantism.

Given this background, the ultimate purpose of this Article is to propose a unified framework of self-help, one whose architecture can guide private law norms as society faces a rapidly evolving landscape of disruptive technologies that may grant individuals unprecedented powers of unilateral action. In order to derive this framework of self-help, this Article proceeds in three Parts.

First, it addresses the question of whether self-help should indeed be treated as a single unified legal concept in private law. To answer this question, the Article builds on the New Private Law research framework[41] and expands upon the role of *intensional* and *extensional* definitions in law.

Even judges have found the distinction helpful in their analyses. *See, e.g.*, Fides v. Comm'r of Internal Revenue, 137 F.2d 731, 734 (4th Cir. 1943) ("[C]ourts should be extremely cautious not to add words to a statute that are not found in the statute — and should be careful, too, not to decrease deliberately the extension of a word or phrase by increasing its intension."); Moore v. Stevens, 90 Fla. 879, 893 (1925) ("It is an elementary law of thought, a basic rule of correct reasoning, that the terms of a proposition should have a definite meaning both in intension and extension and that meaning shall be consistently held and recognized throughout the entire argument.").

[40] Marinotti, *Escaping Circularity*, *supra* note 39, at 677 ("[E]xtensional concepts are defined as nothing more than their enumerated contents. In other words, extensionally, the answer to whether something falls within concept X can only be answered by looking up whether it falls within concept X.").

[41] *See generally* John Oberdiek, *Method and Morality in the New Private Law of Torts*, 125 HARV. L. REV. F. 189, 192 (2012) ("The New Private Law endorses what one might call a constrained instrumentalism — one constrained by the concepts embedded within and constitutive of private law.").

Second, the Article explores the role of self-help in legal theory. By relying on Civil Recourse Theory,[42] the Article explains that self-help must not be analyzed as a pre-legal or extra-legal concept, but rather as a core part of a rule-of-law-governed system of civil recourse.

With the concept of self-help firmly contextualized, the Article then proceeds to derive and describe the prescriptive framework of self-help that is so desperately needed. It concludes by highlighting the value of this framework to judges, legislators, corporations, and individuals.

I. SELF-HELP IN PRIVATE LAW

Self-help[43] is often discussed in contrast to "state-sanctioned aid"; it is presented as an "alternative to the slower, costlier, and more cumbersome civil justice system."[44] The efficiency of self-help, especially in comparison to bringing a lawsuit, has been praised by both judges[45] and academics.[46] Notably, this efficiency is largely premised on the fact that self-help is "a mode of reparation in which *the whole procedure is in the hands of, and conducted by, private individuals*, entirely independent of the courts."[47] In other words, individuals engage in self-help when they engage in discretionary real-time decision-making in an

[42] *See generally* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020) (describing Civil Recourse Theory).

[43] Self-help is sometimes referred to by other related terms including "self-redress." *See, e.g.*, C.A. Branston, *The Forcible Recaption of Chattels,* 28 L.Q. REV. 262, 264 n. 8 (1912) (creating a subtle distinction between the terms: "[T]he term 'self-help' is employed to indicate those acts of private individuals which . . . [are] . . . ancillary to the procedure of the courts. The expression '[s]elf-redress' is used to indicate the mode of reparation in which the whole procedure is . . . entirely independent of the courts . . . .")

[44] Sinel, *supra* note 12, at 32.

[45] *See, e.g.*, Melnick v. C.S.X. Corp., 312 Md. 511, 516 (1988) ("The Supreme Judicial Court of Massachusetts reasoned that limiting the plaintiffs to self-help was the most efficient . . . way to resolve the problem.") (summarizing and accepting the proposition of Michalson v. Nutting, 275 Mass. 232 (1931)); Salisbury Livestock Co. v. Colo. Cent. Credit Union, 793 P.2d 470, 473 (Wyo. 1990) ("[I]t is apparent that the self-help remedy is efficient for creditors . . . .").

[46] Ryan McRobert, *Defining "Breach of the Peace" in Self-Help Repossessions*, 87 WASH. L. REV. 569, 572 (2012) (noting that self-help is an "efficient extrajudicial tool"); Taylor, *supra* note 1, at 848 ("Self-help may also encourage societal efficiency by helping to correct power imbalances inherent in our judicial system.").

[47] Branston, *supra* note 43, at 264 n.8 (emphasis added).

attempt to protect their interests. If successful, no further redress is necessary.[48]

Such discretionary real-time decisions, however, are not always efficient. If private decision-makers are uninformed, irrational, or simply corrupt, their decisions will not lead to a legitimate arrangement of rights and resources. Uninformed, irrational, or corrupt decision-making could lead to further acts of self-help or litigation in an attempt to rearrange rights and resources in a legitimate manner. Such acts of rearrangement, being far from efficient, produce redundancies and are wasteful of resources. Thus, private decision-makers must be informed as to the bounds of self-help so that they do not engage in illegitimate or otherwise inefficient behavior, which would negate one of the presumed principal benefits of self-help. Without such knowledge, private decision-makers cannot be expected to understand which acts would cross the boundary into unlawful vigilantism. How, though, do private decision-makers obtain knowledge about permissible or impermissible interpersonal behavior?

Thankfully, private law scholarship has been confronted with this very question numerous times. As this Part demonstrates, the dissemination of necessary information for private decision-making is possible, but it requires a shared, coherent, unified, and *intensional* framework. This Part will thus offer a deep dive into private law's reliance on social customs, intuitions, and coherent theories. As this Article demonstrates, a doctrinally coherent and prescriptively useful theory of self-help must comply with this set of dimensions and requirements rooted in private law.

A. The Power of Customs and Shared Expectations

Lay individuals generally know that murder is a crime and that if they engage in such behavior, they will be held criminally liable.[49] They do

[48] If self-help action prevents some but not all damages, lawsuits may nonetheless proceed. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 922 cmt. b (AM. L. INST. 1979) ("When a chattel has been converted and the person entitled to its possession recovers it, whether by legal process or *by self-help*, . . . the damages recoverable for the conversion are diminished to the extent of the value of the chattel at the time of its recovery or return." (emphasis added)).

[49] I expect the reader does not require a citation for this proposition.

not, however, know the minutia of tort, contract, or property doctrines. Nonetheless, individuals are let loose upon the world to interact with each other without much to-do. Lack of legal knowledge, thankfully, does not lead to disastrous consequences, and many of their interpersonal interactions occur successfully without resort to legal interference. Arguably, many of these interactions take place under the shadow of law.[50] Most, however, occur with no regard to law at all.[51] After all, "large sections of social life are located and shaped beyond the reach of law."[52]

When Sarah promises to pick up Susan's kids from school in exchange for a chocolate bar, for example, Sarah does not first remind herself of contract law, of consideration, and of the meeting of the minds.[53] Rather she refers to their shared understanding of promise. Susan's reliance on Sarah's stated behavior, alongside Sarah's own compassion, will likely

[50] *See generally* Barak D. Richman, *Norms and Law: Putting the Horse Before the Cart*, 62 DUKE L.J. 739, 744 (2012) (noting that in a shadow-of-law system of dispute resolution "parties have a reasonably accurate understanding of their legal rights — specifically, the rights that a state-sponsored court will enforce with the state's coercive powers — and will manage their transactions and disputes accordingly"); *see also generally* M. Alexander Pearl, *Of "Texans" and "Custers": Maximizing Welfare and Efficiency Through Informal Norms*, 19 ROGER WILLIAMS U. L. REV. 32, 42-43 (2014) ("In a shadow of law base system . . . [t]he parties have a reasonably accurate view of their legal rights — something that entirely relies upon the existence, operation, and use of public law courts rendering relevant decisions.").

[51] Some describe the resulting sum of these interactions as "order without law," a term made famous by Professor Robert Ellickson. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

[52] ELLICKSON, *supra* note 51, at 4. Ellickson's perspective, however, is not free from controversy. Douglas Litowitz, for example, argues that:

> Neighbors can live outside litigation (that is, they can resolve disputes without setting foot in a courtroom), but they cannot live outside the law. . . . Ellickson's claim that people live outside the law misses the deeper point that law is *constitutive* of social ontology. . . . Law does not merely stand above and regulate a pre-existing society, but is already "on the ground," causing a society to exist in a particular way, *all the way* down.

Douglas Litowitz, *A Critical Take on Shasta County and the "New Chicago School,"* 15 YALE J.L. & HUMANS. 295, 320 (2003) (emphasis in original).

[53] *See, e.g.*, Carter v. United States, 102 Fed. Cl. 61, 66 (2011) ("A contract requires 'a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.'" (quoting RESTATEMENT (SECOND) OF CONTS. § 17 (1981))).

lead her to fulfil her obligation. When Tommy steals Timmy's Pokémon card during recess,[54] Tommy does not need to cross reference his emotions against the doctrines of personal property law to know he has been wronged.

In fact, in unique circumstances, interpersonal interactions and extra-judicial conflict resolution may even actively *reject* "state law and state institutions," notwithstanding actual knowledge of legal rules.[55] An empirical study of Shasta County ranchers, for example, found that the community "rejected the county's substantive property law and in its place articulated alternative substantive rules." [56] Violations of local norms were punished through "gossip," "social sanctions," "scorn," and "exclusion."[57] In such contexts, "neither state law nor the law's shadow plays a role in securing social order."[58] Note that the redress and "extralegal enforcement mechanisms" in the Shasta County study were "wholly outside the parameters of the state."[59]

These examples demonstrate that individuals (e.g., Sarah, Tommy, and the ranchers) do not generally rely on the knowledge of legal doctrines when engaging in their private lives and interacting with each other. When making discretionary decisions "such as purchasing land, entering into contracts, and determining one's interactions with friends, neighbors, and strangers," individuals do not require or wait to attain specific legal knowledge; rather, individuals frequently "rely on a baseline of *shared expectations* about the behavior of others and [about the] availability of redress when such expectations are violated."[60] It is this intuitive core of shared expectations that forms the foundation of private ordering.

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[54] Although the legal concept at play here would be conversion of chattel, the word "steal," is likely what Tommy would use to describe the situation.

[55] Richman, *supra* note 50, at 746 (summarizing and commenting on ELLICKSON, *supra* note 51); *see also* Pearl, *supra* note 50, at 47 ("Despite the existence of a law preventing a certain behavior, a norm may nonetheless arise in a community that encourages (or at least does not discourage) an individual's election to act otherwise.").

[56] Richman, *supra* note 50, at 746.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] João Marinotti, *Possessing Intangibles*, 116 NW. U. L. REV. 1227, 1233 n.29 (2022) (emphasis added).

While these examples can be taken merely as descriptions of successful systems of private ordering, they also delineate aspects of our social system that promote individual autonomy and efficiency. Without reliance on shared expectations, individual autonomy is limited to mere physical control. Take Sarah and Susan, for example. Sarah does not physically control Susan; nonetheless, the trust she places in Susan's future behavior allows Sarah to extend her power beyond physical control. Sarah will not physically pick up her kids; nor will she physically force Susan to pick up her kids. Despite this lack of force, Sarah's autonomy in decision-making is respected when Susan follows the expected behavior of complying with a promise.

Without reliance on shared expectations, efficiency is also limited beyond mere physical control. Susan benefits from having Sarah pick up her kids for otherwise she would not have entered into the agreement. Likewise, Sarah benefits from picking up the kids and from obtaining the promised chocolate bar, for otherwise she would not have entered into the agreement either. This mutually beneficial agreement, however, would not have taken place without Susan and Sarah both trusting that the others' future behavior would align with their shared expectations. Sarah would have to pick up her own kids and Susan would go without a chocolate bar but for the strength of their shared expectations.

Thus, if a community has shared intuitions about what is expected behavior, individuals within the community will plan their lives under the assumption that (most) individuals will adhere to these expected behaviors.[61] When such expectations are shattered, individuals hold liable those whose *unexpected* behavior caused them harm.

Another word for this set of shared expectations is "custom."[62] While both terms refer to the same phenomena, "custom" highlights the

[61] *See, e.g.*, Carol M. Rose, *Psychologies of Property* (*and Why Property Is Not a Hawk-Dove Game*), *in* PHIL. FOUNDS. OF PROP. L. (J.E. Penner & H.E. Smith, eds., 2013) ("[M]ost non-owners are not larcenists, and they do not like larcenists. . . . [Y]ou do not have to guard your things all the time, because the 'world' of non-owners respects your ownership.").

[62] *See, e.g.*, Smith v. Garnero, 194 P. 375, 376 (Wash. 1920) (noting that there was a "*general custom*" which should have informed the expectations and actions of the parties (emphasis added)). For an analysis of this case and the role of custom, see João Marinotti, *Tangibility as Technology*, 37 GA. ST. U. L. REV. 671, 703-04 (2021) [hereinafter Marinotti, *Tangibility as Technology*].

cultural and historical background involved in creating the shared expectations whereas the term "shared expectations" highlights the interpersonal rationale behind the customs' relevance to private law. In fact, local customs are more likely to be incorporated into legal doctrines if they are built on a broader set of shared expectations.[63]

To fully understand how such theories of customs and shared expectations play out in real communities with real disputes, two examples are highlighted: the first demonstrates how shared expectations can invalidate liability; and the second demonstrates how adhering to shared expectations — even when such expectations are illegal under public law — negates liability under private law.

In 1875, Jupiter Mining sued Bodie Consolidated for trespass onto a gold-bearing quartz vein located due east of Sacramento, California.[64] Jupiter Mining had never registered its ownership over the vein, but registration was not required by federal law at the time.[65] Thus, when Bodie Consolidated began mining the disputed ore, Jupiter Mining thought they were clearly in the right. Despite positive law's relative clarity, the California Circuit Court did not immediately side with Jupiter Mining. Rather, the court highlighted the central role that custom played in settling mining disputes: California law explicitly acknowledged that "customs, usages, or [private] regulations, when not in conflict with the laws of this state, must govern the decision of the action."[66] The court, therefore, ordered the jury to determine whether California mining customs negated Jupiter Mining's legal claims.[67]

[63] *See* Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5, 23 (2009) ("We should tend to find more incorporation of community custom where the custom relies on knowledge likely to be found outside the community or relies on salience and focal points that do not require intense interaction by the parties.").

[64] Although the case does not describe the contents of the vein, it is likely a gold-bearing quartz vein. *See Bodie Mining District*, MINDAT, https://www.mindat.org/loc-209168.html (last visited Oct. 13, 2024).

[65] Jupiter Mining Co. v. Bodie Consol. Mining Co., 11 F. 666, 680 (C.C.D. Cal. 1881) ("The congressional law does not require a record . . . .").

[66] *Id.* at 673.

[67] *Id.* at 678-79 ("There is testimony tending to show that the rule and custom of miners in Bodie district at the time the Lucky Jack location, under which defendant claims, was made, required mining claims to be recorded within a certain time after location, [but there is also] testimony also tending to show that there was

Customs, the court noted, could potentially invalidate Jupiter's claim to legal title outright.[68]

In 1929, Cartwright and Geysel engaged in a prize fight[69] that took place in Seattle, Washington.[70] At the time, Washington law made prize fighting a gross misdemeanor.[71] As a "matter of business or sport," however, the unlawful prize fighting that did occur was governed by a generally shared understanding that the fighting would be done without (i) "anger," (ii) "malicious intent to seriously injure," and (iii) "excessive force."[72] Although both fighters adhered to these expectations, Cartwright ultimately died from an injury sustained during the fight. In adjudicating a wrongful death suit against Geysel, the Supreme Court of Washington concluded that because the rules of the sport were so widespread, easily understood, and shared amongst the two litigants, they "expressly consented to and engaged in" the fight.[73] The court noted that because of this explicit understanding

no mining recorder elected in Bodie district from July 3, 1869, to October 9, 1875, — more than six years, including the period of this location; and that during a portion of this time, at least, in the apparent uncertain condition of affairs, some locators recorded their claims in the office of the county recorder, and also in the books of the district in the possession of the last preceding recorder, or of the last preceding deputy recorder, of the district, and the Lucky Jack, at least, in the county recorder's office only.

If you find a rule or custom to record to have been in force in the district at the time, then a record was necessary to perfect and preserve the rights of the locators as against all subsequent locators, at least, not having actual notice of the prior location. If no such custom was in force, then no record was necessary . . . . *The custom to record, and the place of the record, to be binding, ought to be so well known, understood, and recognized in the district that locators should have no reasonable ground for doubt as to what is required to make and preserve a valid location*. It is for you, gentlemen, to determine, from the evidence in the case, what record, if any, and the place where it must be made, the custom in force at the time required; whether the custom was in all particulars sufficiently known and recognized to make it binding upon the miners; and whether the location of the Lucky Jack claim substantially conformed to it." (emphasis added)).

[68] *Id.* at 678.

[69] *See Prizefight*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/prizefight (last visited Dec. 8, 2023) [https://perma.cc/G2ZR-ADKW] (a prizefight is "a professional boxing match").

[70] Hart v. Geysel, 294 P. 570, 571 (Wash. 1930).

[71] *Id.* at 571.

[72] *Id.* at 572.

[73] *Id.*

between defendant and plaintiff, a violation of public law does not per se expose the defendant to liability.[74] Ultimately, the shared understanding enabled the explicit consent which negated the wrongful death claim.

A crucial element present in these examples is the set of expectations shared and accepted by the members of each community. These expectations were not written in thousand-page acts of Congress. Rather, they were built on general principles understood by the communities that abode by them.

B. The Role of Coherence and Explanatory Theories

From the discussion so far, it would be understandable to confuse the concept of shared expectations with the concept of "common sense,"[75] the "sound and prudent judgment based on a simple perception of the situation or facts."[76] If individuals within a community share expectations, after all, such expectations would likely be considered "sound and prudent judgements." As explained below, however, the two potentially overlapping concepts also have critical differences. These differences explain why certain shared expectations gain force of law and why others may not. Specifically, the differences between common sense and shared expectations highlight the role of coherent explanatory theories in private law. Such theories form the required substrate from which private law doctrines can establish a robust foundation capable of adapting to the social and technological upheavals that have now become the norm.

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[74] *Id.* ("To enforce the criminal statute against prize fighting, it is not necessary to reward the one that got the worst of the encounter at the expense of his more fortunate opponent.").

[75] In fact, academic and judicial discussions on "common sense" and "expectations" sometimes interweave these concepts. *See, e.g.*, David E. Van Zandt, *An Alternative Theory of Practical Reason in Judicial Decisions*, 65 TUL. L. REV. 775, 815 (1991) ("[D]eciding a matter under prior existing law comports with the *expectations* of parties and *common sense*." (emphasis added)); Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541, 544-45 (1988) (labeling the *Katz* reasonable *expectation* of privacy test for the Fourth Amendment as a "*common sense* approach." (emphasis added)).

[76] *Common Sense,* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/common%20sense (last visited Jan. 2, 2024) [https://perma.cc/8BNH-RSBX].

Common sense refers to "good" but "unsophisticated and unreflective" judgements.[77] Frequently, these judgements are "shamelessly and unapologetically ad hoc."[78] From any single individual's perspective, common sense simply is what it is. Take the context of groceries as an example. After buying a dozen eggs, Adam from the United States might immediately store them in the refrigerator without even thinking about it. Why? Well, it's common sense. Eggs go in the fridge. Britney from the United Kingdom, on the other hand, might store the dozen eggs in the pantry without even thinking about it. Why? Well, that's also common sense. Eggs go in the pantry. Of course, there are scientific reasons behind these distinct egg-storage cultural practices,[79] but Adam and Britney will probably not engage in any sort of analysis before putting away their eggs.

In a static culinary world, both individuals would be sufficiently informed and safe from the evils of salmonella.[80] Imagine, though, a dynamic world in which both Adam and Britney see a new and unusual item in the grocery store. Is common sense sufficiently informative for food safety in this situation? It depends. If the novel goods are ostrich eggs — a new but recognizable item — then both individuals might be protected by analogizing to the common sense they already have. The underlying food processing methods used in the US and UK would likely lead to similar outcomes for all edible bird eggs. If the novel goods are brand new, however, the "common sense" of egg storage will leave Adam and Britney high and dry. Common sense is not robust enough to

[77] RENÉE ELIO, COMMON SENSE, REASONING, & RATIONALITY 3 (2002) (emphasis omitted).

[78] *See* Clifford Geertz, *Common Sense as a Cultural System*, 67 ANTIOCH REV. 221, 238 (1992); Andrew S. Gold, *The Elegance of Private Law*, *in* UNDERSTANDING PRIVATE LAW: ESSAYS IN HONOUR OF STEPHEN A. SMITH (Evan Fox-Decent, John C. Goldberg & Lionel Smith eds., forthcoming Jan. 2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4573837 [https://perma.cc/8TGA-P3L7] (citing Geertz and noting that the superficial and ad hoc nature of these judgements means that a community's set of common sense "may even be inconsistent at times").

[79] In fact, due to processing differences, refrigerated eggs are safer to eat in the US whereas unrefrigerated eggs are safer to eat in the UK. *See* Russ Parsons, *Here's Why You Have to Refrigerate Eggs in the U.S. But Not in Europe*, L.A. TIMES (July 14, 2014), https://www.latimes.com/food/dailydish/la-dd-heres-why-we-need-to-refrigerate-eggs-20140714-story.html [https://perma.cc/43RS-YLZB].

[80] *See id.*

adequately protect Adam and Britney in the face of wave after wave of new culinary treats. Ultimately, something more is needed. A coherent theory of food safety, shared between farmers, distributers, grocers, and buyers, is needed. Such a theory could be used to address novel situations never before encountered, situations in which common sense fails to provide adequate guidance.

Similarly, the shared expectations that provide a robust foundation for private law (including self-help) are not merely superficial, unreflective, and discrete sets of judgements. They are not merely the set of all alleged truths accepted by a community. Rather, they must be *robust and coherent explanatory theories of human behavior* shared within a community. Note that by theory, I do not mean an explicit studied framework such as a scientific theory. Rather, the term "theory" here comes from the study of cognition and theory-of-mind. "Theories," in this context, allow "psychologically competent humans [to] understand and predict thought and action by inferentially applying a body of implicit knowledge."[81] As Louise Röska-Hardy explains, "the attribution of mental states both to self and others is based on knowledge of a *theory*, which deploys mental state concepts like perception, belief, and desire within a network of causal-explanatory generalizations."[82]

The definition of coherence is also worth clarifying. By labeling such explanatory theories as coherent, I do not mean that they must be perfectly logical or completely cohesive, two impossibly high standards. What I do mean is that legally relevant shared expectations, and their respective mental theories, are sets of beliefs, values, and predictions that interact with each other to form an adaptive explanatory theory of human behavior. Such explanatory theories attempt to explain (though not always successfully) *why* things are the way they are.[83]

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[81] Louise Röska-Hardy, *Theory Theory* (*Simulation Theory, Theory of Mind*), *in* ENCYCLOPEDIA OF NEUROSCIENCE 4064, 4064 (Marc D. Binder, Nobutaka Hirokawa & Uwe Windhorst eds., 2008).

[82] *Id.* (emphasis added).

[83] *See, e.g.*, Matthew S. Dryer, *Descriptive Theories, Explanatory Theories, and Basic Linguistic Theory*, *in* CATCHING LANGUAGE: THE STANDING CHALLENGE OF GRAMMAR WRITING 207 (Felix K. Ameka, Alan Dech & Nicholas Evans eds., 2006) (noting that in the context of linguistics, "Descriptive theories . . . are theories about what languages are like. . . . Explanatory theories . . . are theories about why languages are the way they are." (emphasis omitted)).

As noted above, these coherent explanatory theories are not the product of a scientific inquiry. Instead, the creation of these theories is simply a consequence of human cognition and social experience. As other work in private law has discussed, these theories largely stem from three aspects of human life. First, we acquire many of these theories as learned associations, whether economic, social, or otherwise. Second, the basic "cognitive effects of human perception" shape the way we understand the world and theorize about its workings.[84] And third, socialization spreads and reinforces culturally prevalent or salient theories. In other words, social, cultural, and biological factors[85] all play central roles in our theory-building.

At this point it is important to acknowledge that to some, the conclusion that social and biological factors affect our beliefs, expectations, and decision-making is obvious, uninteresting, or at least irrelevant for positivist legal studies. This conclusion, however, is foundational to an understanding of how private law — and ultimately self-help — functions in society.[86]

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[84] Marinotti, *Tangibility as Technology*, *supra* note 62, at 709.

[85] To some, the claim that biology plays a role in human perception and behavior may sound too deterministic. Note, however, that I am not claiming that human behavior is solely determined biologically. Rather, I am merely noting that biology, which includes the study of psychology, cognition, and neuroscience, affects everything down to our ability to conceptualize object permanence. *See generally* P.L. Harris, *Development of Search and Object Permanence During Infancy*, 82 PSYCH. BULL. 332 (1975) (describing the developmental psychology of object permanence).

[86] While it is also true that "[p]ublic law, like private law, could hardly exist without a significant degree of voluntary compliance by persons subject to its mandates . . . given that [public law's] content is collectively determined, it can deviate more sharply from social norms than private law . . . ." Merrill, *supra* note 24, at 578-79. The content of public law "is subject to more avulsive changes than private law, and often elicits sharper disagreement relative to private law." *Id.* at 579.

Note that the argument made here is not equivalent to John Stuart Mill's broader proposition that "the laws . . . are, and can be, nothing but the laws of the actions and passions of human beings" governed solely by "laws of individual human nature." JOHN STUART MILL, A SYSTEM OF LOGIC, RATIOCINATIVE AND INDUCTIVE 608 (8th ed. 1882). Rather, the relevant argument here is merely that in the "large sections of social life" governed by private law individual expectations, social customs, and intuitions play a critical role in decision-making. *See* ELLICKSON, *supra* note 51, at 4. Ultimately, as Thomas Merrill summarized, private law must be "highly stable and predictable" in order to serve its purpose in enabling private ordering. Merrill, *supra* note 24, at 591.

By analyzing legally binding shared expectations as coherent theories, we are ready to demonstrate why self-help cannot simply be conceived of as an "indiscriminate cataloguing of behaviour."[87] Such a catalogue would lack "any unifying characteristics." Any unreflective catalogue-approach to self-help would ultimately be "meaningless,"[88] giving individuals no coherent theory to rely upon when engaging with others, protecting their rights, and addressing novel situations.

As the next Section illustrates, coherent theories can and do exist in private law jurisprudence and, therefore, should be the gold-standard for any theory of self-help. By doctrinally rejecting *extensional* legal concepts, private law frequently eschews common-sense style unreflective reasoning. Instead, private law and self-help doctrines must rely on *intensional*[89] concepts which directly align with the coherent theories discussed above.

C. Normativity in Intensional and Extensional Legal Definitions

To understand how private law, and self-help, rely on coherent theories rather than itemized lists of prohibited or allowed behavior, we must first define the terms "intension" and "extension" and then apply them to legal definitions. While the nuances of these terms differ in the fields of philosophy, psychology, neuroscience, linguistics, and mathematics, the basic underlying concepts are all we need for the purposes of this Article. Put perhaps too succinctly, a concept's intension refers to the concept's set of necessary and sufficient conditions.[90] A concept's extension, on the other hand, consists of the set of real world entities, events, or ideas to which the concept refers.[91]

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[87] Sinel, *supra* note 12, at 46.

[88] *Id.*

[89] This technical word (spelled with an 's') is distinct from the common term "intention" (spelled with a 't').

[90] *See* Georg Löckinger, Hendrik J. Kockaert & Gerhard Budin, *Intensional Definitions*, *in* 1 HANDBOOK OF TERMINOLOGY 60, 64 (Frieda Steurs & Hendrik J. Kockaert eds. 2015) (An intensional definition "describes the intension of a concept by stating the generic concept and the delimiting characteristics" where the generic concept is the "superordinate concept.").

[91] James A. Hampton, *Concepts*, *in* THE MIT ENCYCLOPEDIA OF THE COGNITIVE SCIENCES 176, 177 (Robert A. Wilson & Frank C. Keil eds., 1999) ("The extension of a

As will be described in more detail below, at any one time, a concept's intension and extension may be coextensive.[92] Nonetheless, if a concept's extension is legally authoritative, novel situations cannot be addressed but through ad hoc decisions. If a concept's intension is legally authoritative, however, novel legal questions may nonetheless have determinate answers. Furthermore, if a concept's intension is based on shared expectations, these determinate legal answers may be relied upon when defining the boundaries of expected behavior even in unique situations.

Concretely, this means that if a concept such as self-help is defined intensionally, based on a set of shared expectations derived from coherent theories of human behavior, private law can hold individuals liable for breaching the bounds of self-help into vigilantism even in never before addressed situations. It is for this reason that this Article proposes an intensional framework of self-help.

To see how intensional definitions are more efficient and robust, let us take a look at the mathematical concept of multiplication.

During elementary school, many if not most of us were required to memorize multiplication tables. We learned by rote memorization the fact that 1 x 1 = 1, 2 x 2 = 4, and 2 x 4 = 8.[93] At this stage of learning, the concept of multiplication appears to be a simple aggregation of individual "*multiplication facts*" taking the form of "statements like: 'three times two is six.'"[94] Later, we understood that multiplication represents a mathematical function with inputs and outputs, but until then we were simply expected to memorize a set of *facts* in the arbitrary shape of *multiplicand x multiplier = product*.[95]

concept is the class of objects, actions or situations in the actual external world which the concept represents and to which the concept term therefore refers . . . .").

[92] *See* Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097, 2100 (2012) ("intensions" are "functions from states of the world to sets of objects"; "extensions" are the "set of things denoted").

[93] John Trivett, *The Multiplication Table: To Be Memorized or Mastered?*, *in* 1 FOR THE LEARNING OF MATHEMATICS 21, 21-22 (1980); *see also* Rob Eastaway, *In Praise of the 12 Times Table*, BBC NEWS BLOG (July 8, 2013), https://www.bbc.com/news/blogs-magazine-monitor-23230183 [https://perma.cc/84AV-JQW9].

[94] Trivett, *supra* note 93, at 21-22 (emphasis added).

[95] Or *factor x factor = product*.

Despite the presentation of multiplication as a set of facts, the *definition* of multiplication is not a set of abstract truths. Multiplication is a function. Multiplication is the "mathematical operation that at its simplest is an abbreviated process of adding an integer to zero a specified number of times."[96] Until we understand this underlying function, multiplication is a static concept unapplicable to new mathematical questions. If a child has never before seen the question of 143 x 21, they will not be able to derive the answer unless they understand the underlying function behind the multiplication symbol. Notice that these two approaches to multiplication map directly onto the concepts of extension and intension. The set-of-facts approach is an extensional definition of multiplication, while the mathematical function approach is an intensional approach to multiplication.

In theory, these two approaches are coextensive. If someone memorizes an infinitely large set of multiplication facts in the form of *multiplicand x multiplier = product* they would be largely indistinguishable from someone who has understood the multiplication function. In fact, they would actually be faster at answering multiplication questions because all they would need to do is look up the predetermined answer. Unfortunately, no human has this ability.[97] Infinitely large sets of information are not something we can handle. Therefore, in real life, individuals must rely on the intension of multiplication when facing all but the simplest of multiplication questions.

Similarly, when individuals face a world full of unique and unprecedented situations, it is unlikely that an extensional set-of-judgements approach to self-help would be a sufficiently robust method of decision making. Instead, an intensional understanding of self-help

[96] *Multiplication*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/multiplication (last visited Jan. 2, 2024) [https://perma.cc/PTB2-NRRK].

[97] In this way, extensional approaches to multiplication parallel extensional approaches to linguistics and cognition in which an "extensional definition is of limited interest from a cognitive point of view and a more fruitful generative approach entails the specification of (finite) mechanisms that are capable of generating the language in question . . . by specifying principles of combinations as well as non-terminal symbols over which these mechanisms operate," though much more of an intensional approach. Karl Magnus Petersson, *On the Relevance of the Neurobiological Analogue of the Finite-State Architecture*, 65 NEUROCOMPUTING 825, 826 (2005).

may offer better guidance in determining the expected bounds of allowed behavior. By specifying a concept's underlying principles, the concept's "intension" can uncover "the set of objects that fall under the concept in '*all possible worlds*,'" even in those we have not yet encountered or memorized.[98] Rather than merely enumerating items that currently fit within the concept, intensional definitions of self-help would "highlight characteristics that would otherwise be hidden."[99]

Ultimately, as the concept is currently understood, the list of actions that constitute self-help "is so long and the behaviour(s) identified so heterogeneous that self-help becomes a meaningless, empty concept."[100] In other words, self-help has been defined extensionally. As this Article has demonstrated, however, a single coherent, intensional framework of self-help is necessary for self-help to be successful as an efficient mechanism in private law. The clarity, coherence and robustness offered by an intensional framework of self-help is necessary for "[a]ny normative system whose purpose is actually to guide people's behavior, including how they should think about what they are doing."[101]

II. SELF-HELP AS PART OF CIVIL RECOURSE

To build a robust framework of self-help, it is first necessary to understand what self-help does *not* refer to. Specifically, this Article addresses two common understandings of self-help that might impede the derivation of a coherent framework. By demonstrating how these conceptualizations of self-help are self-defeating or irrelevant for our analysis, this Part contextualizes self-help within the larger system of civil recourse. Self-help, as this Article argues, is part of our civil recourse system and must therefore function in harmony with the

[98] As opposed to the extension of a concept which comprises "the set of all objects [or actions] in the 'actual' world which fall under the concept." Hampton, *supra* note 91, at 177 (emphasis added). For self-help, this would refer to the list of actions already considered legitimate self-help (though precedent or statute) without needing to engage in further analytical thinking.

[99] Löckinger et al., *supra* note 90, at 67.

[100] Sinel, *supra* note 12, at 33.

[101] *See* JAMES E. PENNER, PROPERTY RIGHTS: A RE-EXAMINATION 23 (2020).

principles and purposes of civil recourse.[102] This conclusion sets the groundwork for Part III in which our intensional framework of self-help is derived.

A. The Private Law of Self-Help Is Not an Alternative to the Legal System

Self-help is sometimes understood as part of the "state of nature."[103] It is interpreted as the means through which pre-legal humans engaged in conflict resolution. Without a legal system to prevent and address interpersonal conflict, pre-legal humans resorted to taking matters into their own hands. This version of "self-help," which I refer to explicitly as *pre-legal self-help*, has indeed "been a useful and widely employed remedy in society since the outset of human kind."[104]

It was only over time, through "social evolution and the growth of law" that "the degree of [pre-legal] self-help . . . declined." [105] Legal institutions slowly replaced pre-legal self-help as the primary — or sole — means of conflict resolution. Eventually, the state came to "preclud[e] individuals from exercising [pre-legal] self-help on their own."[106] Instead, the state provided "the private right of action" as "a substitute means for a wronged party to act against a wrongdoer."[107]

Does pre-legal self-help provide us with any insights into existing private law doctrines of self-help? Insights from pre-legal self-help would indeed be helpful if the modern law of self-help were derived from it. But that is not so.

If self-help referred to the left-over means of extra-legal redress that were *not* "precluded" by the state, then modern and pre-legal self-help would be one and the same. This analysis would view self-help as existing wholly outside of the legal system. In fact, it would be the

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[102] *See* Taylor, *supra* note 1, at 846 ("Although self-help is non-judicial, it is not extra-legal and does not lie outside the 'shadow of the law.'").

[103] Smith, *supra* note 31, at 106 ("Except in the state of nature, entitlements to self-help require some delineation.").

[104] CĂTĂLIN GABRIEL STĂNESCU, SELF-HELP, PRIVATE DEBT COLLECTION AND THE CONCOMITANT RISKS 51 (2015).

[105] Donald Black & M.P. Baumgartner, *On Self-Help in Modern Society*, 12 DIALECTICAL ANTHROPOLOGY 33, 33 (1987).

[106] Andrew S. Gold, *The Taxonomy of Civil Recourse*, 39 FLA. ST. U. L. REV. 65, 68 (2011).

[107] *Id.*

definitional inverse of the legal system. Everything that the state has incorporated into law would be subtracted from the set of all pre-legal self-help measures, leaving behind instances of extra-legal private action that would comprise modern self-help.

If defined in this way, extra-legal self-help would now comprise all background freedoms left over once the state enacted a set list of itemized restrictions against the original set of pre-legal self-help measures. Is that helpful? No. It would redefine self-help as simply that which is not restricted by law. Self-help would simply refer to lawful extra-legal action.

This definition does not meet the requirements of a doctrinally cohesive and prescriptively useful definition of self-help. Rather than providing self-help with any guiding principles, it reinforces "the dumpster analysis" of self-help.[108] It would define self-help as merely a collection of left-over doctrines from various areas of law. We must therefore reject the analysis of self-help as the set of extra-legal freedoms left over from pre-legal self-help. The private law of self-help is something entirely different.

B. The Private of Law Self-Help Is Not the Law of Helping Oneself

Understandably, self-help is also frequently understood as all actions taken to help oneself. Given this common — and expansive — analysis, it is no wonder that almost anything can be, and has been, considered instances of self-help:

> [S]elf-defence, rebuttal, deprogramming, protection of personal property, recovery of personal property, detention of suspected shoplifters, abatement, defence of others, vigilantism, neighbourhood watch programs, the 'Guardian Angels,' resistingunlawful arrest, escaping from official incarceration,

[108] *See generally supra* notes 10–14 and accompanying text. In the specific literature of tort law, Goldberg and Zipursky have introduced a parallel concern known as the "Hodgepodge Problem." The authors introduce (and ultimately rebut) the idea that "torts seem not to have any common characteristics," that "there is no conceptual integrity to the idea of tortious wrongdoing," and that "it is unhelpful to think of torts as wrongs." John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 936-37 (2010).

> liquidated damages provisions, repossession, commercial arbitration, distraint, eviction, rent application, antenuptial agreements, divorce mediation, and alternative dispute resolution (ADR).[109]

Despite its intuitive appeal, this approach lacks limiting principles. Unadulterated altruism aside, every action we take can be analyzed as one that helps ourselves. Even altruism, some argue, does not exist but for its benefits to those who are altruistic.[110] The following examples demonstrate how this conceptualization of self-help is problematically vacuous.

Irving, an investment analyst, notices some unusual and unnerving market volatility. Unfortunately, Irving's job performance to date has been rocky. Not only is his yearly bonus on the line, but his future at the company may also be at stake. Thankfully, Irving has a new AI algorithm that he's sure will outperform the market in this tricky situation. Is using this algorithm self-help? Irving thinks that it will not only protect his future bonus earnings but will also protect his very livelihood. If his actions are indeed self-help, what isn't? Irving woke up at 8 AM to make it into work on time. Is this self-help? Without waking up on time, he would surely be reprimanded; he might lose his bonus and would potentially be fired. Irving orders a latte every morning on his way to work. Without it, he would be way too tired to pay attention to his work duties. Is this self-help?

As this example demonstrates, helping oneself cannot functionally define the scope of self-help. If it did, self-help would encompass

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[109] Sinel, *supra* note 12, at 35 (citing concepts from Douglas I. Brandon, Melinda L. Cooper, Jeremy H. Greshin, Alvin L. Harris & James M. Head, Jr., *Special Project: Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 850-1039 (1984) (The special project, the most comprehensive study ever conducted of self-help doctrine in American law, sought to identify "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.")).

[110] Barry Schwartz, *Why Altruism is Impossible . . . and Ubiquitous*, 67 SOC. SERV. REV. 314, 315 (1993) (noting, but not agreeing with, the background assumption in social science and psychology that "for altruism to occur, there simply must be something in it for the altruist and, further, that something must be not merely an incidental byproduct of the altruistic act but its cause").

anything motivated by a cost-benefit analysis. Even escaping prison would likely fall under the category of self-help. Of course, escaping prison is unlawful. To exclude such actions from a cost-benefit analysis of self-help, one would need to define self-help as the set of all lawful actions that help oneself. We would find ourselves, once again, with a definition of self-help that simply refers to actions not prohibited by any existing body of law. The definition itself would be normatively vacuous, providing no guiding principles or limiting factors. In our search for a doctrinally coherent and prescriptively useful definition of self-help we would once again show up empty handed.

It is also worth pointing out that self-help, under this analysis, would include actions that have no external effects at all. If I crack my knuckles out of a habit that makes me feel better, this action would be considered self-help. As one commentator noted, this definition would be truly "absurd":[111] "[This conclusion] shows quite starkly that something has gone wrong with the leading definition [of self-help]. How is it that if a defendant chooses to stay at home and twiddle his thumbs, he exercises self-help? This is an uncomfortable, if not absurd, conclusion."[112]

Self-help cannot refer to "everything one does that is independent of a court or executive say-so."[113] If it did, self-help would be "quite meaningless."[114] To retain any possibility of meaningfulness, self-help must refer solely to actions that have consequence. Specifically, as a legal term, self-help must refer to actions that have legal consequences, that is, actions that affect another's access to legal rights and resources. Without this requirement, no unified concept of self-help is possible because the category would encompass the large majority, if not the entirety, of human behavior.

C. The Civil Recourse Purpose of Self-Help

This Part began by demonstrating how two popular definitions of self-help lead to self-defeating conceptual dead ends. These are examples of what the private law concept of self-help is not. By analyzing why these

[111] Sinel, *supra* note 12, at 44.

[112] *Id.*

[113] *Id.*

[114] *Id.* at 45.

conceptualizations fail, the Part has also clarified two features that must indeed be present in any coherent and useful definition of self-help. First, by rejecting self-help as an extra-legal remedy, this Article places self-help within our system of civil recourse rather than outside of it. Second, by refusing to accept that everything that helps oneself is self-help, this Article has narrowed the scope of self-help to actions that affect another's access to legal rights and resources.

Together, these two requirements provide the groundwork for defining the scope and purpose of self-help. On one end of the spectrum, these requirements reject an overly expansive view of self-help that would include all manner of "legally permissible" actions, such as "[w]alking with friends on a well-lighted street"; locking doors to homes and automobiles; "remov[ing] valuable objects from plain view"; and even "hir[ing] bodyguards."[115] This analysis, as Richard Epstein has argued, would be "incautiously broad."[116]

At the other end of the spectrum, these requirements explain why self-help is frequently only available if it "is subject to potential judicial oversight" in most areas of domestic law.[117] As David Pozen has noted: "If I take it upon myself to redress a perceived breach of my contract or property rights — say, by deducting damages from what I owe a seller or by trespassing to reclaim a personal chattel — then a court may eventually be engaged to review the legality of my actions."[118]

In other words, if Person A engages in self-help in a way that affects Person B's access to legal rights and resources, Person B "can always seek civil recourse and complain of the self-helper's conduct."[119] This is not just a theoretical assertion, as Zoë Sinel has demonstrated:

> [T]he few self-help cases on the books reflect just this situation. In *Blades v. Higgs*, the purchaser of the poached game sued the self-helping defendants for their exercise of recaption. In *Lemmon v. Webb*, Mr. Lemmon sued Mr. Webb for the self-helping actions he undertook to abate a nuisance. In cases of

[115] Epstein, *supra* note 1, at 3.

[116] *Id.*

[117] Pozen, *supra* note 13, at 51.

[118] *Id.*

[119] Sinel, *supra* note 12, at 65.

> self-defence, it is the defendant who raises the self-help remedy as a defence to the plaintiffs claim against him in assault or battery.[120]

These features of self-help must be taken seriously. They must be part of any theory of self-help that aims to have both prescriptive and explanatory power. Thus, they form the foundation for this Article's theory of self-help. They neatly place self-help within our system of civil recourse. Self-help exists as part of a single multi-stage process of achieving civil recourse for perceived infringements. Thus, self-help cannot undermine civil recourse, nor can it exist outside of the legal system entirely. Rather, legitimate self-help can only exist within and in harmony with our system of civil recourse.

Prior analyses of self-help have sometimes approximated this conclusion by arguing that self-help only refers to actions that are "presumptive wrongs"[121] or normally "legally impermissible."[122] These analyses posit that a prior or imminent wrong against the self-helper grants the self-helper a "privilege" to engage in otherwise unlawful behavior.[123] By describing self-help as an action that "otherwise would be tortious,"[124] these theories are indeed able to bring self-help into the civil recourse system. They are also able to narrow the scope of self-help to those actions that affect another's access to legal rights and resources. But this approach is circuitous. It defines self-help in relation to the acts of another. It also, theoretically, presumes that lay individuals, outside of court, in the midst of their daily lives, will be able to perceive of *civil wrongs* as *civil wrongs*. Without this legal analysis, how else would individuals be assured ex ante of their privilege to engage in otherwise tortious conduct?

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[120] *Id.*

[121] Epstein, *supra* note 1, at 3-4.

[122] Sinel, *supra* note 12, at 66.

[123] *See* Epstein, *supra* note 1, at 3-4. Epstein relies on the definition of privilege found in the Restatement (Second) of Torts: "The word 'privilege' is used . . . to denote the fact that conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances does not subject him to such liability." RESTATEMENT (SECOND) OF TORTS § 10 (AM. L. INST. 1965).

[124] RESTATEMENT (SECOND) OF TORTS § 10 cmt. a (AM. L. INST. 1965).

By defining self-help as a "[t]he commission of an act that constitutes a prima facie violation of the law . . . in response to someone else's violation,"[125] these theories cite to ex post legal determinations. Private individuals, as this Article has explained, require an ex ante definition of self-help. Such ex ante frameworks can provide guiding principles to individuals before engaging in conduct that could ultimately be tortious. Thus, this Article not only places self-help within our system of civil recourse, but it also defines a self-help framework that does not rely on a future court's analysis of another's alleged civil wrong.

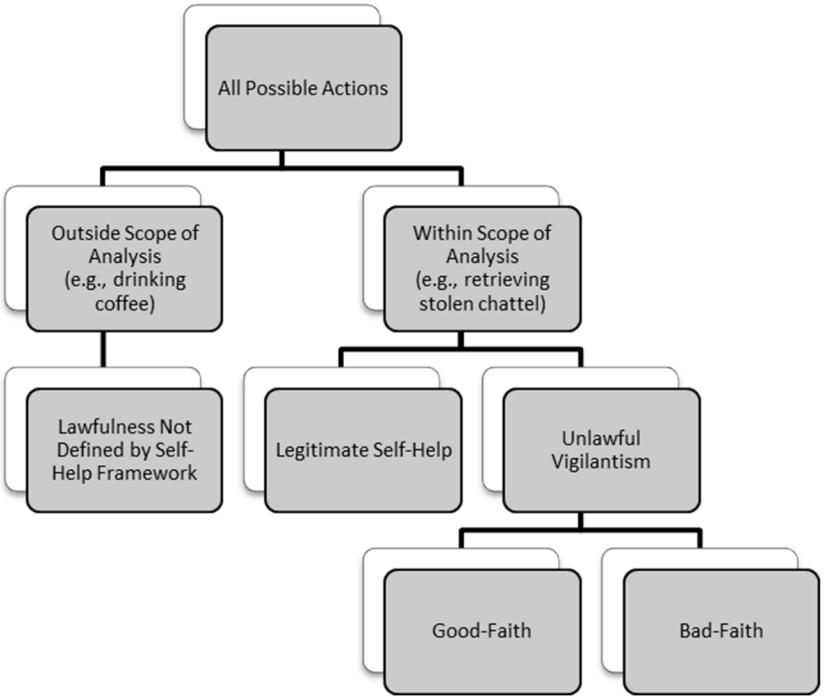
III. DERIVING A NORMATIVE FRAMEWORK OF SELF-HELP

With this theoretical foundation in place, we are finally ready to build the much-needed *intensional* framework of self-help. This framework proceeds in four parts, building up to the following doctrinal analysis of self-help:

> Self-help refers to unilateral, relational actions that affect another's access to legal rights and resources. Legitimate self-help cannot:
>
> 1. cause irreparable harm;
> 2. lead to an unlawful arrangement of rights and resources;
> 3. cause unreasonable risk to another; or
> 4. rely on the abuse of civil processes.
>
> If any of these requirements is not met, the action is unlawful and is categorized as either good-faith or bad-faith vigilantism.

[125] Pozen, *supra* note 13, at 11-12 (noting that attempting to define self-help in this way "is inherently more fraught than" defining self-help as "the commission of an act that would be lawful regardless").

Graphically, the framework may be described as follows:



Before delving into the framework itself, a terminological clarification is in order. All actions that fall within our scope of analysis are considered self-help. Some of these actions are lawful and others are not. The former are referred to as legitimate self-help. The latter are vigilantism. Under this framework, vigilantism is another term for unlawful self-help.

The self-help framework is described as follows. Section A examines which actions fall within our Scope of Analysis. Section B examines the two bright-line rules that distinguish between lawful self-help and unlawful vigilantism. Section C examines the two contextual standards that distinguish between legitimate self-help and unlawful vigilantism. And finally, Section D analyzes the doctrinal distinctions between good-faith and bad-faith vigilantism.

A. Scope of Analysis

As this Article has demonstrated, the concept of self-help applies to a strictly delimited set of actions that play a role within the larger system of civil recourse. Thus, legitimate self-help must go beyond simply helping oneself *and* must refrain from crossing the line into unlawful vigilantism. This Section examines the first of these requirements. By determining which actions go beyond simply helping oneself, this Section defines which actions are subject to a self-help analysis in the first place. Drinking one's morning coffee is neither lawful self-help nor unlawful vigilantism. It is simply outside the scope of this framework.

Actions that fail to meet the eligibility requirements presented here may be lawful or unlawful, but such determinations are based on other areas of law. The lawfulness of such actions is not determined by the substantive private law principles of self-help discussed here.

1. Unilateral

Self-help refers to actions taken unilaterally. As Richard Epstein noted, the word self-help "typically evokes images of *unilateral* behavior by a single individual acting alone."[126] Common examples of self-help reinforce this notion: "[W]hen Jane seeks to grab her watch back from the thief[, s]he is seemingly a private party *unilaterally* enforcing her rights, acting on her own behalf."[127] But what exactly does this mean?

First, it means that the term self-help does not apply to collaborative decision-making or communal action. If Person A and Person B agree to engage in Action X, there is no self-help between these two individuals. If Action X does not affect the rights of any other individuals, it falls wholly outside the scope of this framework.

This seems rather straightforward: if Person B consents to Person A's action toward Person B, then the action is not self-help. Notice,

[126] Epstein, *supra* note 1, at 3 (emphasis added) (noting, however, in his analysis of self-help "nothing . . . precludes one or more persons from acting in support of any individual or group of individuals that is subject to a wrong").

[127] Andrew S. Gold, *Private Rights and Private Wrongs*, 115 MICH. L. REV. 1071, 1075, 1077 (2017) (emphasis added) (contrasting this view with the possible argument that self-help "represent[s] an omnilateral will instead of exemplifying . . . unilateral coercion").

however, that the framework employs the term unilateral. It does not use the term non-consensual despite the fact that consent "permeates our law," establishing a rich body of jurisprudence to learn from.[128] Why shouldn't this framework be built on the foundational pillar of consent?

This framework purposefully avoids the word consent because contract law jurisprudence has stretched the meaning of consent beyond what is reasonable in this context.[129] A California court, for example, described "nonjudicial foreclosure sales, vehicle repossessions[,] and a bank's exercise of its equitable right of setoff" as "private *consensual* self-help remedies."[130] According to this court, the existence of "notice" through a prior written contract of adhesion renders these remedies "consensual."[131]

Does James really consent to the repossession of his car? James *did* sign the financing agreement. The agreement *did* contain information about repossession. And James *did* default on his payments. Does this truly equate to consent? According to contract law, the answer is yes.[132] Doctrinally, James allegedly gave prior informed consent to the repossession.[133] Factually, however, "[c]ontracts of adhesion," including

[128] Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 WASH. U. L. REV. 1461, 1462 (2019) (noting that consent "is the basis of contracts, whether for goods, services, real estate, or marriage. The consent of the governed is the basis for the rule of law in democratic societies and was an important basis for the American Revolution. Consent can also work magic. When consent is present, trespassers can become dinner guests, a battery can become a welcome pat on the back, and even what would otherwise be a sexual assault can become an act of intimacy. Consent's power, its usefulness, and its resonance with norms of autonomy and choice make it an easy legal tool to reach for when we want to regulate behavior").

[129] As Daniel Solove argues, defining consent "has proven to be a contentious and difficult issue wherever it is involved," from the context of "contract to sexual assault to plea bargaining to waiver of rights." Daniel J. Solove, *Murky Consent: An Approach to the Fictions of Consent in Privacy Law*, 104 B.U. L. REV. 593, 596 (2024).

[130] Martin v. Heady, 103 Cal. App. 3d 580, 587 (Cal. Ct. App. 1980) (emphasis added) (contrasting these allegedly "consensual" remedies with "nonconsensual" statutorily imposed liens).

[131] *Id.* at 584, 587.

[132] *See* Res. Mgmt. Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1047 (Utah 1985) ("Each party has the burden to understand the terms of a contract before he affixes his signature to it and may not thereafter assert his ignorance as a defense.").

[133] To add to the confusion around consent, some courts actually call contractually allowed repossession non-consensual, while enforcing their validity nonetheless. *See,*

James' financing agreement, "involve[e] little in the way of negotiation and informed consent."[134]

This stretched reading of consent is, unfortunately, only gaining steam. Take online terms of service ("ToS") and end user license agreements ("EULAs") as examples. Consent, in these contexts "is a fiction. When the law allows dubious or nonexistent consent to masquerade as valid consent, it grants unwarranted legitimacy" to all manner of unilateral action.[135] The problems inherent to this version of consent have deservedly attracted scholarly attention.[136] Unfortunately, as Neil Richards and Woodrow Harzog have explained:

> [C]ritics [of this fictional version of consent] lack a shared vocabulary with which to discuss when consent is legitimate, when it is flawed, and how to talk about and distinguish those

e.g., Borg-Warner Acceptance Corp. v. Scott, 86 Wash. 2d 276, 279 (Wash. 1975) ("[A] creditor or seller has, *without the consent of the debtor*, repossessed items sold under a security agreement giving the right of repossession . . . ." (emphasis added)).

[134] Andrew Tutt, Note, *On the Invalidation of Terms in Contracts of Adhesion*, 30 YALE J. ON REGUL. 439, 445 (2013).

[135] Solove, *supra* note 129, at 596 (discussing "data collection, use, and disclosure," specifically).

[136] *See, e.g.*, NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 218 (2019) ("Legal consent is a conclusion, and without understanding how that conclusion was reached, we cannot determine whether it promotes or diminishes autonomy."); Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 32 (2014) (noting how few individuals read "standard-form online contracts." The author's empirical research estimates that the "fraction of retail software shoppers who access EULAs is between .05 percent and .22 percent . . . . Even under generous assumptions, it is difficult to envision the probability that EULAs are read (and understood) growing even to 1 percent"); Meg Leta Jones & Jenny Lee, *Comparing Consent to Cookies: A Case for Protecting Non-Use*, 53 CORNELL INT'L L.J. 97, 109 (2020) (noting how bills requiring consent for online tracking "required users to research, understand, and set settings by hand, [and so] were inherently at odds with the concept of true consent because they considered silence (in the form of an uneducated or unaware user) to represent a user's active decision to be tracked"); Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1901 (2013) ("What does consenting to something really mean? What should the law recognize as valid consent? Many transactions occur with some kind of inequality in knowledge and power. When are these asymmetries so substantial as to be coercive? The law's current view of consent is incoherent, and the law treats consent as a simple binary (that is, it either exists or it does not). Consent is far more nuanced . . . .").

> flaws. Our lack of the right words and concepts with which to talk about defects in consent models runs into the rhetorical, cultural, and legal power of consent. As a consequence, consent criticism can fail to gain traction in the minds of those who are undecided or who have taken consent's powerful "consenting adults" rhetoric at face value.[137]

If this framework were to rely on the basics of consent, it would inherit the fragmented, internally inconsistent, and normatively fraught status quo of consent jurisprudence. Thankfully, the concept of consent is not necessary. Instead, this framework must only determine whether actions are unilateral.

Unilateral actions are those taken by one individual, or other distinct legal entities.[138] Consent is not what matters. Instead, what matters is that self-help may not be a collective enterprise amongst the would-be self-helper and the would-be self-helpee. An action is unilateral if it is "done or undertaken *by one person or party*."[139]

In other words, if an action is undertaken collaboratively by both Person A and Person B, it does not qualify as self-help. If Johann asks Jan to step out of his way *and* Jan does step out of Johann's way, no self-help occurred. If, instead of asking, Johann simply pushes Jan out of his way, he is acting unilaterally. He is acting unilaterally not because Jan's lack of consent; rather, he is acting unilaterally because Jan did not act at all.[140]

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[137] Richards & Hartzog, *supra* note 128, at 1464.

[138] Self-help measures may be taken by any distinct legal person or entity. A "distinct legal entity" is one "with legal rights, obligations, powers, and privileges." Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001).

[139] *Unilateral*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/unilateral (last visited Oct. 26, 2024) [https://perma.cc/2BKC-4T5F] (emphasis added). Within the limits of this paper, I leave open the question of whether a group of individuals working in concert may take a collective self-help action, for example, where three neighbors decide to block the entrance to a public road. Note, however, that this does not apply to corporate action, which is done by a single legal entity.

[140] At this point, one may be wondering how this framework addresses the actions that are made lawful through actual consent. Consensual actions may be analyzed in two ways. First, true informed consent may be analyzed as an act by the would-be self-helpee. In this way, the would-be self-help measure would no longer be unilateral. Of course, this would simply resurface all of the problems with consent jurisprudence that

2. Relational Action

Self-help refers to relational action. These are actions between the self-helper and the self-helpee(s).[141] Actions by Person A that affect no one cannot be self-help, as discussed above, because they are not part of the system of civil recourse.[142] Self-help measures *must* affect other legal individuals (or other legal entities). But who exactly is this other individual? The identity of the would-be self-helpee may be categorized based on when the self-help measure takes place.[143]

a. Reactive measures

The prototypical example of self-help is the reactive measure. As the name suggests, these measures are taken in response to some prior precipitating act. Most frequently, reactive self-help measures are those taken against another who has infringed on one's rights. For example, if a thief steals Amanda's purse, Amanda's property rights have been infringed. She runs after the thief and engages in reactive self-help measures to retrieve her rightful property. In this case, the self-helpee is the thief, the individual whose original precipitating act triggered the self-help. Note, however, that the normative salience of *victim* and *perpetrator* in this burglary example are not requirements for this

this Article has attempted to bypass. Alternatively, consent may simply lead to a determination of lawfulness through the four substantive tests for legitimate self-help (described in Parts III.B and III.C). It is not that consent itself plays a doctrinal rule, but rather that the features that would make an action consensual would also make it lawful under this framework. For more on this, see sources cited *supra* note 136.

[141] The analysis of actions that affect society or the world writ large is more complex: if self-help measures would affect society through a "battery of one-to-one" relations, each individual relation is subject to our scope of analysis. *See* PENNER, *supra* note 101, at 87 (describing — but not agreeing with — the idea that multital rights may be analyzed as a "battery of *one-to-one rights in personam*" (emphasis in original)).

[142] *See, e.g.*, *supra* notes 110–114 and accompanying text.

[143] This analysis mirrors the categorization of self-defense in the law on the use of force (*jus ad bellum*) in international law: preventive versus preemptive or anticipatory self-defense, and self-defense that occurs after an armed attack had materialized. For further reading, see generally Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 700 (2005) (describing the concept of preemptive self-defense); CHRISTIAN HENDERSON, THE USE OF FORCE AND INTERNATIONAL LAW 34-35 (2d ed. 2023) (describing the rules of self-defense taken in response to a prior armed attack).

framework.[144] Rather, they are just demonstrative of a common instance of reactive self-help. More broadly, reactive self-help measures take the following form: First, the self-helpee engages in precipitating action 1. Then, in response, the self-helper engages in action 2 which affects the self-helpee. Note that the self-helpee's original action is not inherently defined as wrongful or even as an infringement of the self-helper's rights. This is purposeful. As the following subsections demonstrate, reactive measures may occur erroneously, corruptly, or simply in response to lawful activity. The rest of the framework analyzes such reactive measures and determines whether they are instances of legitimate self-help or unlawful vigilantism. This latter legal determination of lawfulness, however, does not change their status as reactive measures subject within the scope of this analysis.

b. Preemptive measures

Preemptive self-help measures are those taken in response to a self-helpee's "credible" and "imminent" action.[145] Note, again, that the imminent action need not be wrongful for the purposes of this categorization. It does not need to be imminent *harm*, imminent *infringement*, or imminent *unlawful* behavior. Rather, preemptive measures are those taken by the self-helper to prevent the self-helpee from engaging in *some* activity, regardless of what that might be.

It is also important to note that the term preemptive refers solely to the successful negation of the self-helpee's intended action. As this Article goes on to describe, preemptive measures can only be categorized as self-help if they affect another's access to legal rights and resources. Successfully swerving out of the way to prevent a would-be

[144] Other analyses of self-help, rely on similarly words such as "potential plaintiff" and "potential defendant." Sinel, *supra* note 12, at 35 n.32 (noting the "awkwardness of referring to the relevant actors as 'plaintiffs' and 'defendants,' as these are labels reserved for parties before a court").

[145] William H. Taft, IV, *Preemptive Action in Self-Defense*, 98 AM. SOC'Y INT'L L. 331, 332 (2004) (noting that the right of preemptive action in self-defense is traditionally only available in the context of "credible, imminent threat and the exhaustion of peaceful remedies"); *see also* Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 769, 775-77 (2012) (listing sixteen "principles [r]elevant to the [s]cope" of right of preemptive self-help measures).

purse thief from successfully stealing my purse is not a preemptive self-help measure. It would indeed preempt the theft, but such a self-protective measure would fall outside the scope of analysis because no action took place that affected another's ability to enjoy their legal rights and resources. Thus, such action would be wholly outside the system and purpose of civil recourse.

c. Preventive measures

Preventive self-help measures are those taken in preparation for some possible future non-imminent event. Building a fence to secure one's property line, for example, prevents a possible future trespass. Note, however, that such actions cannot be truly categorized as self-help because they do not affect the ability of others to access their legal rights and resources. Building a fence is very much like "locking the door of one's car or walking home on a well-lit street."[146] They are actions that help oneself, but they are not examples of self-help. But it is not the "speculative" nature of building a fence that removes it from this framework's scope of analysis.[147] Rather, it is the fact that building a lawful fence does not affect — or have the ability to affect — another's rights.

Imagine, instead, the automatic spring gun used in the famous torts case of *Katko v. Briney*.[148] As established by the court, the relevant facts were as follows:

> On June 11, 1967 [the property owner self-helpers] set "a shotgun trap" in the north bedroom . . . . [They] took [the 20-gauge shotgun] to the old house where they secured it to an iron bed with the barrel pointed at the bedroom door. It was rigged with wire from the doorknob to the gun's trigger so it would fire when the door was opened. . . . As [trespasser self-helpee] started to open the north bedroom door the shotgun went off

[146] Pozen, *supra* note 13, at 11.

[147] *Id.*

[148] 183 N.W.2d 657 (Iowa 1971).

> striking him in the right leg above the ankle bone. Much of his leg, including part of the tibia, was blown away.[149]

Here, the preventive measure was both: (i) taken in response to a possible future event and (ii) had the ability to affect a another's ability to enjoy their legal rights and resources. In this case, the possible future event was a trespass and the self-helpee's right to enjoy bodily integrity was affected. What makes an event merely speculative, rather than imminent or likely, concerns the knowledge possessed by the self-helper about the probability that the event will materialize in light of its nature and prior experience.

Note that both the court in *Katko* and this framework, as demonstrated below, would ultimately determine that a preventive measure such as this is unlawful and crosses the line into vigilantism. Nonetheless, the gun trap itself is a preventive measure within the scope of analysis.

3. Affects Another's Ability to Enjoy Their Legal Rights and Resources

Finally, as actions subject to judicial oversight and part of the civil recourse system, self-help measures must affect another's ability to enjoy their legal rights and resources. As this Article has demonstrated, this requirement is necessary to avoid an utterly "meaningless" definition of self-help. Instead, for a doctrinally coherent and prescriptively useful definition of self-help, the framework adopts this requirement to successfully exclude actions such as having one's morning coffee[150] or even building a lawful fence.[151]

B. Bright-Line Rules

We have now limited the scope of analysis to unilateral, relational actions that affect another's ability to enjoy their legal rights and resources. The rest of this framework determines the lawfulness of such actions and their doctrinal consequences. By applying the theoretical

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[149] *Id.* at 658.

[150] *See supra* notes 110–114 and accompanying text.

[151] *See* Pozen, *supra* note 13 and accompanying text.

requisites derived above for a functional private law of self-help, this Section builds two bright-line rules that provide clear boundaries between actions that may be considered legitimate forms of self-help within our system of civil recourse and those that cross the line into unlawful vigilantism.

1. Irreparable Harm

Legitimate self-help measures cannot cause irreparable harm. The rationale behind this requirement comes from the civil recourse purpose of self-help. As part of the civil recourse process, then, legitimate self-help measures cannot undermine the very purpose of recourse; they cannot undermine "potential judicial oversight."[152] Self-help must work *with* judicial remedies; it cannot preemptively nullify the power of civil recourse to restore order and make whole those harmed.

To understand this requirement fully, it is first necessary to determine one of the core purposes of the civil recourse system. As John Goldberg has argued:

> Government, by taking on the task of maintaining civil society, obtains from individuals a variety of powers that they would otherwise be entitled to exercise. Thus, apart from special cases such as self-defense, the victim of a wrong is by law disabled from responding to the wrong on his own, or with the aid of his friends or kin. If he attacks or seizes another or expropriates her goods in an effort to obtain satisfaction for the wrong done to him, he will be subject to liability for battery, false imprisonment, and/or conversion, as well as criminal punishment. With resort to [pre-legal[153]] self-help blocked by the law, government is obligated, at least to some degree, to provide an alternative path for the attainment of satisfaction. Granting the victim a right to redress is an obvious way for government to fulfill that duty, particularly when the law

[152] Pozen, *supra* note 13, at 51 (noting that self-help is only available if it "is subject to potential judicial oversight" in most areas of domestic law).

[153] Goldberg does not claim that self-help is always prohibited; rather this analysis is one in which pre legal self-help freedoms (as defined in Part II.A *supra*) are replaced with access to private rights of action.

> declines to impose affirmative legal duties on officials to act in other ways for the protection of individuals.[154]

In other words, the civil recourse system is a result of "the state's obligation to empower individuals" with private rights of actions to hold accountable "those who have wronged them."[155] Failing to provide such a system would be a "violation of the due process right to a law for the redress of private wrongs."[156]

Any coherent part of the civil recourse system, then, cannot disempower individuals by undermining the potency of private rights of action. Irreparable harm wrought through extra-judicial means would do just that. By causing irreparable harm, such measures would reduce societal confidence in the process of civil recourse. Individuals would live in fear, knowing that they could be subject to another's irreparable but lawful self-help action. In such a world, self-helpees would have to choose between engaging in further irreparable acts of self-help against the original self-helper and waiting for judicial oversight which would be unable to make the self-helpee whole or hold the original self-helper sufficiently accountable.

If irreparable harm were ever accepted as legitimate self-help, individuals would face a race to the bottom. Rational individuals would in most instances prefer facing toothless future judicial oversight over enduring current irreparable harm. This system would render private rights of action impotent and would, therefore, have no place in a purposeful system of civil recourse.

Before moving onto other requirements of self-help, a couple of words on the definition of irreparable harm are warranted. As the term suggests, it refers to harms that cannot be adequately remedied by any judgements awarded ex post facto.

Determinations of irreparable harm are not new to law. Such determinations are routine requirements in the context of injunctive

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[154] John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to A Law for the Redress of Wrongs*, 115 YALE L.J. 524, 606 (2005).

[155] Benjamin C. Zipursky, *Substantive Standing, Civil Recourse, and Corrective Justice*, 39 FLA. ST. U. L. REV. 299, 300, 322 (2011).

[156] *See* Goldberg, *supra* note 154, at 627.

relief.[157] Therefore, this framework adopts such equitable tests for irreparable harm as have been developed for injunctions. Irreparable harm "cannot be based on speculation and hypothesis," and the "harm must be irreversible before it is deemed irreparable."[158] The harm incurred "must be of a peculiar nature, so that compensation in money cannot atone for it."[159] Any "loss capable of recoupment in a proper action at law" does not constitute irreparable harm.[160]

Note, however, that this bright-line requirement refers to causing actual irreparable harm. In the context of injunctive relief, irreparable harm is frequently analyzed in the counterfactual.[161] Courts determine whether irreparable harm *would* occur (or would be *likely* to occur) if an injunction were not granted. For self-help, *risk* of irreparable harm is analyzed through another standard described below.[162] The bright-line rule examined here refers to actual irreparable harm that has come to pass.

2. Lawful Arrangement of Rights and Resources

As part of the civil recourse process, self-help must lead to a lawful arrangement of rights and resources.[163] On the surface, this requirement

[157] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer *irreparable harm* in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." (emphasis added)).

[158] Cutler v. Chapman, 289 A.3d 139, 155 (Pa. Commw. Ct. 2023) (noting the irreparable harm requirement of preliminary injunctions).

[159] Glasco v. Hills, 558 F.2d 179, 181 (3d Cir. 1977).

[160] *In re* Arthur Treacher's Franchisee Litig., 689 F.2d 1137, 1145 (3d Cir. 1982).

[161] Ramirez v. Collier, 595 U.S. 411, 421 (2022) (noting that plaintiffs requesting preliminary injunctions must show that they are "likely to suffer irreparable harm in the absence of preliminary relief").

[162] *See infra* Part III.C.1.

[163] Legal rights may be further broken down into claim rights and liberty rights (and their respective duties), as defined by Hohfeld. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 36 (Walter Wheeler Cook ed. 1920). As João Marinotti summarized:

> According to Hohfeld's classic framework: (1) claim-rights are those rights which correlate to duties, meaning that X's claim-right and Y's duty "are two

seems simple enough. It would be almost oxymoronic to say that *lawful* self-help could be used to engender *unlawful* situations. For an action to be lawful it simply cannot lead to unlawful arrangements of rights and resources.

Another way of framing this requirement is by juxtaposing self-help with judicial proceedings. Under this framework, self-help and civil action are both part of the same system. As such, they have the same goal: to make victims whole and to hold liable those who commit wrongs. If the end result of a self-help measure is an arrangement of rights and resources that a civil court would rule as unlawful, the measure itself cannot be lawful.

What does this mean in practice? As noted above, lay individuals are not privy to ex post legal analyses. They may not know what a civil court would ultimately rule as lawful. How, then, does this requirement make sense in an intensional analysis of self-help meant to guide ex ante decision making and behavior?

The ex ante uncertainty of lay individuals is precisely the point. The less sure a would-be self-helper is of the lawfulness of her desired goal, the less she should pursue self-help measures in the first place. This is not only a normatively desirable feature of this framework, it is also descriptively accurate. If there is "clarity" in "the underlying rights," individuals are more capable of making "accurate assessments about those rights."[164] When more accurate assessments are available, the law is more likely to "permi[t] parties to take matters into their own hands."[165] As Celia Taylor noted:

> sides of the same coin"; (2) duties are simply defined as legal obligations to do or not do *a* (an action); (3) liberty-rights, unlike claim-rights, do not correlate to duties. X's liberty to do *a* is a descriptive statement noting that there is no person Y who has a claim-right that X not do *a*; and (4) no-rights correlate to liberties, such that if X has a liberty to do *a* then Y has a no-right over X's liberty to do *a*.

Marinotti, *Tangibility as Technology*, *supra* note 62, at 688. If a self-help measure leads to an unlawful arrangement of these jural relations, it cannot be labeled as anything other than unlawful itself.

[164] Badawi, *supra* note 1, at 43.

[165] *Id.*

> In most cases, parties have some understanding of legal rights. That understanding guides the determination to use self-help; a party that uses self-help does so with the backdrop of the legal system in mind. For example, a seller facing breach by a buyer who refuses to pay may exercise self-help by terminating further deliveries. The seller does not seek official recognition of its decision to stop delivery; it simply uses self-help to protect its interests. The decision to do so is made with some understanding of legal rights, even if those rights are not expressly relied on.[166]

In this example, the seller's ex ante legal certainty — about the lawfulness of the final arrangement of rights and resources that resulted from its actions — came from familiarity with the "legal regime."[167] As this Article demonstrated above, however, this is not necessary.[168] In the context of private law, customs, intuitions, and shared expectations are powerful heuristics for law.[169] In property law, there is an "*intuitive* understanding of what ownership entails."[170] In contract law, there is an "*intuitive* understanding of agreement."[171] And in the law of torts, there is too an "*intuitive* understanding that reciprocal exchanges must be roughly equal."[172] As examined in Part I.A of this Article, individual intuitions about the lawful arrangement of rights and resources in private law may provide sufficient certainty to engage in certain acts of

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[166] Taylor, *supra* note 1, at 846.

[167] *Id.*

[168] *See generally supra* notes 49–74 and accompanying text.

[169] It can also be said that private law is restrained from deviation too far from customs, intuitions, and shared expectations. Merrill, *supra* note 24, at 579, 591 ("[Public law] can deviate more sharply from social norms than private law, it is subject to more avulsive changes than private law, and often elicits sharper disagreement relative to private law. . . . This means private law must be rooted in history, evolve slowly, and respond to existing social norms. . . . It must be developed from the bottom up, reflecting existing practice among social actors . . . .").

[170] Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2067 (2012) (emphasis added).

[171] *See* Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 883 (2014) (emphasis added).

[172] Mohsen Manesh, *The Immorality of Theft, the Amorality of Infringement*, 2006 STAN. TECH. L. REV. 5, 102 n.189 (emphasis added).

self-help without ex post knowledge of law. Nonetheless, uncertainty about underlying rights should indeed keep individuals from engaging in self-help in situations where they may ultimately be engaging in unlawful behavior. In this way, the requirement for a lawful arrangement of rights and resources provides individuals with ex ante guiding principles to determine whether to engage in self-help measures in the first place.

C. Contextual Standards

Beyond the two bright-line rules that limit the scope of lawful self-help measures, the theoretical requisites for a private law of self-help described above also lead to two contextual standards. These standards require more than a categorical yes-or-no determination but nonetheless provide ex ante guideposts to a would-be self-helper.

1. Ex Ante Risk Analysis

By definition, self-help measures affect the ability of others to enjoy their legal rights and resources. As such, self-help always incurs a certain level of risk to the self-helpee, to third parties, and even to the self-helper herself. For self-help to be lawful, however, there must be a limit on the amount of risk incurred and on the magnitude of potential damage. It cannot be that a self-helper can lawfully risk global nuclear war for the sake of retrieving a stolen $5 bill. Any normatively reliable self-help framework must be able to reject such actions as unlawful. The concept of *proportionality* provides a means to distinguish between lawful and unlawful self-help measures based on such risk factors. In the context of self-defense in tort law for example, the Restatement (Second) of Torts establishes that an actor "is not privileged to use any means of self-defense which is intended or likely to cause a bodily harm or confinement *in excess* of that which the actor correctly or reasonably believes to be necessary for his protection."[173] Who gets to decide what is excessive in any particular circumstance? The Restatement turns to

[173] RESTATEMENT (SECOND) OF TORTS § 70 (AM. L. INST. 1965) (emphasis added).

the "reasonable [person]" operating under the conditions of the situation.[174]

In the context of constitutional review, proportionality is used to determine the lawfulness of legislative responses to perceived threat to national security, public order, and public safety.[175]

By analogy, proportionality is used here to determine the lawfulness of relational self-help measures.

In each of these cases, the depth and breadth of a proportionality assessment is of critical importance. "If too many considerations enter the proportionality analysis it tends to lose one of the important elements of the law, calculability, and thus it ultimately calls into question the goal of equal application of the law."[176] This is especially the case where lay individuals — not judges — are expected to engage in proportionality assessments. The number of factors to be considered may not be excessive nor may they be incalculably complex.

Another consideration that often permeates proportionality assessment is the level of knowledge possessed by the assessor of facts at the moment of authorizing a particular measure:

> As the proportionality decision requires an assessment, it is imperative to understand whether the assessment is:

[174] *See id.* § 63 cmt. j.

[175] In general constitutional rational basis review"

> Proportionality Analysis . . . has three basic steps: (1) suitability, which examines whether the government action is rationally related to a legitimate government interest; (2) necessity, which asks whether the government has used the least restrictive means to advance its goals to ensure that the government does not burden the right more than is necessary for the government to achieve its goals; and (3) balancing "*stricto sensu*," which asks whether the marginal benefit of the government regulation to advance the legitimate public interest is greater than the marginal burden on the individual.

R. Randall Kelso, *Clarifying the Four Kinds of "Exacting Scrutiny" Used in Current Supreme Court Doctrine*, 127 PA. ST. L. REV. 375, 402 (2023).

[176] Georg Nolte, *Thin or Thick? The Principle of Proportionality and International Humanitarian Law*, 4 L. & ETHICS HUM. RTS. 243, 248 (2010).

> *subjective* (e.g., "where a person believes"),
> *objective but unqualified* (e.g., "where a person reasonably believes"), or
> *objective but qualified* (e.g., "where a doctor reasonably believes").[177]

In the context of self-help, proportionality assessments must be judged as "objective but unqualified."[178] In other words, self-help proportionality is judged through a lens of a reasonable person. Note, however, that this lens is context sensitive. In its original body of law, these proportionality assessments have been interpreted as being judged through "a reasonably well-informed person in the circumstances of the actual [original decision-maker]," a decision-maker that is "making reasonable use of the information available to him or her."[179] The same context-sensitivity applies here. A self-helper's proportionality assessment is judged from the lens of a "reasonably well-informed person in the circumstances . . . making reasonable use of the information available to him or her."[180]

With this interpretive structure in place, the ex ante risk analysis for self-help may rely on five factors. Note, however, that a determinative and exhaustive standard is beyond the scope of this Article. The following serve as a starting point derived from negligence jurisprudence and proportionality analyses in the bodies of law cited above.

First, the acceptability of risk depends on the nature of the self-help measure, whether the measure is preventive, preemptive, or reactive. As may be expected, the less concrete the self-helper's perceived harm, the

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[177] Ian Henderson & Kate Reece, *Proportionality Under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT'L L. 835, 840 (2018) (emphasis added) (formatting edited).

[178] *Id.*

[179] *Id.* at 841-42 (paraphrasing the International Criminal Tribunal for the former Yugoslavia in the case of *Galić*: "In determining whether an attack was *proportionate* it is necessary to examine whether a *reasonably well-informed person in the circumstances of the actual perpetrator*, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack" (first emphasis added)).

[180] *Id.*

less risk is acceptable because the assessor possesses a greater deal of uncertainty about the factual reality surrounding the measure. Second, the acceptability of risk depends on the availability and reliability of the relevant information. Third, the acceptability of risk depends on the perceived necessity of the self-help measure and whether less intrusive or restrictive measures are available to the self-helper to achieve the same legitimate aim. Fourth, the acceptability of risk depends on the foreseeability of harm and the likelihood of spillover or collateral effects. And fifth, the acceptability of risk depends on the overall level of expected disturbance of the peace.[181]

2. Abuse of Civil Process

By defining self-help as a unilateral, relational action that affects another's access to legal rights and resources, this framework departs from traditional analyses of self-help in yet another way. A logical consequence of the arguments put forth in this Article is that actions taken in the course of litigation, under judicial oversight, may nonetheless comprise self-help. Under the traditional notion, this conclusion is nonsensical; self-help is an "*alternative* to seeking state-sanctioned aid,"[182] and, therefore, any action that occurs as part of state-sanctioned aid would be categorically outside the scope of self-help.

This Article, however, rejected the idea that self-help is an alternative extra-legal method of redress. Instead, this Article demonstrated that self-help is defined by its role within the civil recourse system. Therefore, whether an action takes place in or out of court is immaterial to our analysis of self-help. Any action may be subject to this framework if it is a unilateral, relational action that affects another's access to legal rights and resources. Given the controversial nature of this claim, however, it is important to note that a reader's skepticism or even

[181] Such multi-factor analysis is necessary because it acknowledges the reality that punishing a self-helper for "conduct they cannot avoid at a reasonable cost will have either no effect or bad (inefficient) effect." RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 225 (1981). A test that embeds "reasonableness" factor and social policy rationales is thus the only kind of test that could ever be deemed efficient.

[182] Sinel, *supra* note 12, at 32 (emphasis added); *see, e.g.*, McIlroy Bank & Tr. v. Seven Day Builders of Ark., Inc., 1 Ark. App. 121, 131 (Ark. Ct. App. 1981) ("[S]elf-help and the replevin statutes are alternative methods for obtaining possession of collateral . . . .").

rejection of this subsection does not impact the arguments and framework put forth in the rest of the Article.

It is true, of course, that common examples of self-help — regardless of definition — are extra-judicial measures taken by lay individuals outside of courtrooms. But this is not a logical or definitional requirement. Self-help can consist both of *extra-judicial* measures as well as actions taken before a judge. These actions are referred to as *self-help sub judice*.[183]

By defining self-help in relation to its purpose within the civil recourse system, this Article demonstrates that at least two types of actions taken within the legal system may nonetheless qualify as self-help. The first of these is abusing civil procedure. The second is seeking and receiving judicial permission (e.g., court orders or injunctions) while knowingly taking advantage of the judicial system's lack of substantive oversight.

Before engaging in a deeper analysis of these examples, however, it is important to acknowledge that most actions taken within a lawsuit are not unilateral and therefore not within this framework's scope of analysis. By acting in accordance with civil procedure under a judge's "watchful eye,"[184] plaintiffs surrender their right of unilateral action in return for the state's assistance in achieving justice.[185] Court orders, injunctions, and similar proceedings are, for the most part, actions taken *by the state* on behalf of the plaintiff.[186] As such, they are not unilateral actions taken by the plaintiff and therefore cannot be considered self-help. But this is always the case. As demonstrated below, plaintiffs may take advantage of automatic civil procedures or insufficient judicial oversight, effectively bypassing the state's role in civil recourse. If plaintiffs reject or undermine the state's lawful role in acting *on behalf of* the plaintiff, preferring instead to take complete

[183] Building on the original Latin rather than the term of art.

[184] State v. Elwell, 380 A.2d 1016, 1020 (Me. 1977) ("[T]he trial justice has a continuing duty to keep a watchful eye over the proceedings . . . .").

[185] *See* Goldberg, *supra* note 154, at 606 ("Granting the victim a right to redress is an obvious way for government to fulfill that duty, particularly when the law declines to impose affirmative legal duties on officials to act in other ways for the protection of individuals.").

[186] *See id.*

control over civil proceedings, plaintiffs return to unilateral actions, which may be considered self-help.

In these situations, courts and judges become "passive."[187] They "serve as the near-automatic processors" of civil claims.[188] Aggressive, unilateral plaintiffs only "rarely" leave room for "judges to consider the suits."[189] Instead, such plaintiffs abuse the fact that "the shortest distance from filing through judgement to execution [is] between the offices of the clerk and the sheriff."[190]

By engaging in unilateral actions within the court system, however, plaintiffs impair the state's ability to pursue justice through civil recourse. They bypass judicial — and therefore the state's — informed consent, relying solely on their unilateral decision making.[191]

With this understanding in place, let us first discuss abusing civil procedure as a form of self-help *sub judice*. Our analysis of this type of action takes inspiration from the concept of "abuse of process."[192] "When litigants flagrantly misuse the 'tools of litigation' (e.g., motions, subpoenas, or discovery) for ulterior purposes," they attempt to undermine the goals of the civil recourse system.[193] Despite occurring

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[187] *See* Dalié Jiménez, *Decreasing Supply to the Assembly Line of Debt Collection Litigation*, 135 HARV. L. REV. F. 374, 378-79 (2022).

[188] Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1723 (2022).

[189] Thomas D. Russell, *The Antebellum Courthouse as Creditors' Domain: Trial-Court Activity in South Carolina and the Concomitance of Lending and Litigation*, 40 AM. J. LEGAL HIST. 331, 349 (1996).

[190] *Id.*

[191] If purposefully or knowingly abusing civil processes in this manner is deemed unlawful, the very unilateralism that brings such acts within self-help's scope of analysis would also categorize them as unlawful vigilantism *per se*. In other words, if an action *sub judice* is unilateral enough to be considered self-help, it is also unilateral enough to be unlawful vigilantism. Self-help *sub judice* and vigilantism *sub judice* would be coextensive.

It is also possible, however, that designating a measure as self-help *sub judice* is part of the scope of analysis, rendering such actions subject to the rest of the framework's bright line rules and contextual standards.

[192] *See* Annotation, *Comment Note. — Action for Abuse of Process*, 80 A.L.R. 580 (originally published in 1932) ("[C]ourts commonly refer to the abuse of process as being the perversion of regularly issued process . . . .").

[193] Jeffrey J. Utermohle, *Look What They've Done to My Tort, Ma: The Unfortunate Demise of "Abuse of Process" in Maryland*, 32 U. BALT. L. REV. 1, 1 (2002).

under judicial oversight, such actions are meant to avoid justice, accountability, and compensation. Instead, abusive processes promote the desires of one party above all else. In other words, abuse of civil procedure is a "unilateral, relational action that affects another's access to legal rights and resources."[194] As such, it falls within the scope of analysis and may be ultimately deemed unlawful.

The three doctrinal requirements for abuse of process are as follows: "(1) an illegal, improper, or perverted use of process"; "(2) an ulterior motive or purpose in exercising the illegal, improper, or perverted process"; and "(3) damage . . . as a result."[195] As applied to self-help, these requirements remain largely intact: abusing civil procedure as a means of self-help is (1) a perverted use of process (2) done with an ulterior motive (3) that results in damage.[196]

So far, this discussion has remained largely in the realm of logical reasoning; what does this type of self-help look like in practice? A prime example is the abuse of preliminary injunctions.[197] Plaintiffs sometimes have an "incentive to apply for a preliminary injunction strictly for the purpose of extracting a benefit from the issuance of a *wrongfully granted* preliminary injunction."[198] The benefits sought from this type of action frequently include increased bargaining power to force an unfair settlement. "Extracting such a benefit is clearly an illegitimate goal, as it is derived in violation of the defendant's legal entitlement."[199] Extracting this benefit from an existing legal process — pursuing a preliminary injunction — is (1) a perverted use of process (2) done with an ulterior motive (3) that results in damage. Therefore, such action

[194] *See supra* Part II.A.

[195] Rubber Res., Ltd. v. Press, No. 8:08-CV-1730-T-27TBM, 2009 WL 211556, at *2 (M.D. Fla. Jan. 27, 2009).

[196] In practice, it has been incredibly difficult for courts to define the legitimate purpose of civil processes. How does one distinguish between lawful legal gymnastics, innovative legal strategies, and malicious use of otherwise lawful legal tools? Where is the line? These questions fall outside the scope of this Article.

[197] *See generally* Ofer Grosskopf & Barak Medina, *Remedies for Wrongfully-Issued Preliminary Injunctions: The Case for Disgorgement of Profits*, 32 SEATTLE U. L. REV. 903, 904 (2009) ("A preliminary injunction is a pre-trial order issued with an explicit awareness of the possibility that it will be proved wrong.").

[198] *Id.* at 935 (emphasis added).

[199] *See id.*

would not only be within the scope of our analysis, but it would also cross the line into vigilantism despite occurring within the court system. Beyond undermining the legitimacy and purpose of the civil recourse system — and therefore being antithetical to it — such actions may also lead to irreparable harm, an unlawful arrangement of legal rights and resources, and an unacceptable level of risk

The second version of self-help *sub judice* occurs when parties knowingly take advantage of insufficient or inept judicial oversight. This occurs in highly technical or politically salient areas of law such as cybersecurity, national security, or even patent law. Plaintiffs here frequently turn to the courts looking for ex ante rubber-stamped approval of actions that would otherwise be unlawful. In such cases, the self-helpers know that the courts lack the requisite knowledge or analytical frames to properly assess their requests. Nonetheless, they ask the courts to label their actions as state sanctioned.

Further analysis of this version of self-help *sub judice* could lead to multiple articles in and of itself and is therefore outside the scope of this one. Nonetheless, Microsoft's war on botnets serves as a prototypical case study and has been analyzed under a version of this Article's framework.[200]

D. Vigilantism

The self-help framework presented in Sections A, B, and C defines which actions may be considered self-help and which actions cross the line into unlawful vigilantism. This Section examines the doctrinal consequences of vigilantism itself. It first considers unlawful actions taken in good faith. These are situations in which self-helpers reasonably, but erroneously, believe they are engaging in lawful conduct. It then examines action taken in bad faith. These occur when parties know, or should have known, that their actions were unlawful.

[200] *See generally* Marinotti & Lubin, *supra* note 31, at 36 (analyzing Microsoft's approach to botnet takedowns as a version of self-help *sub judice*).

1. Good Faith Vigilantism

As noted at the beginning of this Article, various legal doctrines allow, encourage, and even require individuals to engage in lawful self-help.[201] Such individuals, however, are not omniscient legal scholars; they will make mistakes. Sometimes, self-helpers will misjudge the legitimacy of their own actions and therefore engage in unlawful vigilantism. Despite being unintended, unlawful self-help actions still cause unlawful harm or unlawful risk of harm. They violate the rights of others. They are torts.[202] And as torts, they are "civil wrong[s] for which a remedy may be obtained."[203]

By designating unlawful self-help as a tort, the doctrinal consequences become clear. Where a self-helpee has been unlawfully harmed by a wrongful self-helper, the state is "obligat[ed] to empower" the self-helpee through private rights of action.[204] Failing to provide such a system would be a "violation of the due process right to a law for the redress of private wrongs."[205] Thus, a wronged self-helpee must have access to private rights of action as redress against the wrongful self-helper.

The result of this analysis is that a good-faith but nonetheless wrongful self-helper is liable to the self-helpee for compensatory damages.[206] But what about punitive damages? Tort jurisprudence has, thankfully, already answered this question: "With respect to both intentional and non-intentional torts, we have held that an award of *punitive damages generally must be based upon actual malice*, in the sense of

[201] *See* Hazel, *supra* note 5, at 336-41.

[202] *See* Gindele v. Corrigan, 129 Ill. 582, 587 (1889) (defining a tort "to be an injury or wrong committed, with or without force, to the person or property of another, and such injury may arise by either the non-feasance, malfeasance, or misfeasance of the wrong-doer").

[203] Gaskin v. City of Jackson, No. 303245, 2012 WL 2865781, at *7 (Mich. Ct. App. July 12, 2012) (defining torts).

[204] Benjamin C. Zipursky, *supra* note 155, at 300, 322.

[205] Goldberg, *supra* note 154, at 627.

[206] Wrongful self-helpers are also liable for collateral damaged caused to third parties. This distinction is not highlighted, however, because there is no doctrinal distinction between an intended self-helpee and an unintended collateral third party. Both would be considered self-helpees. The wrongful self-help action would have affected both party's access to legal rights and resources.

conscious and deliberate wrongdoing, evil or wrongful motive, intent to injure, ill will, or fraud."[207]

Punitive damages, then, are not available against a good faith but erroneous self-helper. The policy implications of this are explored further in the discussion of bad-faith vigilantes that follows.

2. Bad Faith Vigilantism

Parties who know, or should have known, that their self-help actions are unlawful engage in bad-faith vigilantism.[208] They reject and undermine the purpose of self-help as a means to further civil recourse. Instead, they pursue their own goals above all else.

Using the tort law definition of the term, bad faith vigilantes *intend* to violate one or more of the requirements of lawful self-help.[209] In accordance with this framework, bad faith vigilantism occurs when individuals: (i) knowingly cause irreparable harm;[210] (ii) purposefully engender an unlawful arrangement of legal rights and resources;[211] (iii) knowingly expose others to an unacceptable level of risk;[212] or (iv) purposefully abuse civil processes.[213]

To address bad faith vigilantism, court may use punitive damages for "punishment and deterrence."[214] In these circumstances, "punitive damages are awarded in an attempt to punish a defendant whose conduct is characterized by evil motive, intent to injure, or fraud, and to

[207] Montgomery Ward v. Wilson, 339 Md. 701, 733 (1995) (emphasis added).

[208] As the court noted in *Custom & Precision Products, Inc. v. Borruso & Co., P.C.*, "[t]he use of 'knew, or should have known' is an indication that the cause of action alleged by the complaining party is *intentional* in nature, rather than negligent." Custom & Precision Prods., Inc. v. Borruso & Co., P.C., No. CV116023113, 2012 WL 3854619, at *2 (Conn. Super. Ct. Aug. 13, 2012).

[209] *See* Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111, 122 (2008) ("[P]unitive damages may only be available in cases of intentional tort or recklessness."). The distinction between intentional and recklessness would take us beyond the scope of this article, but both lead to punitive damages and, therefore, both would be sufficient for bad-faith vigilantism.

[210] *See supra* Part II.A.1.

[211] *See supra* Part II.A.2.

[212] *See supra* Part II.B.1.

[213] *See supra* Part II.B.2.

[214] Adams v. Coates, 331 Md. 1, 13 (1993).

warn others contemplating similar conduct of the serious risk of monetary liability."[215]

CONCLUSION

By contextualizing self-help within the civil recourse system, this Article provides an original account of self-help as a substantive doctrine in private law. It relies on the New Private Law research framework and on Civil Recourse Theory to delineate the bounds, purposes, and requirements of self-help in modern society. The analysis thus provides the missing private law of self-help.

The Article thus establishes self-help as a unilateral, relational action that affects another's access to legal rights and resources. Lawful self-help cannot: (i) cause irreparable harm; (ii) lead to an unlawful allocation of rights and resources; (iii) cause unreasonable risk to another; or (iv) rely on an abuse of civil process. If any of these requirements is not met, the self-help measure is unlawful. Unlawful measures taken in good faith are nonetheless wrongful and therefore subject to compensatory damages. Unlawful measures taken in bad faith are liable for both compensatory and punitive damages as a means of punishment and deterrence.

The substantive private law of self-help, as described in this Article, is useful to legislatures, judges, corporations and individuals.

For legislatures, this framework provides a springboard for regulating subject-matter-specific self-help. Without understanding the purpose and scope of self-help, legislative frameworks may — for the sake of addressing one issue — undermine aspects of the civil recourse system as a whole. In addressing the recent "spate of crippling cyberattacks" in the United States, for example,[216] the judicial and legislative branches have struggled to coherently define the bounds of lawful cyber self-help. Without a conceptual understanding of the relevant principles, there is no cohesive way to balance tackling this global scourge while

[215] *Id.*

[216] *See* Asaf Lubin & João Marinotti, *Why Current Botnet Takedown Jurisprudence Should Not Be Replicated*, LAWFARE (July 21, 2021, 11:03 AM), https://www.lawfaremedia.org/article/why-current-botnet-takedown-jurisprudence-should-not-be-replicated [https://perma.cc/A83R-NFDM].

maintaining the civil recourse purposes of self-help.[217] The framework provided within this Article helps define the starting point for such legislative decision-making.

The framework also provides judges with the ability to employ self-help as a substantive body of law with its own internal prescriptive principles, even in — or especially in — cases of first impression. This provides a normatively useful alternative to the status quo in which self-help is perceived as a "meaningless" enumeration of non-prohibited but otherwise unrelated actions.[218] When analyzing self-help measures, judges can therefore go beyond solely relying on the fragmented subject-matter specific delineation of unlawful conduct imported from various other fields of law. Rather, even actions which are not otherwise prohibited may cross the line into unlawful vigilantism through the analysis of self-help as a stand-alone substantive body of private law.

Ultimately, the framework also assists individuals and corporations who seek to take self-help action but worry about potential fallout. This prescriptive account offers would-be self-helpers the necessary predictability, stability, and coherence to the private law of self-help.

At a time when the scope, magnitude, and frequency of self-help are on the rise,[219] questions of first impression are everywhere. The lack of a substantive law of self-help leads only to further confusion and increased harm. The private law framework of self-help derived in this Article provides legislators, judges, and individuals with this missing but much-needed guidance.

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[217] Marinotti & Lubin, *supra* note 31, at 201 ("[J]udges and legislatures have been weary of adopting their role as regulators of cyber self-help precisely because the concept of self-help has devolved into a confusing mess.").

[218] *See* Sinel, *supra* note 12, at 33.

[219] *See, e.g.*, hiQ Labs, Inc. v. LinkedIn Corp., 31 F.4th 1180, 1202 (9th Cir. 2022) (discussing a question of first impression in the context of "technological self-help").