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## **Domination in Wrongdoing**

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# DOMINATION IN WRONGDOING

GEORGE P. FLETCHER

## INTRODUCTION

Blackstone had a point in identifying crimes as public wrongs and torts as private wrongs.<sup>1</sup> Both crimes and torts claim victims, however, the victims' responses vary according to context. In criminal cases, the victim responds by hoping that the government will apprehend and successfully prosecute the offender.<sup>2</sup> In tort disputes, the victim responds by demanding compensation.<sup>3</sup>

It is unclear, however, what constitutes wrongdoing. Defining wrongdoing as the violation of rights is unhelpful, for that definition only raises other questions: Who has rights and what is their content? Therefore, to understand the nature of wrongdoing, we should seek a substantive theory of wrongdoing—an account of what is wrong and why it is wrong. I wish to venture a theory of this sort by examining the role of dominance, or domination, in wrongdoing.

Dominance is not the only form of wrongdoing; it is one type of wrong that, when properly explicated, illuminates large dimensions of torts and criminal law. The kind of dominance I have in mind is not class dominance of the sort asserted in the Marxist description of capitalism;<sup>4</sup> nor is it akin to the alleged dominance of women by men,<sup>5</sup> or blacks by whites.<sup>6</sup> These instances of status-dominance are undoubtedly unjust and wrong. If the dominance exists, then surely those subordinated would wish to take democratic or even revolutionary measures in response. Yet, the

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<sup>1</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*5 (asserting that private wrongs infringe upon civil rights and public wrongs breach public duties owed to the entire community).

<sup>2</sup> See *id.* at \*6 (contending that the Crown may indict an aggressor in the case of a battery because a public wrong harms the community and the Crown must protect the society from violation of its laws).

<sup>3</sup> See *id.* at \*5 (stating that, because private wrongs injure individuals, individuals must compensate for the wrongs themselves).

<sup>4</sup> See KARL MARX, CAPITAL: THE COMMUNIST MANIFESTO AND OTHER WRITINGS 322 (Max Eastman ed., Random House 1932) (premising the conflict between capitalists and workers on the notion that struggles have occurred between classes throughout history).

<sup>5</sup> See ANDREA DWORKIN, PORNOGRAPHY 14 (4th ed. 1989) (asserting that pornography promotes male supremacy, violence, and sexual domination over women).

<sup>6</sup> See CLAYBORNE CARSON, MALCOLM X: THE FBI FILE 120 (David Gallen ed., 1991).

criteria for identifying unjust status-dominance are elusive. It is not clear, for example, whether differential wealth in society necessarily creates the unjust dominance of the rich over the poor.

Implicit in the notion of unjust status-dominance is precisely that it is unjust. Adults undoubtedly dominate children, but most people approve of this categorical assertion of control over the young.

Unjust dominance based on status, when it occurs, violates the values of both freedom and equality. The subordinated party is able to realize fewer preferences for action, and the dominant party, relatively more. The disparity in options creates a situation of inequality, some having more opportunities than others. On the grounds of freedom and equality both, then, dominance is morally objectionable.

Dominance, or domination, also affects the extent of responsibility that the law attributes to the acting party. For example, the South Carolina statutory scheme for imposing the death penalty lists as a mitigating factor in sentencing those convicted of murder: "The defendant acted under duress or under the domination of another person."<sup>7</sup> Dominated parties bear less responsibility for what they do, even when the external pressure on their actions falls below the threshold of duress as a legal defense. The reference to domination in this context reminds me of the common law "marital coercion defense," so brilliantly explored by Anne Coughlin.<sup>8</sup> This defense presumed that a husband dominated his wife, and consequently, a wife was not responsible for ordinary crimes that she committed in her husband's presence.<sup>9</sup>

## I. THE CORRUPTING EFFECT OF DOMINATION

One line of Neo-Kantian thinking assumes that shared values express what is really good if the consensus is achieved under conditions of non-domination.<sup>10</sup> Consensus is a sign of truth only when no one claims more than one vote. Domination of others is a way of expressing one's own preferences in the votes and actions of others.<sup>11</sup> The corrupting effect of domination on shared societal values causes Roberto Unger to despair that "moral agreement is often little more than a testimonial to the allo-

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<sup>7</sup> S.C. CODE ANN. § 16-3-20(b)(5) (Law. Co-op. 1976).

<sup>8</sup> Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 32 (1994) (contending that the battered woman syndrome, which is the modern day version of the "marital coercion doctrine," holds negative implications for women because it defines their activity as a product of a "mental health disorder").

<sup>9</sup> *Id.* at 31.

<sup>10</sup> See ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* 243 (1975) ("For moral union to be representative of the species nature, it must arise from conditions of autonomy.").

<sup>11</sup> See *id.* (explaining that dominance corrupts the authority of a shared value system).

cation of power in the group."<sup>12</sup> Jürgen Habermas reasons along the same lines when he grounds the regulative ideal of moral philosophy in consensus without domination.<sup>13</sup>

This ideal has many precursors in the history of philosophy. In one version or another, philosophers have sought the true person within, the person who expresses himself essentially, unaffected by any form of domination. For example, Kant had an image of moral behavior, based purely on reason, unaffected by the domination of sensual impulses.<sup>14</sup> Also, John Locke argued that it was irrational to try to coerce someone to follow the true religion because salvation could only come to those who acted freely, without external pressure.<sup>15</sup> Economists have adopted the same model of truly free and informed actors in their models of the perfect market.<sup>16</sup>

The assumption underlying this implicit claim about the corrupting effect of domination is that the undominated self, if allowed to express itself, will do the right thing.<sup>17</sup> If freed of corrupting external stimuli, the self of pure reason will, as Kant saw it, act under the moral law.<sup>18</sup>

It is a short step from these abstract ideals to the notion of fully informed consent in the real world. In criminal, tort, and contract law, we assume that voluntary consent can legitimate transactions. Informed consent, given freely, expresses the actor's true desires, and for that reason, we assume that the declaration of consent should change the relevant legal and moral context of the action.

Unfortunately, fully free and informed consent is a fiction. The notion that we can act uninfluenced by others hardly conforms to the world as we know it. We always act in context. The cues of approval and disapproval from friends and family invariably affect our actions. Even those

<sup>12</sup> *Id.*

<sup>13</sup> See 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 70 (Thomas McCarthy trans., 3d ed. 1987) (contending that "the moral authority of an existing institution 'stems' from the so-called collective consciousness").

<sup>14</sup> See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* \*452-53 (claiming that for man to achieve morality, which is linked to autonomy, he must free himself from the world of sense).

<sup>15</sup> JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 34-35 (William Popple trans., 2d ed. 1955) (arguing that men should have freedom to choose their religion because God cannot save people forced into religions in which they do not believe).

<sup>16</sup> See C.E. FERGUSON & J.P. GOULD, *MICROECONOMIC THEORY* 224 (Lloyd G. Reynolds ed., 4th ed. 1975) (asserting that consumers, producers, and resource owners must have perfect knowledge in order to have perfect competition).

<sup>17</sup> See George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 *COLUM. L. REV.* 533, 539 (1987) (stating Kant's theory that to act morally, one must "abstract oneself from the phenomenal necessity of physical laws and . . . subject oneself to the noumenal prices in a system of perfect competition").

<sup>18</sup> See *id.* (discussing Kant's theory that in order for an individual to act morally, the individual must have autonomy).

who think that they reject society's values still stand in a relationship to those values and thus act by reaction. Further, it is impossible to be omniscient about the consequences of our actions. Risks and uncertainties attend everything we do. Assessing those risks is always a guess. In the end, the notion of acting freely, without influence, is unattainable.

Even though perfect consent is impossible in the real world, varying degrees of autonomous consent exist. Knowledge increases autonomy. The more information the better, provided that the person asked to consent can assimilate the material. For example, prior to a medical operation, doctors and nurses inform patients of the risks involved, but they cannot ask patients to spend a week researching the risks in the medical library before allowing the operation. Another dimension that affects the autonomy of consent is the subtle way people influence each other in their interactions. This is the dimension of potential domination.

Of course, there are varying degrees of interpersonal influence or domination. The problem is determining when acts of influence cross the line and render consent invalid. For example, consider the inducement of paying money in return for consent. This inducement does not render an employment contract suspect because people ordinarily receive money for their work. But, suppose a police officer offers money to a suspect to induce him to confess. Undoubtedly, this level of inducement, and even lesser acts of influence, would render the confession involuntary. Why should offering money undermine consent in one context and not in another?

In plea bargaining negotiations, there is nothing untoward about a prosecutor offering a lower charge or sentence in order to convince a defendant to plead guilty. Yet, the prosecutor could not achieve the same end by offering a recalcitrant suspect a sum of money in return for a plea. Further, if a police officer comes to your door in uniform and asks to look around, he need not advise you of your right to refuse entry. But, if the officer arrests you, she must read you your Miranda rights before eliciting a statement admissible as evidence against you. These are very curious inconsistencies. Sometimes the influence is acceptable and sometimes it is not. There does not seem to be a precise way of measuring influence and domination. Nor is there a criterion for deciding when domination invalidates a seemingly voluntary response.

The ideal of free and informed consent expresses Isaiah Berlin's conception of "negative liberty."<sup>19</sup> It is the liberty that springs from being left alone, from not being subject to the domination or coercion of others.<sup>20</sup> Positive liberty, which Berlin railed against as the invention of dictators, holds that people act freely only when they are doing the right

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<sup>19</sup> ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 122 (1969) (describing "negative freedom" as freedom to act unobstructed by others).

<sup>20</sup> *Id.*

thing.<sup>21</sup> The prime example of positive liberty is Kant's notion of the moral law.<sup>22</sup> Only when legislating the moral law and subjecting oneself to it, is the individual autonomous and free.<sup>23</sup>

Accepting the notion of positive liberty—based upon doing the right thing—would seem to be consent, at least so far as consent implies that individuals may choose to realize their private preferences. But this is not necessarily true. Our evaluation of conduct at stake sometimes influences our assessments of whether it was freely chosen. A good example presents itself in the Jewish tradition. A man must voluntarily grant a divorce to his wife.<sup>24</sup> If he refuses to execute a rabbinical decision ordering him to grant the divorce and the rabbis find that his conduct is unreasonable, they may apply coercive means, such as detaining him until he consents.<sup>25</sup> The justification for forcing him to consent is that though it is right that there be a divorce, the rabbis do not have the power to circumvent his power to say yes or no.<sup>26</sup>

There are also many cases in political life when we accept implicit domination in the name of a good cause. For example, General MacArthur and his American staff exercised considerable influence over the Japanese transition to democracy after the Second World War.<sup>27</sup> The same is true of the Allies' influence over the Germans in the wake of the Third Reich,<sup>28</sup> or the North's sway over the South in the period after the American Civil War.<sup>29</sup> As between victor and vanquished, some degree of domination is inevitable. Yet, it would be difficult to say that Japan and Germany did not consent to their new mode of democratic government or that the South did not consent to the Fourteenth Amendment and the new national order created by the Civil War.<sup>30</sup> At times, the right result warrants compromise in the process leading to decision.

<sup>21</sup> *Id.* at 131 (defining "positive freedom" as one's wish to have freedom to control one's own life).

<sup>22</sup> See KANT, *supra* note 14, at \*447 (explaining that autonomous choices achieve the moral law).

<sup>23</sup> *Id.* at \*450 (asserting that "freedom and self-legislation of the will are both autonomy and thus are reciprocal concepts").

<sup>24</sup> See IRWIN H. HAUT, *DIVORCE IN JEWISH LAW AND LIFE* 20-25 (1983).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See ROBERT LECKIE, *THE WARS OF AMERICA* 844 (3d ed. 1992) (arguing that due to General MacArthur's skill, the United States helped transform Japan into a self-sufficient democracy).

<sup>28</sup> See 9 HENRY FRIEDLANDER, *THE NAZI HOLOCAUST* 665 (Michael R. Marrus ed. 1989) (discussing how the Allies replaced the government of the Nazi state with military rule after Germany surrendered).

<sup>29</sup> See LECKIE, *supra* note 27, at 529 (recounting after the war, Congress supervised the South by dividing it into five military districts, commanded by federal generals, in order to ensure that it met its post-war obligations).

<sup>30</sup> See MELVIN I. UROFSKY, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY*

These examples of Jewish divorce and political restructuring after a war illustrate the way domination may enter into a choice that is regarded as voluntary. In real life, domination is sometimes good, and sometimes bad. In the abstract, Kant could pose the ideal of withdrawing from external stimuli; but in the real world, we have to accommodate external stimuli by sorting them into those that properly influence us and those that should not.

## II. DOMINATION IN CRIMINAL LAW

The wrong in domination is that it prevents individuals from acting in harmony with their true selves. This is harmful only when there is no good reason for suppressing the true self for the sake of some other outcome. A good example of this harm, in criminal law, is the wrong implicit in blackmail. As I have argued elsewhere,<sup>31</sup> we can understand the essential wrong in blackmail by comparing two hypothetical cases, the "political embarrassment" and "paid silence" cases.

These two scenarios are variations of an incident that reportedly occurred during the 1989 New York mayoralty election.<sup>32</sup> David Dinkins allegedly paid \$9,500 to a group headed by Sonny Carson, as the opposition campaign manager Roger Ailes charged, as "a pay off for . . . keeping him [Carson] quiet until after the election."<sup>33</sup>

The common element in these cases is that V, a black political candidate, finds the support of D, a black activist with strong anti-white views, an embarrassment in his campaign. In the "paid silence" variation, V goes to D and offers him \$20,000 to "lay low" until after the next election.

Most people assume that in this variation, namely, in the "paid silence case," there is nothing criminal afoot. But, if the facts vary slightly; if Carson goes to Dinkins and insists on a payment to "lie low," that demand, most legally trained people seem to think, would be criminal blackmail.

There are two distinct senses in which the themes of dominance and subordination enter into our intuitions in distinguishing the "paid silence" from the "political embarrassment" case. First, think of these two cases as posing variations on the dominance gained by either David Dinkins or Sonny Carson. If Dinkins submits to Carson's demand and pays Carson

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OF THE UNITED STATES 443-45 (1988) (discussing the congressional plan for reconstruction after the Civil War).

<sup>31</sup> See generally George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617 (1993).

<sup>32</sup> Howard Kurtz, *With Ailes's Aid, Convict Becomes 'Willie Horton' of N.Y. Campaign*, WASH. POST, Oct. 20, 1989, at A14 (reporting the allegations of David Dinkins's possible payment to Sonny Carson for remaining quiet until after the election).

<sup>33</sup> *Id.* (reporting that Roger Ailes "pounced on recent disclosures that Dinkins's campaign paid \$9,500 in 'walking around money' to a group headed by Carson").

to keep quiet, Carson gains control of Dinkins and would probably continue to make demands. On the other hand, in the "paid silence" situation, Dinkins takes the initiative because he seeks out Carson and offers him money to stay out of sight until after the election. Dinkins becomes the master of the transaction. He certainly is not being blackmailed, and neither is Carson, who is simply being paid a salary for remaining quiet for a certain period of time. If our fictional Dinkins is smart, he will structure the payment in the "paid silence" case in staggered installments so that Carson has an incentive to keep quiet. Of course, Carson may catch on that there is more money to be had by selling his silence; but if he starts threatening Dinkins that he will speak should he not receive more money, the situation reverts to the pattern of the "political embarrassment" case.

Becoming dominant in a transaction could hardly be a wrong sufficient to justify the state's intervening with a criminal sanction. But as a result of the transaction, another critical feature of blackmail comes into play. The blackmailer establishes an ongoing state of dominance over the victim. Once bitten, the prey is defenseless.<sup>34</sup> The blackmailer may return and double his demands the next day. This aftermath of potential domination and subordination is the evil that the crime of blackmail is designed to prevent.

The thesis of domination as wrongdoing extends to other crimes of violence and even to theft and embezzlement. Rape victims have good reason to fear that the rapist will return, particularly if the rape occurred at home or the rapist otherwise knows the victim's address. Burglars and robbers pose the same threat. Becoming a victim of violence beyond the law means that what we all fear becomes a personal reality; exposure and vulnerability take hold and they continue until the offender is apprehended. It would be difficult to maintain that all crimes are characterized by this feature of dominance. For example, homicide poses special problems because ongoing domination over the deceased is conceptually impossible. The most we can say is that a relationship of power and domination lies at the core of criminal law. It is characteristic of the system as a whole.

The way to counteract the power of the criminal over the victim is for the state to intervene and assert its power over the criminal.<sup>35</sup> It is not enough to make offenders pay damages or a fine, for all this means is that they purchase a privilege to transgress the prohibitions that apply to others. The state must dominate the criminal's freedom in order to pre-

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<sup>34</sup> This is true only regarding typical transactions. Undoubtedly, cases exist that illustrate demands that people can never repeat.

<sup>35</sup> See GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* 6 (1995) (arguing that "[c]onvicting and punishing the guilty is our [society's] way of expressing solidarity with those who have fallen prey to the pervasive violence of American life").



vent the criminal from continuing domination of the victim. The deprivation of liberty and the stigmatization of the offense and the offender provide the means to counteract the criminal's dominance by reducing his capacity to exercise power and by symbolically lowering his status.<sup>36</sup>

This analysis, then, is an account of retributive punishment that brings the element of dominance to the fore. It is a way of looking at punishment that enables us to see how the sanction expresses solidarity with the victim and restores the relationship of equality that antedated the crime.<sup>37</sup> To appreciate the psychological significance of the state's standing by the victim is to think about the cases in which the state refuses to prosecute and thereby abandons the victim in solitary suffering. During the terror in Argentina that led to approximately 9000 "desparecidos" prior to 1983, many victims' families realized, to their horror, that they could not turn to the police for protection.<sup>38</sup> The police were often the ones engaged in the roundup of suspected terrorists. In the understanding of the victims' families, the failure of the state to come to the aid of victims implied official complicity in the criminal dominance over the victims, their families, and other citizens.

The suggestion is that by failing to intervene to counteract the dominance achieved by a criminal, the state and society become complicitous in the crime. Immanuel Kant had this point in mind when he posed the famous and oft-derided thought-experiment of an island society about to disband.<sup>39</sup> What should the governing authorities do about imprisoned murderers? Should they carry out the executions, even if no good could possibly follow from the hangings? Kant insisted on the executions "so that each has done to him what his deeds deserve and blood guilt does not cling to the people."<sup>40</sup>

The notion of a society's disbanding should be treated as a hypothetical event, very much like the idea of a society's coming together in a social contract. Neither of these events ever occurred in history, but they are useful constructs for testing our intuitions about the conditions of a just social order. Further, the biblical reference to "blood guilt" supports the interpretation I have suggested. The view in biblical culture, apparently, was that a murderer acquired control over the victim's blood, and thus,

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<sup>36</sup> See *id.* at 203 ("Punishment counteracts domination by reducing the criminal to the position of the victim.").

<sup>37</sup> Restoration of the relationship of equality is not obvious in a culture that has become accustomed to thinking of punishment as a utilitarian instrument of crime control.

<sup>38</sup> See Cesar A. Chelala, *Argentine 'Amnesty'*, N.Y. TIMES, Mar. 14, 1983, at A15 (reporting that human rights organizations claim that the terror in Argentina, after 1976, is the "most systematic and widespread abuse of human rights Argentina has known in this century").

<sup>39</sup> IMMANUEL KANT, *THE METAPHYSICS OF MORALS* \*333 (1797).

<sup>40</sup> *Id.*

had to be executed in order to release the blood. Once released, the blood could return to God as in the case of a natural death.<sup>41</sup> The failure to execute the murderer meant that the rest of society, charged with this function, became responsible for preventing the release of the victim's blood. This is the meaning of Kant's argument that "blood guilt [should] not cling to the people."<sup>42</sup>

Whatever the metaphysics of gaining and releasing control of blood, the biblical idea should be understood today as a metaphor for society's complicity in the crime due to its failure to punish the criminal after the crime. Once the institution of punishment becomes the conventional response to crime, the state's decision either to prosecute or not to prosecute an obvious crime carries social meaning. The state's intervention communicates condemnation of the crime and solidarity with the victim. By prosecuting, the state officials say to the victim and his or her family: "You are not alone. We stand with you, against the criminal."

Refusing to prosecute and convict for an obvious crime also carries meaning. The failure of police, prosecutors, and juries to invoke their established power, their standing by which there is an opportunity to act, provides the foundation for the perception of shared responsibility. If they willfully refuse to invoke the traditional response to crime, they in effect disassociate themselves from the victim. Abandoned, left alone, the victim and the victim's community readily feel betrayed by the system.

Juries also communicate this message when they fail to convict in the face of obvious crimes. When the state court jury acquitted the four officers charged with beating Rodney King, Jr., they communicated implicit approval of the police behavior, thus engendering rage among African-Americans in Los Angeles.<sup>43</sup> The anguish of those who identified with Rodney King, Jr. resembled the sense of abandonment that the families of the "desparecidos" felt in Argentina.

The themes of dominance and subordination generate new insights into the meaning of crime and the point of punishment. It can lead, as it has in my own thinking, to a renewed emphasis on the place of victims in the system of criminal justice. It also can lead, as we now explore, to a better understanding of the structure of tort law.

### III. DOMINANCE IN TORT THEORY

The starting place for understanding the difference between the two

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<sup>41</sup> See DAVID DAUBE, *STUDIES IN BIBLICAL LAW* 122-23 (1947).

<sup>42</sup> See KANT, *supra* note 39, at \*333.

<sup>43</sup> I am speaking of the popular understanding of the verdict. As a technical matter, of course, the jury in *State v. Powell* only concluded that they had reasonable doubt concerning the issue of excessive police force. See FLETCHER, *supra* note 35, at 1 (discussing the anger that African-Americans experienced as a result of the verdict in the Rodney King case).

types of “wrongs”—private and public—is to think about the place of the victim in the analysis of liability. The injured party’s contributory fault plays an important part in the structure of tort liability. But in criminal law, the victim’s negligence or foolhardiness is irrelevant to liability. If the victim is mugged while jogging at night in Manhattan’s Central Park, the defendant could hardly defend by claiming that “she assumed the risk.” It was irrelevant in the trial of Bernhard Goetz, that when he entered the subway car, on that fateful day, he chose to sit next to the four “boisterous” youths who would later ask him for money.<sup>44</sup> The irrelevance of the victim’s fault cuts across the criminal law. Pickpockets cannot interpose that their victims should have kept a closer eye on their wallets. Even in cases of criminal negligence, the defendant cannot defend on the basis of the victim’s contributory fault. The role of the victim in precipitating crimes has engaged the interest of sociologists, but the phenomenon has no bearing on the proper analysis of criminal liability. The question is: Why?

The answer is precisely that criminal aggression is an act of dominance. The violation of the victim’s rights subordinates the victim to the criminal’s will. The criminal law shields victims against their own imprudence. They are entitled to move in the world at large with as much freedom as they enjoy behind locked doors. They can walk in the park when they want, sit where they want in the subway, and wear skimpy clothes without fearing that they will be faulted for precipitating rape. This is what it means to be a free person, and the criminal law protects this freedom by not censuring those who expose themselves, perhaps with less than due care, to risks of criminal aggression. The blame properly attaches to the mugger, thief, and rapist, regardless of the victim’s role in the interaction leading to the crime.

What, one might ask, would be an alternative conception of the interaction between injurer and victim? Think about a typical tort case. Defendant swings a stick in an effort to break up a dog fight. The dogs move around, the defendant and plaintiff move with them. Eventually the stick hits the plaintiff in the eye. Now we could focus narrowly on this interaction and see it just as an act of aggression and dominance. Defendant’s swing injures the passive plaintiff. But we also could see the interaction as a failure of the parties, taken together, to prevent the injury. An alternative paradigm of “failed collaboration” treats the injurer and the victim as jointly responsible for the minimization of harm. When the stick makes contact with the eye, it turns out that the bearer of the eye, as well as the bearer of the stick, may be seen as the causally dominant party.

There are two ways, then, that we may conceptualize a routine injury from A hitting B. According to the paradigm of dominance, A asserts

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<sup>44</sup> *People v. Goetz*, 497 N.E.2d 41, 43 (N.Y. 1986) (holding that the prosecutor’s charge to the Grand Jury about an objective element in the defense of justification was proper).

himself by hitting passive B and thus subjecting B to his will. According to the paradigm of failed collaboration, it takes two for a hit to occur: Both B and A contribute to the harm by failing to avert the harmful contact. The critical difference is whether we perceive the victim as a responsible participant in the genesis of the injury. That perception, in turn, depends on whether we see the two parties as engaged in a collaborative effort to minimize the potential harm occurring in their interactions.

The striking feature of contract jurisprudence—at least from the perspective of criminal law—is that the victim of a contract breach is under a duty to mitigate damages. If the seller breaches the contract by failing to deliver the goods, the buyer must go into the market and try to cover by buying the goods from another source.<sup>45</sup> Thus, if the market price at the time of the breach equals the price stipulated in the contract, there are no damages.<sup>46</sup> This elementary doctrine of contract law expresses a radically different way of conceptualizing the relationship between injurer and victim. They are engaged in a collaborative scheme for their mutual welfare, and the breakdown of the scheme imposes burdens on the victim to minimize the damage. The victim of a contract breach bears no resemblance, then, to the victim of a mugging in Central Park. The former, but not the latter, is under a duty to take measures to avoid injury. This duty follows from the principle that the parties must act together to minimize the loss. There is no comparable duty under the paradigm of dominance.

The example of the defendant's stick hitting the plaintiff's eye derives from the pivotal 1850 case of *Brown v. Kendall*.<sup>47</sup> This famous decision by the Massachusetts Supreme Judicial Council should be understood as recasting the writ of trespass to fit the paradigm of failed collaboration.<sup>48</sup> The traditional conception of trespass that guided the trial court limited the inquiry to whether the defendant's stick directly caused the injury. The court asserted that if the impact was direct, the plaintiff's causal contribution to the injury was irrelevant.<sup>49</sup> All that mattered was the defendant directly encroaching upon the plaintiff's physical autonomy. The

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<sup>45</sup> U.C.C. § 2-712(1) (1991) (dictating that in order for a buyer to recover damages for a seller's failure to deliver goods under the terms of their contract, the buyer must "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due").

<sup>46</sup> *Id.* § 2-713(1) (measuring damages for seller's non-delivery essentially by "the difference between the market price at the time when the buyer learned of the breach and the contract price").

<sup>47</sup> 60 Mass. (6 Cush.) 292 (1850).

<sup>48</sup> *Id.* at 296 (asserting that the trial court should have given the jury defendant's instruction stating that "if both plaintiff and defendant . . . were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover").

<sup>49</sup> *Id.* at 295 (remarking that judges found trespass to exist when one received injury from the acts of another).

principle was that if the defendant dominated the body of the plaintiff by direct causation, justice required compensation of the resulting injuries.<sup>50</sup>

The conventional reading of the high court's ruling in *Brown v. Kendall* emphasizes a shift from a traditional strict liability standard for trespass to a fault standard requiring the plaintiff to exercise due care, with the burden on the plaintiff to prove the defendant's fault.<sup>51</sup> More significantly, however, the case reshapes the law of aggressive injuries by making the plaintiff's contributory negligence a complete defense, thus signaling a paradigmatic shift from trespassory dominance to a private law standard of failed collaboration.<sup>52</sup> As the contract obligee must mitigate damages, the tort plaintiff must, after *Brown*, mitigate the risk of injury by exercising due care. The failure to exercise due care implies a breach of duty so serious that under the rule of contributory negligence, the plaintiff forfeits the entire recovery, and under the rule of comparative fault, only a portion of the recovery corresponding to the relative degree of the two parties' fault.

One might say that in general terms, the paradigm of dominance is a characteristic of the criminal law and the paradigm of failed collaboration, a feature of private law, of torts as well as contracts. Yet the basic principle of criminal law—the wrong of dominating another's physical well-being—survives and flourishes in the law of torts. It accounts for the body of intentional torts, which treats the victim with almost as much concern as one finds in criminal law. The primary difference between torts and criminal law is that the assumption of risk can be a defense of varying impact in tort cases,<sup>53</sup> whereas in criminal cases of violent aggression, the victim's knowing and voluntary exposure to the risk is no defense.<sup>54</sup>

In many tort cases, however, the law does not interfere to prevent domination until after the injury occurs. In cases of abnormally dangerous activities—e.g., blasting, crop-dusting, fumigating, or flying an airplane overhead—the defendant directs a disproportionately great risk toward the plaintiff.<sup>55</sup> The defendant dominates the plaintiff by the imposition of risk and the law refuses to intervene prior to the occurrence of damage. Because the activity is regarded as socially beneficial, it is not

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<sup>50</sup> *Id.*

<sup>51</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 29, at 163 (5th ed. 1984) (explaining that *Brown* has become the leading case).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 480 (explaining that courts use "assumption of the risk" in many different types of tort cases).

<sup>54</sup> See, e.g., MODEL PENAL CODE § 213.1 (Proposed Official Draft 1962) (explaining that defendants can rape prostitutes even if the prostitutes put themselves in dangerous situations as long as they do not consent).

<sup>55</sup> See generally KEETON, *supra* note 51, § 78, at 548-54 (tracing the development of American law pertaining to dangerous activities).

subject to an injunction and the plaintiff may not interpose defensive force to protect his physical space. The subordinated plaintiff can do nothing except wait until the injury occurs and then sue for compensation.

This subordinated position is exemplified by the passivity enforced against the dock owner victim in *Vincent v. Lake Erie Transportation Co.*<sup>56</sup> The court held that the dock owner may not close off his dock to a ship caught in an unexpected storm, rather he may do nothing except wait until the dock is damaged.<sup>57</sup> He has no option but to receive compensation after the deed. In all of these cases, the guiding principle of justice is that if the injurer dominates another by the imposition of a risk that is beneficial to society as a whole, the injurer must make whole those who fall victim to the activity.

This, then, is the proper understanding of tort law as a mixture of criminal law and private law principles. When courts impose strict liability, we see a reflection of criminal law ideas of dominance. The influence begins early in the law of torts under the writ of trespass and carries forward into the various situations in which we perceive the defendant's action as aggression dominating the interests of the plaintiff. In contrast, the influence of private law thinking breaks through in the collaborative principle underlying the law of negligence. By entering into certain spheres of risk-taking, the plaintiff and defendant both come under duties to act with a view to the costs and benefits of their actions. They become a unit acting under an implicit obligation to optimize the consequences of their actions.

The problem that remains unanswered is when each of these two approaches in tort liability should prevail. When should we think in the victim-protective style of criminal law? When should we think in the collaborative paradigm of contract law?

Alas, this sketch is but the beginning of an adequate theory. We can find some guidance in the notion of a plaintiff entering into certain spheres of risk. Consider the tripartite liability relations of airplane owners and operators. As to passengers in the airplane as well as passengers and owners of others planes sharing the airlines, the owners and operators are liable under the rule of negligence. As to persons and property owners on the ground, the owners and operators of airplanes putting them at risk fall under the rule of strict liability for ground damage.

These rules make good sense. Passengers enter into a sphere of risk by voluntary contracting for passage. Those who fly the neighboring airlines also enter into the sphere by imposing reciprocal risks on the defendant.<sup>58</sup>

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<sup>56</sup> 124 N.W. 221 (Minn. 1910).

<sup>57</sup> *Id.* (holding that a master may maintain a vessel's moorings to a dock in bad weather, but the dock owner may recover damages from the ship owner if the vessel injures the dock).

<sup>58</sup> Cf. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV.

However, homeowners in the path of the flight do nothing to subject themselves to the risk of airplanes crashing into their living rooms.

The following objection lies at the ready: Because pedestrians enter into the sphere of risk by walking near the highway (and thus are protected only by the rule of negligence), homeowners must enter into the community of risk defined by airplane overflights if they buy their homes with full knowledge of the overflights (or if they refuse to move once they learn of them). Admittedly, the distinction between pedestrians relative to cars and homeowners relative to airplanes lies at the foundation of current legal practice. The distinction bears some intuitive plausibility based on the likelihood of an accident. But the border between the two paradigms is open to dispute, and it would not be shocking if car accidents with pedestrians were treated like airplane-caused ground damage or vice versa. The principle remains sound even if there may be debate at the fringes of its application.

#### CONCLUSION

It turns out that the theory of domination illuminates more than the problem of undue influence in contract negotiations. It is no surprise that if one party dominates another, the latter hardly expresses his or her own true self in consenting to an agreement. Yet, the wrong of dominating another has also left its imprint on the structure of criminal and tort law. Violent crimes are acts of domination, and one way of understanding punishment is to view the violent intervention by the state as the only available means of correcting the aggressor's dominant position over the victim. Tort law also embodies the wrong of domination so far as some of its strains recognize the right of the victim to remain passive in the face of danger. Therefore, when an aggressor injures a plaintiff, the aggressor achieves a dominance over the victim that the law may correct as both a crime and a tort.

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537, 548 (1972) (stressing the unity of fault and strict liability under the paradigm of non-reciprocal risk-taking). Although here I elicit the difference between the two, I do not mean to depart from the basic contours of my earlier argument. I offer instead another view.