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# Guilty of the Crime of Trust: Nonstranger Rape

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There is a cop who is both prowler and father
he comes from your block, grew up with your brothers,
had certain ideals.
You hardly know him in his boots and silver badge,
on horseback, one hand touching his gun.
You hardly know him but you have to get to know him:
he has access to machinery that could kill you.
He and his stallion clop like warlords among the trash,
his ideals stand in the air, a frozen cloud
from between his unsmiling lips.
And so, when the time comes, you have to turn to him,
the maniac's sperm still greasing your thighs,
your mind whirling like crazy. You have to confess
to him, you are guilty of the crime
of having been forced . . .[1]

Feminist activists and theorists agree that a prerequisite for securing a woman's selfhood is assurance of her physical security against male aggression. For this reason, the criminal justice system's treatment of the crime of rape has come under close scrutiny.[2] Feminists rely on the law's definition of rape


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1. A. RICH, *Rape*, in DIVING INTO THE WRECK, POEMS 1971-1972, at 44 (1973).

2. *See, e.g.*, S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975); A. DWORKIN, INTERCOURSE (1987); A. EDWARDS, RAPE, RACISM AND THE WHITE WOMEN'S MOVEMENT: AN ANSWER TO SUSAN BROWNMILLER (1979); S. ESTRICH, REAL RAPE (1987); B. HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984); D. RUSSELL, THE POLITICS OF RAPE (1975); Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977); MacKinnon, *Feminism, Marxism, Method, and the State*, 8 SIGNS 635 (1983); Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990); Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983).

This Essay uses the term rape because the term "criminal sexual conduct" or the term "criminal sexual assault" has the effect of sanitizing the unique

and the criminal justice system's treatment of rape to explore misogyny, phallocentrism, and heterosexism. Their work has resulted in widespread consensus throughout the feminist community that the law fails to provide physical security against rape to middle-class white women. Their work also makes clear that men rape women of African-American, Asian, Hispanic, and Native American descent with impunity. Racism and sexism combine to make prosecutors less willing to pursue a rape charge, juries less willing to convict, and judges less willing to impose a sentence of equal severity when the victim is a woman of color. Myths about the promiscuity of African-American, Asian, Hispanic, and Native American women operate to make the criminal justice system disbelieve these women's accounts and to devalue their claims of physical invasion.[3]

Feminists responded to the law's inadequacy on a number of fronts. They lobbied for the establishment of rape victims' advocacy programs[4] and the passage of rape shield legislation as well as reforms of state criminal codes.[5] These legislative accomplishments have led people to believe that substantial strides have been made to protect all women against rape. Most feminists, however, continue to believe that the criminal justice system's treatment of rape remains inadequate.

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harm to the victim. *See* S. ESTRICH, *supra*, at 81-83; Henderson, *Review Essay: What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 207 (1987-88).

3. One source of these myths comes from celebration of the domestic life and the development of a parallel myth about the "cult of the lady." The message of the cult was that a true woman belonged in the home to care for and nurture the next generation of citizens. Those women who ventured outside the home and became part of the harsh and unseemly commercial world were not "ladies." They were labelled unchaste and viewed as accessible. In fact, men viewed women who were out and about as inviting or provoking sexual advances. Only women who had husbands and fathers who could provide them a home and the means to be a lady benefitted from the cult. The rest, the women who earned their living as domestics, nursemaids, and the like, suffered not only the unearned label of "whore," but the reality of sexual violation. The cult of the lady was reinforced on the backs of unskilled laborers, who were disproportionately women of color. *See, e.g.*, J. JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT (1985); M. RYAN, WOMANHOOD IN AMERICA (3rd ed. 1983); Hirata, *Free, Indentured, Enslaved: Chinese Prostitutes in Nineteenth-Century America*, 5 SIGNS 3 (1979); Welter, *The Cult of True Womanhood, 1820-1860*, 18 AM. Q. 151 (1966).

4. *See, e.g.*, Hardgrove, *An Interagency Service Network to Meet Needs of Rape Victims*, 57 SOC. CASEWORK 245 (1976).

5. *See* Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 767-68 (1986).

One continuing aspect of the inadequacy of the treatment of rape in the courts gained brief public attention in the fall of 1990. Opponents of Associate Justice Souter's nomination to the Supreme Court,[6] in particular women's rights groups, argued that his opinion in *State v. Colbath*[7] was nothing short of a "blame the victim" polemic demonstrating a lack of legal sophistication about the law of rape and rape shield laws as well as a general hostility toward women.

In *Colbath*, Justice Souter viewed the victim's conduct with other men that same afternoon, as highly relevant in determining whether the victim later consented to sexual intercourse with the defendant.[8] He also appeared to be willing to infer consent from the fact that the defendant and the victim had become acquainted earlier in the day and had been seen touching each other sexually. Other courts share Justice Souter's assumptions about the relevance of the victim's prior acquaintance with the defendant. The California Appellate Court, for example, made similar assumptions in *People v. Perez*[9] when analyzing the defenses of consent and reasonable, good faith belief of consent in the context of a prior long-term sexual relationship.[10] This Essay explores the judicial assumption that proof of acquaintance allows a defendant more easily to argue consent or, in the alternative, to argue that he had a reasonable, good faith belief that the victim consented to sexual intercourse.

The Essay builds on the work of feminist activists and theorists questioning the conventional wisdom, practice, and judicial analytical assumptions that make nonstranger rapes more difficult to prosecute and win. Nonstranger rape cases are more difficult to prosecute successfully under current law because prosecutors and courts fail to apply the common law doctrine of confidential relationship that prevails in other areas of the law. Current law allows defendants to use a preexisting relationship to give credibility to a defense of consent or reasonable, good faith belief of consent. If courts applied the doctrine of confidential relationship, evidence of the relationship would impose upon the defendant a heightened duty of care to the

6. Justice Souter was confirmed on October 2, 1990, by a vote of 90 to 9 in the United States Senate. 136 CONG. REC. S14,374 (daily ed. Oct. 2, 1990).

7. 130 N.H. 316, 540 A.2d 1212 (1988).

8. *Id.* at 324, 540 A.2d at 1216-17.

9. 194 Cal. App. 3d 525, 239 Cal. Rptr. 569 (1987).

10. *Id.* at 528-30, 239 Cal. Rptr. at 571-72.

victim.[11]

Imposing the heightened duty of care associated with the confidential relationship doctrine makes three distinct changes to the prosecution of nonstranger rapes. First, it changes the mental element of the crime because the heightened duty of care requires that the defendant be found blameworthy for being inattentive to the victim's words or conduct indicating nonconsent, and for failing to obtain consent through positive words or positive actions. Second, the heightened duty changes the definition of consent to mean positive words or positive action indicating a freely given agreement to have sexual contact. Third, this heightened duty deters the defendant from introducing evidence of the prior relationship or prior conduct between the victim and the defendant as relevant to showing consent to sexual contact during the disputed incident. Instead, the prosecution may introduce evidence of the prior relationship and conduct in order to impose on the defendant a heightened duty to obtain consent.

Part I of this Essay explores the doctrine of confidential relationship and its use in contexts other than nonstranger rape. Part II details the doctrine's applicability to the criminal prosecution of nonstranger rape. Part III examines the *Colbath* and *Perez* decisions in order to demonstrate how application of the confidential relationship doctrine would change the courts' analyses and use of the evidence of prior relationships. Based on the doctrine of confidential relationship, this Essay concludes that the existence of a prior relationship between the defendant and the victim should impose a heightened duty of care on the defendant to obtain consent by positive words or actions.

## I. THE CONFIDENTIAL RELATIONSHIP DOCTRINE

A primary premise of the law's classical liberal tradition is each individual's right to exercise her or his autonomy and realize self with the minimum amount of constraint that others impose.[12] The obvious problem with this statement of the liberal tradition is its failure to acknowledge that a person's liberty and selfhood cannot be realized without connections with other persons as well as freedom from those connections.

11. This analysis also supports legislative reform.

12. For an account of the liberal conception, see Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 13 (D. Kairys rev. ed. 1990); *see also* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

Therefore, one person's claim for liberty may result in a loss of liberty for another. The law, in fact, acknowledges engagement, dependency, and connection with others, and recognizes that under certain circumstances it is appropriate both to prevent a person from acting and to require a person to act. Confidential relationship is one of the doctrines the law uses to mediate conflicts between one person's right to act or not act and another person's right to be free from the consequences of that action or inaction.

Confidential relationship is not limited to one single meaning in the law.[13] Sometimes it is used to prevent one person from overreaching another for economic gain. The law refuses to police all economic interactions for overreaching, however, and confines itself to policing those economic transactions where the situation indicates that the victim was unable to protect herself or himself.[14] One criteria for determining whether a party to a transaction is unable to protect herself or himself is whether the other party was in a position to dominate — a situation the courts then label a confidential relationship. Finding a dominant party and, consequently, a confidential relationship raises a rebuttable presumption that the economic transaction was the product of undue influence. Examples of courts granting restitution based on finding a confidential relationship giving rise to a presumption of undue influence include a gift by a client to a lawyer,[15] a gift by a feeble brother to a younger sister,[16] and a gift by an elderly woman to a bond salesman.[17] Evidence that one party was at a physical or mental disadvantage and that the other party was in a position to take advantage of those weaknesses is the key to the conclusion that the economic transaction is not a product of one party's free will.[18]

Confidential relationship has a different legal meaning when applied to breach of a confidence.[19] An example is a land conveyance to a grantee who promises orally to hold it in trust for the grantor or a third person. The Statute of Frauds writ-

13. *See* 4 G. PALMER, THE LAW OF RESTITUTION §§ 19.2-3, at 100-18 (1978). The following analysis relies heavily on Professor Palmer's work.

14. *See* Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1024-38 (1985). *See generally* Dawson, *Economic Duress — An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).

15. *See, e.g.*, Fisher v. Bishop, 108 N.Y. 25, 27, 30, 15 N.E. 331, 331-33 (1888).

16. *See, e.g.*, Eldridge v. May, 129 Me. 112, 116-22, 150 A. 378, 379-82 (1930).

17. *See, e.g.*, Stanley v. Shaw, 120 Me. 483, 485-88, 115 A. 263, 264-65 (1921).

18. For further elaboration of this discussion, see 4 G. PALMER, *supra* note 13, § 19.2, at 100-06.

19. *See id.* § 19.3, at 108-18.

ing requirement makes this trust of land unenforceable, but the courts nevertheless provide constructive trust relief in favor of the intended beneficiary if they find that the grantor and grantee were in a confidential relationship. Courts give relief not because the grantee obtained an economic advantage through wrongful conduct of undue influence, but because the grantee's failure to carry out the express trust was a breach of the confidence reposed in her or him. When overreaching is not the issue, the meaning of confidential relationship does not turn on whether one person exercised dominance over the other. Instead, courts find that:

> [A] confidential relation exists not only where there is a fiduciary relation such as exists between attorney and client, trustee and beneficiary, guardian and ward, and the like, but also where, because of family relationship or otherwise, the transferor is in fact accustomed to be guided by the judgment of the transferee or is justified in placing confidence in the belief that the transferee will act in the interest of the transferor.[20]

The doctrine of confidential relationship, whether reflecting inequality of power or a relationship of trust, represents the law's unwillingness to allow the classical liberal tradition of individuality to be the instrument of unjust treatment of one person by another. Moreover, it goes further and imposes an affirmative duty on one person to act in the interest of another. The law imposes only limited duties between strangers, but requires persons who are connected with each other to act in each other's interest.

## II. EXTENDING THE CONFIDENTIAL RELATIONSHIP DOCTRINE TO NONSTRANGER RAPES

Traditionally, the law has not treated nonstranger rape as rape. Nonstranger rape has been a legal oxymoron for two reasons. First, if a woman previously consented to any connection

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20. RESTATEMENT (SECOND) OF TRUSTS § 44 comment c (1959).

A concept related to confidential relationship found in tort law and criminal law is the duty to rescue. The law in these areas imposes a duty to rescue on persons who have made certain types of connections with each other. For example, tort law imposes on an employer a duty to rescue an employee. *See, e.g.*, Anderson v. Atchison, Topeka & Santa Fe Ry., 333 U.S. 821, 823 (1948) (per curiam). It also imposes a duty to rescue on persons other than those who have economic relationships. For example, a court imposed a duty on one friend to rescue another when they had been drinking together. Farwell v. Keaton, 396 Mich. 281, 291-92, 240 N.W.2d 217, 222 (1976). The law's application of the duty to rescue reinforces the proposition that a person takes on legal responsibilities when she or he makes a connection with another person.

with a man — developing a friendship with a male colleague or superior at work, accepting a date, going to a bar or a party and talking with a man (i.e., making a stranger a nonstranger through conversation), agreeing to drive a man she has just met to his home, allowing a man she just met to drive her home, dating a man for an extended period of time, consenting to sexual relations with a man once or many times, cohabitating with a man, marrying a man — a presumption arises that she subsequently consented to sexual contact during the incident in question.[21] Second, she is considered responsible for having placed herself in a situation that might result in sexual contact, and, therefore, she must accept the consequences of her own conduct (i.e., nonconsensual sexual contact).[22] Of course, the law does not explicitly state that a presumption arises nor does it explicitly rely on the assumption of risk argument. This description, however, is a fair reading of many nonstranger rape cases.[23] Moreover, it explains why women do not make complaints, why prosecutors refuse to take complaints seriously, and why judges and juries refuse to convict defendants.

Just as was true for both types of confidential relationship — trust and dominance — the history of the connection between the two people matters in rape law. Unlike the doctrine of confidential relationship, however, current nonstranger rape law does not impose a duty on the parties to act in each other's interest nor does it inquire about inequality within the relationship. On the contrary, under current law, a connection between the parties before the disputed sexual contact decreases the likelihood of a successful rape prosecution and, therefore, jeopardizes the woman's physical safety. She reposes trust in her new acquaintance, her friend, her boss, her date, her lover, or her husband at her own risk. Strikingly, in contrast to other areas of the law that apply the doctrine of confidential relationship, a history of connection operates to decrease, rather than to increase, each other's responsibility to act in the interest of the other with regard to sexual relations.

If the civil doctrine of confidential relationship were transported to the criminal arena, proof of a preexisting relationship would create a presumption that the parties reposed trust in each other and, based on that presumption, the law would re-

21. *See* Henderson, *supra* note 2, at 214.

22. *See* S. ESTRICH, *supra* note 2, at 41.

23. *See id.* at 25 n.62 (citing M. AMIN, PATTERNS IN FORCIBLE RAPE 259-76 (1971)).

quire each party to exercise a heightened duty of care. The civil law presumes trust from the fact that one party made a promise to the other. Analogously, the criminal law should presume trust from the fact of familiarity between the parties.

The justification for a presumption of reposed trust regarding unwanted sexual contact is that familiarity encourages a woman to be less wary. Failing to acknowledge the reposed trust is equivalent to saying that women have a duty to be wary. Not all women, of course, repose trust in every male acquaintance, but this is no reason to deny women a right to trust.

Therefore, a preexisting relationship between the victim and the defendant should apply to assist, rather than to hinder, the state's prosecution of the crime of rape.[24] The two types of confidential relationships will be considered separately for this purpose. First, this Essay analyzes the prosecution of the crime of rape assuming a trust-type relationship, and then modifies the analysis by assuming a dominant-type relationship between the defendant and the victim.

### A. THE TRUST-TYPE RELATIONSHIP

The first way that a preexisting trust-type relationship changes the prosecution of the crime of rape concerns the mental element of the crime. Different jurisdictions have different definitions and degrees of rape,[25] but the one element common to the crime in all jurisdictions is sexual contact against a person's will.[26] Beyond this, the definition and degree of rape varies based on the nature of the force required, the nature of the sexual contact required, and what constitutes consent.[27] Although some courts have held that the state must

24. Professor Henderson warns against the wholesale transplantation of a property concept into the law of rape because of the crime's history as being against a man's property and because the doctrines themselves may not be powerful enough to meet the unique circumstances of sexual violation. *See* Henderson, *supra* note 2, at 219 n.97. The confidential relationship doctrine, with its emphasis on the duty two persons owe to each other, seems not to risk the reinfusion into the law of rape as a crime against a man's property. The rest of this Essay is devoted to whether the doctrine as presently applied to economic transactions is powerful enough to redress breaches of trust and overreaching that occur in nonstranger rape.

25. *See* R. PERKINS & R. BOYCE, CRIMINAL LAW 197-200 (3d ed. 1982).

26. *Id.*

27. *See* NAT'L INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, FORCIBLE RAPE, AN ANALYSIS OF LEGAL ISSUES 5-19, 71 (1978); S. ESTRICH, *supra* note 2, at 83.

prove that the defendant acted recklessly in failing to recognize the victim's nonconsent,[28] others only require the state to show that the defendant's belief regarding consent was unreasonable.[29] The introduction of the confidential relationship doctrine would substantially change the mental element. The standard of attentiveness to the victim's interests would increase as a result of the preexisting trust relationship. This heightened duty justifies conviction if the evidence establishes that the defendant failed to obtain the victim's consent regardless of the defendant's reasonable or good faith belief.

Conviction is justified based on this heightened standard of attentiveness regardless of the duration of the relationship between the defendant and the victim and regardless of any past sexual intimacy. Application of the confidential relationship doctrine in the rape context acknowledges that the victim reposed trust in the defendant. Evidence of a prolonged intimate relationship indicates that the victim reposed more trust in the defendant than had the relationship been of a shorter more platonic nature. The argument put forward here, however, is that any imposition of trust by the victim should be sufficient to raise the heightened duty.

The second way that the preexisting trust-type relationship affects the prosecution of the crime of rape is in the meaning that courts accord the term "consent." This issue is obviously closely connected to the question of the mental element and the heightened duty imposed on a nonstranger for attentiveness to the victim's interests. Silence or other passive behavior by the victim would not constitute sufficient evidence of consent between nonstrangers.[30] The defense of a reasonable, good faith belief that the words or conduct were overt and constituted consent also would not be available to the defendant, because it would undermine the heightened duty that arises out of the preexisting relationship.

The heightened duty of care imposes an obligation on the defendant to meet a stricter standard of conduct than mere reasonable belief. This duty requires the defendant to inquire as to the victim's desire for sexual contact and the form of contact desired. The defendant's subjective belief that the victim's

28. *See, e.g.*, Reynolds v. State, 664 P.2d 621, 626 (Alaska Ct. App. 1983).

29. *See, e.g.*, People v. Mayberry, 15 Cal. 3d 143, 155, 542 P.2d 1337, 1345, 125 Cal. Rptr. 745, 753 (1975).

30. This is already the definition of consent in a few states. *See, e.g.*, CAL. PENAL CODE § 261.6 (Supp. 1990); WASH. REV. CODE ANN. § 9A.44.010(7) (Supp. 1990); WIS. STAT. ANN. § 940.225(4) (West 1982 & Supp. 1990).

words or acts constituted consent is not relevant because under the heightened duty of care the defendant has no right to rely on his own belief, but rather has the obligation to listen to the victim.[31]

Another way to reconcile the heightened duty standard with reasonable belief is to think of the heightened duty as transforming the meaning of reasonable belief. Society expects a person in a confidential relationship with another to exercise more responsibility. The failure to meet that responsibility is blameworthy. Thus, a reasonable belief consists of the defendant determining consent based on the victim's positive words or conduct.

The third way that the preexisting trust-type relationship affects the prosecution of the crime of rape is that the evidence proving the relationship becomes relevant for the purpose of imposing a heightened duty of care on the defendant to determine the victim's consent. A prior relationship will no longer be used, as is the current practice, to infer present consent from the fact of previous consent. Although a defendant may still introduce evidence of a preexisting relationship with the victim in an attempt to raise questions in the jurors' minds about the victim's credibility and morality, the primary purpose of this evidence, as the jury instructions should indicate, would be to impose a heightened duty of care on the defendant.

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31. *See* Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217, 236-37 (1989). Pineau contends that the "dialectics of desire" impose a responsibility on persons engaged in communicative sexuality to not misuse their position of trust:

> Just as a conversationalist's prime concern is for the mutuality of the discussion, a person engaged in communicative sexuality will be most concerned with the mutuality of desire. As such, both will put into practice a regard for their respondent that is guaranteed no place in the contractual language of rights, duties, and consent. The dialectics of both activities reflect the dialectics of desire insofar as each person's interest in continuing is contingent upon the other person wishing to do so too, and each person's interest is as much fueled by the other's interest as it is by her own. . . . To be intimate just is to open up in emotional and personal ways, to share personal knowledge, and to be receptive to the openness of the other. This openness and sharing normally takes place only in an atmosphere of confidence and trust. But once availed of this knowledge, and confidence, and trust, one has, as it were, responsibility thrust upon one, the responsibility not to betray the trust by misusing the knowledge. And only by respecting the dialectics of desire can we have any confidence that we have not misused our position of trust and knowledge.

*Id.*

## B. THE DOMINANCE-TYPE RELATIONSHIP

The legal significance to be accorded evidence showing that the defendant had a pattern of exercising dominance over the victim in their confidential relationship raises serious policy questions. The fact of a preexisting relationship means that under the trust branch of the confidential relationship doctrine the defendant already has the burden of showing that the victim consented through positive words or positive conduct. Does the added dimension of domination mean that the victim was unable to exercise her free will to engage in sexual relations with the defendant? Should proof of consent through positive words or conduct be irrelevant and should sexual contact between the defendant and the victim be viewed as nonconsensual, and thus rape?[32]

Catharine MacKinnon and Andrea Dworkin have argued that women do not have real choices in heterosexual sex because of the systemic presence of male dominance in relationships between men and women and because our male-dominated society eroticizes dominance.[33] Although acknowledging male dominance in heterosexual relationships does not lead to the conclusion that all heterosexual sex should be criminalized, it demands that the criminal law recognize the impossibility of consent in egregious circumstances where a man exercises control over a woman through physical and mental intimidation. The dominance branch of the confidential relationship doctrine is the means by which the courts could acknowledge the impossibility of a victim's consent. If the state shows that the defendant had a history of physically abusing the victim within the definitions used for domestic abuse prosecutions, the defense that the victim consented to the sexual contact with positive words or positive conduct would be unavailable.[34]

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32. The concept that victims cannot exercise free will in certain situations has achieved limited recognition in some areas of the criminal law. *See, e.g.*, MINN. STAT. §§ 609.344(1)(h)-(k), 609.345(1)(h)-(k) (1990) (consent not a defense when a psychotherapist and current patient, or former patient who is emotionally dependent upon the psychotherapist, engage in sexual penetration or sexual contact).

33. *See* A. DWORKIN, *supra* note 2; MacKinnon, *supra* note 2, at 646-47.

34. The criminal law has recognized that the nature of the relationship between the victim and the abuser creates the need for special circumstances in the criminal justice system's treatment of domestic violence. In recognition of this relationship, statutory schemes have been amended in an attempt to provide increased protection for the victim. For example, in Minnesota, probable cause nonpresence arrest is permitted in misdemeanor domestic assault

This approach acknowledges the myth of a woman's choice under circumstances where survival to the next hour or day is itself a struggle. It might also serve to empower the woman in a dominant-type relationship. In these circumstances, even if her words or conduct affirmatively indicated consent to sex, both she and he would know that this is no defense to a rape complaint. Therefore, the dominance prong of confidential relationship doctrine may both empower the woman to pursue a rape prosecution and create for the man an interest in curtailing his behavior designed to control and dominate her. The argument, however, that an abstract evidentiary rule regarding the law of rape will empower a woman who daily is subjected to intimidation, at best, poses an interesting academic debating point, and, at worst, devalues the intense harm that an abused woman experiences.

Admittedly, applying the dominant-type confidential relationship doctrine in this manner may result in diminishing a woman's selfhood. Application of the trust-type confidential relationship to nonstranger rape empowers a woman to control access to her body. Unless she overtly demonstrates her sexual desires through acts or words, her male acquaintance is denied access. To assume that these same overt words or acts demonstrate consent when the woman has been a victim of physical and mental intimidation, however, is to ignore her life. Essentially, it would remove her right to agree to consensual sex. Once again, the question poses the familiar dilemma between acknowledging a woman's subordination and protecting against it and celebrating her autonomous and actualized self.

One possible solution to this dilemma is that courts could restrict application of the dominance branch of the confidential relationship doctrine to situations where the prosecution shows that the sexual contact occurred within some reasonably short time period after an incident of physical abuse. Only under circumstances of recent physical abuse would proof of the woman's affirmative words or conduct agreeing to sexual contact not be a defense. If a woman were to consent to sex freely or seek sex from her partner, it would likely be during a time period when the man had not been overtly abusive. Limiting application of the dominance-type confidential relationship

cases. MINN. STAT. § 629.341(1) (1990). When police make an arrest they must bring the arrested individual to the police station or jail rather than merely issue a citation. *Id.* § 629.72 (1990). Arrest is mandatory when a previously issued order for protection is violated. *Id.* § 518B.01(14) (1990).

doctrine to instances when overt abuse recently occurred would validate the woman's sexual choices in those circumstances when the possibility of choice was greatest.

Two reasons, however, mandate against restricting the use of the dominance-type confidential relationship rule. First, it fails to recognize that domination and intimidation persist in a relationship regardless of whether the man has recently or repeatedly manifested that domination and intimidation through physical abuse. Second, the proximate timing of overt physical abuse will become the cornerstone of a batterer's defense to rape and will do little to protect abused women from sexual invasion. It will mean that the only battering that makes a difference will be the overt abuse that occurs near and around the rape. The legal rules would continue to fail to reflect the reality of a battered woman's life.

## III. TWO CASE STUDIES

Analysis of two cases, *People v. Perez*[35] and *State v. Colbath*,[36] illustrates the current implications of a preexisting relationship between the victim of rape and the rapist and how those implications can result in a cruel distortion of the rape event. Both cases deal with jury instructions based on evidentiary restraints adopted pursuant to rape shield laws. Rape shield laws are an attempt to reverse the admissability under common law, and even modern codifications, of evidence of the previous sexual conduct of the victim as relevant to the issue of consent.[37]

Rape shield laws vary among the states in how much they restrict inquiry into the victim's past sexual history. Twenty-five states have adopted an approach modeled after Michigan's rape shield statute.[38] These statutes prohibit the introduction of sexual conduct evidence subject to certain exceptions.[39] The primary exception in all these statutes is that they permit the introduction of evidence of past sexual conduct between the victim and the defendant.[40] *Perez* and *Colbath* demonstrate

35. 194 Cal. App. 3d 525, 239 Cal. Rptr. 569 (1987).

36. 130 N.H. 316, 540 A.2d 1212 (1988).

37. *See* Galvin, *supra* note 5, at 765-66. Before the enactment of these statutes, some courts even permitted evidence of unchastity to be used to impeach a victim's credibility on the theory that promiscuity imports dishonesty. *Id.* at 766, 787 n.115 (citing Berger, *supra* note 2, at 3).

38. *See* Galvin, *supra* note 5, at 773.

39. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.520j (West Supp. 1990).

40. *See* Galvin, *supra* note 5, at 813-14.

that the statutory reform designed to protect the victim from having the defense use her past relationships to attack credibility and character, has become an imprimatur for the defendant to introduce evidence of a past relationship between the defendant and the victim as a strategy to lend credibility to the defendant's claim of consent or reasonable good faith belief of consent.

### A. *PEREZ*

In *Perez*, a 1987 California Appeals Court decision, the defendant was convicted in the trial court of forcible rape and burglary.[41] The appellate court set forth the facts as follows: The defendant and the victim had lived together for three years. For six months thereafter, until October 7, 1985, they dated occasionally and engaged in consensual intercourse. On the evening of October 14, 1985, the defendant entered the victim's house through her window despite her protests and efforts to stop him. She resisted his subsequent hugs and kisses, but he threatened her with a knife, forcing her into her bedroom. He choked, hit, and bit her, and ultimately had intercourse with her. After the defendant fell asleep, the victim escaped and contacted the authorities. Photographs and medical testimony established that she had extensive bruises and bite marks.[42]

The defendant admitted entering the victim's home through her window but contended that the ensuing intercourse was consensual. He denied having a knife, and although he admitted that she initially appeared upset, he testified that after he hugged, kissed, and talked to her, she let him carry her to bed. He contended that "she did nothing to indicate that she did not want to have intercourse."[43] He explained her injuries by stating that she bruised easily and the bite marks were "monkey bites."[44]

The defendant raised the defenses of consent and reasonable, good faith belief as to the victim's consent. The issue before the court was whether a jury instruction that allowed consideration of prior consensual sexual intercourse between the defendant and the victim in order to evaluate the defense of consent also applied to the defense of reasonable, good faith be-

41. 194 Cal. App. 3d at 527, 239 Cal. Rptr. at 570.
42. *Id.* at 528, 239 Cal. Rptr. at 570.
43. *Id.*
44. *Id.*

lief of consent.[45] The jury instruction in question embodied the evidentiary restrictions in the California Evidence Code.[46] The Court of Appeals agreed with the defendant that the jury instruction should have been expanded to apply to the defense of reasonable, good faith belief.[47] It found, however, that the failure to modify the jury instruction to include reasonable, good faith belief of consent was harmless error in the case at bar.[48]

Although the court affirmed the conviction, language in the court's analysis reveals its view that the existence of a relationship between the parties militates toward inferring consent rather than, analogous to other areas of the law, imposing a heightened duty of care to ensure consent. The court supported its decision to modify the jury instruction by stating that under the defendant's version of the facts, consent was manifested, as it historically had been, by conduct — acquiescence — and not by words.[49] Therefore, the court decided that the victim's prior consensual intercourse was highly relevant on the issue of the defendant's reasonable, good faith belief of consent. In so ruling, the court viewed acquiescence as relevant even when the encounter was aggressive and predatory.

Even the defendant's own testimony that "[the victim] did nothing to indicate that she did not want to have intercourse" at best only minimally supports consent.[50] The defendant did not claim that the victim did or said anything to indicate that she wanted to have intercourse with this man who had climbed through her window.

The court supported its determination that failure to modify the jury instruction was harmless error by distinguishing this rape from the previous encounters. The court noted that the defendant denied ever hitting or kicking the victim before, "negating any inference that resistance on the victim's part, and physical force on his part played a role in prior consensual acts."[51] Strikingly, the court did not question the notion of consent in the context of the defendant's aggressive physical force,

45. *Id.* at 528, 239 Cal. Rptr. at 571.

46. *Id.* at 529, 239 Cal. Rptr. at 571.

47. *Id.*, 239 Cal. Rptr. at 572.

48. *Id.* at 530, 239 Cal. Rptr. at 572.

49. Without explanation, the court makes no reference to CAL. PENAL CODE § 261.6 (West Supp. 1990), which defines consent to mean "positive cooperation in act or attitude pursuant to an exercise of free will." Under this definition, acquiescence alone seems inadequate.

50. *Perez*, 194 Cal. App. 3d at 528, 239 Cal. Rptr. at 570.

51. *Id.* at 530, 239 Cal. Rptr. at 572.

at least in so far as past encounters were concerned. Implied in the court's statement was the notion that if the past history between the victim and the defendant had included physical violence, the defendant's present contention of good faith, reasonable belief in consent would gain credibility. Thus, the court suggested that violent behavior that induces acquiescence would be rewarded rather than discouraged. Contrary to the court's apparent logic concerning the effect of evidence of past physical violence, the proposed dominance-type confidential relationship rule would mandate conviction for rape upon a showing of sexual contact and invalidate the defense of consent.

Under a trust-type confidential relationship analysis, the defendant's claim that the victim did nothing to indicate that she did not want to have intercourse would not be a sufficient defense. The court would have to acknowledge the trust that this preexisting relationship induced and impose on the defendant a heightened degree of care. The court would have been compelled to examine whether the victim's trust in the defendant had been violated by the defendant's failure to exercise the utmost care in determining whether the victim wanted to participate in sex. Thus, under a confidential relationship analysis, instead of the defendant introducing evidence of a preexisting relationship between the defendant and the victim to bolster his defense of consent, the prosecution would use this evidence to establish that the defendant's conduct be judged according to a heightened duty of care.

### B. *COLBATH*

In *Colbath*, Justice Souter, writing for the New Hampshire Supreme Court reversed the defendant's conviction of aggravated felonious assault.[52] The court described the circumstances surrounding the assault as follows:

> During the noon hour of June 28, 1985, the defendant . . . went with some companions to the Smokey Lantern tavern . . . where he became acquainted with the female complainant. There was evidence that she directed sexually provocative attention toward several men in the bar, with whom she associated during the ensuing afternoon, the defendant among them. He testified that he had engaged in "feeling [the complainant's] breasts [and] bottom [and that she had been] rubbing his crotch" before the two of them eventually left the tavern and went to the defendant's trailer. It is undisputed that sexual intercourse followed; forcible according to the complainant, consensual according to the defendant. In any case, before they left the trailer the

52. State v. Colbath, 130 N.H. 316, 325, 540 A.2d 1212, 1217 (1988).

> two of them were joined unexpectedly by a young woman who lived with the defendant, who came home at an unusual hour suspecting that the defendant was indulging in faithless behavior. With her suspicion confirmed, she became enraged, kicked the trailer door open and went for the complainant, whom she assaulted violently and dragged outside by the hair. It took the intervention of the defendant and a third woman to bring the melee to an end.
>
> As soon as the complainant returned to town she accused the defendant of rape, and the police promptly arrested and charged him accordingly.[53]

On appeal, the defendant objected to the jury instruction that evidence of the victim's behavior with men other than the defendant in the hours preceding the incident was irrelevant to the question of the defendant's guilt or innocence.[54] During the course of the trial, the defense elicited testimony of the victim's public activities that afternoon with various men, including her own admission that she had engaged in close physical contact with at least one man besides the defendant.[55] The trial court's jury instruction reflected its earlier ruling in the case on a motion *in limine* to restrict this testimony.[56] The judge explained that the testimony in question had been received only to provide background information, and that the jurors were to ignore evidence regarding the victim's conduct with other individuals as irrelevant to whether she gave consent to sexual intercourse. The New Hampshire Supreme Court treated this instruction as an order to strike the testimony concerning "the complainant's openly observed behavior with other men during the course of the afternoon."[57]

In reversing the conviction, the supreme court emphasized the public aspect of the victim's alleged behavior. The court narrowed the purpose of the rape shield law to an intention to honor the victim's interest in preserving the privacy of intimate activity. Thus narrowed, the victim's interest in protection became trivialized. The court then proceeded to balance the privacy interest of the victim against the defendant's constitutional interest in confronting witnesses and presenting evidence.[58] Not surprisingly, framing the question as a balance between a defendant's constitutional rights and a victim's already devalued interest dictated the supreme court's answer.

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53. *Id.* at 317-18, 540 A.2d at 1212-13.
54. *Id.* at 321, 540 A.2d at 1214.
55. *Id.*, 540 A.2d at 1215.
56. *See id.* at 322, 540 A.2d at 1215.
57. *Id.*
58. *Id.* at 325, 540 A.2d at 1217.

The supreme court asserted with no apparent authority other than its own personal belief that "evidence of public displays of general interest in sexual activity can be taken to indicate a contemporaneous receptiveness to sexual advances that cannot be inferred from evidence of private behavior with chosen sex partners."[59] The court cited no empirical support for its assumption that public displays of general interest in sexual activity are evidence of some sort of nonparticularized receptiveness to sexual advances. The court's unsupported view assumed away any question that this behavior was relevant to the incident in question. According to the court, public behavior by women that might indicate a general interest in sex was viewed as an indication of "contemporaneous receptiveness"[60] — a receptiveness that is apparently non-selective. Further, although the court talked about "contemporaneous receptiveness" and the "publicly inviting acts" occurring closely in time to the alleged sexual assault,[61] the court never specified how much time elapsed between the victim's behavior and the rape. We are left to speculate as to how long a woman indicating general interest in sexual activity remains vulnerable to the sexual advances of men.

The supreme court further emphasized its support of male access to women by speculating on the attitude of the victim. The court theorized that the jury could have taken evidence of the victim's "sexually provocative behavior toward a group of men as evidence of her probable attitude toward an individual within the group."[62] The court went on to speculate that "[e]vidence that the publicly inviting acts occurred closely in time to the alleged sexual assault by one such man could have been viewed as indicating the complainant's likely attitude at the time of the sexual activity in question."[63]

While recognizing that the procedural posture of the case requires the appellate court to consider whether the excluded evidence of the victim's behavior prejudiced the defense, this court adopted an analysis that goes beyond that necessary for judicial review. The progression of language the court used is notable. The court initially characterized the victim's behavior as sexually "provocative."[64] The victim's "provocative activi-

59. *Id.*
60. *Id.* at 324, 540 A.2d at 1217.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 320, 540 A.2d at 1214.

ties" became "sexually suggestive conduct," which the court finally described as "publicly inviting acts."[65]

The court then speculated that the defendant's companion could have inflicted the victim's injuries. Further, the court suggested that the companion's attack on the victim could be regarded as a motive for the victim to lie in order to explain her injuries and "excuse her undignified predicament."[66] According to the court, the victim not only publicly invited acts and had a minimal interest in being protected from inquiry concerning her actions with others, but also had a motivation to make a false accusation. Thus, *Colbath* illustrates that long-held concepts of victim provocation and fear of the falsely accusing woman remain a part of judicial reasoning.

Nowhere does the court analyze the relationship between the defendant and the victim as it would in other contexts in terms of trust and the resulting duty of care that arises out of that relationship. If the court had recognized the significance of the relationship in these terms, the relationship then would have become, as it would have in *Perez*, evidence to be elicited by the prosecutor to show that the duty should have been triggered in this instance. The duty that would arise is an obligation to ascertain with certainty that the other party is in fact consenting to sexual activity. If the circumstances result in ambiguity, sexual activity should not occur unless and until that ambiguity is positively clarified and consent is certain.

Although the confidential relationships at issue in *Perez* and *Colbath* differ as to longevity and prior sexual intimacy, both relationships were sufficient for the victims to have reposed trust in the defendants. Instead of viewing trust as an experience to be respected and as an element creating an additional duty on the part of the defendants, as courts routinely do in other areas of the law, in both cases the preexisting relationships were used to the detriment of the victims.

## CONCLUSION

The argument in this Essay is straightforward. First, the Essay describes how courts use the common law doctrine of confidential relationship to require one person to act in the interest of another. The Essay then explains why and how this common law doctrine should apply to nonstranger rapes. The

65. *Id.* at 324, 540 A.2d at 1217.
66. *Id.*

precise nature of the relationship is unimportant. The key is whether a connection has been made so that the victim's familiarity with the defendant may lead her to trust him to respect and act in her interest. Even in situations where the relationship has ended, the continuing familiarity gives rise to a continuing repose of trust. In general, the victim will not be as wary of a nonstranger as of a stranger notwithstanding that the nature of the relationship may have changed. Given the severity of the harm and pain that rape victims experience, the obligation positively to inquire so that unequivocal consent is obtained seems a minimal requirement indeed.