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1995]

Notes

WHAT DOES "NO" MEAN IN PENNSYLVANIA? — THE PENNSYLVANIA SUPREME COURT'S INTERPRETATION OF RAPE AND THE EFFECTIVENESS OF THE LEGISLATURE'S RESPONSE

Commonwealth v. Berkowitz

I. INTRODUCTION

In hearings on violence against women, members of the United States Senate have declared instances of rape to be a national epidemic.¹ In 1990, for the first time in United States history, the number of reported rapes exceeded 100,000.² Moreover, the FBI reported that the number of rapes rose from ten per hour in 1989 to twelve per hour, approximately 300 per day, in 1990.³ At that time, these statistics indicated that the United States led the world with its number and rate of reported rapes.⁴

These alarming records were broken again by the most recent data available. In 1992, more than 109,000 women reported that they were raped.⁵ Despite this shockingly high number, the FBI continues to list rape as the most under-reported crime.⁶ Indeed, statistics reveal that only sixteen percent of the rapes that occurred in 1992 were reported to the police.⁷ Information obtained from state-wide rape crisis centers substan-

1. *Violence Against Women: Victims of the System, 1991: Hearings on S.15 Before the Committee on the Judiciary of the Senate, 102d Cong., 1st. Sess. 4, 22, 183 (1991)* [hereinafter *Hearings*] (opening statement of Sen. DeConcini, testimony of Sen. Dole and introduction of majority staff report entitled *Violence Against Women: The Increase of Rape in America 1990* by Sen. Biden, Chairman, Senate Committee on the Judiciary).

2. *Id.* at 189 (noting that rape epidemic is likely to worsen).

3. *Id.*

4. *Id.* at 193 (citing United States Department of Justice, Bureau of Justice Statistics Special Report, *International Crime Rates*, May 1988). The term "rape number" refers to the number of rapes, while the term "rape rate" refers to the percentage of women who were raped. *Id.* at 189; see also JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE: THE MISUNDERSTOOD CRIME* 9-19 (1993) (discussing explanations for prevalence of rape in United States).

5. BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992* (1993).

6. See ALLISON & WRIGHTSMAN, *supra* note 4, at 172 (discussing reasons for under-reporting); JEANNE C. MARSH ET AL., *RAPE AND THE LIMITS OF LAW REFORM* 28 (1982) (listing factors that enter into victim's decision to report rape).

7. NATIONAL VICTIM CENTER SURVEY, *RAPE IN AMERICA* (1992).

tiates the assertion that the number of rapes reported to the police is fewer than the number of rapes that actually occur.⁸

The controversy surrounding rape begins with this statistical information and pervades legal and social realms.⁹ The interrelationship between rape and social attitudes is suggested by one feminist author's view that "rape is an exercise in the imbalance of power that exists between most men and women, a relationship that has forged the social order from ancient times on."¹⁰ Inevitably, these social attitudes and myths culminate in the law.¹¹ The tension between myth and reality and the controversy about men and women's social roles affect every stage of a rape case's progression through the legal system—from the victim's decision of whether to report to the court's decision of whether to convict.¹² Consequently, the problems inherent in the legal system's approach to rape have been coined the "second rape" because of the victims' feelings that they "will be tried, battered and abused by the system."¹³

Despite legislative reforms to remedy these feelings of injustice, some courts continue to perpetuate rape myths and social inequalities between

8. *Hearings*, *supra* note 1, at 195. In two out of every three cases, the state-wide rape crisis centers showed dramatically higher increases in the number of rapes than the data provided by police. *Id.* The report highlights the importance of this unofficial data noting that, "because the rape crisis center data is independent of official rape reporting trends and because the data indicate that the rape rate is rising at a pace even greater than that suggested by the Uniform Crime Reporting system, we know that the surging epidemic is real." *Id.* at 196.

9. See SUSAN ESTRICH, *REAL RAPE* 10 (1987) (noting that feminists, relying on problem of under-reporting, declare that rape is at epidemic levels, while others maintain that rape is relatively uncommon).

10. ROBIN WARSHAW, *I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE* 21 (1988) (discussing feminist author Susan Brownmiller's views on rape).

11. MARSH ET AL., *supra* note 6, at viii. Particularly, "legislative debate over issues of marital rape, acquaintance rape, rape without other extensive physical damage, and the relevance of the victim's sexual conduct tap basic—almost primordial—beliefs about the subservient place and role of women, sex, seduction and fear." *Id.*

12. *Id.* at 85-102 (discussing influences on investigation, issuance of warrant and prosecution of rape cases); *The Response to Rape: Detours on the Road to Equal Justice: A Majority Staff Report Prepared for the Use of the Committee on the Judiciary of the Senate*, 103d Cong., 1st Sess. 1-13 (1993) [hereinafter *Report*] (discussing stumbling blocks confronting victims in arrest, dismissal of cases, acquittal and sentencing, and providing statistical information on each of these areas).

13. *Report*, *supra* note 12, at 8 (discussing judicial system's inadequacy with regard to prosecution of attackers and quoting *Violence Against Women: Victims of the System, 1991: Hearings on S.15 Before the Committee on the Judiciary of the Senate*, 102d Cong., 1st Sess. 137 (1991)); see LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM* 7 (1991) ("The second rape is exemplified most dramatically when the survivor is strong enough, brave enough, and even naive enough to believe that if she decides to prosecute her offender, justice will be done. It is a rape more devastating and despoiling than the first.").

men and women when the courts interpret the law.¹⁴ For example, the Pennsylvania Supreme Court has held that a woman is not raped when a man penetrates her despite her repeated and clearly-expressed lack of consent in the controversial case *Commonwealth v. Berkowitz*.¹⁵ According to the court, because Pennsylvania's rape statute does not contain a consent element, consent is not relevant to the issue of force.¹⁶

As a result of public discontent with the *Berkowitz* court's holding and as part of a broad attempt to reform Pennsylvania's outdated rape law, the Pennsylvania General Assembly has enacted a law that purports to remedy

14. See MARSH ET AL., *supra* note 6, at 49-65 (discussing impact of rape law reform in courtroom).

15. 641 A.2d 1161, 1164 (Pa. 1994) (finding that complainant's testimony failed to establish that appellee forcibly compelled her to engage in sexual intercourse).

16. *Id.* at 1164 n.4 (defining "forcible compulsion" as requiring physical force, threat of physical force, or psychological coercion). At the time of *Berkowitz*, Pennsylvania's rape statute stated:

A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse:

- (1) by forcible compulsion;
- (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (3) who is unconscious; or
- (4) who is so mentally deranged or deficient that such person is incapable of consent.

18 PA. CONS. STAT. ANN. § 3121 (Supp. 1994), *amended by* 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1995).

While the court reversed *Berkowitz*'s rape conviction, the court reinstated the indecent assault conviction because the elements of indecent assault, indecent contact and lack of consent, were met. *Berkowitz*, 641 A.2d at 1166. At the time of *Berkowitz*, Pennsylvania's indecent assault statute stated:

(a) Offense defined. — A person who has indecent contact with another not his spouse, or causes such other to have indecent contact with him, is guilty of indecent assault if:

- (1) he does so without the consent of the other person;
- (2) he knows that the other person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct;
- (3) he knows that the other person is unaware that an indecent contact is being committed;
- (4) he has substantially impaired the other person's power to appraise or control his or her conduct by administering or employing, without the knowledge of the other drugs, intoxicants or other means for the purpose of preventing resistance;
- (5) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him; or
- (6) he is over 18 years of age and the other person is under 14 years of age.

(b) Grading. — Indecent assault under subsection (a)(6) is a misdemeanor of the first degree. Otherwise, indecent assault is a misdemeanor of the second degree.

18 PA. CONS. STAT. ANN. § 3126 (Supp. 1994), *amended by* 18 PA. CONS. STAT. ANN. § 3126 (Supp. 1995).

the court's decision.¹⁷ The "new" addition to the statutory scheme for rape, the crime of sexual assault, makes nonconsensual intercourse a second degree felony.¹⁸ While the media and legislature hail this statute as the " 'no means no' provision," a critical review of the statute suggests imperfections and unresolved issues that make its impact on rape and the *Berkowitz* decision dubious.¹⁹

This Casenote discusses the development of rape law throughout the country, focusing particularly on Pennsylvania law. As background, Part II discusses the history of rape laws, the rape reform movement and the impact rape reform has had on legislation and case law.²⁰ Particularly, Part II focuses on Pennsylvania's reformist efforts and the manifestations

17. See Hunter T. George II, *Governor Signs New Rape Bill into Law, Drops Need to Prove Force*, HARRISBURG PATRIOT & EVENING NEWS, Apr. 1, 1995, at A3 (noting that Governor Tom Ridge signed bill into law on Mar. 31, 1995 and describing law as "sparked by a court decision last year that cleared an East Stroudsburg University student of a rape conviction"). For a discussion of the new legislation and its impact on the *Berkowitz* decision, see *infra* notes 18, 19, 126-28, 136-42, 183-206, 213-15 and accompanying text.

18. The sexual assault statute provides: "Except as provided in section 3121 (relating to rape) or 3123 (relating to involuntary deviate sexual intercourse), a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent." 18 PA. CONS. STAT. ANN. § 3124.1 (Supp. 1995) (effective May 31, 1995).

As a second-degree felony, a conviction under this statute carries a maximum prison sentence of 10 years and a maximum fine of \$25,000. Tanya Barrientos & Lini S. Kadaba, *The No-Means-No Bill Is Clear; Student Opinion Isn't, The Legislation Would Strengthen Pa.'s Rape Laws. Many Students at Area Colleges Applaud the Changes. Others Say Life Isn't That Simple.*, PHILA. INQUIRER, Mar. 28, 1995, at B1.

19. See, e.g., Robert Moran, *No-Means-No Bill Sent to Governor*, HARRISBURG PATRIOT & EVENING NEWS, Mar. 22, 1995, at B1 (referring to then-pending bill as the "so-called no-means-no legislation"). In response to the new law, Delilah Rumburg, executive director of the Pennsylvania Coalition Against Rape, remarked, "[n]ow victims that have been afraid to come forward will feel more secure." George, *supra* note 17 at A3. Similarly, legislators have praised the law as "a major step forward." Russell E. Eshleman, Jr., *Rape Bill Likely to Pass Today, 'The No Means No' Provision Is Expected to Win House Approval. The Senate OK'd It Yesterday.*, PHILA. INQUIRER, Mar. 21, 1995, at B1 (quoting former State Representative Karen A. Ritter who directed House efforts to reform rape laws in 1994). Additionally, perhaps the most poignant evidence of the political reaction to this legislation is that both the House and Senate unanimously passed the bill. Moran, *supra*, at B1 (also noting Governor Ridge's support).

For a further discussion of the sexual assault statute and other changes in the statutory scheme for rape, see *supra* note 18 and *infra* notes 129-42 and accompanying text. For a discussion of the potential problems and defects with the legislation, see *infra* notes 183-206, 213-15 and accompanying text.

20. For a discussion of the history of rape laws and the impact of the rape reform movement, see *infra* notes 29-38 and accompanying text. For a discussion of rape laws in various states and cases implementing these laws, see *infra* notes 39-80 and accompanying text.

of these efforts in pre-*Berkowitz* cases.²¹ Part III A discusses the facts and procedural history of the Pennsylvania Supreme Court case *Commonwealth v. Berkowitz*.²² Part III A also discusses the Pennsylvania Supreme Court's rationale underlying its application of Pennsylvania's rape laws in the *Berkowitz* case.²³ Part III B discusses the Pennsylvania State Legislature's reaction to the *Berkowitz* decision, including the proposed legal reforms, as well as the legislation that was finally enacted in March 1995.²⁴ Part IV A provides a critical analysis of the Pennsylvania Supreme Court's *Berkowitz* decision and suggests that the court narrowly construed the rape laws and, in doing so, undermined rape reform efforts.²⁵ Part IV B critically analyzes the legislature's response and suggests that while the new law may be a step forward, it leaves various issues unanswered and does not fully resolve the *Berkowitz* controversy.²⁶ Finally, Part V discusses the ramifications that the *Berkowitz* decision and the new legislation will have on future rape prosecutions and victims in the Commonwealth.²⁷ Part VI concludes that, while the latest legislative action may be a step toward effectuating the goals of rape reform, its impact on the *Berkowitz* decision is unclear and will ultimately depend on the court's interpretation as it hears cases involving the new legislation.²⁸

II. BACKGROUND—TRADITIONAL RAPE LEGISLATION AND CASE LAW

A. *Traditional Rape Law and the Movement to Reform*

For decades, rape laws in the United States were based on outdated myths of rape promulgated by early seventeenth-century English jurists such as Lord Chief Justice Matthew Hale.²⁹ That the laws were geared to pro-

21. For a discussion of rape reform in Pennsylvania, see *infra* notes 39-47 and accompanying text. For a discussion of Pennsylvania cases implementing these laws, see *infra* notes 48-80 and accompanying text.

22. For a discussion of the facts and procedural history of *Berkowitz*, see *infra* notes 81-111 and accompanying text.

23. For a discussion of the Pennsylvania Supreme Court's interpretation of the forcible compulsion element of rape in *Berkowitz*, see *infra* notes 112-15 and accompanying text. For a discussion of the relevance of lack of consent, see *infra* notes 116-21 and accompanying text. For a discussion of the court's analysis of indecent assault, see *infra* notes 122-25 and accompanying text.

24. For a discussion of the Pennsylvania Legislature's failed reform attempts following the *Berkowitz* decision, see *infra* notes 129-35 and accompanying text. For a discussion of the provisions of the new legislation and the changes it effectuates in the law, see *supra* note 18 and *infra* notes 136-42 and accompanying text.

25. For a critical discussion of the court's analysis in *Berkowitz*, see *infra* notes 143-82 and accompanying text.

26. For a discussion of the defects in the new law and its dubious effect on the *Berkowitz* decision, see *infra* notes 183-206, 213-15 and accompanying text.

27. For a discussion of the social and legal impact of the *Berkowitz* decision, see *infra* notes 207-24 and accompanying text.

28. For a discussion of the fate of *Berkowitz* in the wake of the legislature's actions, see *infra* notes 183-206, 213-15 and accompanying text.

29. *Commonwealth v. Rhodes*, 510 A.2d 1217, 1223 n.11 (Pa. 1986) (noting that Model Penal Code perpetuated many myths of rape).

tect the accused man by portraying him as the actual victim is evident in Hale's remark: "Rape is an accusation easily to be made and hard to be proved, and harder still to be defended by the party accused, tho never so innocent."³⁰ This attitude resulted in rules that defined rape to require proof of actual physical resistance by the victim and substantial force by the accused.³¹ Moreover, evidentiary rules that focused on the victim's prior unchaste history penalized women who did not complain promptly and required corroboration of the woman's testimony.³² Despite the seeming injustice of these rules, they were supported by societal views and norms.³³

30. MATTHEW HALE, 1 HISTORY OF THE PLEAS OF THE CROWN 634 (London 1st ed. 1736). This statement served as the basis for cautionary instructions to jurors. ESTRICH, *supra* note 9, at 108 n.6. The Model Penal Code ascribes to this approach in the following provision:

In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.

MODEL PENAL CODE § 213.6(5) (1962).

Under this approach, the usual procedural guarantee that the government must prove the man's guilt beyond a reasonable doubt is turned upside down so that "the one who so 'easily' charges rape, must first prove her own lack of guilt." ESTRICH, *supra* note 9, at 5. The Pennsylvania General Assembly has rejected the Model Penal Code's juror instruction requirement, as well as other rules that perpetuate rape myths, like the prompt reporting and corroboration requirements. 18 PA. CONS. STAT. ANN. §§ 3101-07 (1983 & Supp. 1994), *amended by* 18 PA. CONS. STAT. ANN. §§ 3101-02, 3105-06 (Supp. 1995). *Compare* MODEL PENAL CODE § 213.6 (requiring prompt complaint, corroboration, heightened scrutiny in jury evaluation of victim's testimony and allowing evidence of victim's prior promiscuity as defense) *with* 18 PA. CONS. STAT. ANN. §§ 3101-07 (eliminating prompt complaint, corroboration, and resistance requirements, and disallowing evidence of victim's prior sexual conduct as defense), *amended by* 18 PA. CONS. STAT. ANN. §§ 3101-02, 3105-06 (Supp. 1995). Fortunately, the Pennsylvania Supreme Court also shares the legislature's view that these rules are out-dated. *See Rhodes*, 510 A.2d at 1223 n.11 (describing these rules as "ill-conceived").

31. ESTRICH, *supra* note 9, at 5.

32. *Id.*; *see* MODEL PENAL CODE § 213.6 (3)-(5) (allowing accused to use evidence of victim's promiscuity as defense to rape, requiring prompt complaint and requiring that victim's testimony be corroborated).

33. *See In re M.T.S.*, 609 A.2d 1266, 1272 (N.J. 1992). Among these views was the notion that men had a right to sex and that women were the property of their husbands. *Id.* (noting that rape had its legal origins in laws designed to protect male property rights); J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 546 (1980) (discussing relationship between rape and male desire to protect his property); ESTRICH, *supra* note 9, at 72-73 (discussing marital rape exemption's origin in stereotype of wife as "permanent chattel"). Moreover, men believed women had rape fantasies about being ravished by their lovers and that women would turn these fantasies into rape accusations when they ultimately estranged from the relationship. ESTRICH, *supra* note 9, at 5.

As social, psychological and legal thinking began to change in the 1970s, the rape reform movement emerged.³⁴ The purpose of this movement was to revise outdated rape laws "to reflect and legitimate the changing status of women in American societies" and to reject the patriarchal view that men had a right to own women and treat them as sexual objects.³⁵ The reformers' message stressed that rape is a crime of violence, not sex.³⁶ The reformers goals included: (1) reducing the skeptical attitude of criminal justice officials toward rape victims, (2) eliminating non-legal considerations in judicial decision making, (3) improving treatment of rape victims, (4) increasing the number of reported rapes and (5) removing legal barriers to arrest, prosecution and conviction for rape.³⁷ Among the most common changes adopted by the states during this reform movement were: (1) redefining rape and replacing the single crime with a series of graded offenses defined by the presence or absence of aggravating factors, (2) changing the consent standard by eliminating the requirement that the victim physically resist her attacker, (3) eliminating the rule that the victim's testimony be corroborated and (4) placing restrictions on the introduction of evidence of the victim's prior sexual conduct.³⁸

While Michigan is regarded as having made the greatest strides in rape reform, Pennsylvania has also embraced strong reforms.³⁹ Consistent with the common law construction of rape, former Pennsylvania rape laws required that the actor have unlawful carnal knowledge of the woman and that the act be committed forcibly and against the will of the female.⁴⁰

34. For a discussion of rape reform and the groups involved in the movement, see CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM* (1992).

35. *Id.* at 20. See generally Martha Chamallas, *Consent, Equality and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 787-90 (1988) (discussing traditional views of marital and nonmarital sex as means of maintaining patriarchal social system).

36. Cynthia A. Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 400 (1988) (noting that power and anger are dominant motives for rape).

37. SPOHN & HORNEY, *supra* note 34, at 20-21. But see Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & LAW 41, 42 (1993) (arguing that rape laws have failed to have impact on rate of rape in United States because cultural conventions still view rape merely as sex, rather than criminal conduct and because media continues to perpetuate belief that female submission to male dominance and aggression is natural, erotic and romantic).

38. For a more detailed discussion of the changes made in rape laws, see SPOHN & HORNEY, *supra* note 34, at 21-32.

39. *Id.* at 35-46 (discussing pro-victim reforms made in Michigan, Pennsylvania and Illinois, as well as lesser reforms made in Texas, Georgia and Washington, D.C.).

40. Act of May 12, 1966, No. 1, § 1, 1966 Pa. Laws 84 (repealed 1972) (delineating requirements of crime of rape); see Mark Soifer, Comment, *Revision of the Law of Sex Crimes in Pennsylvania and New Jersey*, 78 DICK. L. REV. 73, 74-84 (1973) (comparing old rape laws with revisions that were made). The "unlawful carnal knowledge" element required penetration, however slight, of the male's penis into the female's vagina. *Id.* at 74. The force needed to satisfy the "forcibly and against

Using the Model Penal Code as a "starting point," the legislature made substantial changes in the law culminating in the Pennsylvania Crime Code of 1972.⁴¹ Among the most significant revisions made in the law included the use of more explicit terminology defining rape.⁴² For instance, the term "sexual intercourse," with a broad interpretation including traditional vaginal intercourse as well as oral and anal intercourse, replaced the archaic phrase "unlawful carnal knowledge."⁴³ Similarly, the new law eliminated the phrase "forcibly and against her will," which caused courts to over emphasize the victim's lack of consent.⁴⁴ Moreover,

her will" element need not have been actually-applied force, rather constructive or implied force was sufficient. *Id.* Constructive and implied force commonly involved cases where a man had intercourse with an intoxicated or mentally unaware victim. *Id.* The "against her will" element introduced the concept of consent into the crime. *Id.* at 75. Typically, resistance was the primary indicator of lack of consent. *Id.* For a further discussion of consent, mens rea and resistance, see *infra* notes 69-80, 116-21, and 143-82 and accompanying text.

41. Commonwealth v. Rhodes, 510 A.2d 1217, 1223 (Pa. 1986) (noting that Model Penal Code was focal point of legislative debate leading to enactment of Pennsylvania Crimes Code in 1972); see Soifer, *supra* note 40, at 77-84 (discussing development of Pennsylvania Crimes Code).

42. Soifer, *supra* note 40, at 77 (comparing Pennsylvania Crimes Code of 1972 to prior statutes).

43. *Id.* (noting that Crimes Code retains old laws' construction of penetration and emission); see 18 PA. CONS. STAT. ANN. §§ 3121-22 (Supp. 1994) (defining crime of rape), amended by 18 PA. CONS. STAT. ANN. §§ 3121-22 (Supp. 1995); 18 PA. CONS. STAT. ANN. § 3101 (Supp. 1994) (defining "sexual intercourse"), amended by 18 PA. CONS. STAT. ANN. § 3101 (Supp. 1995).

44. Soifer, *supra* note 40, at 78. However, current law retains the concept of force with the phrase "forcible compulsion," but avoids the ambiguities inherent in the phrase "forcibly and against her will." 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1994), amended by 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1995). In Commonwealth v. Rhodes, the court stated that the Model Penal Code approach to force specifically focuses on physical force and acts of violence, while the Pennsylvania concept of "forcible compulsion" has a broader meaning. *Rhodes*, 510 A.2d at 1224. Compare MODEL PENAL CODE 213.1 ("A man who has sexual intercourse with a female not his wife is guilty of rape if: (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone . . .") with 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1994) (stating that rape includes sexual intercourse by "forcible compulsion"), amended by 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1995).

Several states adhere to the "forcible compulsion" requirement in their sexual assault and rape statutes. See ALA. CODE § 13A-6-61 (1994) (first-degree rape); ARK. CODE ANN. § 5-14-103 (Michie 1993) (rape); KY. REV. STAT. ANN. § 510.040 (Michie/Bobbs-Merrill 1990) (first-degree rape); MO. REV. STAT. § 566.030 (Supp. 1995) (rape); NY PENAL LAW § 130.35 (McKinney 1987) (first-degree rape); OR. REV. STAT. § 163.375 (1990) (first-degree rape); WASH. REV. CODE § 9A.44.040 (1988) (first-degree rape).

Other states require that the defendant use "force or coercion" in performing the sexual act. See CAL. PENAL CODE § 261(2) (West Supp. 1995) (stating that rape is intercourse "accomplished against a person's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the person of another"); FLA. STAT. ch. 794.011(3) (Supp. 1995) (providing life felony for sexual battery committed when person engages in nonconsensual intercourse with another person and "in the process . . . uses or threatens to use a deadly weapon or

Pennsylvania has departed from some of the Model Penal Code's stringent requirements for rape by repealing the "corroboration" and "prompt-complaint" requirements, and by eliminating Hale's cautionary instructions to jurors.⁴⁵ Additionally, Pennsylvania has enacted a statute, applicable to the crime of rape (as well as to other crimes), that eliminates the requirement that the victim resist an attacker.⁴⁶ Pennsylvania has also been praised for its evidentiary changes, including its strong rape shield laws.⁴⁷

Despite these legislative reforms, the Pennsylvania Supreme Court has received criticism for its approach and application of the state's rape laws.⁴⁸ Particularly, critics have questioned the court's refinement of the "forcible compulsion" requirement in *Commonwealth v. Berkowitz* and

uses actual physical force"); ILL. ANN. STAT. ch. 720, para. 5/12-13 (Smith-Hurd 1993) (stating that criminal sexual assault requires "sexual penetration by the use of force or threat of force"); IND. CODE § 35-42-4-1(1) (Supp. 1994) (requiring rape victim to be "compelled by force or imminent threat of force"); KAN. STAT. ANN. § 21-3502(1)(a) (Supp. 1994) ("Rape is sexual intercourse with a person who does not consent to the sexual intercourse . . . when the victim is overcome by force or fear . . ."); MD. CODE ANN., CRIM. LAW § 462 (Supp. 1991) (requiring "intercourse by force or threat of force"); MASS. GEN. L. ch. 265, § 22 (1990) (stating that rape requires that defendant compel victim to "submit by force and against his will"); MICH. COMP. LAWS § 750.520(b) (1991) (providing that criminal sexual conduct requires "force or coercion to accomplish the sexual penetration"); N.J. REV. STAT. § 2C:14-2c(1) (1995) (providing that sexual assault is committed when actor sexually penetrates victim and "uses physical force or coercion, but the victim does not sustain severe personal injury"); N.M. STAT. ANN. § 30-9-11 (Michie 1993) (defining criminal sexual penetration as intercourse "by use of force or coercion that results in great bodily harm or great mental anguish to the victim"); OHIO REV. CODE ANN. § 2907.02(A)(2) (Anderson Supp. 1994) (providing rape is committed when person engages in sexual conduct with another and "purposely compels the other person to submit by force or threat of force"); R.I. GEN. LAWS § 11-37-2(2) (Supp. 1994) (stating that first-degree sexual assault includes sexual penetration when "the accused uses force or coercion"); TENN. CODE ANN. § 39-13-503(a)(1) (1991) (providing that "rape is unlawful sexual penetration of a victim" when "force or coercion is used to accomplish the act"); WIS. STAT. § 940.225(2) (1982) (providing that second-degree sexual assault is "sexual contact or sexual intercourse with another person without consent of that person by use of force or threat of force or violence").

45. See MODEL PENAL CODE § 213.6(4),(5) (requiring prompt reporting and corroboration of victim's testimony to secure rape conviction); *Rhodes*, 510 A.2d at 1223 n.11 (discussing Pennsylvania's departure from Model Penal Code).

46. 18 PA. CONS. STAT. ANN. § 3107 (1983) (stating that alleged victim "need not resist the actor in prosecutions under this chapter").

47. SPOHN & HORNEY, *supra* note 34, at 41-44 (recognizing strong rape shield laws of Pennsylvania, as well as Illinois and Michigan); see 18 PA. CONS. STAT. ANN. § 3104 (1983) (Pennsylvania's Rape Shield Law).

48. See Scott Flander, *In Rape, Force Is Required: Court Ruling Called Setback for Women in Pennsylvania*, PHILA. DAILY NEWS, June 2, 1994, at 5 ("The court reaffirmed a myth that we've been battling for centuries — that a woman has to show up with cuts and bruises to prove that she was a rape victim," said Vanessa Grant Jackson, head of Women Organized Against Rape."). Prosecutor in the *Berkowitz* case, Jane Roach, criticized the court's decision as a "dangerous . . . confusing, unenlightened, and unwarranted message." Jane Roach, *Just Saying No Should Be Enough*, PHILA. INQUIRER, June 5, 1994, at C7. According to Roach, the force necessary to commit rape is the act of intercourse "in disregard of a clear 'no.'" *Id.*

whether this interpretation has effectively reinstated the resistance requirement.⁴⁹

B. Interpreting "Forcible Compulsion"

Historically, the Pennsylvania Supreme Court, in accord with the goals of rape reform, broadly interpreted the forcible compulsion requirement.⁵⁰ For instance, the court explicitly rejected the Model Penal Code's emphasis on physical force and violence in *Commonwealth v. Rhodes*.⁵¹ Thoroughly discussing the meaning of the word "force," the court stated that "forcible compulsion" clearly connotes something more than the exercise of sheer physical force or violence.⁵² Specifically, the court held that "'forcible compulsion' as used in section 3121(1) of the Pennsylvania statute includes not only physical force or violence but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will."⁵³

Roach commented that "[no] wasn't enough to stop a rapist, but it should have been enough for the Supreme Court." *Id.*

49. See Cheryl Siskin, Note, *Criminal Law — No. The "Resistance Not Required" Statute and "Rape Shield Law" May Not Be Enough*—*Commonwealth v. Berkowitz*, 66 TEMP. L. REV. 531, 558-60 (1993) (discussing superior court's misapplication of "resistance not required" statute); Lani A. Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1116-17 (1993) (citing *Berkowitz* as an example of negative implications of "separate and indispensable force requirement").

Typically, rape prevention programs and women's organizations teach women to just say "no" to unwanted sexual advances. Melissa H. Rakas, *Date Rape*, AWARE: A PUBLICATION OF THE WOMEN'S LAW CAUCUS OF VILLANOVA UNIVERSITY, Winter 1992, at 19 (interview with Dr. Helene Feinberg-Walker) (stating that a woman should "be firm in her NO, believing that she is entitled to her integrity"). According to Kathryn Geller Myers, spokeswoman for the Pennsylvania Coalition Against Rape, the *Berkowitz* decision "'goes against what we've been teaching women all these years — to say 'no,' and mean 'no,' and after that, any nonconsensual sex act is rape The message here is that a woman has to physically resist and risk serious bodily injury to prove she was raped.'" Dale Russakoff, *Where Women Can't Just Say 'No,'* WASH. POST, June 3, 1994, at A1 (quoting Myers). *Berkowitz* prosecutor James Gregor's statement that "victims now better start kicking and screaming or there will not be sufficient evidence for rape," illustrates the public's fear that the *Berkowitz* decision has resurrected the resistance requirement in Pennsylvania. Lee Linder, *Saying 'No' Not Enough for Rape*, LEGAL INTELLIGENCER, June 6, 1994, at 1 (quoting Gregor).

50. See *Commonwealth v. Rhodes*, 510 A.2d 1217, 1224-26 (Pa. 1986).

51. *Id.* at 1224.

52. *Id.* at 1225. Because the legislature provided no definition of forcible compulsion, the court was left with the task of interpreting the phrase. *Id.* at 1224-25. However, other states have provided some legislative insight and background into the meaning of forcible compulsion. See, e.g., N.Y. PENAL LAW § 130 (McKinney Supp. 1995) (describing New York courts' interpretation of "forcible compulsion" element and legislative purpose and reasoning underlying element); R.I. GEN. LAWS § 11-37-1 (1994) (defining force or coercion).

53. *Rhodes*, 510 A.2d at 1226; see also *Powe v. State*, 597 So. 2d 721, 728 (Ala. 1991) (adopting *Rhodes* interpretation of forcible compulsion and holding that, despite lack of physical force or express or implied threats, totality of circum-

Acknowledging the fact-sensitive nature of rape cases, the *Rhodes* court stated that determining whether the forcible compulsion element was met would require a case-by-case analysis based on the totality of the circumstances.⁵⁴ However, the court provided some guidance to the lower courts by outlining a series of significant factors relevant to establishing forcible compulsion.⁵⁵ These factors include:

[1] the respective ages of the victim and the accused; [2] the respective mental and physical conditions of the victim and the accused; [3] the atmosphere and physical setting in which the incident was alleged to have taken place; [4] the extent to which the accused may have been in a position of authority, domination or custodial control over the victim; and [5] whether the victim was under duress.⁵⁶

Maintaining a flexible approach, the court stated that this list of factors was not exhaustive and that the law "will evolve in the best tradition of the common law — by development of a body of case law applying section 3121 (as it has been here construed) and the principles of construction set forth in the Crimes Code."⁵⁷

In effect, it was this very body of ensuing case law that constricted the once broadly-defined concept of "forcible compulsion." Since *Rhodes*, the Pennsylvania Supreme Court has decided only two cases where the central issue was whether the evidence established forcible compulsion. These cases are *Commonwealth v. Mlinarich*⁵⁸ and *Commonwealth v. Berkowitz*.⁵⁹

In *Mlinarich*, the court was evenly divided as to whether a sixty-nine-year-old guardian's threat to send a fourteen-year-old girl back to a juvenile detention center unless she engaged in various forms of intercourse was sufficient to establish forcible compulsion.⁶⁰ In an opinion written by Justice Nix, a plurality of the court agreed with the superior court's reversal of the defendant's rape conviction.⁶¹ Dissenting, Justices Larsen and

stances in father-daughter relationship at issue was sufficient to uphold father's rape conviction). Although Rhode Island's first-degree sexual assault statute requires "force or coercion," rather than forcible compulsion, the Rhode Island Supreme Court has adopted the *Rhodes* approach to "forcible compulsion" in defining "force or coercion." See *State v. Amant*, 536 A.2d 897, 900-01 (R.I. 1988) (approving *Rhodes* court's definition of forcible compulsion and holding that psychological coercion involved in incestuous stepfather-stepdaughter relationship was sufficient to meet statutory requirement of force or coercion for first-degree sexual assault conviction).

54. *Rhodes*, 510 A.2d at 1226.

55. *Id.*

56. *Id.*; see also *Powe*, 597 So. 2d at 728 (quoting *Rhodes*' factors relating to forcible compulsion).

57. *Rhodes*, 510 A.2d at 1226.

58. 542 A.2d 1335 (Pa. 1988).

59. 641 A.2d 1161 (Pa. 1994).

60. *Mlinarich*, 542 A.2d at 1336.

61. *Id.* at 1336, 1342.

McDermott stated that the conviction should be reinstated.⁶² Justice Larsen did agree with the plurality, however, that the term " 'forcible compulsion' includes both physical force as well as psychological duress."⁶³ However, the plurality also stated that "[w]e are constrained to reject the contention that 'forcible compulsion' was intended by the General Assembly . . . to be extended to embrace appeals to the intellect or the morals of the victim."⁶⁴ Therefore, Justice Nix took a much more narrow view of forcible compulsion than the *Rhodes* court's interpretation.⁶⁵

62. *Id.* at 1342-50.

63. *Id.* at 1343-44. The dissenting opinion remained silent on the issues of intellectual and moral coercion. *Id.* For cases involving psychological coercion, see *Commonwealth v. Ruppert*, 579 A.2d 966, 969 (Pa. Super. Ct. 1990) (finding that father's encouragement of daughter to imitate acts depicted in sexually explicit pictures was sufficient evidence to establish psychological coercion), *alloc. denied*, 588 A.2d 914 (Pa. 1991); *Commonwealth v. Frank*, 577 A.2d 609, 619 (Pa. Super. Ct.) (finding that patient-psychologist relationship coupled with psychologist's threat to ruin 11-year-old patient's chance for adoption if she did not submit is sufficient evidence to establish psychological coercion), *alloc. denied*, 584 A.2d 312 (Pa. 1990); *Commonwealth v. Dorman*, 547 A.2d 757, 761-62 (Pa. Super. Ct. 1988) (finding psychological force established when victim's uncle took her to isolated area and had intercourse with her after she verbally protested), *alloc. denied*, 571 A.2d 380 (Pa. 1989). *But see Commonwealth v. Titus*, 556 A.2d 425, 429-30 (Pa. Super. Ct. 1989) (finding psychological force not established when daughter only lived with father short time before incident and no specific evidence illustrated that he exercised authority over her).

64. *Mlinarich*, 542 A.2d at 1338. In *Berkowitz*, the superior court rejected the precedential value of the plurality opinion of *Mlinarich*; therefore, the *Rhodes* factors, which include moral and intellectual coercion, remained in effect. See *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1344 (Pa. Super. Ct. 1992), *aff'd in part & vacated in part*, 641 A.2d 1161 (Pa. 1994) (finding no evidence of moral or intellectual coercion); *Commonwealth v. Ables*, 590 A.2d 334, 338 (Pa. Super. Ct. 1991) (holding that position of confidence and trust coupled with emotional exploitation is sufficient to establish moral coercion).

However, when *Berkowitz* reached the Pennsylvania Supreme Court, the court revived the *Mlinarich* case, citing it with more frequency than *Rhodes*. *Berkowitz*, 641 A.2d at 1164 n.4 (attempting to reconcile plurality and dissenting opinions in *Mlinarich* by suggesting that *Mlinarich* dissenters did not take issue with certain implicit holdings and contentions in plurality opinion).

65. Compare *Commonwealth v. Mlinarich*, 542 A.2d 1335, 1342 (Pa. 1988) (plurality opinion) (construing *Rhodes* to require psychological coercion to reach "such intensity that it may overpower the will to resist as effectively as physical force") with *Commonwealth v. Rhodes*, 510 A.2d 1217, 1227 (Pa. 1986) (stating that resistance is not required). Justice Larsen, writing the dissenting opinion in *Mlinarich*, stated that the plurality opinion ignored *Rhodes* by failing to distinguish it or to explain why it was not controlling. *Mlinarich*, 542 A.2d at 1349 (Larsen, J., dissenting). In the dissenting opinion, Justice Larsen seemed to maintain the *Rhodes* court's broad approach to forcible compulsion. The dissenting opinion concluded that *Mlinarich*'s threat to deprive the child of liberty by taking her back to the juvenile detention center constituted threats of force and violence. *Id.* at 1343 (Larsen, J., dissenting). Moreover, Justice Larsen stated, "if *Mlinarich*'s conduct here did not constitute 'psychological duress' which overwhelmed the will of the victim, then I doubt that any conduct could." *Id.* at 1344 (Larsen, J., dissenting).

In *Berkowitz*, the Pennsylvania Superior Court seemed to adhere more closely to the analysis set forth in *Rhodes*.⁶⁶ Examining and applying the *Rhodes* factors to the facts of *Berkowitz*, the court found that the "cold" record did not support a finding of forcible compulsion.⁶⁷ According to the court, intercourse without consent is insufficient for a rape conviction, but could support a conviction for indecent assault.⁶⁸

66. *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1344 n.4 (Pa. Super. Ct. 1990), *aff'd in part & vacated in part*, 641 A.2d 1161 (Pa. 1994) (rejecting any changes *Mlinarich* might have made in law because *Mlinarich* was non-binding plurality opinion).

67. *Berkowitz*, 609 A.2d at 1347. In its analysis of the *Rhodes* factors, the superior court stated that:

The cold record is utterly devoid of any evidence regarding the respective sizes of either appellant or the victim. As such, we are left only to speculate as to the coercive effect of such acts as "leaning" against the victim or placing the "weight of his body" on top of her. This we may not do.

Id. (citing *Commonwealth v. Roscioli*, 309 A.2d 396, 398 (Pa. 1973); *Commonwealth v. Scott*, 597 A.2d 1220, 1221 (Pa. Super. Ct. 1991)).

On appeal to the Pennsylvania Supreme Court, the prosecutor argued that the superior court usurped the jury's role by substituting its determinations of credibility and weight of the evidence for those reached by the jury. Brief for the Commonwealth at 8-11, *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994) [hereinafter Commonwealth's Brief]. The prosecutor argued that "this analysis totally ignores the fact that the jury was in a position to make this evaluation by observing the individuals in the courtroom, that the jury had already made this determination, and was, in fact, the only entity legally competent to draw these conclusions." *Id.* at 9. Despite this argument, the supreme court found that the superior court did not err in reversing the conviction. *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1165 (Pa. 1994).

68. *Berkowitz*, 609 A.2d at 1348. Compare 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1994) (providing that rape requires penetration by forcible compulsion), amended by 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1995) with 18 PA. CONS. STAT. ANN. § 3126 (Supp. 1994) (providing that indecent assault requires indecent touching without consent), amended by 18 PA. CONS. STAT. ANN. § 3126 (Supp. 1995). Indecent contact is defined as "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person." 18 PA. CONS. STAT. ANN. § 3101 (Supp. 1994), amended by 18 PA. CONS. STAT. ANN. § 3101 (Supp. 1995). Under this formulation, fondling a victim's breast without consent is the equivalent of penetrating her without consent—both are second-degree misdemeanors. Siskin, *supra* note 49, at 534 (arguing that most fundamental difference between rape and indecent assault is penetration); see *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1166 (Pa. 1994) (reinstating trial court's indecent assault conviction). In affirming the superior court's reversal of the rape conviction, the supreme court adopted the lower court's statutory interpretation that, because consent is "conspicuously absent" from the rape statute, but present in the indecent assault statute, the legislature must have intended rape and forcible compulsion to include something more than nonconsensual intercourse. *Berkowitz*, 641 A.2d at 1164. For a complete discussion of the supreme court's rationale in *Berkowitz*, see *infra* notes 109-28 and accompanying text.

Other courts have also agreed with the *Berkowitz* approach. See *People v. Senior*, 5 Cal. Rptr. 2d 14 (Ct. App. 1992) (holding that "'force' means 'physical force' in excess of that required for the lewd act" (citing *People v. Quinones*, 249 Cal. Rptr. 435, 438 (Ct. App.), review denied, 249 Cal. Rptr. 435 (1988))); *Jones v. State*, 589 N.E.2d 241, 243 (Ind. 1992) (finding that, although complainant did not consent, there was no evidence that defendant used any force or threats to

C. *Consent, Mens Rea and Resistance in Rape*

Inextricably related to the concept of forcible compulsion are the issues of consent, mens rea and resistance.⁶⁹ Often, the consent require-

engage in intercourse); *People v. Patterson*, 410 N.W.2d 733, 743 (Mich. 1987) (noting that, if legislature wanted to make all nonconsensual sexual contact punishable without force, it would have done so); *State v. Jacques*, 536 A.2d 535, 537 (R.I. 1988) (holding that force inherent in intercourse is not enough); *State v. Ritola*, 817 P.2d 1390, 1391 (Wash. Ct. App. 1991) (holding that “[f]orcible compulsion requires more than the force normally used to achieve sexual intercourse or sexual contact” (citing *State v. McKnight*, 774 P.2d 532 (Wash. Ct. App. 1989))).

In July of 1992, the New Jersey Supreme Court faced a case similar to *Berkowitz* in that the New Jersey defendant had intercourse with the victim, despite her verbally-expressed lack of consent. *In re M.T.S.*, 609 A.2d 1266 (N.J. 1992). Contrary to the Pennsylvania Supreme Court’s approach in *Berkowitz*, the New Jersey Supreme Court held that “physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful.” *Id.* at 1277 (reversing superior court’s reversal of conviction).

Although the Pennsylvania Supreme Court did not address the persuasive authority of *M.T.S.* in the *Berkowitz* decision, the attorneys debated the relevance of the case in their briefs. See Brief for Appellee at 19-20, *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994) [hereinafter Appellee’s Brief] (arguing that, in Pennsylvania statute, word “forcible” modifies type of compulsion, while “[t]he New Jersey provision of physical force or coercion has no such modifying language” and noting factual difference that atmosphere in *M.T.S.* was more coercive because defendant sneaked into victim’s room late at night and only ceased his attack after being slapped). *But see* Brief for Amici Curiae in Support of the Commonwealth of Pennsylvania at 22-23, *Commonwealth v. Berkowitz*, 641 A.2d 1161 (1994) (urging court to follow *M.T.S.* approach because of similarities between *Berkowitz* and *M.T.S.*).

Other courts have agreed with New Jersey’s view that the force inherent in intercourse is enough to satisfy the statutory force requirement. See *D.D. v. State*, 842 S.W.2d 62, 63 (Ark. Ct. App. 1992) (holding that, because physical force required for forcible compulsion is defined as any bodily impact, restraint or confinement, penetration is enough for conviction); *State v. Sedia*, 614 So. 2d 533, 535 (Fla. Dist. Ct. App. 1993) (holding that, for sexual battery, “state need not prove that the defendant used more physical force than merely the physical force necessary to accomplish sexual penetration” (citing *Lowry v. Parole & Probation Comm’n*, 474 So. 2d 1248, 1249-50 (Fla. 1985))); *State v. Brown*, 609 N.E.2d 346, 355 (Ill. App. Ct. 1993) (noting that, when victim does not consent to sexual relations, ensuing act of sexual penetration is committed by force); *Commonwealth v. Carracciola*, 569 N.E.2d 774, 776 (Mass. 1991) (finding force involved in sexual penetration sufficient to meet statutory force requirement); *State v. Bonds*, 477 N.W.2d 265, 266 (Wis. 1991) (finding that “force employed in the actual nonconsensual contact” may be sufficient force to sustain second-degree sexual assault conviction).

69. See generally Symonds, *The Rape Victim: Psychological Patterns of Response*, 36 AM. J. PSYCHOANALYSIS 27 (1976) (noting that consent is product of particular victim’s actions and reactions, and sometimes victim may exhibit submissive behavior to prevent further aggressions). Under early rape laws that defined rape as “unlawful carnal knowledge of a woman forcibly against her will,” the essential elements of rape were penetration, force and lack of consent. *Commonwealth v. Rhodes*, 510 A.2d 1217, 1221 (Pa. 1986) (quoting Act of June 24, 1939, Pub. L. No. 872, § 721).

ment caused courts to focus excessively on the acts of the victim.⁷⁰ The courts strictly scrutinized each victim's behavior with the belief that a victim's physical resistance was most probative of nonconsent.⁷¹ Because of their excessive focus on victims, courts often ignore an element essential to criminal liability, the "mens rea" of the defendant as to the essential elements of the crime.⁷² Like other courts, Pennsylvania has paid little attention to the defendant's "mens rea."⁷³

70. Christina M. Tchen, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. & CRIMINOLOGY 1518, 1525-27 (1983) (noting that resistance requirements improperly focus court's analysis on victim's conduct, rather than defendant's conduct).

71. Note, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680, 682 (1966) (noting that presence or absence of consent turned on victim's credibility and that, therefore, evidence of resistance bolstered victim's credibility because it was "outward manifestation of nonconsent").

In early cases, courts required victims to resist to the "utmost." See, e.g., *People v. Barnes*, 721 P.2d 110, 117 (Cal. 1986) (observing that, "[h]istorically, it was considered inconceivable that a woman who truly did not consent to sexual intercourse would not meet force with force"); *Moss v. State*, 45 So. 2d 125, 126 (Miss. 1950) ("[A] mere tactical surrender in the face of an assumed superior physical force is not enough. Where the penalty for the defendant may be supreme, so must resistance be unto the uttermost."); *People v. Carey*, 119 N.E. 83, 83 (N.Y. 1918) ("Rape is not committed unless the woman opposes the man to the utmost limit of her power."); *Commonwealth v. Moran*, 97 Pa. Super. 120, 124 (1929) (declaring that actual resistance is material element of rape); *Starr v. State*, 237 N.W. 96, 97 (Wis. 1931) (finding woman must provide maximum resistance because voluntary submission after assault negates essential elements of rape).

72. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 218 (5th ed. 1989) (noting that "legislatures have often left the mental element undefined or have treated it ambiguously, while courts have as often failed to analyze it with precision"). In particular, "rape statutes almost invariably fail to specify the mens rea (if any) required with respect to the victim's consent." *Id.* at 257; see also Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1094-1132 (1986) (arguing that courts should focus on mens rea of defendants, rather than on attitudes of victims, when reviewing consent issue).

73. See *Commonwealth v. Carter*, 418 A.2d 537, 539 (Pa. Super. 1980). In *Carter*, the superior court noted that the intent required to establish culpability is absent from the rape statute. *Id.* In attempting to discern the mental state required for the material elements of rape, the court turned to section 302(c) of the Crimes Code which provides, "[w]hen the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto." *Id.* (citation omitted). The court held that at least recklessness was required where a person was charged with raping an individual "so mentally deranged or deficient that she was incapable of consent." *Id.* In dicta, the superior court stated that "the defendant [must have] acted at least recklessly" with regard to the other elements of the section. *Id.* However, because this statement is dicta in the superior court's opinion, the law as to the defendant's mental state for the elements of rape, including the victim's lack of consent, is still unclear. For a further discussion of mens rea and the Pennsylvania Supreme Court's failure to discuss this in *Berkowitz*, see *supra* notes 69-72 and *infra* notes 170-82 and accompanying text.

The New Jersey Supreme Court is one of the few courts to consider a defendant's mental state thoroughly. See *In re M.T.S.*, 609 A.2d 1266, 1278-80 (N.J. 1992). In adopting the negligence standard for the defendant's mental state as to the victim's lack of consent, the court noted that "[t]he role of the factfinder is to

However, in an effort concerted with rape reform, the Pennsylvania legislature adopted the "resistance not required" statute.⁷⁴ In *Rhodes*, the

decide not whether engaging in an act of penetration without permission of another person is reasonable, but only whether the defendant's belief that the alleged victim had freely given affirmative permission was reasonable." *Id.* at 1279. The court stressed that the focus should remain on the defendant and that "the law places no burden on the alleged victim to have expressed non-consent or to have denied permission." *Id.* (stating that victim may only be questioned about what she did to determine whether defendant held reasonable belief that her affirmative permission was freely given). Therefore, the state must prove, beyond a reasonable doubt, that "a reasonable person would not have believed that there was affirmative freely-given permission." *Id.* If there is evidence suggesting that the defendant reasonably believed he had the complainant's permission, then "the State must demonstrate either that defendant did not actually believe that affirmative permission had been freely-given or that such a belief was unreasonable under all the circumstances." *Id.*

For examples of other states' treatment of a defendant's mental state see, *Ervin v. State*, 761 P.2d 124, 125 (Alaska Ct. App. 1988) (citing *Reynold v. State*, 664 P.2d 621, 625 (Alaska Ct. App. 1983)) (holding that "state must show that the defendant acted recklessly in determining whether the alleged victim consented to the sexual activity" and rejecting negligence standard that reasonable and good-faith belief of victim's consent constitutes defense to rape); *State v. Smith*, 554 A.2d 713, 717 (Conn. 1989) (rejecting notion that state must prove that defendant was actually aware of, or recklessly disregarded, victim's lack of consent or that he recklessly disregarded it, but accepting negligence standard such that "defendant may not be convicted . . . if the words or conduct of the complainant under all the circumstances would justify a reasonable belief that she had consented"); *Commonwealth v. Simcock*, 575 N.E.2d 1137, 1141 (Mass. App. Ct. 1991) (accepting negligence standard such that honest, but reasonable mistake as to consent may be defense to rape), *review denied*, 579 N.E.2d 1360 (Mass. 1991); *State v. Aumick*, 869 P.2d 421, 424 (Wash. Ct. App. 1994) (noting that "conviction of rape is possible without proof of any mental state"), *aff'd*, 894 P.2d 1325 (Wash. 1995); *State v. Walden*, 841 P.2d 81, 84 n.2 (Wash. Ct. App. 1992) (noting that "the focus is on the victim's consent or lack of consent rather than the perpetrator's subjective assessment thereof").

74. See 18 PA. CONS. STAT. ANN. § 3107 (1983) ("The alleged victim need not resist the actor in prosecutions under this chapter . . ."). *But see* 18 PA. CONS. STAT. ANN. § 3121(2) (Supp. 1994) (providing person can commit rape by "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution"), *amended by* 18 PA. CONS. STAT. ANN. § 3121(2) (Supp. 1995).

Several states have abolished the resistance requirement. See ALASKA STAT. § 11.41.470(8)(A) (1994) ("without consent" means that a person with or without resisting, is coerced"); ILL. ANN. STAT. ch.720, para. 5/12-17 (Smith-Hurd 1993) ("Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent"); MICH. COMP. LAWS § 750.520i (1991) ("[V]ictim need not resist . . ."); MINN. STAT. § 609.347(2) (Supp. 1995) ("no need to show that the victim resisted the accused"); N.M. STAT. ANN. § 30-9-10A (Michie 1994) ("resistance . . . is not an element of force"); OHIO REV. CODE ANN. § 2907.02(C) (Anderson Supp. 1994) ("victim need not prove physical resistance"); R.I. GEN. LAWS § 11-37-12 (1994) (not requiring proof of resistance if resistance is useless and might result in bodily harm); VT. STAT. ANN. tit. 13, § 3254(1) (Supp. 1994) ("Lack of consent may be shown without proof of resistance . . .").

However, remnants of the resistance requirement remain. See ALA. CODE § 13A-6-60(8) (1994) (providing forcible compulsion requires "[p]hysical force that overcomes earnest resistance"); *State v. Lima*, 643 P.2d 536, 541 (Haw. 1982)

court, interpreting this statute, stated that the victim need not actually resist to prove forcible compulsion.⁷⁵ In *Mlinarich*, however, the plurality construed the "resistance not required" statute more narrowly, stating that, while compulsion is still required, "[t]he degree of resistance . . . was modified to remove the requirement that the victim continue the struggle when struggle would be useless and dangerous."⁷⁶ Disagreeing with this proposition, the *Mlinarich* dissenters disagreed and emphatically stated that "[t]his section does not merely 'modify' the 'degree of resistance requirement,' . . . it makes it clear that there is no such requirement — period!"⁷⁷

(finding victim's pleas to attacker to stop and victim's attempt to push him off of her insufficient to exhibit "genuine physical" effort to resist); *Yarnell v. Commonwealth*, 833 S.W.2d 834, 836 (Ky. 1992) (finding "earnest resistance" for forcible compulsion "requires more than token initial resistance but less than showing that the victim was physically incapable of additional struggle against the assailant"); *Goldberg v. State*, 395 A.2d 1213 (Md. 1979) ("It is true that she *told* the appellant she 'didn't want to do that [stuff].' But the resistance that must be shown involves not merely verbal but *physical* resistance 'to the extent of her ability at the time.'" (quoting *Hazel v. State*, 157 A.2d 922, 925 (Md. Ct. App. 1960))); *State v. Nixon*, 858 S.W.2d 782, 785-86 (Mo. 1993) (finding that forcible compulsion may be proved by evidence of physical force that overcomes reasonable resistance or by a threat that places a person in reasonable fear of death, serious physical injury or kidnapping, but that "[r]esistance never comes into play where a threat (constructive force) is employed"); MODEL PENAL CODE § 213.1 (providing compulsion plainly implies non-consent and the phrase "compels to submit" requires more than a "token initial resistance"); see also *Estrich*, *supra* note 72 at 1121-32 (discussing negative effects of consent and resistance requirements on women); *Schwartz, An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape*, 16 LOY. L.A. L. REV. 567 (1983) (arguing that resistance should not be required in rape); *Wicktom*, *supra* note 36, at 401-03 (arguing that resistance requirement should be eliminated because it is not reliable indicator of victim's non-consent and because physical resistance may increase victim's risk of injury).

75. 510 A.2d 1217, 1227 n.14 (Pa. 1986).

76. 542 A.2d 1335, 1341 (Pa. 1988). Specifically, the plurality opinion discussed the requirement that the threat of forcible compulsion be such as "would prevent resistance by a person of reasonable resolution." *Id.* According to the court, this mandates an "objective" test to determine "whether the pressure generated upon the victim by the threat would be such as to overcome the resolve and prevent further resistance of a person of reasonable resolution." *Id.* at 1340.

77. *Id.* at 1346. Writing the dissenting opinion, Justice Larsen explained:

There is some objective measurement in the language "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution," but section 3107 clarifies that this is not a requirement that the victim must have put forth some minimum level of actual resistance. This language does ensure that the threat must meet some minimum level of forcible compulsion, so that mere seduction or persuasion will not suffice; however, the language is not meant to require some minimum level of actual resistance or to preclude the jury from considering the emotional makeup of the victim in determining whether the actor used forcible compulsion to overbear her will.

Id. (Larsen, J., dissenting).

In *Commonwealth v. Berkowitz*, the superior court discussed the issues of consent and resistance as they applied to forcible compulsion.⁷⁸ Although the court noted that verbal resistance is relevant in a determination of forcible compulsion, the court found that verbal protests were not "dispositive or sufficient evidence of forcible compulsion."⁷⁹ As a result of this court's finding, critics have interpreted the *Berkowitz* court to have promulgated a "no means yes" mentality.⁸⁰ Confronted with the public's disap-

78. 609 A.2d 1338, 1347 (Pa. Super. Ct. 1992), *aff'd in part & vacated in part*, 641 A.2d 1161 (Pa. 1994). The legislative purpose behind the 1976 Amendments to the Crimes Code, which includes section 3107 was to provide a procedural change in the way trials were conducted so that "the victim is no longer treated as the defendant and the defendant can still receive a very fair trial." Legislative Journal - Senate, p. 1462 (April 6, 1976). In Appellee's Brief, defense counsel for Berkowitz pointed out that any intention to change the elements of the offense of rape was conspicuously absent. Appellee's Brief, *supra* note 68, at 34. Moreover, defense counsel noted that the "no resistance" statute is not found within the statutory scheme for rape, rather it is found in the general provisions of the Pennsylvania Crimes Code. *Id.* at 32. Defense counsel concluded that "[i]f section 3107 abrogates or somehow diminishes the element of forcible compulsion . . . it would have been duly noted at that juncture." *Id.* at 33.

79. *Berkowitz*, 609 A.2d at 1348; see *People v. Schmidt*, 885 P.2d 312, 316 (Colo. Ct. App. 1994) (expressly rejecting *Berkowitz* rationale and holding that "the statement 'no' provides a sufficient basis upon which a jury could find that a victim resisted sexual intercourse and that a defendant thereafter caused 'submission against the victim's will'"), *cert. denied*, 885 P.2d 312 (Colo. 1994).

As in the *Berkowitz* case, the Pennsylvania Superior Court has only found verbal protestations to be sufficient for a rape conviction when they were coupled with forcible compulsion. *Berkowitz*, 609 A.2d at 1348. According to the superior court, the

"no resistance requirement" must be applied only to prevent any adverse inference to be drawn against the person who, while being "forcibly compelled" to engage in intercourse, chooses not to physically resist Since there is no evidence that the instant victim was at any time "forcibly compelled" to engage in sexual intercourse, our conclusion is not at odds with the "no resistance requirement."

Id. at 1348 n.7 (emphasis omitted); see also *Commonwealth v. Meadows*, 553 A.2d 1006, 1008 (Pa. Super. Ct. 1989) (finding evidence of forcible compulsion sufficient where victim verbally resisted, pushed against defendant before and during intercourse, and was in vacant field with defendant), *alloc. denied*, 571 A.2d 381 (Pa. 1989); *Commonwealth v. Dorman*, 547 A.2d 757, 758 (Pa. Super. Ct. 1988) (finding resistance beyond victim's pleas of "don't" not required when forcible compulsion established by taking victim to remote area and disrobing her); *Commonwealth v. Williams*, 439 A.2d 765, 768 (Pa. Super. Ct. 1982) (finding additional resistance not required where there is tangible evidence of physical force or threats of force—i.e., forcible compulsion); *Commonwealth v. Rough*, 418 A.2d 605, 609 (Pa. Super. Ct. 1980) (same); *Commonwealth v. Irvin*, 393 A.2d 1042, 1044 (Pa. Super. Ct. 1978) (same); *Estrich*, *supra* note 72, at 1131 ("[F]or many courts, saying 'no' - passive resistance - does not count as resistance.").

80. Linder, *supra* note 49, at 1 (discussing critics' reaction to *Berkowitz*). According to Kathryn Geller Myers, spokeswoman for the Pennsylvania Coalition Against Rape, "[t]he message is clear . . . that 'no' really doesn't mean 'no' in Pennsylvania." *Id.* at 14; see also Henderson, *supra* note 37, at 54-55 (discussing how "no means yes" belief has existed for centuries and is fueled by myths of dominance and submission); ALLISON & WRIGHTSMAN, *supra* note 4, at 207 (discussing "no means yes" mentality); ESTRICH, *supra* note 9, at 39 (stating that, in addition to

proval of the superior court's opinon and with the aforementioned tumultuous history of rape jurisprudence, the Pennsylvania Supreme Court confronted the issues in *Commonwealth v. Berkowitz*.

III. *COMMONWEALTH V. BERKOWITZ*—A PENNSYLVANIA SUPREME COURT CONTROVERSY AND THE PENNSYLVANIA LEGISLATURE'S CATALYST

A. *The Culmination of Pennsylvania's Rape Law Jurisprudence: Commonwealth v. Berkowitz*

1. *Facts and Procedural History*

On the afternoon of April 19, 1988, the victim, a nineteen-year-old sophomore at East Stroudsburg State University, walked to her boyfriend's dormitory.⁸¹ While waiting for her boyfriend to meet her, she visited a friend who lived in the same building.⁸² After knocking several times and receiving no answer, she tried the door knob.⁸³ Finding the door open, she walked into the room and saw someone lying on the bed with a pillow over his head.⁸⁴ After removing the pillow from his face, she realized the man she thought was her friend was her friend's roommate, Robert Berkowitz.⁸⁵

Berkowitz asked the victim to stay for a while and she agreed.⁸⁶ Then, Berkowitz asked the victim to give him a back rub and to sit on his bed, but the victim declined.⁸⁷ After conversing briefly, Berkowitz moved off the bed and onto the floor where the victim was sitting.⁸⁸ Once on the floor,

saying no, society has viewed active resistance as indicator that women really desire forceful penetration).

81. *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1339 (Pa. Super. Ct. 1992), *aff'd in part & vacated in part*, 641 A.2d 1161 (Pa. 1994). Before leaving her room, the victim testified that she drank a martini "to loosen up a bit." *Id.* She also stated that she had argued with her boyfriend the night before. *Id.*

82. *Id.* (setting forth factual background of case).

83. *Id.* Before trying the door, the victim wrote a note to her friend, notifying him that she had stopped by. *Id.* In the note, the victim stated that she was drunk. *Id.* However, the victim testified that she was merely joking and did not feel any intoxicating effects from the martini. *Id.*

84. *Id.*

85. *Id.* at 1340.

86. *Id.* Defendant Berkowitz testified that the victim's visit confirmed his suspicion that she wanted to pursue sexual relations with him. *Id.* at 1341. The defendant stated that he based his belief on two instances, a phone conversation with the victim during which she asked him the size of his penis, and a drunken visit by the victim during which she laid on his bed in a provocative position and asked to see his penis. *Id.* The victim admitted calling the defendant and asking him about his penis. *Id.* She also remembered going to his room and laying on his bed while intoxicated. *Id.* However, she could not remember if she asked about his penis on this occasion. *Id.*

87. *Id.* at 1340.

88. *Id.*

Berkowitz "kind of pushed the [victim] back with his body."⁸⁹ Berkowitz then straddled the victim and started kissing her.⁹⁰ Despite her protests that she had to leave to meet her boyfriend, Berkowitz lifted up her shirt and brassiere and began fondling her breasts.⁹¹ At this point, the victim said, "No."⁹²

After more kissing and fondling, Berkowitz unzipped his pants and tried to insert his penis in her mouth.⁹³ The victim continued to verbally protest saying "no," "let me go" and "I gotta meet my boyfriend."⁹⁴ Because Berkowitz was laying on the victim throughout the encounter, the victim was unable to move.⁹⁵

Disregarding the victim's continual protests that she had to leave, Berkowitz locked the door and put her on the bed.⁹⁶ Berkowitz then straddled her again and untied the knot in her sweatpants. The victim neither physically resisted nor screamed.⁹⁷

After removing her sweatpants and underwear, Berkowitz used his hand to guide his penis into her vagina.⁹⁸ After Berkowitz had penetrated her vagina, the victim began saying "no" again.⁹⁹ After thirty seconds, the defendant pulled out his penis, ejaculated on the victim's stomach and immediately got off of her.¹⁰⁰ The defendant then said, "Wow, I guess we

89. *Id.* The victim described Berkowitz's action by stating, "It wasn't a shove, it was just kind of a leaning type of thing." *Id.*

90. *Id.*

91. *Id.* Berkowitz testified that the victim was responding warmly to his advances by passionately returning his kisses. *Id.* at 1341.

92. *Id.* at 1340.

93. *Id.*

94. *Id.* The victim indicated that her statements were made in a scolding tone of voice. *Id.*

95. *Id.*

96. *Id.* The victim testified that she knew the door was of the type that could not lock people inside the room. *Id.* In describing Berkowitz's actions, the victim stated, "[Berkowitz] didn't throw me on the bed It was kind of like a push but no It wasn't slow like a romantic kind of thing, but it wasn't a fast shove either. It was kind of in the middle." *Id.*

97. *Id.* The victim testified that she "couldn't like go anywhere" because Berkowitz was on top of her. *Id.* Moreover, she did not scream, because "it was like a dream was happening or something." *Id.*

98. *Id.* The defendant testified that the victim assisted him throughout the encounter by helping him remove her clothes. *Id.* at 1341.

99. *Id.* at 1340. The victim described her words as "soft . . . in a moaning kind of way because it was just so scary." *Id.* The defendant agreed that the victim was saying "no" but stated that her words were moaned passionately. *Id.* at 1341.

100. *Id.* Berkowitz testified that he immediately withdrew when he saw a "blank look on her face" and asked her if anything was wrong. *Id.* at 1341. He ejaculated on her stomach because he could "no longer control himself." *Id.* He stated that, after it was over, "she made her move" and got off the bed immediately. *Id.*

just got carried away."¹⁰¹ The victim responded, "No we didn't get carried away, you got carried away."¹⁰²

After quickly dressing, the victim raced downstairs to her boyfriend who had finally arrived in the lounge.¹⁰³ She began to cry and her boyfriend took her to his room where he called the police and she cleaned the semen from her stomach.¹⁰⁴

Subsequently, Berkowitz was arrested and charged with rape and indecent assault. Following a trial in the Court of Common Pleas of Monroe County, the jury found Berkowitz guilty of both charges.¹⁰⁵ After his post-trial motions were denied, Berkowitz appealed to the superior court.¹⁰⁶ In a per curiam opinion, the court discharged the rape conviction. In addition, the court reversed and remanded on the charge of indecent assault because it found that evidence was improperly excluded under Pennsylvania's Rape Shield Law.¹⁰⁷ The Commonwealth appealed and the supreme court granted allocatur to address the issue concerning the degree of force necessary to satisfy the "forcible compulsion" element of the rape statute.¹⁰⁸

2. *The Pennsylvania Supreme Court's Analysis*

On appeal, the Pennsylvania Supreme Court affirmed the superior court's dismissal of the defendant's rape charge, because the evidence did not satisfy the "forcible compulsion" element of the rape statute.¹⁰⁹ However, the court found that the lower court's reversal of the jury's indecent assault charge was erroneous.¹¹⁰ Therefore, finding the elements of inde-

101. *Id.* at 1340.

102. *Id.* The defendant wholly corroborated this aspect of the victim's account. *Id.* at 1341.

103. *Id.* at 1340.

104. *Id.*

105. *Id.*

106. *Id.* at 1341-42.

107. *Id.* at 1352. The trial court permitted the defendant to introduce evidence about the victim's prior contact with the defendant including the phone call during which the victim asked about the size of Berkowitz's penis and her previous visit to his room. *Id.* at 1341. Additionally, the court allowed general evidence that the victim had been quarreling with her boyfriend. *Id.* at 1351. However, the court refused to allow detailed evidence about the nature of their disagreement or about the victim's past reputation for engaging in consensual intercourse. *Id.*

108. *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1162-63 (Pa. 1994). The court also granted allocatur to further define the scope of Pennsylvania's Rape Shield Law. *Id.*

109. *Id.* at 1166. Given that the victim stated "no" throughout the encounter and that the defendant himself testified to the indecent contact, the court found that the evidence was sufficient to support the jury's conviction of indecent assault. *Id.* Moreover, the court found that the trial court properly applied the Rape Shield Law to exclude evidence showing that the victim and her boyfriend argued over whether she had been unfaithful. *Id.* at 1165.

110. *Id.* at 1166. The superior court had reversed and remanded the case on the indecent assault charge because it believed the trial judge improperly excluded

cent assault satisfied, the court reinstated Defendant Berkowitz's conviction and sentence for the indecent assault charge.¹¹¹

a. Rape and Forcible Compulsion

In reviewing the sufficiency of the evidence, the *Berkowitz* court was compelled to construe the evidence and all reasonable inferences that could be drawn therefrom in the light most favorable to the verdict winner, the Commonwealth.¹¹² Examining the evidence under the *Rhodes* court's formulation of "forcible compulsion," the court concluded that the testimony contained no reference to force or threat of force.¹¹³ Unlike the superior court's systematic inquiry into the factors set forth in *Rhodes*, the supreme court reached its conclusion that the evidence was insufficient to establish forcible compulsion by noting that the victim did not discourage the defendant or try to leave when he made advances toward her and was not threatened or restrained during the encounter.¹¹⁴ The court determined that the only force applied to the victim was the weight of Berkowitz's body on top of her and that this was not enough force to establish forcible compulsion.¹¹⁵

b. The Relevance of "No"

In addressing the fact that the victim repeated "no" during the encounter, the *Berkowitz* court held that her words were only relevant to consent, not to force.¹¹⁶ Although the superior court refused to rely on *Mlinarich* because it was a plurality decision with questionable precedential value, the supreme court applied the principles established by the *Mlinarich* plurality to the facts of *Berkowitz*.¹¹⁷ According to the court, the ruling in *Mlinarich* "implicitly dictates that where there is lack of consent, but no showing of either physical force, a threat of physical force, or psy-

evidence offered by Berkowitz under the Rape Shield Law. *Id.* at 1165. Defense counsel attempted to show that the victim had a motive to lie by introducing evidence that her boyfriend was jealous and that they had argued over whether she was unfaithful. *Id.* The superior court tried to distinguish this evidence from evidence protected by the Rape Shield Law by noting that the "proffered evidence was not that the victim had, in fact been unfaithful, but rather only that the victim and her boyfriend had argued over *whether or not* she had been unfaithful." *Id.* The supreme court stated that the Rape Shield Law did not recognize this distinction because whether a victim was unfaithful was closely tied to the victim's reputation for chastity, which is protected by the Rape Shield Law. *Id.*

111. *Id.* at 1166.

112. *Id.* at 1163.

113. *Id.* The supreme court also noted that "[t]he force necessary to support a conviction of rape . . . need only be such as to establish lack of consent and to induce the [victim] to submit without additional resistance." *Id.* (quoting *Commonwealth v. Rhodes*, 510 A.2d 1217, 1225 (Pa. 1986)).

114. *Id.* at 1164.

115. *Id.*

116. *Id.*

117. *Id.*

chological coercion, the 'forcible compulsion' requirement . . . is not met."¹¹⁸

In addition, the court supported its position that forcible compulsion requires more than nonconsensual intercourse by examining the rape statute in conjunction with the statute governing the "related but distinct crime" of indecent assault.¹¹⁹ The court noted that the indecent assault statute requires nonconsent of the victim, while the rape statute has no such element.¹²⁰ Therefore, the court concluded that, if the legislature wanted to equate nonconsensual intercourse with forcible compulsion, it would have done so expressly in the statute.¹²¹

c. The Indecent Assault Charge

In reviewing the indecent assault issue, the court concluded that the testimony established the elements of the offense: indecent contact and lack of consent.¹²² According to the court, the defendant testified to the indecent contact by admitting he had intercourse with the victim.¹²³ In addition, the court found that the victim's statement of "no" sufficiently established lack of consent.¹²⁴ Therefore, the court reinstated the indecent assault conviction.¹²⁵

118. *Id.* The court attempted to reconcile *Mlinarich's* plurality and dissenting opinions by stating that the dissenting opinion did not challenge the implicit holding of the plurality opinion that something more than a lack of consent is required to prove forcible compulsion. *Id.* at 1164 n.4. Moreover, the court stated that both opinions agreed that psychological force, physical force and threat of physical force had to reach such a degree as to "prevent resistance by a person of reasonable resolution." *Id.* According to the supreme court, the dissenting opinion only distinguished itself from the plurality opinion by urging that subjective factors be considered in determining resistance, assent and consent. *Id.*

119. *Id.* at 1164-65.

120. *Id.* Compare 18 PA. CONS. STAT. ANN. § 3126 (Supp. 1994) (providing indecent assault has consent element, but not forcible compulsion element), amended by 18 PA. CONS. STAT. ANN. § 3126 (Supp. 1995) with 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1994) (requiring forcible compulsion, but not mentioning consent), amended by 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1995).

121. *Berkowitz*, 641 A.2d at 1164. The court acknowledged that it was taking a strict interpretation of the rape statute, but justified it in light of the need to provide fair warning to defendants. *Id.* at 1165.

122. *Id.* at 1166. Moreover, the court found that the trial court had not erred by excluding evidence under the Rape Shield Law; therefore, there was no need to remand the case. *Id.* at 1165. For a discussion of the Rape Shield Law in *Berkowitz*, see *infra* note 125.

123. *Id.* at 1166.

124. *Id.*

125. *Id.* After this decision, the defendant applied for a reargument on the indecent assault charge alleging prosecutorial misconduct during the trial. *Commonwealth v. Berkowitz*, 641 A.2d 1161, *reh'g denied*, 641 A.2d 1161 (Pa. 1994). The supreme court did not address this issue, but the superior court did. *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1351-52 (Pa. Super. Ct. 1992), *aff'd in part & vacated in part*, 641 A.2d 1161 (Pa. 1994). The superior court concluded that the prosecutor took unfair advantage of the Rape Shield exclusion of the evidence illustrating the jealous nature of victim's boyfriend. *Id.* According to the defense

Upon the release of the *Berkowitz* ruling, "a firestorm of controversy engulfed Pennsylvania and the country."¹²⁶ As a result of this public outcry, Pennsylvania legislators directed their attention to rape reform.¹²⁷ After a year of political volleying and numerous fallen attempts, the House of Representatives and Senate unanimously passed a revised statutory scheme that Governor Ridge endorsed on March 31, 1995.¹²⁸

B. *The Pennsylvania General Assembly's Response to Berkowitz*

Following the *Berkowitz* decision and the public controversy that followed its release, the Pennsylvania legislature focused its attention on rape

counsel, this evidence suggested a motive for the victim to lie. *Id.* In closing arguments, the prosecutor emphasized the lack of motive to fabricate by saying, "Why would she lie? . . . [T]here's just really no reason to believe she would lie and go through this . . . [I]f there was any reason, there's no reason here. I suggest to you, you have to have a reason." *Id.* In the application for reargument, defense counsel noted that the victim "did have a reason to lie. The prosecutor knew that. The trial judge knew that. Unfortunately, the jury did not." Application for Reargument for Appellee at 4, *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994). The supreme court denied the motion. *Commonwealth v. Berkowitz*, 641 A.2d 1161, *reh'g denied*, 641 A.2d 1161 (Pa. 1994).

126. Kathryn Geller Myers, *Supreme Court Ruling Stirs National Debate*, SPOKESWOMAN, Summer 1994, at 1. For weeks after the decision, the Pennsylvania Coalition Against Rape was the focus of numerous newspaper articles, radio shows and television broadcasts extending as far away as Toronto, Hawaii, Seattle and London. *Id.* In addition, the National Organization for Women launched two protest marches, one outside Justice Cappy's office (the author of the supreme court's *Berkowitz* opinion) and one outside Justice Nix's office, to raise public awareness about the opinion and express its outrage. Jan Ackerman, *Two Protests By NOW Take Judges to Task on Rape Ruling*, PITT. POST-GAZETTE, June 7, 1994, at B1; see also Myers, *supra*, at 1 (discussing protestors' efforts and noting similar rally of over 100 people at Monroe County Courthouse where *Berkowitz* was originally tried and convicted of rape).

127. See *Pennsylvania Senate Judiciary Committee to Address Rape Law Change*, PR NEWSWIRE, June 6, 1994 (revealing that various Pennsylvania senators were urging Legislature to "act expeditiously to clarify the state's rape statute"). According to Senator D. Michael Fisher, "[i]f the Legislature needs to spell out in the law that saying no to a sexual act is enough, then we should do that and do it without delay." *Id.* State Representative Karen Ritter, expressed a similar sentiment: "Our job now is to make clear enough that even judges can understand that if someone says 'no,' then it's a crime." Flander, *supra* note 48, at 5.

128. See Moran, *supra* note 19, at B1 (noting that "Republicans and Democrats accused each other of stalling opposing-party legislation" and particularly noting that "Democrats accused Republicans of saving the issue for [Governor] Ridge, while Republicans accused Democrats of maneuvering on behalf of former Rep. Karen A. Ritter, who for the last few years led House efforts to overhaul statutes pertaining to rape and other sex crimes"); Eshleman, *supra* note 19, at B1 ("Although lawmakers came up with a bill last year to address the situation, they chose to hold off on it until Gov. Ridge's special legislative session on crime.").

For a discussion of the legislators' rape reform efforts, see *infra* notes 129-35. For a discussion of the bill that was finally signed into law, see *infra* notes 136-42 and notes 183-206.

reform.¹²⁹ In the House of Representatives, momentum finally gathered around a bill that predated the *Berkowitz* decision and attempted to comprehensively overhaul the statutory scheme for rape.¹³⁰ Similarly, the Senate proposed various bills that were more narrowly tailored to specifically overrule *Berkowitz* by making nonconsensual intercourse rape.¹³¹ How-

129. For the reaction of various legislators to the *Berkowitz* decision, see *supra* note 127 and accompanying text.

130. See H.B. 160, 178th General Assembly, 1993-94 Sess. (introduced by Rep. Karen Ritter and others on February 1, 1993) (Printer's No. 4317) [hereinafter H.B. 160 (Printer's No. 4317)]. This bill represented a comprehensive attempt to amend the sexual offenses statutory scheme by replacing rape with two separate crimes, aggravated sexual assault (a first-degree felony retaining forcible compulsion and resembling the already existing rape statute) and sexual assault (a second-degree felony only requiring intercourse without the complainant's consent). *Id.*; see also Paul J. Mathison, *Editorial Letter: Amend State Rape Law*, HARRISBURG PATRIOT, Nov. 18, 1994 (discussing House Bill 160, urging Senate to pass bill and noting that "the possibility exists that attempts could be made to delay this bill to achieve partisan gain"). While the bill unanimously passed the House in October, 1994, it did not meet Senate approval. Adam Bell, *Ruling Puts Rape Reform Bill on Lawmakers' Plates*, HARRISBURG PATRIOT, December 28, 1994, at B4 (noting that various parts of House Bill 160 needed to be "ironed out" and that similar legislation was likely "to resurface in [Governor] Ridge's crime session" in 1995).

131. See S. 1750, 178th General Assembly, 1993-94 Sess. (Printer's No. 2222) [hereinafter S. 1750 (Printer's No. 2222)]; S. 533, 178th General Assembly, 1993-94 Sess. (amended as of June 7, 1994 to address *Berkowitz*) (Printer's No. 2229) [hereinafter S. 533 (Printer's No. 2229)].

Senate Bill 1750 retained the forcible compulsion language of Pennsylvania's existing rape statute, but added a fifth element of non-consent. Compare S. 1750 (Printer's No. 2222) with 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1994), as amended by 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1995). In relevant part, Senate Bill 1750 stated:

A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse:

- (1) by forcible compulsion;
- (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (3) who is unconscious;
- (4) who is so mentally deranged or deficient that such person is incapable of consent; or
- (5) without the consent of the other person

S. 1750 (Printer's No. 2222). The bill failed to define consent and, ultimately, did not move beyond the Senate Judiciary Committee.

Senate Bill 533 had a considerably longer life than Senate Bill 1750, but was amended numerous times. See Bell, *supra* note 130, at B4 (noting that, ultimately, Senate unanimously passed S. 533, "Greenleaf's plan"). Initially, in an effort to directly address the statutory criticisms pointed out by the *Berkowitz* reaction, the bill removed the controversial forcible compulsion element entirely, added a consent element and defined consent. See S. 533 (Printer's No. 2229). Senate Bill 533, originally defined rape as follows:

A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse:

- (1) without consent of the other person;
- (2) who is unconscious;
- (3) who is so mentally deranged or deficient that such person is incapable of consent

ever, both chambers could not agree on any bill.¹³² Therefore, despite the sense of urgency and outrage created by the supreme court, the legislative session ended in 1994 without a resolution to the *Berkowitz* controversy.¹³³

With the start of the Special Legislative Session on Crime in 1995, legislators revived rape reform.¹³⁴ Again, legislators proposed bills making nonconsensual intercourse rape.¹³⁵ However, with the inactivity of these bills, it became clear that a compromise would be necessary if rape reform was to be a reality. Senate Bill 2, which represents such a compromise, received unanimous approval by the House and Senate and was signed into law on March 31, 1995.¹³⁶

....
(C) Consent.—For the purpose of this section, “consent” shall mean words or overt actions by a person who is competent to give informed consent indicating freely given agreement to have sexual intercourse.

S. 533 (Printer's No. 2229). By the time the Senate passed Senate Bill 533, it was virtually unrecognizable from its earlier form. *Compare* S. 533 (Printer's No. 2229) with S. 533, 178th General Assembly, 1993-94 Sess. (as amended November 22, 1994) (Printer's No. 2570). In fact, the bill ultimately proposed a more comprehensive statutory reform and utilized the two-tier system of aggravated sexual assault (a first-degree felony) and sexual assault (a second-degree felony) that closely resembled House Bill 160. *Compare* S. 533, 178th General Assembly, 1993-94 Sess. (as amended November 22, 1994) (Printer's No. 2570) with H.B. 160 (Printer's No. 4317) (both utilizing same two-tier system).

132. *See* Moran, *supra* note 19, at B1 (discussing House and Senate's failure to agree on any bills during 1994).

133. *See* Bell, *supra* note 130, at B4 (discussing Legislature's progress in rape reform since supreme court's ruling). Expressing disappointment with the Legislature's progress, Kathryn Geller Myers, spokeswoman for the Pennsylvania Coalition Against Rape, said, “I thought this would be the year Certainly the momentum was there. The public outrage was there. But issues are hot one day and not the next.” *Id.*

134. *See* Moran, *supra* note 19, at B1 (“The no-means-no issue was revived this year as part of the governor's special legislative session on crime.”).

135. *See, e.g.*, S. 29, 179th General Assembly, 1995 Spec. Sess. (introduced by Senators Mellow, O'Pake, Stewart, Stapleton and Bodak on January 24, 1995, and using the same language as Senate Bill 1750); S. 37, 179th General Assembly, 1995 Spec. Sess. (introduced by Senator Greenleaf on January 24, 1995, and using the same language as Senate Bill 533). For the language of Senate Bill 29, see S. 1750 (Printer's No. 2222), *supra* note 131. For the language of Senate Bill 37, see S. 533 (Printer's No. 2229), *supra* note 131.

136. *See* 18 PA. CONS. STAT. ANN. §§ 3101 *et seq.* (Supp. 1995) (effective May 31, 1995) (formerly S. 2, 179th General Assembly, 1995 Spec. Sess. (introduced by Senator Greenleaf on January 24, 1995) (Printer's No. 105)); George, *supra* note 17, at A3 (discussing new law and noting Governor Ridge's endorsement).

Prior to the unanimous approval of the bill, there was some debate over whether the statute would retain the word “rape” and provide for two separate first-degree felonies, rape and involuntary deviate sexual intercourse, or whether the term “aggravated sexual assault” would be used as an “umbrella term” to cover both rape and involuntary deviate sexual intercourse in the same statute. Johnna A. Pro, *Senators Rewrite Law on Sexual Assault, Rape*, PITT. POST-GAZETTE, March 21, 1995, at B4. Senators opposed the single statute approach using the term “aggravated sexual assault” because they were concerned that judges would impose con-

Senate Bill 2, now codified, revises the statutory scheme for sexual crimes in general.¹³⁷ Utilizing a gradation approach, the statute classifies the sexual crimes for adult offenders and victims as follows: (1) first-degree felonies include rape and involuntary deviate sexual intercourse, (2) second-degree felonies include sexual assault and aggravated indecent assault, and (3) second-degree misdemeanors include indecent assault and indecent exposure.¹³⁸

Among the new statutory provisions, section 3124.1 entitled "Sexual Assault," purports to address the *Berkowitz* decision directly.¹³⁹ Hailed in the press as the "no means no provision," this statute makes nonconsensual intercourse a second-degree felony punishable by a maximum of ten years imprisonment.¹⁴⁰ With respect to sentencing and grading of the crime, this statute is an improvement from the supreme court's approach that made nonconsensual intercourse a mere second-degree misdemeanor.¹⁴¹

In addition, while the rape statute was the focus of post-*Berkowitz* public outcry, the legislature made only one relevant change to the *Berkowitz* issues regarding the crime of rape. The General Assembly added a definition of forcible compulsion in an attempt to clarify the rape statute which, even in its "new" form, retains the controversial forcible compulsion element.¹⁴²

current sentences that would shorten prison terms for sex offenders, instead of consecutive sentences that would be lengthier. *Id.* Originally, the Pennsylvania Coalition Against Rape wanted the rape term removed; however, they changed their position and supported the Senate version. *Id.* (acknowledging coalition spokeswoman Kathryn Geller Myers on change in position).

137. See 18 PA. CONS. STAT. ANN. §§ 3101 *et seq.* (Supp. 1995) (effective May 31, 1995). Other changes in the statute include definitional clarifications, most notably the definition of forcible compulsion. 18 PA. CONS. STAT. ANN. § 3101 (Supp. 1995) (effective May 31, 1995). Additional changes include the removal of the phrase "alleged victim" and its replacement with the term "complainant," and various changes with respect to sexual assault and statutory rape, including revised age provisions. *Id.*

138. See 18 PA. CONS. STAT. ANN. §§ 3121, 3123-27 (Supp. 1995) (effective May 31, 1995).

139. For the text of 18 PA. CONS. STAT. ANN. § 3124.1 (Supp. 1995) (effective May 31, 1995), see *supra* note 18.

140. For a discussion of the public reaction to section 3124.1, see *supra* note 19 and accompanying text. For a discussion of the penalty imposed by section 3124.1, see *supra* note 18 and accompanying text.

141. *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1166 (Pa. 1994) (finding only enough evidence to support indecent assault conviction); 18 PA. CONS. STAT. ANN. § 3126 (Supp. 1994) (grading indecent assault as a second-degree misdemeanor), amended by 18 PA. CONS. STAT. ANN. § 3126 (Supp. 1995).

142. See 18 PA. CONS. STAT. ANN. § 3101 (Supp. 1995) (effective May 31, 1995). The statute defines forcible compulsion as: "Compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied. The term includes, but is not limited to, compulsion resulting in another person's death, whether the death occurred before, during or after sexual intercourse." *Id.*; see also 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1995) (effective May 31, 1995) (retaining forcible compulsion in definition of rape).

IV. A CRITICAL ANALYSIS OF THE PENNSYLVANIA SUPREME COURT'S
DECISION IN *BERKOWITZ* AND THE LEGISLATURE'S RESPONSE

A. *The Weaknesses in the Berkowitz Rationale*

The Pennsylvania Supreme Court's decision in *Commonwealth v. Berkowitz*¹⁴³ contravenes the spirit of rape reform that has shaped the law throughout the past two decades. Although the court purportedly followed the legislature's intent by construing the rape statute in connection with the indecent assault statute, the court disregarded the legislative intent expressed in another statute, the "resistance not required" statute. Moreover, the court construed its own precedential cases in such a constricting manner that it revived rape myths and stereotypes that it once rejected.¹⁴⁴

Although the court initially acknowledged that a rape victim need not resist, the court effectively ignored this proposition throughout the remainder of its opinion.¹⁴⁵ In analyzing the facts of the case, the court emphasized that the victim did not physically resist during her encounter with Berkowitz.¹⁴⁶ Specifically, the court noted that the defendant's hands were not restraining the victim in any manner and that the victim never attempted to leave the room.¹⁴⁷

Under the mandate of the "resistance not required" statute, such factual observations should be irrelevant to establishing the crime of rape.¹⁴⁸ However, the court incorrectly associated lack of resistance with degree of force by finding that, on the record, the defendant did not use force against the victim.¹⁴⁹ Moreover, the court mistakenly relied on *Commonwealth v. Mlinarich* to support its statement that the degree of force used must be enough to "prevent resistance by a person of reasonable resolution."¹⁵⁰ While the plurality opinion in *Mlinarich* took this approach, the

143. *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994).

144. *Commonwealth v. Rhodes*, 510 A.2d 1217, 1223 n.11 (Pa. 1986) (rejecting rape myths and "ill-conceived" rules perpetuating them). For a discussion of *Rhodes*, see *supra* notes 51-57 and accompanying text.

145. *Berkowitz*, 641 A.2d at 1163 (quoting 18 PA. CONS. STAT. ANN. § 3107 (1983) that "[t]he victim of a rape need not resist" and quoting *Commonwealth v. Rhodes*, 510 A.2d 1217, 1217 (Pa. 1986) that "[t]he force necessary to support a conviction of rape . . . need only be such as to establish lack of consent and to induce the [victim] to submit *without additional resistance* . . ." (emphasis added)).

146. *Id.* at 1164.

147. *Id.* Moreover, the court pointed out that, in response to defense counsel's question, "Is it possible that [when Appellee lifted your bra and shirt] you took no physical action to discourage him," the victim answered, "It's possible." *Id.*

148. See § 3107; *Rhodes*, 510 A.2d at 1227 n.14 ("It is not necessary to prove that the victim actually resisted in order to prove that the act of sexual intercourse was against the victim's will and/or without consent.").

149. *Berkowitz*, 641 A.2d at 1164 (concluding that victim's testimony "is devoid of any statement which clearly or adequately describes the use of force . . . against her").

150. *Id.* (citing *Commonwealth v. Mlinarich*, 542 A.2d 1335 (Pa. 1988) (plurality opinion)). As a plurality decision, the precedential value of *Mlinarich* is ques-

Berkowitz court neglected to mention that the *Mlinarich* dissenters expressly disagreed with the assertion that resistance and force are dependent concepts.¹⁵¹ Because the opinions of the *Mlinarich* plurality and dissenters could not be reconciled on this point, the *Berkowitz* court's reference to *Mlinarich* provided weak support, at best.¹⁵²

Not only did the *Berkowitz* court restore the resistance requirement in proving forcible compulsion, the court also took a narrow view of resistance and force. According to the court, the weight of the defendant's body pinning the victim and the act of intercourse, despite the victim's repeated protests, were insufficient to constitute rape by forcible compulsion.¹⁵³ Thus, while physical resistance has an impact on force according to the *Berkowitz* court, verbal resistance does not.¹⁵⁴ Moreover, in reaching its decision that nonconsensual intercourse is not rape by forcible

tionable. See *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1344 n.4 (Pa. Super. Ct. 1992) (acknowledging plurality problem of *Mlinarich* and refusing to apply *Mlinarich* to facts of *Berkowitz*), *aff'd in part & vacated in part*, 641 A.2d 1161 (Pa. 1994); *Commonwealth v. Ruppert*, 579 A.2d 966, 969 n.6 (Pa. Super. Ct. 1990) (rejecting *Mlinarich* as non-binding precedent and following majority holding in *Rhodes*), *alloc. denied*, 588 A.2d 914 (Pa. 1991); *Commonwealth v. Dorman*, 547 A.2d 757, 761 (Pa. Super. Ct. 1988) (same), *alloc. denied*, 571 A.2d 380 (Pa. 1989). For a discussion of *Mlinarich*, see *supra* notes 60-65, 76-77 and accompanying text, and *infra* notes 150-51 and accompanying text.

151. *Berkowitz*, 641 A.2d 1161; see also *Mlinarich*, 542 A.2d at 1340 (plurality opinion). While declaring that the force used in rape must "prevent resistance by a person of reasonable resolution," the plurality opinion did not go so far as to reinstate resistance "to the utmost" or "useless resistance which would further imperil the victim's safety." *Id.*

The dissenting opinion, written by Justice Larsen, strongly opposed this resistance rationale. According to the dissenting opinion, the plurality opinion turns around and places the focus of attention in a rape prosecution squarely back on the victim, only this time that focus is achieved in a more subtle, but no less pernicious, manner. Instead of requiring the victim to resist "to the utmost," she is now required to satisfy the court that she withstood a "prescribed level" of compulsion.

Id. at 1345 (Larsen, J., dissenting).

The dissenters disagreed with the plurality's position that resistance was *modified* to adopt an objective requirement that the victim resist as much as a person of reasonable resolution should have resisted. *Id.* at 1346. The dissenters strongly declared that 18 PA. CONS. STAT. ANN. § 3107 "does not merely 'modify' the 'degree of resistance requirement in sexual assault cases,' it makes it clear that there is no such requirement—period!" *Id.*

152. When the supreme court referred to *Mlinarich*, it attempted to reconcile the plurality opinion and the dissenting opinion by arguing that the dissenting opinion did not take issue with the implicit holding of the plurality opinion, that something more than lack of consent is required to prove forcible compulsion. *Berkowitz*, 641 A.2d at 1164 n.4. Even if this reading of the dissenting opinion is correct, it does not change the fact that both opinions expressly deal with the resistance issue and reach opposite conclusions on it. Therefore, it is impossible to effectively reconcile the plurality and dissenting opinions on the very issue that the *Berkowitz* court cites the case to support.

153. *Id.* at 1164.

154. *Id.* (declaring fact that victim stated "no" is relevant to issue of consent, but not to issue of force). *But see Henderson*, *supra* note 37, at 65 ("[I]t should go

compulsion, the court took a narrow view of "force" and exceeded its discretion in reviewing the evidence.

In contrast to Pennsylvania's highest court, the New Jersey Supreme Court has broadly interpreted force to include the force inherent in non-consensual intercourse.¹⁵⁵ While the Pennsylvania Supreme Court recognized that the weight of Berkowitz's body pinning the victim during intercourse constituted some force, the court declared that this was an insufficient amount of force.¹⁵⁶ To reach this conclusion, the court exceeded its standard of review and usurped the function of the jury.¹⁵⁷ The trial record did not reveal the relative weights and sizes of the victim and defendant, but the jury saw both individuals and concluded that the victim was forcibly compelled to engage in intercourse with the defendant.¹⁵⁸ Therefore, the court should not infer that the weight of the defendant was insufficient force because such an inference contradicts the jury's conclusion.¹⁵⁹ In an attempt to support its view that forcible compulsion requires more than nonconsensual intercourse, the court examined the rape statute in light of the indecent assault statute.¹⁶⁰ The court correctly acknowledged that indecent assault is " 'indecent contact with another . . . without the consent of the other person' " and that rape lacks such a consent element.¹⁶¹ Thus, the court concluded that, if the legislature in-

without saying that if a woman does not want to engage in intercourse and is not consenting, the man 'has to use physical force to accomplish the act.' ").

155. *In re M.T.S.*, 609 A.2d 1266, 1276 (N.J. 1992). Although the New Jersey statute is not identical to the Pennsylvania statute, both statutes do not consider resistance or lack of consent to be relevant to rape. Compare 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1994), amended by 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1995) with N.J. REV. STAT. § 2C:14-3 (1982). Therefore, the Pennsylvania Supreme Court in *Berkowitz* could have adopted the New Jersey Supreme Court's reasoning that "to require physical force in addition to that entailed in an act of involuntary or unwanted sexual penetration would be fundamentally inconsistent with the legislative purpose to eliminate any consideration of whether the victim resisted or expressed non-consent." *In re M.T.S.*, 609 A.2d at 1276. For a further discussion of *In re M.T.S.*, see *supra* notes 33, 68 and accompanying text.

156. *Berkowitz*, 641 A.2d at 1164.

157. In reviewing the evidence, the court could only overturn the jury verdict if, upon accepting all evidence as true and drawing all reasonable inferences in favor of the Commonwealth, the jury could not have concluded that the elements of the crime were met. *Id.* at 1163.

158. See *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1347 (Pa. Super. Ct. 1992) (noting that "cold record is utterly devoid of any evidence regarding the respective sizes of either appellant or the victim"), *aff'd in part & vacated in part*, 641 A.2d 1161 (Pa. 1994); Commonwealth's Brief, *supra* note 67, at 9 (arguing that jury observed individuals in court and, therefore, was only entity legally competent to determine significance of defendant's weight on top of victim).

159. Commonwealth's Brief, *supra* note 67, at 8-10.

160. *Berkowitz*, 641 A.2d at 1164-65.

161. *Id.* at 1164 (citation omitted) (comparing rape statute with indecent assault statute).

tended forcible compulsion to be nonconsensual intercourse, the legislature would have defined rape as intercourse without consent.¹⁶²

While there is some logic in this statutory construction, the court failed to recognize that fundamental differences between rape and indecent assault undermine any comparison that can be made between them. For example, indecent assault is a misdemeanor, while rape is a first-degree felony.¹⁶³ In addition, rape requires penetration, while indecent assault does not.¹⁶⁴ Because the court ignores this distinction, it makes penetrating a non-consenting woman, which should be a more serious offense, the equivalent of fondling a woman without her consent, in that both offenses are second-degree misdemeanors.¹⁶⁵ Furthermore, this mechanistic approach to statutory construction overlooks the reality faced by those most affected by the law, the victims.¹⁶⁶ According to one scholar, "[T]he harm in rape is nonconsensual intercourse . . . and that requiring some form of violence in addition perpetuates a male, rather than a female interpretation of rape law."¹⁶⁷

Finally, the court ignored the spirit of rape reform by construing the rape statute so narrowly. Rape reform is intended to facilitate meritorious rape prosecutions and convictions.¹⁶⁸ However, by constricting the con-

162. *Id.*

163. 18 PA. CONS. STAT. ANN. § 3126(b) (Supp. 1994) (grading indecent assault as misdemeanor), *amended by* 18 PA. CONS. STAT. ANN. § 3126 (Supp. 1995); 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1994) (stating that penalty is reduced from life to 20 years imprisonment), *amended by* 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1995); *see* Siskin, *supra* note 49, at 534 (arguing that superior court's forcible compulsion holding, which has since been affirmed by supreme court, contradicts legislative intent evinced by classification of rape as felony and indecent assault as misdemeanor).

164. Siskin, *supra* note 49, at 534 (describing penetration as fundamental distinction between two offenses).

165. *Id.* Because the court declared that nonconsensual intercourse constitutes indecent assault, a second-degree misdemeanor, Berkowitz is serving only a six to 12 month sentence, rather than a maximum of 20 years that a rape charge would have carried. *Ex-Student, Acquitted of Rape, Now Serving Assault Sentence*, LEGAL INTELLIGENCER, Aug. 3, 1994, at 6.

166. Henderson, *supra* note 37, at 65 (citing *Berkowitz* as case that ignores women's experiences during nonconsensual intercourse).

167. *Id.* According to Lynne Henderson, professor at Indiana University at Bloomington School of Law,

The requirement of additional force assumes that lack-of-consent intercourse itself does not constitute force and pain, which utterly ignores women's experiences And a man's forcing his penis into a woman's body can be excruciatingly painful. The harm is in the invasion and the denial of one's existence as a human being, not whether or not there is additional violence.

Id.

168. For a discussion of traditional rape reform and its impact, see *supra* notes 34-38 and accompanying text. For a discussion of Pennsylvania's rape reform, see *supra* notes 39-79 and accompanying text. For a discussion of Pennsylvania's most recent rape reform and its impact, see *supra* notes 18-19 and *infra* notes 183-206, 213-15 and accompanying text.

cept of "forcible compulsion," the court undermines meritorious rape prosecutions and lessens the likelihood of obtaining convictions.¹⁶⁹

The court also ignored a fundamental element of all criminal prosecutions, the state of mind of the accused with regard to the victim's lack of consent.¹⁷⁰ According to basic principles of criminal law, a defendant should only be guilty of a crime if he acted with "moral reprehensibility," meaning that he or she "was aware of the major facts and circumstances that justify making the conduct criminal."¹⁷¹ In upholding the indecent assault conviction in *Berkowitz*, the court simply acknowledged that because the victim "repeatedly said 'no' throughout the encounter . . . the jury reasonably could have inferred that the victim did not consent to the indecent contact."¹⁷² The court failed to articulate whether the defendant had to actually know the victim was not consenting or whether a lesser mental state, such as recklessness or negligence as to the victim's lack of consent, would suffice for criminal liability.¹⁷³

Essentially, the defendant's mental state is the crux of the "no means yes" debate.¹⁷⁴ Generally, in discussing rape reform, critics pose four alternatives for a defendant's mental state: (1) knowledge or actual awareness, (2) recklessness, (3) negligence or (4) strict liability.¹⁷⁵ Under the first standard, if actual awareness of lack of consent is required, defendants will argue, as *Berkowitz* attempted, that they believed the victims' protestations were "thinly veiled acts of encouragement."¹⁷⁶ Such a requirement would completely undermine feminist and rape prevention

169. See *Report, supra* note 12, at 1-7 (citing *Berkowitz* as case "that horri[fi]es" and represents "detour on the road to equal justice").

170. See George Dix, *Date Rape: Defining When 'No' Means 'No'*, CONN. L. TRIB., Apr. 12, 1993, at 22 (discussing state of mind requirement in criminal prosecutions). According to Dix,

Berkowitz's state of mind should be the focus of attention in his case, rather than the issues that have pre-occupied the Pennsylvania courts . . . Whether "[putting]" the complainant on the bed or any of the other actions he took constituted sufficient force beyond what was inherently necessary to accomplish penetration is a quibble over what should be an irrelevancy.

Id.

171. Dix, *supra* note 170, at 22. Dix notes that "failure to require awareness of the complainant's non-consent is likely to violate the due-process requirement that criminal liability not be outrageously disproportionate to the blameworthiness of the offender's conduct." *Id.*

172. *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1166 (Pa. 1994).

173. *Id.*

174. See Henderson, *supra* note 37, at 63-72 (discussing relevance of defendant's mental state to stereotypical views of females that "no-means-yes" and that women like to be dominated and overpowered).

175. For a discussion of each of these standards in the context of rape prosecutions, see *infra* notes 176-82 and accompanying text.

176. *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1341 (Pa. Super. Ct. 1992), *aff'd in part & vacated in part*, 641 A.2d 1161 (Pa. 1994).

teachings that "no" does, in fact, mean "no."¹⁷⁷ Some critics believe that recklessness, which is an awareness of the risk of lack of consent and a conscious disregard of that risk, would be a more reasonable requirement for both victims and defendants.¹⁷⁸ Under this formulation, a jury could conclude that, given a victim's protestations, the defendant was aware of the likelihood that she was not consenting, but ignored the risk by proceeding with the act of intercourse.¹⁷⁹ Others support the negligence standard, which would give victims added protection by imposing criminal liability on a defendant if the defendant failed to recognize the victim's lack of consent in a situation where a reasonable person would have recognized it.¹⁸⁰ Still others, in an attempt to ensure even greater protection for victims, advocate strict liability as to lack of consent.¹⁸¹ However, by failing to address any of these alternatives, the court implicitly sustains the possibility that a victim's protestations could be misinterpreted as encour-

177. For a discussion of rape prevention teaching, see *supra* notes 48-49 and accompanying text.

178. See Dix, *supra* note 170, at 22 (arguing that recklessness is proper standard and that requiring negligence by "showing that the accused should have been aware of this risk is too low a threshold in a prosecution for a serious crime"). But see Henderson, *supra* note 37, at 65-66 (opposing recklessness standard because under recklessness standard, "a defendant can successfully argue that he never 'consciously disregarded' the risk of nonconsent").

179. Dix, *supra* note 170, at 22. In advocating recklessness as the mental state requirement for rape, Dix noted that, in *Berkowitz*, "[a] jury willing to find that he [Berkowitz] knew she was non-consenting might well—and properly—be willing to find that he considered that he might be wrong in thinking she really meant 'yes,' but disregarded that risk and proceeded nevertheless." *Id.*

180. See ESTRICH, *supra* note 9, at 96-98 (arguing that minimum culpable mental state as to consent should be negligence); Estrich, *supra* note 72, at 1182-83 (same). For a detailed discussion of the New Jersey Supreme Court's use of the negligence standard, see *supra* note 73. However, not all commentators agree with New Jersey's approach. See Dix, *supra* note 170, at 22 (rebuking New Jersey Supreme Court's use of negligence as "too low a threshold").

While agreeing with Estrich that negligence should be the minimum mental state required, one commentator argues that even negligence is not enough to protect victims. Henderson, *supra* note 37, at 67-68. According to Henderson, "[S]imply using the reasonable man, or the reasonable man in the defendant's circumstances, standard is not enough to displace the presumption that women are always and already consenting, lustful creatures, nor does it counteract images of male persistence and dominance." *Id.*

181. See Henderson, *supra* note 37, at 68-72 (arguing that strict liability should be imposed "as soon as the woman says no or indicates that she does not want to engage in sexual activity" and discussing advantages of this standard). According to Henderson,

Once the man is told no, he is alerted to the risk of lack of consent and should bear the risk if he continues despite the no. No should mean no. Stop should mean stop. Crying should negate consent. Similarly, screaming and silence are negations. Further, a woman's lack of positive cooperation in sexual activity is a signal of nonconsent, not her 'natural' passivity.

Id. at 68. However, Henderson admits that legislatures would probably not be eager to adopt this standard. *Id.* at 69 (acknowledging and discussing arguments against this standard).

agement and, thereby, perpetuates the "no means yes" stereotype that is so damaging to victims.¹⁸²

B. *The Effectiveness of the Legislative Remedy*

While the new legislation has received much praise and little criticism, a critical analysis of the legislation indicates that its impact on existing law may not be as innovative and responsive to *Berkowitz* as its advocates suggest.¹⁸³

While on its face the legislature's gradation approach to sexual crimes seems innovative and responsive to *Berkowitz*, even before the supreme court made its ruling in *Berkowitz*, the legislature amended the statutory scheme to add a middle tier, aggravated indecent assault.¹⁸⁴ While this statute was not applicable to *Berkowitz*, its enactment suggests that the legislature was well aware that only two alternatives, rape and indecent assault, did not provide adequate relief to victims of sexual crimes.

The newly enacted sexual assault statute, which purports to be the new "middle tier" in the gradation approach, is designed to directly address the Pennsylvania Supreme Court's ruling in *Berkowitz*, by applying to cases like *Berkowitz* in which there is no evidence of force or physical resistance.¹⁸⁵ Under this statute, the victim's verbal resistance would have been sufficient to convict *Berkowitz* of a second-degree felony, rather than a second-degree misdemeanor.¹⁸⁶ However, this same result could have

182. See Henderson, *supra* note 37, at 55 (noting that "[a] particular tragedy of . . . no means yes stories is not only that passivity means acceptance, but also that women's assertiveness means acceptance").

183. Rape counselors and legislators have an optimistic view that the new legislation will increase reporting and encourage victims to come forward. See Barrientos & Kadaba, *supra* note 18, at B1. However, others believe that the new legislation is "misconceived." *Id.* According to Philadelphia defense attorney Michael Mustokoff, who argued the *Berkowitz* case before the Pennsylvania Supreme Court, "As the law previously existed . . . it took into consideration the full spectrum of non-consensual sexual activity as opposed to the present statute, which draws no differentiation between non-consensual sexual activity and rape." *Id.*

184. See *Editorial: State's Rape Laws Must Change*, LANCASTER INTELLIGENCER J., July 8, 1994, at A9 (Letter to the Editor from Thomas R. Caltagirone, Chairman of House Judiciary Committee). In his letter, Chairman Caltagirone noted that, in 1990, Governor Casey signed into law a bill establishing the crime of aggravated indecent assault, a second-degree felony. *Id.* According to Caltagirone, "'No does mean no' in this charge. If a *Berkowitz*-type case happened today, the perpetrator would face this charge and face stiffer penalties." *Id.*

Notably, however, at the time *Berkowitz* was indicted, the statutory scheme for sexual crimes did not provide for a middle tier. Rather, the two alternatives that existed and that *Berkowitz* was charged with were rape, a first-degree felony and indecent assault, a second-degree misdemeanor. *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1162 (Pa. 1994).

185. See Barrientos & Kadaba, *supra* note 18, at B1 (describing new legislation). For a further discussion of the features of the sexual assault statute, see *supra* notes 18, 139-41 and accompanying text.

186. *Id.*

been achieved under the already existing aggravated indecent assault statute.¹⁸⁷ Moreover, the aggravated indecent assault statute was an even more comprehensive reform than the new statute, because it applies to a broader range of cases than the "new" sexual assault statute.¹⁸⁸ Aggravated indecent assault encompasses any "penetration, however slight, of the genitals or anus of another with a part of the actor's body for any purpose other than good faith hygienic or law enforcement procedures."¹⁸⁹ The "new" sexual assault statute, however, is only applicable to sexual intercourse.¹⁹⁰ Because this "new" sexual assault statute is so narrow, it is already encompassed in the aggravated indecent assault statute.¹⁹¹ Therefore, this new legislation merely duplicates the already existing law and is a superfluous addition to an already complex statutory scheme.

Even if the sexual assault statute is viewed positively, as a more specific alternative method of conviction than the aggravated indecent assault statute, the sexual assault statute fails to address issues raised by *Berkowitz*.¹⁹² First, by making a *Berkowitz*-type situation a second-degree felony, the legislature still refuses to acknowledge that a victim in circumstances resembling the *Berkowitz* case is a rape victim. Rather, such a victim will be considered "sexually assaulted" and her assailant will only be subjected to a punishment that is half as severe as that mandated by a rape conviction.¹⁹³ Because the legislature denies that a *Berkowitz*-type situation is rape, victims may continue to feel betrayed by the justice system and assailants will continue to avoid harsher sentencing.¹⁹⁴

Second, although the legislature believes it clarified the definition of forcible compulsion, it essentially restated the definition that the supreme

187. See *Editorial: State's Rape Laws Must Change*, *supra* note 183, at A9 (noting that aggravated indecent assault statute enacted in 1990 already prevents *Berkowitz*-type situation from recurring).

188. See 18 PA. CONS. STAT. ANN. § 3125 (Supp. 1994) (aggravated indecent assault), *amended by* 18 PA. CONS. STAT. ANN. § 3125 (Supp. 1995).

189. *Id.*

190. See 18 PA. CONS. STAT. ANN. § 3124.1 (Supp. 1995) (effective May 31, 1995).

191. Compare 18 PA. CONS. STAT. ANN. § 3125 (Supp. 1994) (defining aggravated indecent assault), *amended by* 18 PA. CONS. STAT. ANN. § 3125 (Supp. 1995) with 18 PA. CONS. STAT. ANN. § 3124.1 (Supp. 1995) (effective May 31, 1995) (defining sexual assault).

192. For a discussion of the issues in *Berkowitz*, see *supra* notes 109-25, 143-82 and accompanying text.

193. Compare 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1995) (effective May 31, 1995) (defining rape as a first-degree felony) with 18 PA. CONS. STAT. ANN. § 3124.1 (Supp. 1995) (effective May 31, 1995) (defining sexual assault as a second-degree felony).

194. See *Pro*, *supra* note 136, at B4 (recognizing importance of proper terminology for effective judicial interpretation of laws). For a discussion of the psychological impact laws have on rape victims, see *supra* notes 9-13 and accompanying text.

court initially articulated in *Commonwealth v. Rhodes*.¹⁹⁵ Because the court in *Berkowitz* purported to follow the *Rhodes* definition, the supreme court's narrow approach to forcible compulsion remains the guiding precedent and is not overruled by the legislature's mere codification.¹⁹⁶ For instance, because the legislature failed to elaborate what constitutes force and coercion, the *Berkowitz* court's proposition that the weight of an assailant's body on a victim does not constitute force, remains the law in Pennsylvania.¹⁹⁷ Therefore, even with the latest reform, Pennsylvania law is still not as progressive as the law in other states.¹⁹⁸

Third, because the legislature failed to refine the definition of forcible compulsion, it is still unclear what, if any, impact the circumstances surrounding an attack will have. For example, in *Berkowitz*, the court stressed that because the victim could have easily unlocked the door, she was not in a coercive environment.¹⁹⁹ Lacking proper legislative guidance, the court's narrow-minded positions on such factors will remain valid law and will continue to impede rape prosecutions and subject victims to intense judicial scrutiny.²⁰⁰

Fourth, by simply restating the already established definition of forcible compulsion, the legislature also overlooked that the court ignored section 3107, the "resistance not required" statute, and stressed that the victim did not physically resist her attacker.²⁰¹ The legislature neither referred to the already existing section 3107, nor added a new "resistance not required" element to the rape law. Therefore, because the legislature failed to explicitly address the resistance issue in the rape context, they seemingly condoned the court's disregard of the "resistance not required" statute.

195. For a discussion of the legislature's use of the *Rhodes* definition of forcible compulsion, see *supra* note 142 and *infra* notes 196-97 and accompanying text.

196. See *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1163 (Pa. 1994) (purporting to follow *Rhodes* court's approach to forcible compulsion).

197. *Id.* at 1164.

198. See *In re M.T.S.*, 609 A.2d 1266 (1992) (recognizing that weight of assailant's body constitutes sufficient force). For a further discussion of the New Jersey Supreme Court's approach in *M.T.S.* and a comparison of that approach with the Pennsylvania Supreme Court's position in *Berkowitz*, see *supra* notes 155-59 and accompanying text. For a discussion of the more progressive case law of other states, see *supra* note 68 and accompanying text.

199. *Berkowitz*, 641 A.2d at 1164 (emphasizing that "the record clearly demonstrates that the door could be unlocked easily from the inside, that . . . [the victim] was aware of this fact, but that she never attempted to go to the door or unlock it").

200. For a discussion of rape victims' courtroom experiences and the effect of laws on rape prosecutions, see *supra* notes 9-14 and accompanying text.

201. *Berkowitz*, 641 A.2d at 1164 (noting that "[a]ppellee's hands were not restraining her in any manner during the actual penetration" and that she never attempted to leave room).

Finally, like the supreme court, the legislature failed to address the mental state requirement for lack of consent.²⁰² Such an omission provides a glaring loophole for future assailants to argue out of either a rape or sexual assault conviction.²⁰³ For instance, an assailant may argue that despite the victim's verbal or physical protestations, the assailant genuinely believed the victim was consenting, and therefore, did not have the mens rea necessary to be convicted of either sexual assault or rape.²⁰⁴ Had the legislature addressed mental state, it could have clearly erected a legal bar to the use of the "no means yes" stereotype.²⁰⁵ Instead, through its omission, the legislature left assailants with a possible defense and left the courts with the opportunity to judge the validity of these arguments.

Although the new legislation is an improvement from the supreme court's approach, it is not as comprehensive as its supporters suggest.²⁰⁶ As future prosecutions reveal the loopholes discussed, the courts will once again be in the position to effectuate the legislature's reformist intent. However, if the court should fail again, the legislature will be forced to confront its own omissions and redraft its legislation.

V. THE SOCIAL AND LEGAL RAMIFICATIONS OF THE *BERKOWITZ* DECISION

Unfortunately, the Pennsylvania Supreme Court failed to have the foresight to recognize the impact the *Berkowitz* decision would have in both the legal and social realms.²⁰⁷ Trials are so taxing on victims that many women simply would not pursue prosecution if nonconsensual intercourse was only a misdemeanor.²⁰⁸ While working on the legislative remedy, one Pennsylvania senator feared the effect the *Berkowitz* decision would have on the prosecution of rape in Pennsylvania: "Victims may now hesitate to come forward; prosecutors may hesitate to take cases to trial and juries may hesitate to convict in instances where weapons, violent struggle and physical injury are not involved."²⁰⁹

202. For a discussion of mens rea, see *supra* notes 170-82 and accompanying text.

203. See Dix, *supra* note 170, at 22 (discussing importance of specifying mental state).

204. *Id.* (discussing arguments based on lack of mens rea).

205. For a discussion of the "no means yes" stereotype, see Henderson, *supra* note 37, at 55.

206. For a discussion of the reaction to Pennsylvania's latest rape reforms, see *supra* note 183 and *infra* note 223 and accompanying text.

207. See Barrientos & Kadaba, *supra* note 18, at B1 (discussing college students', rape counselors' and lawyers' reactions to the *Berkowitz* decision); Myers, *supra* note 126, at 1 (discussing impact of the *Berkowitz* decision).

208. See MADIGAN AND GAMBLE, *supra* note 13, at 91-107 (discussing impact trials have on rape survivors); Wicktom, *supra* note 36, at 400 (finding that inadequate definitions of rape contribute to low rates of reporting, arrest and conviction).

209. *Pennsylvania Senate Judiciary Committee to Address Rape Law Change*, *supra* note 127 (quoting Sen. Stewart J. Greenleaf).

In addition, the court's emphasis on the victim's lack of resistance in *Berkowitz* also raised concerns that victims would have to physically resist attackers to be able to prosecute rapes successfully.²¹⁰ Such a resistance requirement would not only revive rape myths that victims must be battered and bruised to have really been raped, but it could also further jeopardize women's lives during an attack.²¹¹ Such effects would undoubtedly undermine the rape reform goal of preventing a "second-victimization" of the rape survivor by the judicial system.²¹²

Although many believe the new legislation remedies these judicial obstacles, others still wonder whether the new law "will simply open the door for legal compromises."²¹³ While the new legislation is a step forward, loopholes like its failure to address mental state and to further define forcible compulsion, may also hinder rape reporting and rape prosecutions.²¹⁴ Thus, the same concerns that the *Berkowitz* decision presented, are potentially present under the new legislation.²¹⁵ However, because the legislation has not yet been subjected to the "judicial test," its true impact remains unclear.

Despite the new legislation, the *Berkowitz* decision has already become infamous nationwide.²¹⁶ For instance, a Colorado appellate court has explicitly rejected the *Berkowitz* rationale that lack of consent is not relevant to the issue of force.²¹⁷ While the Colorado second-degree sexual assault

210. For a discussion of the reaction to *Berkowitz*, see *supra* notes 126-29 and accompanying text.

211. Many victim advocate groups tell women not to struggle because they could experience more harm from their attackers. Jack Scherzer & Michael Stetz, *High Court's Rape Ruling Stirs Outrage*, HARRISBURG PATRIOT, June 2, 1994, at A1 (quoting James Gregor, Monroe County District Attorney, discussing harm victims face when they struggle); SPOHN & HORNEY *supra* note 34, at 23 (discussing police and rape counselors' assertions that resistance could increase likelihood of harm to victim). *But see* ALLISON & WRIGHTSMAN, *supra* note 4, at 247-51 (noting that numerous studies indicate that active resistance by victim is more effective in avoiding rape, but cautioning victims that other factors exist and there is "no magical formula for avoiding rape").

212. For a discussion of the goals of rape reform and the reform movement's efforts to avoid putting victims on trial, see *supra* notes 34-49 and accompanying text.

213. Barrientos & Kadaba, *supra* note 18, at B1.

214. For a discussion of the loopholes in the new legislation, see *supra* notes 183-206 and accompanying text.

215. For a discussion of the issues raised by the *Berkowitz* decision, see *supra* notes 109-25, 143-82 and accompanying text.

216. See Myers, *supra* note 126, at 1 (discussing nationwide interest in *Berkowitz* decision).

217. *People v. Schmidt*, 885 P.2d 312, 316 (Colo. Ct. App. 1994) (rejecting *Berkowitz* expressly and holding that verbal resistance is sufficient for finding that victim resisted sexual intercourse and that defendant thereafter caused "submission against the victim's will"), *cert. denied*, 885 P.2d 312 (Colo. 1994); *see also* COLO. REV. STAT. § 18-3-403 (1986) (requiring for second-degree sexual assault penetration by means "of sufficient consequences reasonably calculated to cause submission against the victim's will").

statute does not use the Pennsylvania statute's language of "forcible compulsion . . . [or] threat of forcible compulsion that would prevent resistance by a person of reasonable resolution," it uses comparable language in that it requires the perpetrator to cause "submission against the victim's will."²¹⁸ In interpreting the phrase "submission against the victim's will," the court expressly rejected *Berkowitz* and found that the victim's statement "'no' provides a sufficient basis upon which a jury could find that a victim resisted sexual intercourse and that a defendant thereafter caused 'submission against the victim's will.'"²¹⁹

In addition, the nation has also condemned *Berkowitz* and similar cases as perpetuating injustice.²²⁰ Since 1990, the nation has been investigating rape in the United States.²²¹ Perhaps federal legislative efforts, in connection with state efforts, will provide more comprehensive assistance in preventing *Berkowitz*-type cases from impeding rape reform.²²²

Finally, the *Berkowitz* decision and its legislative progeny have continued to spark social debate, especially among young men and women.²²³ Among the topics brought to the forefront are concerns about dating, the "no means yes" mentality, the need for communication between men and women, and the need for all individuals to take responsibility for their actions.²²⁴ Thus, while continued legislative efforts on the state and local level will offer improved legal recourse, these discussions and the enhanced understanding that they foster between men and women will provide the impetus for the social change that is so vital to an effective, comprehensive rape reform movement.

218. Compare 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1994), amended by 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1995) with COLO. REV. STAT. § 18-3-403 (1986).

219. *Schmidt*, 885 P.2d at 316. The court stated, "[W]e reject the rationale of the Pennsylvania Supreme Court in *Commonwealth v. Berkowitz*, 537 Pa. 143, 641 A.2d 1161 (1994) ('no' is not relevant to the issue of force). We instead specifically conclude that a victim's statement of 'no' is relevant to the issue of 'submission against the victim's will'." *Id.*

220. For a discussion of the national reaction to *Berkowitz*, see *supra* note 126 and accompanying text.

221. For a detailed discussion of the federal government's response to the problem of rape in the United States, see *Hearings, supra* note 1, and *Report, supra* note 12.

222. See *Report, supra* note 12, at 14-18 (discussing Violence Against Women Act of 1993 which seeks to promote national policy on violent crimes against women and to make recommendations on curbing violence against women).

223. *Barrientos & Kadaba, supra* note 18, at B1. In a March, 1994 interview, college students in Pennsylvania hotly debated the *Berkowitz* case and the new legislation. *Id.* Many students applaud the new legislative changes, while others point out that life is not that simple. *Id.* Many students believe that the new law is "more than fair" and that it encourages men to be more responsible and mature. *Id.* Others fear that the new legislation could be an instrument for disgruntled women to take revenge on men by retracting their consent after the sexual act was completed. *Id.* Still others contend that the new legislation fails to recognize that "[w]omen do lie" and that there are times when no can really mean yes. *Id.*

224. *Id.*

VI. CONCLUSION

Motivated by the public outcry²²⁵ against *Berkowitz*, the Pennsylvania General Assembly recognized that its twenty-two-year-old rape law needed to be reformed.²²⁵ While the new legislation is encouraging for rape victims in Pennsylvania, its impact will not be realized until the Pennsylvania Supreme Court is confronted with cases involving the newly-enacted reforms. When addressing such a case, the burden will be on the courts of this Commonwealth, to effectuate, rather than frustrate, the legislature's reformist intent. However, regardless of the future of the new legislation, the Pennsylvania courts, rape victims and rape reform will always be plagued by the infamy of the *Berkowitz* decision.

Rosemary J. Scalo

225. For a discussion of Pennsylvania senators' reformist attitudes, see *supra* notes 127-28 and accompanying text.