RAPE AND THE REQUIREMENT OF FORCE: IS THERE HOPE FOR PENNSYLVANIA AFTER PENNSYLVANIA v. BERKOWITZ?¹

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I. INTRODUCTION

Pennsylvania's rape law has been in a state of flux for many years. This is due in large part to the Pennsylvania Supreme Court's inability to agree on a single definition of forcible compulsion, an element which must be proven in all Pennsylvania rape cases.² Recently, in Pennsylvania v. Berkowitz, the Pennsylvania Supreme Court overturned a defendant's rape conviction because the defendant did not apply actual force and the victim, who said 'no' throughout the encounter, did not physically resist.³ In holding as it did, the Pennsylvania Supreme Court ignored contemporary definitions of forcible compulsion.⁴ The holding also unacceptably limits a sexual offense

¹ 641 A.2d 1161 (Pa. 1994).
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³ 18 PA. CONS. STAT. ANN. § 3121 (1993) (listing forcible compulsion as the first required element of rape).
⁴ See In the Interest of M.T.S., 609 A.2d 1266, 1277 (NJ. 1992) (holding that sexual assault consists of any act of sexual penetration performed without affirmative and voluntary consent to the act itself. In the absence of such consent, the act of sexual penetration becomes unlawful and no additional physical force is required.); see also California v. Iniguez, 872 P.2d 1183 (Cal. 1994) (holding that resistance is no longer required to prove force or fear of force and noting that it is unacceptably speculative to assert that the defendant would have abandoned his attack had the victim resisted by screaming); Donna J. Case, Condom or Not, Rape is Rape: Rape Law in the Era of AIDS—Does Condom Use Constitute Consent?, 19 U. DAYTON L. REV. 227 (1993) (discussing forcible compulsion as a minimal amount of actual or constructive force); Lani Ann Remick, Comment, Read Her Lips: An Argument for a Verbal Consent Standard in Rape, 141 U. PA. L. REV. 1103 (1993) (asserting that a rape victim's verbal consent or non-consent is the proper standard for rape as it is the standard applied to victims of other crimes).
that eliminates any requirement that rape victims resist and virtually overturns the court's own recent precedent expanding the definition of forcible compulsion to include non-physical coercion.\textsuperscript{5}

This note evaluates the \textit{Berkowitz} definition of forcible compulsion,\textsuperscript{7} and analyzes the decision's impact on Pennsylvania's rape cases.\textsuperscript{8} Section two examines current statutory provisions and reviews Pennsylvania's most decisive and varying opinions defining forcible compulsion. Section three describes the sexual encounter between the victim and defendant in \textit{Berkowitz} and reviews the Superior and Supreme Courts' decisions in terms of Pennsylvania's prior case law. Section four describes the legislative response to \textit{Berkowitz} and evaluates proposed modifications of Pennsylvania's rape statute. Section five concludes by condemning the \textit{Berkowitz} decision as inconsistent with Pennsylvania's prior case law, but also asserts that there is hope for Pennsylvania, if not in the courts, then in the legislature.

\section{Prior History}

\subsection{Statutory Provisions}

Pennsylvania defines rape as a first degree felony committed by one who has "sexual intercourse with another person not his spouse:"\textsuperscript{9}

\begin{enumerate}
\item by forcible compulsion,
\item by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution,
\item who is unconscious, or
\item who is so mentally deranged or deficient that such person is incapable of consent."\textsuperscript{10}
\end{enumerate}

\begin{thebibliography}{10}
\bibitem{5} Pennsylvania v. Berkowitz, 641 A.2d 1161, 1164 (Pa. 1994) (holding that forcible compulsion requires something more than verbal resistance to show that the victim's will was overborne).
\bibitem{6} Remick, \textit{supra} note 4 (defining forcible compulsion as the use of threats or force sufficient to dissuade a reasonable person from resisting).
\bibitem{7} Pennsylvania v. Rhodes, 510 A.2d 1217, 1225-26 (Pa. 1986) (holding that forcible compulsion connotes more than physical force and includes moral, intellectual and psychological coercion).
\bibitem{10} Id. § 3121(1)-(4).
\end{thebibliography}
Pennsylvania supplements its definition of rape with a statute entitled "Resistance Not Required," which states that "the alleged victim need not resist the actor in prosecutions under this chapter: Provided, however, that nothing in this section shall be construed to prohibit a defendant from introducing evidence that the alleged victim consented to the conduct in question."\footnote{11} The forcible compulsion requirement makes Pennsylvania's current rape statute less effective than it could be at deterring rapists. Traditionally, forcible compulsion has been proven with evidence of the victim's resistance.\footnote{12} By eliminating the resistance requirement, but maintaining the forcible compulsion requirement, the legislature has left Pennsylvania's courts to redefine forcible compulsion without the aid of their traditional measuring stick, resistance.\footnote{13} The absence of a consistently applied definition of forcible compulsion is most notable in cases where the defendant does not leave the victim with objectively verifiable evidence of force, like the marks of a struggle.\footnote{14}

\begin{enumerate}
\item \textit{B. Evolution of the Force Requirement}

In 1978, a defendant argued that his rape conviction should be overturned because his acquittal on an aggravated assault charge precluded any finding of forcible compulsion.\footnote{15} The Pennsylvania Superior Court rejected this argument, holding that lack of consent is sufficient to support a rape conviction if the victim was induced by threats or force to submit without physical resistance.\footnote{16} The court further held that the sufficiency of the force should not be measured

\footnote{11. \textit{Id.} \S 3107. \textit{But see} 18 PA. CONS. STAT. ANN. \S 3107 (Supp. 1983) (restating the 1972 Official Comment restricting rape to "'classic' rape cases, i.e., where the woman is subdued by violence or threat of violence").

12. \textit{See Pennsylvania v. Moskorison,} 85 A.2d 644, 646 (Pa. Super. Ct. 1952) (presuming the victim's resistance is the measure of defendant's force); John Dwight Ingram, \textit{Date Rape: It's Time for "No" to Really Mean "No"}, 21 AM. J. CRIM. L. 3, 16 (1993) (asserting that "without her consent" has usually been considered synonymous with 'by force'; 'force' required physical resistance by the woman, and usually resulted in physical injury


14. \textit{See Mlinarich,} 542 A.2d at 1342 (overturning the defendant's rape conviction because, absent evidence that she was beaten, the victim "chose" to submit to sexual intercourse rather than resist); \textit{cf. Susan Estrich,} \textit{Real Rape} 6, 60 (1987) (asserting that force and resistance requirements serve to protect the acquaintance rapist more than the stranger rapist since the acquaintance rapist is not apt to use traditional implementations of force such as guns or knives).


16. \textit{Id. (citing Pennsylvania v. Moskorison,} 85 A.2d 644, 646 (Pa. Super. Ct. 1952) as stating that aggravated assault consists of recklessly, intentionally, or knowingly attempting or causing serious bodily injury under conditions evincing extreme indifference to the value of human life).}
against the victim’s physical resistance; rather, the sufficiency of the force should be measured against the effect it has on the victim’s will.\textsuperscript{17} Although Pennsylvania courts continue to cite this standard,\textsuperscript{18} it is difficult to apply and has required numerous expansions and revisions.\textsuperscript{19}

In the 1982 case of \textit{Pennsylvania v. Williams},\textsuperscript{20} Pennsylvania expanded its definition of forcible compulsion. The victim in \textit{Williams} was waiting for a bus at the station when she accepted a ride from the defendant.\textsuperscript{21} Instead of driving to the victim’s destination, the defendant drove to a dark, secluded area.\textsuperscript{22} He told the victim he wanted “a little sex,” twice threatened to kill her and kept one hand in his pocket leading her to believe he was armed.\textsuperscript{23} The victim told the defendant that if he was going to rape her, “to go ahead” because she did not want to be hurt.\textsuperscript{24} After the victim submitted to oral sex and sexual intercourse with the defendant, he returned her to the bus station where she contacted the police.\textsuperscript{25}

The Pennsylvania Superior Court found that murder threats were sufficient to sustain the defendant’s rape conviction\textsuperscript{26} and stated:

\begin{quote}
It is not necessary that the victim be beaten, that the victim cry, that the victim become hysterical, or that she be threatened by a weapon for the crime of rape to occur. The degree of force required to constitute rape is relative and depends on the facts and particular circumstances of each case.\textsuperscript{27}
\end{quote}

Because each assessment of forcible compulsion is relative, Pennsylvania’s courts have reached contradictory results.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} \textit{See Pennsylvania v. Titus}, 556 A.2d 425, 427 (Pa. Super. Ct. 1989) (holding that the standard for rape is whether the attacker’s threats or force overpower the victim’s will and would overcome a reasonable person’s will); \textit{Pennsylvania v. Dorman}, 547 A.2d 757, 759 (Pa. Super. Ct. 1988) (affirming that the rape standard is the effect the threat or force has on the victim’s will and the effect it would have on a reasonable person); \textit{Pennsylvania v. Poindexter}, 539 A.2d 1341, 1344 (Pa. Super. Ct. 1988) (holding that the standard for rape also applies to involuntary deviant sexual intercourse).
\item \textsuperscript{19} \textit{Compare Pennsylvania v. Poindexter}, 539 A.2d 1341, 1344 (Pa. Super. Ct. 1988) (broadening the definition of forcible compulsion to include the use of moral, intellectual, or psychological force) \textit{with Pennsylvania v. Mlinarich}, 542 A.2d 1335 (Pa. 1988) (holding that the victim chose to submit to sexual intercourse with the defendant and that the psychological force applied was not sufficient to overpower her will or constitute forcible compulsion).
\item \textsuperscript{20} 439 A.2d 765 (Pa. Super. Ct. 1982).
\item \textsuperscript{21} \textit{Id. at 767}.
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{26} \textit{Id. at 768}.
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Compare Rhodes}, 510 A.2d at 1226 \textit{with Mlinarich}, 542 A.2d at 1336 (upholding Rhodes’ conviction but overturning Mlinarich’s where both victims were young girls who knew their
In 1986, the Pennsylvania Supreme Court expanded the definition of forcible compulsion to include non-physical coercion. In *Pennsylvania v. Rhodes*, the defendant led his eight year old neighbor to an abandoned building where he told her to lie on the floor and pull up her legs. She complied and the defendant had anal and vaginal intercourse with her.

The trial court found the defendant guilty of rape, but the Superior Court reversed the conviction for lack of evidence of forcible compulsion. The Supreme Court reinstated the rape conviction holding that forcible compulsion existed because the victim's young age rendered her incapable of consenting to the sex acts with the defendant.

Justice Larsen, writing for the *Rhodes* majority, commented extensively on the meaning of forcible compulsion. Justice Larsen noted that while Pennsylvania's current rape statute is based on the Model Penal Code (MPC), Pennsylvania rejected the MPC's three-tiered felony structure in favor of one crime, first degree felony rape. The one-tiered structure Justice Larsen describes does not exist in Pennsylvania. Pennsylvania has two degrees of felony rape.

First degree rape applies to prosecutions under Title 18, section 3121 of the Pennsylvania Code, governing non-spousal rape, and second

30. Id. at 1218.
31. Id. at 1218-19.
32. Id. at 1219 (stating that the trial court also found the defendant guilty of statutory rape, involuntary deviant sexual intercourse, indecent assault, indecent exposure, and corruption of minors. The Superior and Supreme Courts did not disturb these convictions.).
33. Pennsylvania v. Rhodes, 510 A.2d 1217, 1219-20 (Pa. 1986) (citing the absence of violence by the defendant, the lack of injury to the victim and the victim's state of consciousness during the attack as support for the contention that the defendant did not forcibly compel the victim to submit to sexual intercourse).
34. Id. at 1220 (expanding the definition of forcible compulsion to include situations lacking force or threat of force where the victim is deemed legally incapable of consent).
35. Id. at 1221-27 (describing forcible compulsion as the use of superior force, which includes superior physical, intellectual, moral, or psychological abilities).
36. Id. at 1221-24 (citing *MODEL PENAL CODE* § 213.1 (Proposed Official Draft 1962)).
38. Pennsylvania v. Rhodes, 510 A.2d 1217, 1224 (Pa. 1986) (asserting that Pennsylvania's one category of rape ensures that the crime always merits harsh punishment while the three-tiered structure envisioned by the *MODEL PENAL CODE* allows lesser degrees of rape to be treated less severely).
39. Id. (asserting that Pennsylvania's rape statutes are broader than the *MODEL PENAL CODE* 's provisions).
degree rape applies to prosecutions under section 3128, spousal rape.40

The *Rhodes* court asserted that Pennsylvania’s statutory requirement of forcible compulsion is broader than the MPC’s similar requirement.41 The court claims this is because the MPC focuses primarily on physical force and violence, while Pennsylvania’s statute does not.42 The Pennsylvania Supreme Court criticized the Superior Court for limiting forcible compulsion to “sheer physical force or physical violence.”43 The Supreme Court held that forcible compulsion connotes more than physical force and includes moral, intellectual and psychological coercion.44

The *Rhodes* court noted that Pennsylvania has long evaluated force in terms of the effect it produces on the victim’s will.45 The fact-finder should measure the reasonableness of the victim’s abandonment of her will by the totality of the circumstances.46 Relevant factors include, but are not limited to, the following:

a. age of the victim;

b. mental and physical condition of the victim and the defendant;

c. atmosphere and physical setting wherein the alleged rape occurred;

d. defendant’s authoritative position over the victim, if any; and

e. victim’s duress.47

The *Rhodes* decision turned primarily on the first of these factors, the victim’s age.48

In a concurring opinion, Chief Justice Nix pointed out that the majority did not need to address the issue of forcible compulsion.49 The defendant’s appeal was premised not on lack of evidence of

40. 18 PA. CONS. STAT. ANN. §§ 3121, 3128 (1993) (creating a first degree felony for forcible rape and a second degree felony for spousal rape); see also H.B. 160, Pa. 175th General Assembly, 1993-94 Regular Session (creating a two-tiered felony structure for rape).


42. *Id. But see* Pennsylvania v. Milnarich, 542 A.2d 1335, 1338 (rejecting the contention that “forcible compulsion” was intended by the General Assembly “to be extended to embrace appeals to the intellect or morals of the victim”). This rejection effectively defies Justice Larsen’s assertion that Pennsylvania’s rape statute is broader than the MPC’s. *Id.*


44. *Id.* at 1225-26.

45. *Id.* at 1226 (quoting Pennsylvania v. Irvin, 393 A.2d 1042, 1044 (Pa. Super. Ct. 1978)).

46. Pennsylvania v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986); see infra note 62 and accompanying text (recounting the Milnarich court’s assertion that forcible compulsion is not present unless the victim acted reasonably in submitting to the defendant’s actual or threatened force).

47. *Rhodes*, 510 A.2d at 1226 (stating that the forcible compulsion determination is fact-specific).

48. *Id.* at 1220 (stating that the victim’s young age rendered her mentally deficient and legally incapable of consent).

49. *Id.* at 1232 (Nix, C.J., concurring).
forcible compulsion, but on the victim's inconsistent statements.\textsuperscript{50} Since the defendant failed to challenge the sufficiency of the evidence of forcible compulsion, the court should have limited its review to the issue the defendant did raise.\textsuperscript{51}

Chief Justice Nix reevaluated the meaning of forcible compulsion just two years later in \textit{Pennsylvania v. Mlinarich}.\textsuperscript{52} In \textit{Mlinarich}, the fourteen year old victim had just been released from a detention home when she moved in with the sixty-three year old defendant and his wife.\textsuperscript{53} The victim's biological family lived on the same street as the defendant and consented to this living arrangement.\textsuperscript{54} The defendant coerced the victim into performing oral sex on two occasions, raped her once, and attempted to rape her on two other occasions.\textsuperscript{55} At each encounter, the victim resisted the defendant by crying, "screaming and hollering," and asking him to stop.\textsuperscript{56} The defendant countered the victim's resistance by threatening to send her back to the detention home if she did not comply with his demands.\textsuperscript{57}

A jury convicted the defendant of rape, attempted rape, involuntary deviant sexual intercourse, and corrupting the morals of a child.\textsuperscript{58} The convictions for rape and attempted rape were reversed by the Superior Court, which interpreted forcible compulsion to mean physical violence or compulsion and not psychological duress.\textsuperscript{59} In reviewing the Superior Court's reversal of the defendant's rape conviction, the Supreme Court framed the issue as whether the force

\textsuperscript{50} Id. at 1220 n.3 (upholding the Superior Court's rejection of the defendant's argument that the victim's inconsistent statements to police regarding the place of the attack provided insufficient and unreliable evidence).


\textsuperscript{52} 542 A.2d 1335, 1349 (Pa. 1988).

\textsuperscript{53} Id. at 1337 (stating that the defendant's wife suggested this living arrangement).

\textsuperscript{54} Id.

\textsuperscript{55} Id. (resulting in convictions for attempted rape, involuntary deviant sexual intercourse, corrupting the morals of a minor, indecent exposure, and endangering the welfare of a minor). The Supreme Court affirmed the Superior Court in vacating the convictions for endangering the welfare of a minor and indecent exposure, reversing the rape and attempted rape convictions, and affirming the involuntary deviant sexual intercourse and corrupting the morals of a minor charges. \textit{Id}.


\textsuperscript{57} Id. (Larsen, J., dissenting).

\textsuperscript{58} Id. at 1342.

used (defendant's threats to return the victim to the detention home) was sufficient to overcome a reasonable person's will. The Supreme Court held the victim to a reasonable adult standard reasoning that the legislature deemed people fourteen years of age or older capable of consent and thus not entitled to protection as a minor. The Supreme Court stated:

The critical distinction is where the compulsion overwhells the will of the victim in contrast to a situation where the victim can make a deliberate choice to avoid the encounter even though the alternative may be an undesirable one.

... The purpose of the term [forcible compulsion] was to distinguish between an assault upon the will and the forcing of the victim to make a choice regardless of how repugnant. The fact cannot be escaped that the victim made the choice and the act is not involuntary.

An equally divided Supreme Court upheld the Superior Court's reversal of the defendant's rape conviction for lack of evidence of forcible compulsion.

In holding as it did, the Mlinarich court ignored the precedent established by Williams, Rhodes, and the elimination of the resistance requirement by Title 18, section 5107 of the Pennsylvania Code. Although the court paid lip service to the no resistance requirement by tracing its development in the law and affirming it as the present standard, the holding makes clear that resistance is

60. Mlinarich, 542 A.2d at 1341.
61. Id. at 1339 (citing 18 PA. CONS. STAT. ANN. § 3122 (1993) which creates a second degree felony for sexual intercourse with a person under the age of fourteen even if the under-aged person consents).
62. Id. at 1342.
63. Id. at 1336 (holding that forcible compulsion encompasses psychological duress but does not appeal to a victim's intelligence or morals). The key element is that the act must be against the victim's will. The court found the present case lacked psychological duress because the victim engaged in rational calculation and reluctantly chose to submit. Id.
64. Pennsylvania v. Williams, 439 A.2d 765, 768 (Pa. Super. Ct. 1982) (upholding the defendant's rape conviction despite the fact that the victim "chose" to submit to non-consensual sexual intercourse to avoid being beaten or killed).
65. Pennsylvania v. Rhodes, 510 A.2d 1217, 1227 (Pa. 1986) (stating that forcible compulsion exists by virtue of the adult's greater size, age, psychological and emotional maturity, and sophistication where the adult instructs the child to submit to sexual acts, especially if the child knows and trusts the adult); see Mlinarich, 542 A.2d at 1349 (Larsen, J., dissenting) ("The Opinion in Support of Affirmance does not attempt to distinguish Rhodes, nor does it attempt to explain in any way why [Rhodes] is not controlling.").
66. See supra note 11 and accompanying text (asserting that the statute eliminating a requirement that victims resist is ineffective, especially as applied in cases of acquaintance rape).
required. The court's holding indicates that anytime a victim fails to resist such failure can be deemed her choice. If her options are resist or submit, and she submits, then submission was her choice and, as such, a voluntary act despite the threats of force.

The Mlinarich holding is also problematic because the victim's submission to non-consensual sexual intercourse is evaluated in terms of a reasonable person's resolve. The Mlinarich court stated that the unique aspects of the victim's emotional nature are not considerations when determining whether the threat constitutes forcible compulsion. The proper test is the reaction the threat would produce in a reasonable person. If the defendant's actions would not have compelled a reasonable person to submit, then the victim's choice to submit will be deemed voluntary and consensual.

The Mlinarich opinion contradicts Pennsylvania's prior precedents because it requires an objective evaluation of the defendant's force while Rhodes, Williams, and Irvin support more subjective analyses.
The reasonableness requirement is problematic for at least three reasons. First, men and women have different perceptions of reasonableness. Second, if the defendant has a history of physically abusing the victim, such history may lead the victim to submit despite the absence of imminent threatened or actual force. A court, far removed from the circumstances, may deem the parties' history irrelevant and find the victim's submission unreasonable. Thus, a defendant may create a situation designed to intimidate his victim into submission and still be acquitted of rape. Finally, requiring a rape victim to act as a reasonable adult presumes that the trauma inherent in rape is not sufficient to justify a less exacting standard.

In affirming the reversal of Mlinarich's conviction, the Pennsylvania Supreme Court ignored several factors which Rhodes indicates are relevant in identifying moral, psychological or intellectual coercion. First, there was a wide age disparity between the fourteen year old

78. 393 A.2d 1042, 1044 (Pa. Super. Ct. 1978) (holding that the requisite degree of force is defined in terms of the effect it has on the victim's volition, as distinguished from a reasonable victim's volition).
79. See Estrich, supra note 14, at 22 (reporting that men believe the less resistance, the less serious the rape while women believe to the contrary and more readily identify with the victim); Torrey, supra note 75, at 1039 (citing Nona J. Barnett and Hubert S. Field, Sex Differences in University Students' Attitudes Toward Rape, J.C. STUDENT PERSONNEL, March, 1977 at 93, 94, as showing that 40% of women but only 18% of men thought rape was an exercise of male power over females).
81. Alston, 312 S.E.2d at 475 (holding that evidence of the victim's past experience with defendant's violent behavior was irrelevant).
82. See Pennsylvania v. Biggs, 467 A.2d 31 (Pa. Super. Ct. 1983) (reversing the defendant's rape conviction for lack of forcible compulsion where the father blackmailed his daughter and quoted the Bible to her to secure her submission); see also, Estrich supra note 14, at 35-36, 67 (discussing Biggs and criticizing courts for refusing to recognize "force as the power that a defendant need not use").
83. See Pierre Thomas, Rape of Girls Is Common, Study Finds Half of all Victims are Under Age 18, WASH. POST, June 23, 1994, at A1 (citing a 1992 study, in which Pennsylvania participated, which found that half of all rape victims were under 18).
84. Cf. Lynn Hecht Schafran, Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist, 20 FORDHAM URB. L.J. 439 (1993) (stating that "victims of nonstranger rape often experience even more severe and long lasting psychological trauma than the victims of strangers because they experience more self and societal blame for failing to prevent the rape") (citing Sally I. Bowie et al., Blitz Rape and Confidence Rape: Implications for Clinical Intervention, 64 AM. J. OF PSYCHOTHERAPY 180 (1990)).
85. Pennsylvania v. Mlinarich, 542 A.2d 1385, 1342 (Pa. 1988) (citing Rhodes but failing to discuss any of the factors relevant to establishing mental coercion, such as the ages and mental and physical attributes of the persons, location of incident, position of authority or custody held by accused, and whether the victim was under duress).
victim and sixty-three year old defendant. Second, the atmosphere and physical setting worked to the defendant's advantage because the victim lived in a home which was not her family's and in which she was often alone with the defendant. Third, the victim's mental state was not as "reasonable" as it could have been because she had just been released from her first stay in a detention home. Finally, the defendant enjoyed a position of authority over the victim because she was subject to the defendant's supervision when his wife was away and the defendant served as the victim's surrogate father. In his dissenting opinion, Justice Larsen wrote, "if Mlinarich's conduct here did not constitute 'psychological duress' which overwhelmed the will of the victim, then I doubt that any conduct could." In addition to contradicting Rhodes, the Mlinarich opinion contradicts itself. Despite reciting the "resistance not required" standard, the Mlinarich court held that a rape conviction could not be supported absent evidence that the victim's will had been overborne. The court stated that the word 'forceful' was employed to prevent rape convictions where there was no assault upon the will. Thus, Mlinarich holds that force must be applied to the victim's will, that the victim need not resist this force, but that there must be some proof the victim's will was overborne. Therefore, if the defendant does not apply force other than penetration and the victim does not offer more than verbal resistance, then the defendant cannot be convicted of rape in Pennsylvania.

86. Id. at 1337.
87. Id.
88. Id. at 1343 (Larsen, J., dissenting) (implying that the victim was particularly vulnerable to threats of being returned to the detention home).
89. Id.
90. Pennsylvania v. Mlinarich, 542 A.2d 1335, 1345 (Pa. 1988) (Larsen, J., dissenting) (describing the defendant as the victim's "custodial supervisor").
91. Id. at 1344 (advocating reversing the Superior Court and reinstating defendant's conviction); see also ESTIRCH supra note 14, at 70 (arguing that after Mlinarich, forcible compulsion replaced non-consent as the key element of Pennsylvania's rape statute).
93. Mlinarich, 542 A.2d at 1341.
94. Id.
95. See ESTIRCH supra note 14, at 69 (asserting that a similar contradiction occurred in North Carolina v. Alston, 312 S.E.2d 470 (N.C. 1984), where the victim submitted to sexual intercourse with the defendant who had a habit of beating her when she refused his demands). In Alston, the victim's fear of a beating, in the absence of an explicit threat or actual beating, but despite the parties' history, was not sufficient evidence of forcible compulsion. Alston, 312 S.E.2d at 476.
Pennsylvania v. Dorman\textsuperscript{96} and Pennsylvania v. Titu\textsuperscript{97} both address the tension between Rhodes\textsuperscript{98} and Mlinarich.\textsuperscript{99} Rhodes holds that forcible compulsion is broader than "sheer physical force or physical violence"\textsuperscript{100} while Mlinarich limits forcible compulsion to "physical compulsion or violence."\textsuperscript{101} Titus and Dorman both hold that Rhodes governs.\textsuperscript{102}

In Dorman, the thirty-eight year old defendant took his thirteen year old niece for a ride.\textsuperscript{103} Instead of driving to her destination, the defendant drove down a dirt road to a secluded area.\textsuperscript{104} He parked the car, moved closer to his niece, and began fondling her.\textsuperscript{105} The niece said "don’t" but the defendant proceeded to disrobe them both and have sexual intercourse with her.\textsuperscript{106} No conversation occurred during the sexual encounter other than the niece’s original remark, "don’t."\textsuperscript{107}

The defendant was convicted of rape and appealed, arguing that the victim’s one utterance, “don’t,” failed to establish actual or threatened physical compulsion.\textsuperscript{108} In evaluating the defendant’s claim, the Superior Court agreed with the Rhodes court and held that the degree of force required to support a rape conviction varied according to the facts and circumstances of each case.\textsuperscript{109} The Dorman court also noted that:

the courts of Pennsylvania have not always agreed on the amount of force necessary to support a finding that the victim was forcibly compelled to submit to intercourse. The case law dealing with the element of forcible compulsion or threat thereof has been in a constant state of flux.\textsuperscript{110}

\textsuperscript{98} 510 A.2d at 1217 (Pa. 1986).
\textsuperscript{99} 542 A.2d 1395 (Pa. 1988).
\textsuperscript{100} Rhodes, 510 A.2d at 1225, n.12.
\textsuperscript{101} Mlinarich, 542 A.2d at 1342.
\textsuperscript{102} Titus, 556 A.2d at 428 n.2; Dorman, 547 A.2d at 761; see also Berkowitz, 609 A.2d at 1344 n.4 (holding that Mlinarich is non-binding precedent because it was decided by a plurality while Rhodes was decided by a majority) (citing Pennsylvania v. Ruppert, 579 A.2d 966, 969 n.6 (Pa. Super. Ct. 1990)).
\textsuperscript{103} Dorman, 547 A.2d at 757.
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 757-58, 761.
\textsuperscript{106} Id. at 758, 761.
\textsuperscript{107} Id. at 758.
\textsuperscript{108} Dorman, 547 A.2d at 758 (indicating that the defendant was also convicted of statutory rape, corruption of minors, and indecent assault, all of which were affirmed).
\textsuperscript{109} Dorman, 547 A.2d at 758 (citing Pennsylvania v. Williams, 439 A.2d 765 (Pa. Super. Ct. 1982)).
\textsuperscript{110} Id.
The Dorman court followed Rhodes instead of Mlinarich because the affirmance in Mlinarich was the product of an equally divided Supreme Court.\(^{111}\) As such, the Mlinarich decision merits persuasive rather than precedential authority.\(^{112}\)

The Superior Court upheld Dorman's conviction after finding the following Rhodes factors\(^{113}\) present:

\begin{itemize}
  \item a. the physical setting was remote;
  \item b. a twenty-five year age difference existed between the victim and the defendant; and
  \item c. the defendant enjoyed a position of authority over the victim by virtue of their uncle/niece relationship.\(^{114}\)
\end{itemize}

_Pennsylvania v. Titus_ also addresses the tension between Rhodes\(^{115}\) and Mlinarich.\(^{116}\) In Titus, the thirteen year old victim moved from her mother’s home in Florida to live with her father and grandparents in Pennsylvania.\(^{117}\) Within one month of her arrival, the victim’s father came home drunk, crawled into bed with her, woke her up, and had sexual intercourse with her.\(^{118}\) The victim did not consent to having sexual intercourse with her father.\(^{119}\) The court’s opinion, however, stresses that she did not push him away until after the intercourse occurred.\(^{120}\)

Despite following Rhodes and construing forcible compulsion more broadly, the court reversed Titus’ rape conviction.\(^{121}\) The court justified its holding by noting that the defendant had not threatened the victim, she was not in a remote or unfamiliar place, and the record was devoid of any evidence that the defendant had previously

\(\text{References}\)

\(^{111}\) _Id_. at 761.

\(^{112}\) _Id_.

\(^{113}\) See _supra_ note 47 and accompanying text (delineating factors bearing on the reasonableness of the victim’s abandonment of her will).


\(^{115}\) _Titus_, 556 A.2d at 426.

\(^{116}\) _Id_.

\(^{117}\) _Id_.

\(^{118}\) _Id_.

\(^{119}\) _Id_.

\(^{120}\) _Id_. at 426-27; _cf._ ESTRICH, _supra_ note 14, at 32 (asking sarcastically, in relation to another case, whether it is reasonable to believe, as the court apparently does, that she wanted to have sex with her father).

\(^{121}\) _Titus_, 556 A.2d at 430 (upholding the defendant’s convictions of statutory rape, corruption of minors, incest, indecent assault, indecent exposure, and endangering the welfare of children).
abused the victim. The court recognized that a father normally enjoys a position of authority over his child but held the existence of a parent-child relationship was not sufficient to establish forcible compulsion. In an attempt to distinguish Dorman, the court stated that Dorman pushed his niece and this constituted actual physical force which was lacking in Titus.

Although Rhodes was supposedly determinative on questions of forcible compulsion, the Supreme Court accepted Berkowitz in yet another attempt to define forcible compulsion.

III. THE BERKOWITZ FACTS

A. The Rape

In 1988, the victim and defendant were both sophomores at East Stroudsburg State University in Pennsylvania. At the time of the incident, the defendant was twenty years old and the victim was nineteen. Shortly before the April 19, 1988 rape, both victim and defendant attended a school seminar entitled "Does 'No' Sometimes Mean 'Yes'?" Among other things, the speaker, in an attempt to lighten the students' moods, discussed penis sizes.

Both victim and defendant testified that sometime after the seminar they discussed the defendant's penis size. The victim described a conversation which included herself, several of her friends, the defendant and his roommate. The defendant asserted that an additional communication occurred immediately after the seminar which included the victim asking to see his penis. The defendant

122. Id. at 429.
123. Id. at 429-30 (noting that because of the limited duration of this parent/child relationship and the lack of information in the record concerning the intimacy of the relationship, the court could not assume the usual parent/child relationship existed in this case).
124. Id. at 430.
127. Id. at 428; see Titus, 556 A.2d 425 (Pa. Super. Ct. 1989) (holding that since the defendant had not threatened the victim and had no previous record of abusing her, there was no physical force).
129. 641 A.2d 1161 (Pa. 1994).
131. Id.
132. Id. at 1340-41.
133. Telephone Interview with Sergeant Bogart, East Stroudsburg State University Investigating Officer (July 13, 1994).
134. Berkowitz, 609 A.2d at 1340-41.
135. Id. at 1341.
136. Id.
claimed the victim visited his room intoxicated on two occasions before the rape and laid on his bed with her legs spread asking to see his penis.  

On April 19, 1988, the victim attended two morning classes and returned to her dormitory room. The couple quarreled the evening before and the victim, in an effort to relax, drank a martini before going to meet her boyfriend.  

The victim waited for her boyfriend for an unspecified amount of time in his dormitory lounge. Then she went to search for her friend, Earl, who lived with defendant Berkowitz in the same building as the victim's boyfriend. She knocked on Earl's door, received no answer, and decided to leave a note. She then knocked again and still received no answer. She tried the door and, finding it open, entered the room.

Once inside, the victim saw the defendant, whom she mistook as her friend Earl, lying on the bed with a pillow covering his head. The victim lifted the pillow and discovered that the person on the bed was the defendant, not Earl. The victim asked the defendant which dresser belonged to Earl, the defendant pointed it out, and the victim placed her note on Earl's dresser.

The defendant testified that he believed the victim wanted to have sexual intercourse with him because she previously visited his room and awakened him. The defendant asked the victim to stay for a while and she agreed, although she denied his requests to sit on his bed and massage his back. The victim sat on the floor and

137. Id; cf. Lynn Hecht Schafran, Writing & Reading About Rape: A Primer, 66 ST. JOHN'S L. REV. 979, 992 (1993) (noting that many men presume women implicitly consent to sexual intercourse by going to men's rooms).
138. Berkowitz, 609 A.2d at 1339.
139. Id.
140. Id.
141. Id.
142. Id.
143. Berkowitz, 609 A.2d at 1339 (stating that the victim wrote a note which read, "hi Earl, I'm drunk. That's not why I came to see you. I haven't seen you in a while. I'll talk to you later, victim's name.").
144. Id.
145. Id.
146. Id.
147. Id. at 1340.
148. Berkowitz, 609 A.2d at 1340.
149. Id. at 1341 (ignoring the possibility that each time the victim stopped by the defendant's room her intent was to visit Earl).
150. Id. at 1340.
151. Id.
talked with the defendant about her troubled relationship with her boyfriend. The defendant moved to the floor and "straddled" the victim. He began kissing her which prompted her to say that she had to go meet her boyfriend. The defendant then began fondling the victim's breasts at which point she said "no."

The defendant, still straddling the victim, used his body weight to press her back toward the floor to attempt to receive oral sex. The victim testified that at this point she "couldn't move because [the defendant] was shifting his body at her so he was over her." Although she did not physically resist, the victim continuously said "no" and told the defendant she had to go. She described her tone as "scolding."

Both victim and defendant stood up and, despite the victim's saying she had to go, the defendant locked the door. The victim testified that she knew the door could have been opened from the inside. Then, the defendant put the victim on the bed in a manner described as somewhere in between "a fast shove" and a "slow . . . romantic kind of thing." The defendant again straddled the victim, untied her sweat pants, and removed her pants and undergarments from one leg. The victim did not resist because she could not move. She did not scream because she had emotionally distanced herself from the situation.

The defendant used his hand to guide his penis into the victim's vagina. After approximately thirty seconds, he noticed a "blank look on her face." He withdrew and ejaculated onto her stomach. The defendant said, "wow, I guess we just got carried

152. Id.
153. Berkowitz, 609 A.2d at 1340.
154. Id.
155. Id.
156. Id.
157. Id. (quoting Tr. Sept. 14, 1988 at 34).
158. Berkowitz, 609 A.2d at 1340.
159. Id.
160. Id.
161. Id. at n.2 (citing Tr. Sept. 14, 1988 at 61).
162. Id. at 1340 (quoting Tr. Sept. 14, 1988 at 39).
163. Berkowitz, 609 A.2d at 1340.
164. Id.
165. Id. (quoting the victim as stating that "it was like a dream was happening or something"); cf. Schafran, supra note 137, at 990 (noting that rape victims often disassociate their bodies from their minds during rape, as if it were a dream or they were watching it happen to their bodies from the outside) (citing DIANE E.H. RUSSELL, THE POLITICS OF RAPE 19 (1974)).
166. Berkowitz, 609 A.2d at 1340.
167. Id.
168. Id. at 1341.
169. Id. at 1340.
away" to which the victim responded, "no, we didn’t get carried away, you got carried away."170

The victim adjusted her clothing, grabbed her books, and ran downstairs.171 When she saw her boyfriend, she began to cry.172 They went up to his room where the victim cleaned the semen off of her stomach and her boyfriend called the police.173

B. The Trial and Appellate Courts

The jury in Berkowitz convicted the defendant of rape, a first degree felony, and indecent assault, a second degree misdemeanor.174 The defendant was sentenced to one to four years for rape and six to twelve months for indecent assault.175 The sentences were to run concurrently.176 The defendant appealed177 prompting the Superior Court's focus on the element of forcible compulsion and the Rape Shield Law.178

The Pennsylvania Superior Court reviewed the evidence to determine if forcible compulsion could be established under (1) the Rhodes standard,179 (2) 18 PA. CONS. STAT. ANN. § 3121(2),180 (3) in terms of actual physical force,181 or (4) as a result of the victim's reiteration of the word "no" throughout the encounter.182 The court held that the proof of forcible compulsion was insufficient to sustain the defendant's rape conviction.183

170. Id.
171. Berkowitz, 609 A.2d at 1340.
172. Id. at 1341.
173. Berkowitz, 609 A.2d at 1340.
174. Id. at 1341; see 18 PA. CONS. STAT. ANN. §§ 3121, 3126 (1993) (defining rape and indecent assault).
175. Berkowitz, 609 A.2d at 1341-42.
176. Id.
177. Id. (noting that the defendant was not incarcerated during the period between the jury verdict and the appellate court's review of his conviction).
178. Id. at 1342; see Siskin, supra note 8, at 531-33 (discussing the Superior Court's review of the Rape Shield Law). The Rape Shield Law provides that evidence of specific instances of the alleged victim's past sexual conduct, and reputation of such conduct, shall not be admitted as evidence in rape cases, unless such evidence relates to the alleged victim's past sexual conduct with the alleged rapist. Siskin, supra note 8, at 532 n. 6.
179. Berkowitz, 609 A.2d at 1343-45 (citing Pennsylvania v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986), "moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will").
180. Id. at 1343 ("threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.").
181. Id. at 1345 (stating that the prosecution contended that the rape conviction was supported by evidence of actual physical force used to complete the act of intercourse).
182. Id. at 1347.
183. Id. at 1348.
1. The Rhodes Standard

The Superior Court held that the defendant's rape conviction could not be upheld on the basis of Rhodes' "moral, psychological or intellectual force" standard. Although the Rhodes opinion indicated that the factors it listed to help evaluate mental coercion were not exclusive, the Superior Court in Berkowitz did not look beyond those factors.

Rhodes suggests that the ages and mental and physical conditions of the parties are also important in evaluating the existence of moral, psychological or intellectual force. The Superior Court noted that both parties were sophomores at the time of the incident and the victim was only one year younger than the defendant. The Superior Court's evaluation of the victim's mental condition did not include the effect of the victim's recent argument with her boyfriend or the martini she had just consumed.

The Superior Court noted that the record did not disclose the relative sizes of the parties yet found that there was no indication that the parties differed physically or mentally from each other in any material way. The victim testified that the defendant used his body to straddle her and push her back onto the floor in an attempt to obtain oral sex. The victim testified that she "couldn't move" because the defendant was "over her." After putting the victim onto the bed, the defendant again straddled her and she testified that she "couldn't like go anywhere." This inability to move is why the victim did not resist.

The Superior Court did not deem the "atmosphere and physical setting" coercive because the victim voluntarily entered the appellant's

184. Berkowitz, 609 A.2d at 1344 (evidencing its reductionist attitude and unwillingness to follow Rhodes, the court joins the three categories into one, mental coercion).
185. Rhodes, 510 A.2d at 1226.
186. Berkowitz, 609 A.2d at 1344; cf. Robin L. West, Legitimating the Illegitimate: A Comment on Beyond Rape, 90 COLUM. L. REV. 1442, 1454 (1993) (providing factors other than those enumerated in Rhodes to establish mental coercion). Women may submit to sexual intercourse because they know other punishment, such as the withholding of food or money, or the physical abuse of her or her children, will be utilized if they refuse to submit to unwanted sexual intercourse. Id.
187. Rhodes, 510 A.2d at 1226.
188. Berkowitz, 609 A.2d at 1344.
189. Id.
190. Id. (failing to explain how the absence of information leads to the conclusion that the parties were of relatively equal size).
191. Id. at 1940.
192. Id. (quoting Tr. Sept. 14, 1988 at 34).
193. Berkowitz, 609 A.2d at 1340.
194. Id.
dorm room and stayed of her own volition. The opinion does not reflect any consideration of the effect of the defendant’s actions on the atmosphere, even though both parties agreed that the victim said “no” throughout the encounter and the defendant locked the door in response to the victim’s assertion that she wanted to leave. By failing to discuss defendant’s actions as they related to physical setting and atmosphere, the court limited its review in a manner inconsistent with Rhodes.

The Superior Court held the defendant was “not in a position of authority, domination or custodial control over the victim.” The victim testified, however, that the appellant ignored her repeated “no’s” and assertions that she had to go, and instead locked the door. It is unclear whether the victim was consciously aware at the time of the rape that she could open the locked door. It may well be that the victim believed, and the defendant intended her to believe, that he was in a position of domination and custodial control when he locked the door.

The Superior Court paid little attention to the duress aspect of the Rhodes standard, stating, “no record evidence indicates that the victim was under duress.” None of the facts of the case are discussed to determine whether duress was present; in fact, the elements of duress are not even delineated.

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195. Id. at 1344.
196. Id.
197. Id. at 1340-41.
198. See Rhodes, 510 A.2d at 1226 (indicating that sufficiency determinations depend upon the totality of the circumstances and are not limited to the factors delineated in the opinion).
199. Berkowitz, 609 A.2d at 1344.
200. Id. at 1340.
201. See Berkowitz, 609 A.2d at 1340 n. 2 (citing Tr. Sept. 14, 1988 at 61) (stating that the victim later testified that she knew the door could have been opened from the inside).
202. Cf. ESTRICH, supra note 14, at 67 (“That a woman feels genuinely afraid, that a man has created the situation she finds frightening, even that he has done it intentionally in order to secure sexual satisfaction, is apparently not enough to constitute the necessary force or even implicit threat of force.”).
203. Rhodes, 510 A.2d at 1226 (finding that aside from physical force, “moral, psychological or intellectual force” may be used to compel an unwilling person to have sex).
204. Berkowitz, 609 A.2d at 1344.
205. Id; see 18 PA. CONS. STAT. ANN. § 309 (1983 & Supp. 1995) (defining duress as use or threat of use of unlawful force that a reasonable person would not be able to resist). The use of duress in rape cases merits an independent paper addressing issues such as what constitutes unlawful force and should a rape victim be required to be reasonable. Perhaps such complications are what led the Rhodes court to avoid addressing the issue.
2. § 3121(2) Threat of Force

The Superior Court next considered whether the facts could support a finding of forcible compulsion based on a threat of force. A threat is sufficient forcible compulsion only if it will prevent resistance by a person of reasonable resolve. The victim here testified that the defendant did not threaten her and the court found the defendant did not implicitly threaten her. Thus, the court held no threat of force existed sufficient to sustain the defendant’s rape conviction.

The Superior Court did not evaluate threat of forcible compulsion in terms of Rhodes’ additions to the definition of forcible compulsion. Since moral, psychological or intellectual coercion can constitute forcible compulsion, threat of these elements should be sufficient to sustain a rape conviction under the Pennsylvania Rape Statute.

Although the defendant did not specifically threaten the victim, he certainly acted in a manner which could be deemed threatening. He straddled her on two different occasions rendering her unable to escape and locked the door when she said she needed to leave. In addition, the defendant only ceased having sexual intercourse with the victim when he saw a “blank look” on her face. Although the Superior Court’s opinion attaches no significance to this fact, it indicates, at least, that the victim was not an active participant. At most, the victim’s vacant stare indicates that the defendant used sufficient forcible compulsion or the threat of it to obtain her submission without additional resistance.

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206. Berkowitz, 609 A.2d at 1344.
207. Id. (citing 18 PA. CONS. STAT. ANN. § 3121(2) (1983 & Supp. 1995)).
208. Id.
210. Id. at 1340.
212. Id.
213. Id. at 1341.
214. Id.
215. See Pennsylvania v. Irvin, 393 A.2d 1042, 1044 (Pa. Super. Ct. 1978) (holding that only the force necessary to obtain submission without additional resistance is necessary to support a rape conviction).
As the foregoing analysis indicates, the defendant's actions can be viewed as rendering the atmosphere and physical setting intimidating. Similarly, the victim's recent argument with her boyfriend over her alleged infidelity appears to have affected her mental state. The combination of these factors support a belief by the victim that her refusal to submit to sexual intercourse with the defendant would lead to more extreme moral, psychological, or intellectual coercion. For example, the victim might have believed that the defendant would tell her boyfriend she was sexually promiscuous, whether she had sex with him or not. As with actual force where the victim should not be required to resist until the defendant beats or kills her, the victim of mental coercion should not be required to resist until the defendant utilizes his most damaging tactics. The court's holding indicates an unwillingness to respect or validate the victim's evaluation of the situation.

3. Actual Forcible Compulsion

In evaluating the evidence of actual forcible compulsion, the Superior Court held that while injury to, or physical resistance by, the victim were indicia of force, the absence of both resistance and injury were not fatal to the Commonwealth's case. The court stated that absence of physical injury was "insignificant" in evaluating the forcible compulsion requirement. The court considered what precise degree of actual physical force is sufficient to prove forcible compulsion.

The court quoted pre-Rhodes cases as holding forcible compulsion exists whenever a woman is induced to submit without additional resistance. This standard dates back to at least 1952 and, in so far as it requires additional resistance, ignores the statutory mandate...
that no resistance is required.\textsuperscript{225} This standard is more appropriately used in contemporary cases to describe threat of, as distinguished from actual, forcible compulsion.\textsuperscript{226} The Superior Court contended that the proper focus was on the "victim's volition,"\textsuperscript{227} yet its analysis focused solely on the defendant's actions.\textsuperscript{228} In evaluating the victim's volition, the court did not consider the victim's own testimony regarding her state of mind.\textsuperscript{229} The court did not consider the victim's testimony that she found the encounter with the defendant "scary" or that she was in a dream-like state as reflective of her volition.\textsuperscript{230} The court did not consider the defendant's testimony regarding the "blank look" on the victim's face as reflective of her volition.\textsuperscript{231} Because the victim was not "shove[d]," "pinned," nor "imprisoned in [an] isolated area," and because the defendant did not use his hands to restrain her, the court held that the evidence did not demonstrate forcible compulsion.\textsuperscript{232}

The court held that it could not analyze the coercive effect of the defendant's "leaning"\textsuperscript{233} on the victim because of the record's failure to indicate the parties' respective sizes.\textsuperscript{234} However, the court did not have to speculate about the coercive effect of the defendant's actions. The court's opinion indicates that the victim "could not move" when the defendant straddled her on the floor, and "could not like go anywhere" when the defendant straddled her on the bed.\textsuperscript{235} As a result, the opinion indicates that when assailants are able to subdue their victims in a subtle manner, in a manner more akin to the Justice's notions of seduction than rape, the victim's unwillingness to be seduced will be completely irrelevant unless she physically resists.\textsuperscript{236} This holding directly contradicts Pennsylvania's

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{225} 18 PA. CONS. STAT. ANN. § 3107 (1983) (stating that "the alleged victim need not resist the actor").
\item \textsuperscript{226} See 18 PA. CONS. STAT. ANN. § 3121(2) (1983 & Supp. 1995) (indicating that today a threat is sufficient forcible compulsion only when it would prevent a person of reasonable resolution from resisting).
\item \textsuperscript{227} Berkowitz, 609 A.2d at 1345.
\item \textsuperscript{228} Id. at 1346-47 (discussing that the defendant straddled the victim, attempted to have oral sex with her, locked the door, and placed her on the bed and had sex with her).
\item \textsuperscript{229} Id. (discussing only the defendant's physical actions and not evaluating the effect these actions may have had on the victim's state of mind).
\item \textsuperscript{230} Id. at 1340-41.
\item \textsuperscript{231} Id. at 1341.
\item \textsuperscript{232} Berkowitz, 609 A.2d at 1346-47 (focusing on the victim's knowledge that she could have unlocked the defendant's dormitory room after he locked it).
\item \textsuperscript{233} Id. at 1340 ("leaning" was described earlier in the opinion as "straddling").
\item \textsuperscript{234} Id. at 1347. (ignoring the possibility of remanding for additional findings of fact instead of reversing the defendant's conviction).
\item \textsuperscript{235} Id. at 1340.
\item \textsuperscript{236} See Remick, supra note 4, at 1117 (asserting that women's rights to control their bodies will not be absolute as long as force is required to prove rape).
\end{enumerate}
\end{footnotesize}
reform legislation which eliminates any requirement that rape victims resist their attackers.\(^{237}\)

4. *The Victim’s Reiteration of the Word “No”.*

The final argument regarding forcible compulsion relates to the victim’s reiteration of the word “no” before and throughout the rape.\(^{238}\) The Superior Court asserted that verbal resistance was “unquestionably relevant,”\(^{239}\) but not dispositive, in evaluating the presence of forcible compulsion.\(^{240}\) Only where the victim’s verbal resistance is coupled with a threat of forcible compulsion, actual physical force, or mental coercion, can a finding of forcible compulsion be upheld.\(^{241}\) The presence of aggravating factors supports a finding of forcible compulsion.\(^{242}\) Aggravating factors are enumerated in *Rhodes*, and include age disparity, mental/physical condition, atmosphere and physical setting, defendant’s position of authority over the victim and the victim’s duress.\(^{243}\)

The Superior Court found that the *Berkowitz* case lacked any aggravating factors.\(^{244}\) Although the Superior Court believed the victim’s protests prior to penetration were sincere,\(^{245}\) absent any aggravating factors, the protests alone could not establish forcible compulsion.\(^{246}\) The court denounced the victim’s protests during the sexual encounter as “inconsequential” and “merely [going] to . . . credibility.”\(^{247}\)

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\(^{237}\) 18 PA. CONS. STAT. ANN. § 3107 (1983) (eliminating the resistance requirement); *see State Courts Struggling with Definition of Rape*, DALLAS MORNING NEWS, June 3, 1994, at A4 (quoting Cassandra Thomas of the National Coalition Against Sexual Assault as saying, “My concern is that this kind of ruling will take us back to a time when you have to do something, when the victim has to put herself in some degree of danger.”).

\(^{238}\) *Berkowitz*, 609 A.2d at 1347.


\(^{240}\) *Berkowitz*, 609 A.2d 1348.

\(^{241}\) *Id.* at 1347-48 (citing Pennsylvania v. Meadows, 553 A.2d 1006 (Pa. Super. Ct. 1989) where the defendant “knowingly” ignored the victim’s protests as he had sexual intercourse with her and Pennsylvania v. Dorman, 547 A.2d 757 (Pa. Super. Ct. 1988) where the defendant enjoyed an authoritative position over the victim, drove her to a remote area, pushed her down and had sex with her, despite her initial protest).

\(^{242}\) *Berkowitz*, 609 A.2d at 1344 (citing *Rhodes*, 510 A.2d 1217, 1226-27 n.16).

\(^{243}\) *Berkowitz*, 609 A.2d at 1344 (citing *Rhodes*, 510 A.2d 1217, 1226-27 n.15).

\(^{244}\) *Berkowitz*, 609 A.2d at 1344 (asserting that both defendant and victim were college sophomores, there was no evidence that their physical or mental state differed and there was no evidence that defendant was in a position of authority over the victim).

\(^{245}\) *Id.* at 1347 n.6.

\(^{246}\) *Id.* at 1347.

\(^{247}\) *Id.* at 1347 n.6 (stating that the victim’s protests during intercourse only affect the weight of her credibility since the alleged crime occurred upon penetration).
The Superior Court recognized that its holding can be interpreted as requiring a victim, whose verbal resistance has failed, to physically resist.\textsuperscript{248} The decision indicates that when a defendant proceeds to have sexual intercourse with a victim who has said “no”, the defendant is not guilty of rape unless he becomes violent of his own accord, or the victim resists more strenuously so as to prompt the defendant to apply more force. Thus, the victim not only bears the burden of communicating her nonconsent to one who is unwilling to hear, but also of encouraging her attacker to physically assault her in a way extrinsic to sexual intercourse.\textsuperscript{249} The court notes this departure from legislative intent in a footnote, stating that “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.”\textsuperscript{250} The court’s analysis in this regard is unsupported by the language of, and comments appended to, Pennsylvania’s Resistance Not Required Statute.\textsuperscript{251}

C. The Supreme Court

The Pennsylvania Supreme Court upheld the Superior Court’s reversal of the defendant’s rape conviction stating that “in regard to the critical issue of forcible compulsion, the complainant’s testimony is devoid of any statement which clearly or adequately describes the use of force or threat of force against her.”\textsuperscript{252} In support of its holding, the court ignored \textit{Rhodes}\textsuperscript{253} and focused exclusively on physical factors.\textsuperscript{254}

\begin{itemize}
\item \textsuperscript{248} \textit{Id.} at 1348 n.7.
\item \textsuperscript{249} \textit{See Ronet Bachman, U.S. Dep’t of Justice, Violence Against Women: A National Crime Victimization Survey Report} 10 (1994) (reporting that in both acquaintance and stranger rapes victims were most likely to be passive and offer only verbal resistance); Dale Russakoff, \textit{Where Women Can’t Just Say ‘No’: Pennsylvania Supreme Court Rules Force is Needed to Prove Rape}, \textit{Wash. Post}, June 3, 1994, at A1 (quoting Kathryn Geller Myers, spokeswoman for the Pennsylvania Coalition Against Rape, as saying the \textit{Berkowitz} ruling “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.”)
\item \textsuperscript{250} \textit{Berkowitz}, 609 A.2d at 1348 n.7.
\item \textsuperscript{252} \textit{Berkowitz}, 641 A.2d at 1164; \textit{cf. Estrich, supra} note 14, at 62-63 (criticizing rape prosecutions as focusing too much on the victim’s allegedly inadequate response); Berliner, \textit{supra} note 70, at 2694 (criticizing rape prosecutions as ignoring the defendant’s real beliefs by focusing on whether the victim’s behavior would lead a reasonable person to believe she consented and attributing that belief to the defendant).
\item \textsuperscript{253} \textit{510 A.2d} at 1226 (asserting that forcible compulsion is not limited to physical force and moral, psychological, or intellectual force can constitute forcible compulsion).
\item \textsuperscript{254} \textit{Berkowitz}, 641 A.2d at 1164 (asserting that the victim did not physically resist the defendant’s actions).
\end{itemize}
The Pennsylvania Supreme Court's opinion, written by Justice Cappy, omits or mischaracterizes many significant facts. The court states that the victim drank a martini and went to a lounge. The court neglects to mention that the victim's recent argument with her boyfriend prompted her to drink in anticipation of seeing him again and that the lounge was not in a bar but a dormitory. The alcohol might have delayed the victim's response to the defendant. Such a delay could explain why she was not quick to unlock the door or fight off the defendant.

The court also fails to mention that the victim left a note for her friend Earl, the person she was looking for when she encountered the defendant. Omission of this fact lends credence to the defendant's assertion that the victim was visiting him and detracts from the victim's assertion that she was searching for Earl.

Although the court subsequently discusses the relevance of the victim's verbal resistance, the court neglects to mention that the defendant admitted that the victim said "no" throughout the encounter. Justice Cappy's rendition of the facts does not include the defendant's admission that he only ceased having sexual intercourse with the victim upon noticing a blank look on her face. Neither the Supreme Court opinion nor the Superior Court opinion mentions that the entire attack occurred in approximately ninety seconds. Such a quick attack detracts from the argument, contained in both courts' opinions, that the victim could have opened the door and left if she really wanted to avoid sex with the defendant.

255. Id. at 1162.
256. Id. at 1163.
257. Compare Berkowitz, 641 A.2d at 1163 (stating that the victim went to a lounge) with Berkowitz, 609 A.2d at 1399 (stating that the victim drank a martini in her dormitory room).
258. BARENT F. LANDSTREET, THE DRINKING DRIVER: THE ALCOHOL SAFETY ACTION PROGRAM 18 (1977) (discussing how alcohol can lessen an individual's feelings of anxiety, apprehension and caution); see Herbert Muskavitz & Marcelline Burns, Effects of Alcohol on Driving Performance, 14 ALCOHOL HEALTH & RESEARCH WORLD 12, 13 (1990) (stating that alcohol can delay an individual's response time).
259. Berkowitz, 641 A.2d at 1163.
260. Compare Berkowitz, 641 A.2d at 1164 (stating that the fact that complainant said "no" is relevant to the issue of consent, but not to the issue of force) with Berkowitz, 609 A.2d at 1342 (stating that the victim's lack of consent is all that is relevant).
261. Berkowitz, 641 A.2d at 1162.
262. Id. at 1341.
263. Schafran, supra note 137, at 991 (citing Tr. Sept. 14, 1988 at 176 and discussing that when a victim is sexually assaulted by someone she knows, as in Berkowitz, she may be taken off-guard and easily overpowered without an opportunity to fight back); see Berkowitz, 609 A.2d at 1399-41 and Berkowitz 641 A.2d at 1163 (discussing the relevant facts without mentioning the duration of the attack).
264. See Berkowitz, 609 A.2d at 1347 (concluding that there is no evidence that the victim could not have left the room); Berkowitz, 641 A.2d at 1164 (asserting that the victim could easily have opened the door).
Justice Cappy portrays the victim as incompetent. He quotes the trial transcript wherein the victim confesses she "took no physical action to discourage" the defendant. He states, "the record clearly demonstrates that the door could be unlocked easily from the inside." The Supreme Court noted that the victim admitted that the defendant did not quickly shove her onto the bed and the defendant did not restrain her with his hands. Unfortunately, the court refused to recognize that the victim did not willingly lie down on the bed; rather, the defendant pushed her onto the bed.

The court's focus on the encounter's physical aspects indicates that Mlinarich, which limits forcible compulsion to physical force or violence, is more reflective of the governing law than is Rhodes, which holds that forcible compulsion is not limited to physical force nor violence.

In a move further indicating the ascendance of Mlinarich to a position of superiority over Rhodes, the Pennsylvania Supreme Court discussed Mlinarich extensively and only briefly mentioned Rhodes. Directly contradicting the Superior Court, the Supreme Court held that the victim's repetition of the word "no" throughout the encounter was "not relevant to the issue of force." The court approvingly noted that Mlinarich held that the defendant's threat to send the victim back to a juvenile detention home would not have prevented resistance by a person of reasonable resolution. Therefore, Mlinarich dictates that despite the victim's insistence that she did not want to engage in sexual intercourse with the defendant, the threat of force or psychological coercion were not present so as to establish forcible compulsion.

265. Berkowitz, 641 A.2d at 1164.
266. Id.
267. Id.; cf. Remick, supra note 4, at 1104 (noting that a certain amount of coercion, aggression, or violence in sexual situations is accepted by society).
270. See Titus, 556 A.2d at 428 n.2 (quoting Mlinarich, 542 A.2d at 1342 and Rhodes, 510 A.2d at 1225 & n.2) (discussing the differences between the two decisions).
272. Berkowitz, 641 A.2d at 1163-64.
273. Berkowitz, 641 A.2d at 1164. But cf. Berkowitz, 609 A.2d at 1347 ("Evidence of verbal resistance is unquestionably relevant in a determination of 'forcible compulsion'.").
274. Berkowitz, 641 A.2d at 1164.
275. Berkowitz, 641 A.2d at 1164-6; see Estrich, supra note 14, at 71 ("To reverse a conviction, the court need only conclude that a reasonable woman's will would not have been overcome in these circumstances, because there was no force as men understand it. The right to seduce—the right of male sexual access in appropriate relationships—continues to be protected.").
IV. LEGISLATIVE RESPONSES TO BERKOWITZ

This ruling by Pennsylvania’s highest court has prompted a great deal of commentary and a rush to enact new legislation eviscerating the forcible compulsion requirement. Two bills are currently pending in the Pennsylvania legislature. Senate Bill No. 533, introduced on February 19, 1993, by Representative Greenleaf and twelve others, does not eliminate Pennsylvania’s forcible compulsion element. Rep. Greenleaf’s bill does, however, add a clause making it a first degree felony for a person sixteen years or older to engage in sexual intercourse with a child ten years old or younger.

Representative Ritter’s bill, House Bill No. 160, was re-introduced on February 1, 1993, but, unlike Greenleaf’s bill, Ritter’s is a sweeping revolution of Pennsylvania’s rape statute. Ritter’s bill redefines forcible compulsion to include express or implied use of

276. Robin Abcarian, When a Woman Says ‘No’: Rape Conviction Iffy Unless She is the Perfect Victim, PHOENIX GAZETTE, June 9, 1994, at B11 (condemning the Berkowitz decision and commenting on the disbelief of the existence of date rape); see Susan Estrich, Rape: A Question of Force, USA TODAY, Aug. 11, 1994 at 1A (condemning the Berkowitz holding as setting a dangerous precedent); Dave Ivey, Pennsylvania Ruling Defining Rape Stirs Outcry, ARIZONA REPUBLIC, June 3, 1994, at A1 (relaying that women’s rights advocates consider the Berkowitz decision a crime against women); Nancy E. Roman, Scales of Justice Weigh Tiers of Sexual Assault; State May Reform Rape Law, WASH. TIMES, June 16, 1994 at A8 (condemning the Berkowitz holding as setting a dangerous precedent); Women’s Groups Say No to Rape Case Ruling. Court Decision Stirs Anger, ST. LOUIS POST DISPATCH, June 6, 1994, at B6 (quoting Deborah Zubaav of the Women’s International League for Peace and Freedom as commenting “What is it about the word ‘no’ (that the Pennsylvania Supreme Court does not understand”); When Wo’ Means Nothing, ST. LOUIS POST DISPATCH, June 3, 1994, at A1 (quoting Pennsylvania State Representative Karen Ritter as arguing, “It’s ridiculous to say a woman has to do more than just say ‘no,’ that she has to do more than just refuse the sexual acts.”).

277. See Brad Bumsted, Bill to Change Rape Law has Languished for Three Years, GANNET NEWS SERVICE, June 10, 1994 (“A bunch of male politicians are tripping over themselves in a frenzy to get credit for a quickly concocted bill that holds basically that ‘no means no’ in rape cases. It’s good politics with most voters.”).


Ritter's bill defines consent as "intelligent, informed and voluntary affirmation not to be construed as coerced or reluctant submission." In addition to expanding the definitions contained in the rape statute, Ritter's bill creates two degrees of felony sexual assault. Section 3121(A) makes it a first degree felony to engage in a sexual act which is accompanied by forcible compulsion and an aggravating circumstance. Aggravating circumstances exist whenever the defendant has a weapon, inflicts serious bodily injury on the victim, commits another felony in the course of the rape, engages in a sexual act with the victim without consent and with one or more persons, enjoys a position of authority over the victim, or the victim is mentally disabled or physically helpless.

Section 3122(A) of Representative Ritter's bill creates a second degree felony for engaging in a sexual act which is accompanied by forcible compulsion but which is not accompanied by an aggravating circumstance. This provision, combined with the expanded definition of forcible compulsion, ensures that defendants who are charged with rape do not simply have a misdemeanor on their criminal records. In addition to the felony provisions, Representative Ritter's bill makes it a second degree misdemeanor to engage in indecent contact with another person without consent.

Since Representative Ritter's bill languished for three years without receiving any attention and rape law reformists cannot agree on how to best change the law, it might be a while before Pennsylva-
nia's rape law is reformed. The Berkowitz decision, however, may prompt the legislature to act more quickly than it otherwise would.\(^2\)

Following the Pennsylvania Supreme Court's decision in Berkowitz,\(^2\) various officials and groups in the media immediately denounced the verdict.\(^2\) Thereafter, the Berkowitz decision was used by McKean County prosecutor Charles J. Duke to dismiss a rape case against a Salvation Army official.\(^2\) In what has been dubbed "the Salvation Army Case,"\(^2\) the prosecutor said "he had no choice but to drop [the] charges."\(^2\) The victim in the Salvation Army Case testified that she was riding to work with the defendant when he stopped to pick up clothing at a Salvation Army facility.\(^2\) The victim accepted the defendant's offer to tour the facility\(^2\) and was standing in a hallway when the defendant emerged naked from one of the rooms.\(^2\) During the attack, the defendant used his body weight, without hitting the victim, to force her to perform oral sex.\(^2\) The victim verbally protested, saying "no," 'don't do that,'
and 'we can't do this.' The defendant's sixty pound weight advantage, combined with the victim's prior back injury, precluded her from physically resisting.

The dismissal of the Salvation Army case reignited criticism of Pennsylvania's current rape law. If subsequent cases are dismissed on the basis of the victim's failure to resist, Pennsylvania lawmakers may feel increasing pressure to amend the rape law.

V. CONCLUSION

The Berkowitz decision contradicts Pennsylvania's own prior precedents which state that mental coercion or force sufficient to prevent resistance is sufficient to support a rape conviction. The Berkowitz holding ignores the mandate that the totality of the circumstances be reviewed rather than a few, isolated facts. The Berkowitz decision is more in line with Mlinarich than Rhodes, the allegedly more binding precedent. Berkowitz, like Mlinarich, implicitly contradicts the legislative mandate that resistance is not required in rape prosecutions. Berkowitz also follows Mlinarich by indicating that the victim made a choice not to try to open the door and leave.

If results similar to Mlinarich and Berkowitz constitute the future for rape victims in Pennsylvania, then the future looks bleak. Justice Larsen, author of the Rhodes opinion and apparently the Pennsylvania Supreme Court's most progressive thinker with regard to rape, may

302. Bair, supra note 297, at B3.
303. Another Rape Charge Dropped, supra note 298, at D4 (stating that the victim's weight and back injury left her unable to resist the defendant's actions).
304. See Another Rape Charge Dropped, supra note 298, at D4 (stating that the Pennsylvania District Attorney's Association supports new legislation to change Pennsylvania's rape law); Bair, supra note 297, at B3 (quoting the Prosecutor in the Salvation Army case, Charles Duke, as asserting, 'the state rape law must be changed to support a woman's right to decline sex').
305. 641 A.2d 1164 (Pa. 1994).
306. See Pennsylvania v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986) (asserting that forcible compulsion also includes moral, intellectual, or psychological force used to force a person to engage in sexual intercourse).
308. Rhodes, 510 A.2d at 1226.
309. See supra section IIIC (discussing Justice Cappy's omission and mischaracterization of the facts).
310. 542 A.2d 1335 (Pa. 1988); see supra notes 58-70 and accompanying text (discussing how Mlinarich limits forcible compulsion to physical force).
313. 542 A.2d 1335, 1341-42 (Pa. 1988) (discussing how the victim made a choice between the sexual assault and being returned to a detention home).
never sit on the Court again. Thus, Chief Justice Nix, author of the Mlinarich opinion, faces no strong opposition to his views on rape victims’ choices. The unanimous decision by the Supreme Court in Berkowitz does not bode well for future rape victims.

On the other hand, Representative Karen Ritter has been working for years to overhaul Pennsylvania’s rape laws. Representative Ritter offers hope with regard to the language and application of Pennsylvania’s rape statutes. Even if the statutory modifications she proposes cannot elicit the support of a majority of the legislature, she has evinced a willingness to compromise and other politicians have supported the notion of changing Pennsylvania’s rape statute. With lawmakers scurrying to amend the law, changes will hopefully begin to erode the requirement of actual physical forcible compulsion.

Today, Pennsylvania is at best at an impasse. The courts are bound to follow the Berkowitz opinion and the legislature is attempting to enact new legislation effectively overruling Berkowitz. At worst, Pennsylvania continues to allow rapists who do not beat their victims to rape with impunity. It is imperative that Pennsylvania reform its rape laws so that cases like Berkowitz and the Salvation Army Case cease to be the norm.

314. See Emilie Lounsberry, Panel Will Select Court Candidates; It Will Help Casey Fill Vacancies on the Supreme Court and Commonwealth Court, PHILADELPHIA INQUIRER, July 8, 1994, at B9 (asserting that J. Larsen was removed from the Pennsylvania Supreme Court, placed on two years probation, and ordered to perform 240 hours of community service after being found guilty of conspiring to obtain anti-anxiety drugs); Pennsylvania Justice Charged Again, WASH. POST, June 7, 1994, at A6 (noting that Justice Larsen, author of the Rhodes opinion, was impeached on May 24, 1994 as a result of misconduct charges for failing to remove himself from over 20 cases which involved his campaign treasurer from 1978 to 1992. Had Justice Larsen been present on the bench during the Berkowitz deliberations, the result may have been different.).

315. Presumably, the five other justices agree with Justice Nix regarding rape victims’ choices since no dissent was filed in the Berkowitz case.

316. See Bumsted, supra note 277 (recounting Ritter’s efforts to reform Pennsylvania’s rape laws).

317. Bumsted, supra note 277 (stating that Ritter is a “pragmatic politician” and will attempt to get agreement for her main proposals).

318. Bumsted, supra note 277 (discussing that the state senate led by Senator Greenleaf and Senator Fisher are concerned that saying “no” is not enough for a rape conviction).

319. See Bumsted, supra note 277 (stating that after the Berkowitz decision, “lawmakers are in a mad rush to fix [Pennsylvania] state law”); Roman, supra note 276 (stating that a group of prosecutors, district attorneys, judges, state senators, and American Civil Liberty Union members support Ritter’s bill and are working with her to change the current rape law in Pennsylvania).