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It's Not the Thought That Counts: Pennsylvania Quietly Made Rape and IDSI Strict Liability Crimes

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It's Not the Thought That Counts: Pennsylvania Quietly Made Rape and IDSI Strict Liability Crimes

Jordan E. Yatsko*

ABSTRACT

In 1982, the Pennsylvania Superior Court decided *Commonwealth v. Williams*, wherein the court held that a defendant charged with rape or involuntary deviate sexual intercourse (IDSI) cannot use a mistake of fact defense as to the victim's consent. The court relied on the reasoning that a defendant's mens rea is not an element of either rape or IDSI. Section 302 of the Pennsylvania Crimes Code, however, requires that where the legislature has failed to expressly require a finding of mens rea in the text of the statute, at least recklessness must be imputed to each material element.

This Comment argues that both rape and IDSI require a finding of mens rea, and that both offenses must then be susceptible to a mistake of fact defense. This Comment will first examine the development and confusion persistent in Pennsylvania case law surrounding the relationship between "forcible compulsion" and non-consent—both elements of rape and IDSI. This Comment will then examine the problematic consequence of failure to make a mistake of fact defense available to defendants in light of the Pennsylvania courts' controversial history of holdings and the resulting expansion of the "forcible compulsion" definition, as well as the plain mandate of Section 302. Finally, this Comment will present support from the Pennsylvania courts' and the United States Supreme Court's constitutional tradition of requiring a mens rea for a finding of guilt, particularly in serious offenses.

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2018. Thank you to my parents and sister for their love and humor, and for reminding me always of Jeremiah 29:11. Thank you to Bruce Antkowiak and Adam Cogan who allowed me to watch them fight for fairness and made me need to do it, too. Thank you.

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I. INTRODUCTION

The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The pur-

pose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.¹

The above excerpt was the United States Supreme Court's response to a lower court's instruction to the jury that intent is presumed by a defendant's voluntary act.² The Court held that omission of an explicit mens rea element in the text of the statute in question could not be construed to mean that no intent is required,³ absent some evidence of affirmative congressional intent to eliminate the element.⁴ The issue of whether to instruct the jury as to the required mens rea is not merely a question of statutory construction—the Court in *United States v. Morissette*⁵ instructed that where intent is an element, “its existence is a question of fact which must be submitted to the jury.”⁶

Notwithstanding the constitutional doubts raised by the failure to require a mens rea in serious offenses,⁷ as well as the Pennsylvania Crimes Code's⁸ default imposition of a mens rea for crimes lacking an explicit mens rea requirement,⁹ the Pennsylvania courts have refused to recognize a mens rea requirement for rape and involuntary deviate sexual intercourse (IDSI).¹⁰ As a result, the Pennsylvania courts have made a mistake of fact defense unavailable to defendants charged with those offenses, since evidence negating mens rea is irrelevant where mens rea is not an element.¹¹

1. *United States v. Morissette*, 342 U.S. 246, 263 (1952).

2. *Id.* at 249.

3. *Id.* at 263.

4. *Id.* at 273.

5. *United States v. Morissette*, 342 U.S. 246 (1952).

6. *Id.* at 274. *See also In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

7. *See infra* Part III.B.

8. 18 PA. CONS. STAT. §§ 101–9546 (2016).

9. *See* § 302(a), (c).

10. *See Commonwealth v. Williams*, 439 A.2d 765, 769 (Pa. Super. Ct. 1982) (determining that a mistake of fact defense is improper in cases of rape and IDSI on the reasoning that a defendant's mens rea is not an element of either offense).

11. *Id.* *See also Commonwealth v. Callahan*, No. 629 EDA 2016, 2017 Pa. Super. Unpub. LEXIS 3199 (Pa. Super. Ct. Aug. 23, 2017). In *Callahan*, the defendant argued on appeal that the trial court erred in eliminating the mens rea requirement for rape and in failing to instruct the jury as to a mistake of fact defense. *Id.* at *7-8. The Superior Court cited *Williams* for the rule that “mistake of fact is not a defense to rape,” nor is “the defendant's state of mind.” *Id.* at *11 (citing *Williams*, 439 A.2d 765).

This Comment argues that both rape and IDSI require a finding of mens rea, and that both offenses must then be susceptible to a mistake of fact defense. Part II of this Comment will identify the inception of the Pennsylvania rule refusing defendants a mistake of fact defense in cases of rape and IDSI.¹² Part II will then track the Pennsylvania case law underlying the confusion tied to the elements of rape and IDSI.¹³ Part II will also examine the expansion of statutory and common-law definitions of elements affecting the consequences of failure to require a mens rea for rape and IDSI.¹⁴ Part III will present support from the Pennsylvania Crimes Code for requiring a mens rea for rape and IDSI, as well as from the Pennsylvania courts' and the United States Supreme Court's tradition of requiring a finding of some level of intent to avoid raising constitutional doubts.¹⁵

II. BACKGROUND

At the time the Superior Court decided *Commonwealth v. Williams*,¹⁶ “forcible compulsion” within the meaning of the rape¹⁷ and IDSI¹⁸ statutes had not yet been statutorily defined, and the common-law supported only a “physical force” definition.¹⁹ The *Williams* court determined that defendants cannot use a mistake of fact defense²⁰ as to consent when charged with rape or IDSI.²¹ The court reasoned, “[t]he crux of the offense of rape is force and lack of victim’s consent,” and the judiciary lacks power to create a mis-

12. See *infra* Part II.

13. See *infra* Part II.

14. See *infra* Part II.

15. See *infra* Part III.

16. *Commonwealth v. Williams*, 439 A.2d 765 (Pa. Super. Ct. 1982).

17. 18 PA. CONS. STAT. § 3121 (2016).

18. § 3123.

19. See *Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986) (holding, four years after *Williams*, that “forcible compulsion” includes force outside of “physical force or violence” and rejecting a more limited definition that includes only physical force); see also Rosemary J. Scalo, Note, *What Does No Mean in Pennsylvania—The Pennsylvania Supreme Court’s Interpretation of Rape and the Effectiveness of the Legislature’s Response*, 40 VILL. L. REV. 193, 227–28 (1995) (asserting that when the legislature finally expanded the definition of “forcible compulsion,” the statutory definition “essentially restated the definition . . . initially articulated in *Commonwealth v. Rhodes*.”).

20. See § 304 (allowing a mistake of fact defense).

21. *Williams*, 439 A.2d at 769 (“If the element of the defendant’s belief as to the victim’s state of mind is to be established as a defense to the crime of rape then it should be done by our legislature We refuse to create such a defense.”).

take of fact defense to those elements.²² Thus, a defendant's belief as to the victim's consent is irrelevant.²³

Pursuant to Section 304 of the Pennsylvania Crimes Code,²⁴ “[i]gnorance or mistake as to a matter of fact, for which there is a reasonable explanation or excuse, is a defense if . . . the ignorance or mistake negatives the intent, knowledge, belief, recklessness, or negligence to establish a material element of the offense.”²⁵ In essence, Section 304 allows defendants to use a mistake of fact defense where a defendant makes a reasonable mistake about some circumstance or fact that negates mens rea as to an element of the crime charged.²⁶ If permitted, a defendant would raise a mistake of fact defense in the case of rape, for example, where a defendant argues that he was mistaken as to whether the victim was consenting, and therefore lacked the requisite mens rea to commit the offense. The defendant's mistake in this example would negate the mens rea because he lacked mens rea as to a material element—consent—when he mistakenly believed he had it.²⁷

For purposes of this Comment, the relevant substantive Pennsylvania statutes are those criminalizing rape²⁸ and IDSI.²⁹ Pursuant to Pennsylvania's rape statute, Section 3121 of the Pennsylvania Crimes Code,³⁰ “[a] person commits a felony of the first degree when the person engages in sexual intercourse with a complainant” by either “forcible compulsion” or “[b]y threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.”³¹ Pursuant to Pennsylvania's IDSI statute, Section 3123 of the Pennsylvania Crimes Code,³² “[a] person commits a felony of the first degree when the person engages in deviate sexual intercourse³³ with a complainant” by either “forcible compulsion” or

22. *Id.*

23. *See id.*

24. 18 PA. CONS. STAT. § 304 (2016).

25. § 304(1).

26. *See id.*

27. *See* § 3121 (criminalizing rape); *see also* Part II.B (arguing that consent is an element of rape and therefore susceptible to a mistake of fact defense).

28. § 3121.

29. § 3123.

30. 18 PA. CONS. STAT. § 3121 (2016).

31. § 3121(a)(1)–(2).

32. 18 PA. CONS. STAT. § 3123 (2016).

33. *See* § 3101 (defining IDSI). “Deviate sexual intercourse” is [s]exual intercourse per os or per anus between human beings and any form of sexual intercourse with an animal. The term also includes penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.

“by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.”³⁴

This Part of this Comment will outline the context of the *Williams* decision, which made a mistake of fact defense unavailable for rape and IDSI.³⁵ This Part will additionally explain the interplay between the elements of rape and IDSI to the extent it demonstrates that *Williams* was wrongly decided at the time of the decision, and that *Williams* has further become increasingly ill suited to the offenses since a critical element has been statutorily defined.³⁶

A. *The Making of the Williams Rule and Its Lingering Significance*

The *Williams* court declared that a jury instruction on mistake of fact as to consent or non-consent in rape and IDSI “is not now and has never been the law of Pennsylvania,” because a defendant’s mens rea is not an element of either offense.³⁷ However, the same court decided the question differently just two years prior in *Commonwealth v. Carter*.³⁸ The defendant in *Carter* was convicted of what was, at that time, rape of a person “so mentally deranged or deficient that such a person is incapable of consent.”³⁹

The provision at issue in *Carter*, like those at issue in *Williams*, did not explicitly include a mens rea requirement within the text of the statute.⁴⁰ The *Carter* court, however, relied on the default culpability statute, Section 302 of the Crimes Code,⁴¹ to impute a mens rea.⁴² The court ruled that Section 302 required the Commonwealth to prove that the defendant “acted at least recklessly” with respect to each material element, including the victim’s inability to consent because of mental deficiency.⁴³

Id. Deviate sexual intercourse differs from rape in that the act of rape includes only sexual intercourse “per os or per anus,” while IDSI includes, inter alia, sexual intercourse via genitalia as well as with any other object. *See id.*

34. § 3123(a)(1)–(2).

35. *Commonwealth v. Williams*, 439 A.2d 765, 769 (Pa. Super. Ct. 1982).

36. *See* § 3101 (defining “forcible compulsion”).

37. *Williams*, 439 A.2d at 769.

38. *Commonwealth v. Carter*, 418 A.2d 537 (Pa. Super. Ct. 1980).

39. *Id.* at 539 (quoting § 3121 (1982) (amended 1996)).

40. § 3121 (1982) (amended 1996); *Carter*, 418 A.2d at 539 (“[T]he subsection of rape dealing with incompetents does not state that a person must ‘know’ of victim’s condition”); *see also* § 3121 (criminalizing rape).

41. 18 PA. CONS. STAT. § 302 (2016).

42. *Carter*, 418 A.2d at 539.

43. *Id.*

Section 302(a) provides: “[A] person is not guilty of an offense unless he acted intentionally, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.”⁴⁴ Section 302(c) requires, “[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.”⁴⁵ Accordingly, Section 302 as a whole requires that when a statute in the Crimes Code does not explicitly specify the required mens rea for an offense, a mens rea of at least recklessness must be imputed to each material element.⁴⁶ The *Carter* court was thereby bound to find that the trial court erred in failing to instruct the jury as to the required mens rea for the offense.⁴⁷

Interestingly, the *Carter* court drew a contrast between the offense at issue and statutory rape,⁴⁸ which does not require a mens rea, because a separate statute⁴⁹ explicitly provides that mistake is not a defense to statutory rape.⁵⁰ Thus, because neither the statute at issue in *Carter* nor any other governing statute explicitly prohibited a mistake of fact defense, the offense triggered the default culpability provision in Section 302.⁵¹

Post-*Carter*, it appears that Section 302 imputes at least recklessness to each material element of sexual offenses where: (1) the offense does not explicitly provide the required mens rea, and (2) the offense, in its text or in another provision, does not explicitly *prohibit* mistake of fact as a defense.⁵²

The *Williams* court did not address the holding in *Carter* or the substance of Section 302.⁵³ Instead, the *Williams* court determined that the judiciary has no power to impose a mens rea requirement on an offense that contains no explicit statutory mens rea require-

44. § 302(a).

45. § 302(c).

46. § 302(a), (c).

47. *Carter*, 418 A.2d at 539–40.

48. § 3122 (repealed 1995).

49. Section 3102 provides that when “criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older.” § 3102. As a result, mistake as to age is not a defense to a statutory rape charge under what was then Section 3122. *See id.*

50. *Carter*, 418 A.2d at 540; § 3122 (repealed 1995).

51. *Carter*, 418 A.2d at 540.

52. *See id.* at 539–41.

53. *See Commonwealth v. Williams*, 439 A.2d 765, 769 (Pa. Super. Ct. 1982) (determining that the judiciary has no power to create a mistake of fact defense or impose a mens rea requirement rather than relying on the already-existing Section 302 to impute a mens rea).

ment.⁵⁴ The court thus inexplicably ignored Section 302's imputation of a mens rea into offenses lacking an explicit mens rea,⁵⁵ and left the matter to the legislature to write an explicit mens rea requirement into the rape and IDSI statutes.⁵⁶ This legislative task, of course, is unnecessary—Section 302 specifically contemplates that some offenses will lack an express mens rea requirement but still require the imputation of at least recklessness.⁵⁷

A recent Superior Court decision, albeit unpublished,⁵⁸ illustrates the clash between the *Carter* holding and the *Williams* rule.⁵⁹ In *Commonwealth v. Hairston*,⁶⁰ the defendant appealed the trial court's refusal to instruct the jury on a mistake of fact defense for his rape and IDSI charges.⁶¹ The *Hairston* court acknowledged the *Carter* court's mens rea imputation rule via Section 302, but refused to impute a mens rea to rape and IDSI on the ground that, in "the statutory subsections at issue in [*Carter*], the victim's consent, or lack thereof, was an element of the crime."⁶² The court distinguished the statute at issue in *Carter* from rape and IDSI—"Here, the victim's lack of consent, or inability to consent, is not an element of the subsections of the crimes of rape and IDSI."⁶³ The *Hairston* court applied the *Williams* rule and affirmed Hairston's convictions without any finding of mens rea.⁶⁴

This puzzling ruling relies on *Williams*, but on grounds that *victim consent* is not an element rather than that the *defendant's mens rea* is not an element.⁶⁵ The *Williams* court refused to allow a mistake of fact defense related to the defendant's mens rea on the reasoning that the *defendant's mens rea* is not an element, and, instead, *consent* is "[t]he crux" of rape and IDSI.⁶⁶ The *Hairston* court ac-

54. *Id.* ("If the element of the defendant's belief as to the victim's state of mind is to be established as a defense to the crime of rape then it should be done by our legislature which has the power to define crimes and offenses.")

55. *See* § 302.

56. *See Williams*, 439 A.2d at 769.

57. § 302(a), (c).

58. Pennsylvania Court Rules severely limit the precedential value of unpublished decisions. *See* PA. SUPER. CT. I.O.P. § 65.37 (2016).

59. *See Commonwealth v. Hairston*, No. 1108 WDA 2013, 2015 Pa. Super. Unpub. LEXIS 3425 (Pa. Super. Ct. Sept. 17, 2015).

60. *Commonwealth v. Hairston*, No. 1108 WDA 2013, 2015 Pa. Super. Unpub. LEXIS 3425 (Pa. Super. Ct. Sept. 17, 2015).

61. *Id.* at *1, *15.

62. *Id.* at *55.

63. *Id.*

64. *Id.*

65. *Compare id.*, with *Commonwealth v. Williams*, 439 A.2d 765, 769 (Pa. Super. Ct. 1982).

66. *Williams*, 439 A.2d at 769.

knowledge that sexual assault, aggravated indecent assault, and indecent assault⁶⁷ were outside the control of the *Williams* rule⁶⁸ because they each have consent elements and thus could require a mistake of fact instruction.⁶⁹ As a result, the *Hairston* court ruled that where consent is an element, a mistake of fact defense could be proper.⁷⁰ Consent, however, is an element of both rape and IDSI—the *Williams* court itself declared this fact.⁷¹

The *Hairston* ruling reflects the confusion persistent in Pennsylvania caselaw regarding the elements of rape and IDSI, and demonstrates the Pennsylvania courts' nearly-unvaried, reflexive insistence on the survival of the *Williams* rule without due regard to its ill fit.

B. Interplay Between “Forcible Compulsion” and Consent

The *Hairston* court's finding that consent is not an element of rape or IDSI conflicts with Pennsylvania Superior Court and Pennsylvania Supreme Court precedent.⁷² As an initial matter, *Williams* itself ruled that part of “the crux” of rape and IDSI is victim consent.⁷³ Further, Pennsylvania courts have consistently held that “forcible compulsion” is determined by examining its effect on consent.⁷⁴ Put another way, “forcible compulsion” does not replace the consent element, but is instead determined by its effect on consent.⁷⁵

1. The “Forcible Compulsion” Inquiry Is a Non-Consent Inquiry

In 1986, just four years post-*Williams*, the Pennsylvania Supreme Court, in *Commonwealth v. Rhodes*,⁷⁶ judicially expanded the definition of “forcible compulsion” within the meaning of both the rape and IDSI statutes, reasoning that the “forcible compul-

67. 18 PA. CONS. STAT. §§ 3124.1, 3125, 3126 (2016).

68. See *Williams*, 439 A.2d at 769. The *Williams* court held that a mistake of fact defense as to the victim's consent is improper for rape and IDSI charges because the defendant's mens rea is not an element of rape or IDSI. *Id.*

69. *Hairston*, 2015 Pa. Super. Unpub. LEXIS 3425, at *55-56.

70. See *id.*

71. See *infra* Part II.B.1–2 (explaining that consent is an element of both rape and IDSI); see also *Williams*, 439 A.2d at 769 (ruling that consent is part of “[t]he crux” of rape and IDSI).

72. See *infra* Part II.B.1–2; see also *Williams*, 439 A.2d at 769 (ruling that consent is part of “[t]he crux” of rape and IDSI).

73. *Williams*, 439 A.2d at 769.

74. See *Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986) (relying on *Commonwealth v. Irvin*, 393 A.2d 1042, 1044 (Pa. Super. Ct. 1978)).

75. See *id.* (relying on *Irvin*, 393 A.2d at 1044).

76. *Commonwealth v. Rhodes*, 510 A.2d 1217 (Pa. 1986).

sion” inquiry is a non-consent inquiry.⁷⁷ In other words, “forcible compulsion” is determined by the effect the force has on consent.⁷⁸ As a result, “consent . . . will negate a finding of forcible compulsion.”⁷⁹

The *Rhodes* court held that “forcible compulsion” includes not only physical force, to which the term had previously been limited, “but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person’s will.”⁸⁰ The court relied largely on the premise that the “force necessary to support convictions for rape and [IDSI] need only be such as to establish lack of consent.”⁸¹ The court further reasoned that “the ‘degree of force involved in rape and [IDSI] is defined, not in terms of the physical injury to the victim, but in terms of the effect it has on the victim’s volition.’”⁸² Importantly, the *Rhodes* court distinguished rape from statutory rape, an offense for which “consent is immaterial.”⁸³

In determining whether the defendant in *Rhodes* met the “forcible compulsion” element of rape—by either actual force or threatened force—the court inquired into the effect the defendant’s force had on the victim’s consent; the presence of force alone was not enough.⁸⁴ The court looked to the respective ages of the young victim and the 20-year-old defendant, as well as the fact that the defendant “lured” the victim and used the child’s trust that resulted from the defendant’s three-year relationship with her family to commit the sexual act.⁸⁵

The court provided factors for determining whether “forcible compulsion” is met, but determined that, in all cases, “the critical circumstances and evidence here will be those which tend to prove or disprove compulsion or lack of consent, *i.e.* that such force was used to compel a person to engage in sexual intercourse against that person’s will.”⁸⁶

77. *Id.* at 1229.

78. *Id.* at 1226 (citing *Irvin*, 393 A.2d at 1044).

79. *Id.* at 1225.

80. *Id.* at 1226.

81. *Id.* (quoting *Commonwealth v. Williams*, 439 A.2d 765, 768 (Pa. Super. Ct. 1982)).

82. *Id.* (quoting *Irvin*, 393 A.2d 1042 at 1044).

83. *Id.* at 1229.

84. *Id.* at 1227 (determining that the circumstances were such that the victim had “no alternative but submission”).

85. *Id.*

86. *Rhodes*, 510 A.2d at 1227 (internal quotations omitted).

2. *Consent Is a Technical Element in Rape and IDSI*

In 2003, the Pennsylvania Supreme Court revisited the relationship between consent and “forcible compulsion” in *Commonwealth v. Buffington*.⁸⁷ The issue in *Buffington* was whether sexual assault⁸⁸ is a lesser-included offense of rape and IDSI.⁸⁹ The only elements of sexual assault are “sexual intercourse or deviate sexual intercourse” and lack of consent.⁹⁰ Thus, if rape and IDSI do not have consent as elements, then sexual assault cannot be a lesser-included offense.⁹¹

The court determined that rape and IDSI have consent elements, though each offense “requires more.”⁹² The court reasoned, “the force needs to be such as to demonstrate an absence of consent” to constitute “forcible compulsion,” which, in turn, “encompasses a lack of consent.”⁹³

C. *New Statutory Landscape*

1. “*Forcible Compulsion*” Statutorily Expanded

Though the *Rhodes* court, in 1986, extended the common-law definition of “forcible compulsion” to include “moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person’s will,”⁹⁴ some uncertainty resulted about the reach of “forcible compulsion” when the Pennsylvania Supreme Court affirmed per curiam the Superior Court’s decision in *Commonwealth v. Mlinarich*⁹⁵ two years post-*Rhodes*.⁹⁶

In *Mlinarich*, the Superior Court held that rape requires “actual physical compulsion or violence or a threat” thereof to constitute “forcible compulsion.”⁹⁷ The *Mlinarich* court therefore determined that the defendant’s threat to withdraw custodial care and return the 16-year-old victim to a juvenile detention center un-

87. *Commonwealth v. Buffington*, 828 A.2d 1024 (Pa. 2003).

88. 18 PA. CONS. STAT. § 3124.1 (2016).

89. *Buffington*, 828 A.2d at 1028.

90. *Id.* at 1027–28 (citing § 3124.1).

91. *Id.* at 1031.

92. *Id.* at 1032.

93. *Id.* at 1031.

94. *Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986).

95. *Commonwealth v. Mlinarich*, 498 A.2d 395 (Pa. Super. Ct. 1985), *aff’d per curiam*, 542 A.2d 1335 (Pa. 1988).

96. *See Commonwealth v. Dorman*, 547 A.2d 757, 760 (Pa. Super. Ct. 1988) (“[S]ome uncertainty was cast upon [the *Rhodes*] proposition when the Pennsylvania Supreme Court . . . considered the question.”).

97. *Mlinarich*, 498 A.2d at 403.

less she assented to sexual intercourse could not be “forcible compulsion.”⁹⁸

Six years later, in *Commonwealth v. Berkowitz*,⁹⁹ the Pennsylvania Supreme Court again refused a finding of “forcible compulsion”; the court used the definition as specified by *Rhodes*, but demanded a stringent showing of “forcible compulsion” in its review of the victim’s testimony.¹⁰⁰ The victim in *Berkowitz* testified, “[i]t’s possible” that she took no steps during the sexual encounter to discourage the defendant or leave, and that the defendant did not physically restrain or threaten her.¹⁰¹ The victim did, however, say “‘no’ throughout the encounter.”¹⁰² The court determined that the victim’s repeated “no” “would be relevant to the issue of consent, [but] it is not relevant to the issue of force.”¹⁰³ The court reasoned that “forcible compulsion” requires “something more than a lack of consent,” and the record therefore did not support a finding of force.¹⁰⁴ As a result, the court affirmed the Superior Court’s reversal of the defendant’s rape conviction because of insufficiency of evidence regarding the “forcible compulsion” element.¹⁰⁵

Post-*Berkowitz* and post-*Mlinarich*, the Pennsylvania legislature statutorily defined “forcible compulsion”—an expansion that some attribute to the controversial holdings in those cases.¹⁰⁶ The legislature extended “forcible compulsion” to include “physical, intellectual, moral, emotional or psychological force, either express or implied,”¹⁰⁷ which essentially adopts the common-law definition created by *Rhodes*.¹⁰⁸

98. *Id.*

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

100. *See id.* at 1164.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1165.

105. *Id.*

106. *See, e.g.,* Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 742 (2010) (“The Pennsylvania legislature responded to this controversy exactly as one might predict: by ducking it. . . . One could view these changes as effectively overruling *Berkowitz*. . . . Alternatively, one could view the legislation as effectively codifying *Berkowitz*.”); Scalo, *supra* note 19, at 216–17 (“Following the *Berkowitz* decision and the public controversy that followed its release, the Pennsylvania legislature focused its attention on rape reform.”).

107. 18 PA. CONS. STAT. § 3101 (2016).

108. *See* Scalo, *supra* note 19, at 227–28 (asserting that when the legislature finally expanded the definition of “forcible compulsion,” the statutory definition “essentially restated the definition . . . initially articulated in *Commonwealth v. Rhodes*”).

2. Fischer Concerns for the Viability of Williams

Despite the tumult of the changing common-law definition of “forcible compulsion” and the inception of its more expansive statutory definition, the courts remain tied to the *Williams* rule making a mistake of fact defense unavailable to defendants in cases of rape and IDSI. Just a single showing of hesitation appeared in 1998.¹⁰⁹

The Superior Court in *Commonwealth v. Fischer*¹¹⁰ acknowledged the ill fit of the *Williams* rule in some circumstances after “forcible compulsion” was statutorily defined and thereby expanded to include “compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied.”¹¹¹ In *Fischer*, the defendant raised an ineffective assistance of counsel claim for his trial attorney’s failure to request a jury charge on mistake of fact as to consent.¹¹² As a result, the court had to determine first if the request “would have been successful.”¹¹³

The defendant and victim in *Fischer* both testified that two sexual encounters occurred on the evening in question.¹¹⁴ The defendant in *Fischer* testified that he and the victim engaged in “rough sex” in the first encounter, wherein the “victim acted aggressively.”¹¹⁵ The defendant testified that during the second encounter, he was only mimicking the victim’s behavior in the first encounter by, inter alia, holding the victim’s arms above her head.¹¹⁶ The victim testified that the second encounter was nonconsensual.¹¹⁷

109. See *Commonwealth v. Fischer*, 721 A.2d 1111 (Pa. Super. Ct. 1998).

110. *Commonwealth v. Fischer*, 721 A.2d 1111 (Pa. Super. Ct. 1998).

111. § 3101 (defining “forcible compulsion”); *Fischer*, 721 A.2d at 1118. The *Fischer* court noted the Pennsylvania Criminal Jury Instructions Subcommittee’s concerns about the application of *Williams* in “the ever-changing law of sexual assault.” *Fischer*, 721 A.2d at 1118. The court “agree[d] with the Subcommittee that the rule in *Williams* is inappropriate in . . . date rape case[s].” *Id.*

112. *Fischer*, 721 A.2d at 1113 (“[A]ppellant claims that counsel should have asked the court to instruct the jurors that if they found appellant reasonably, though mistakenly, believed that the victim was consenting to his sexual advances, they could find him not guilty.”).

113. *Id.* at 1114.

114. *Id.* at 1112.

115. *Id.*

116. *Id.* at 1113. The defendant testified that during the first encounter, which he mimicked in the second encounter, “the victim acted aggressively . . . by holding [the defendant’s] arms above his head, biting his chest, stating ‘[y]ou know you want me,’ and initiating oral sex.” *Id.* at 1112.

117. *Id.* at 1112–13. The victim testified that the defendant told her, “[n]obody will know where you are” as he tried to engage in sexual acts with her, as well as that the defendant blocked her path when she tried to leave. *Id.*

The *Fischer* court expressed reservations about the *Williams* rule denying defendants a mistake of fact defense as to victim consent in rape and IDSI cases.¹¹⁸ The court recognized that the expansion of “forcible compulsion” to include force other than physical force post-*Williams* makes room for cases where the *Williams* rule is “inappropriate.”¹¹⁹ The court elucidated its conclusion: “[T]he rule in *Williams* is inappropriate” where the defendant and victim experience a “mutual misunderstanding”—that is, where the defendant reasonably, but mistakenly, believes the victim consents, and the victim mistakenly fears that resistance will trigger violence and thus “feigns willingness, even some pleasure.”¹²⁰

Nonetheless, the *Fischer* court reluctantly declined to overrule *Williams* because the defendant’s conduct in *Fischer* involved physical force, rather than “one of the ‘new’ varieties” of force recently added to the definition of “forcible compulsion.”¹²¹ The court ultimately bound itself to *Williams* because, despite being “keenly aware” of the circumstances that could make the conduct in *Fischer* more susceptible to a mistake of fact, *Williams* was based on the reasoning that, categorically, “the law did not require” the defense, rather than based on the particular facts present in the *Williams* case.¹²² The *Fischer* court opined, “[e]ven if we were to disagree with those conclusions, we are powerless to alter them.”¹²³

In 1999, the Pennsylvania Supreme Court granted allocatur to determine whether the Superior Court erred in its ruling regarding counsel’s failure to request a mistake of fact instruction in *Fischer*,¹²⁴ but thereafter, without explanation, dismissed the appeal as having been improvidently granted.¹²⁵

118. *Id.* at 1118. The court stated:

Changing codes of sexual conduct, particularly those exhibited on college campuses, may require that we give greater weight to what is occurring beneath the overt actions of young men and women. Recognition of those changes, in the form of specified jury instructions, strikes us as an appropriate course of action.

Id.

119. *Id.* In addition, the court acknowledged persuasive precedent from other jurisdictions that permit jury instructions on mistake of fact. *Id.* at 1117 (citing *In the Interest of M.T.S.*, 609 A.2d 1266, 1279 (N.J. 1992); *State v. Smith*, 554 A.2d 713 (Conn. 1989); *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975)).

120. *Id.* at 1117–18 (agreeing with the Pennsylvania Criminal Jury Instructions Subcommittee that “the defendant in such a case ought not to be convicted of rape”).

121. *Id.* at 1118.

122. *Fischer*, 721 A.2d at 1118.

123. *Id.*

124. *Commonwealth v. Fischer*, 730 A.2d 485 (Pa. 1999).

125. *Commonwealth v. Fischer*, 745 A.2d 1214 (Pa. 2000).

3. *The Disappearance of Fischer*

Since *Fischer*, the Pennsylvania courts have shown little, if any, reluctance to discard the *Williams* rule denying defendants a mistake of fact defense in rape and IDSI cases. The *Hairston* court, for example, clung to the *Williams* rule to rule that a jury instruction on mistake of fact for “sexual assault cases” is improper.¹²⁶ The *Hairston* court did acknowledge the *Fischer* court’s reservations about the viability of the *Williams* rule, but focused on the *Fischer* court’s ultimate determination that *Williams* must stand.¹²⁷

In *Commonwealth v. Callahan*,¹²⁸ the defendant argued on appeal that the trial court erred in failing to instruct the jury as to the required mens rea and mistake of fact defense.¹²⁹ The Superior Court briefly disposed of this claim by stating, simply, “this Court has long held that mistake of fact is not a defense to rape.”¹³⁰

To be sure, both *Hairston* and *Callahan* involved physical force instead of one of the “new varieties” of force (psychological, for example), which the *Fischer* court indicated makes for a tougher case to refuse the *Williams* rule.¹³¹ The type of force used, however, does not override the mandate of Section 302’s imputation of a mens rea, which, in the cases of rape and IDSI, automatically triggers the availability of a mistake of fact defense by statute.¹³²

126. *Commonwealth v. Hairston*, No. 1108 WDA 2013, 2015 Pa. Super. Unpub. LEXIS 3425, at *54 (Pa. Super. Ct. Sept. 17, 2015). The court did, however, appear to be willing to allow a mistake of fact defense for *some* “sexual assault” offenses (not including rape or IDSI). *See id.* at *55–56.

127. *Id.* at *53.

128. *Commonwealth v. Callahan*, No. 629 EDA 2016, 2017 Pa. Super. Unpub. LEXIS 3199 (Pa. Super. Ct. 2017).

129. *Id.* at *9. The defendant argued that the jury should have been instructed on mistake of fact for his “forcible compulsion” crimes (specifically, rape and aggravated indecent assault by forcible compulsion). *Id.*

130. *Id.* at *11 (citing *Commonwealth v. Williams*, 439 A.2d 765 (Pa. Super. Ct. 1982)).

131. *See Hairston*, 2015 Pa. Super. Unpub. LEXIS 3425, at *3 (determining whether a mistake of fact defense was proper where the defendant’s rape and IDSI convictions stemmed from sexual abuse achieved by physical threats); *Callahan*, 2017 Pa. Super. Unpub. LEXIS 3199, at *2–3 (recounting the victim’s testimony wherein she alleged the defendant used physical force, including punching her); *Commonwealth v. Fischer*, 721 A.2d 1111, 1118 (Pa. Super. Ct. 1998) (finding that “*Williams* controls” in the “case of a young woman alleging physical force in a sexual assault and a young man claiming that he reasonably believed he had consent”).

132. 18 PA. CONS. STAT. § 302(a), (c) (2016) (imputing at least recklessness to offenses lacking an explicit mens rea requirement); § 304(1) (permitting a mistake of fact defense where “ignorance or mistake negatives” the mens rea required).

III. ANALYSIS

The issue with the Pennsylvania courts' refusal to require a mens rea for rape and IDSI extends beyond the fairness concerns expressed by the Superior Court in *Fischer*.¹³³ The *Williams* rule denying mens rea requirements for rape and IDSI plainly violates both Section 302 of the Pennsylvania Crimes Code¹³⁴ and defendants' due process right to be free from prosecution under statutes that criminalize a broad range of innocent conduct, as well as the right to have each element of the crime charged submitted to the jury.¹³⁵

A. Section 302 Imputes a Mens Rea to Rape and IDSI

Pursuant to Section 302 of the Pennsylvania Crimes Code, "a person is not guilty of an offense unless he acted intentionally, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense."¹³⁶ When the substantive provision does not contain a mens rea element as required by that language, "such element is established if a person acts intentionally, knowingly or recklessly with respect thereto."¹³⁷ Thus, each offense, save two exceptions, requires a mens rea even when the provision does not explicitly require a mens rea.¹³⁸ Where the substantive offense provision does not explicitly require a mens rea, Section 302(c) imputes at least recklessness to each material element.¹³⁹

Section 302 of the Pennsylvania Crimes Code does not impute a mens rea to substantive offenses indiscriminately.¹⁴⁰ Section 305¹⁴¹ provides that the culpability requirements imposed by Section 302 generally do not apply to "summary offenses"¹⁴² or to strict liability offenses "in so far as a legislative purpose to impose abso-

133. See *Fischer*, 721 A.2d at 1117–18.

134. See *infra* Part III.A.

135. See *infra* Part III.B.

136. § 302(a).

137. § 302(c).

138. § 302(a). Exceptions to this provision are listed in Section 305 and include summary offenses and offenses for which a legislative intent to impose strict liability is plain. See § 305(a).

139. § 302(c).

140. See § 305(a).

141. 18 PA. CONS. STAT. § 305 (2016).

142. § 305(a)(1) (providing that the Section 302 culpability requirements are inapplicable to "summary offenses, unless the requirement involved is included in the definition of the offense or the court determines that its application is consistent with effective enforcement of the law defining the offense").

lute liability for such offenses or with respect to any material element thereof plainly appears.”¹⁴³

Thus, as a general rule, all offenses require a mens rea.¹⁴⁴ When an offense does not contain an express mens rea requirement, at least recklessness must be imputed to all material elements¹⁴⁵ unless the offense is a summary offense or a strict liability offense.¹⁴⁶

1. *Neither Rape nor IDSI Are Summary Offenses*

Though Section 305 provides that Section 302’s mens rea imputation does not apply to summary offenses, neither rape nor IDSI are summary offenses.¹⁴⁷ Pursuant to Section 106(c),¹⁴⁸ an offense is a summary offense if “it is so designated” or “if a person convicted thereof may be sentenced to a term of imprisonment, the maximum of which is not more than 90 days.”¹⁴⁹ Rape and IDSI are first-degree felonies punishable by up to 20 years’ imprisonment, and therefore neither rape nor IDSI qualify as summary offenses.¹⁵⁰

2. *Neither Rape nor IDSI Can Be Strict Liability Crimes*

Because strict liability offenses are “generally disfavored,” the courts will not impose liability without a finding of culpability “absent indicia of legislative intent to dispense with a mens rea.”¹⁵¹ The legislature has intentionally dispensed with a mens rea requirement where the offense is a “public welfare” offense.¹⁵² Public welfare offenses are “essentially non-criminal” offenses created “to utilize the machinery of criminal administration as an enforcing arm for social regulations of a purely civil nature, with the punishment

143. § 305(a)(2).

144. § 302(a).

145. § 302(c).

146. § 305(a)(1)–(2).

147. § 305 (providing that Section 302 does not apply to summary offenses); § 302(a), (c) (imputing a mens rea to offenses that do not require a mens rea in the text of the statute); § 106 (defining “summary offense”).

148. 18 PA. CONS. STAT. § 106(c) (2016).

149. § 106(c)(1)–(2).

150. § 3121(a) (providing that rape is a first-degree felony); § 3123(a) (providing that IDSI is a first-degree felony); § 1103(1) (providing that first-degree felonies carry a maximum of 20 years’ imprisonment).

151. *Commonwealth v. Moran*, 104 A.3d 1136, 1149 (Pa. 2014).

152. *Id.*

totally unrelated to questions of moral wrongdoing or guilt.”¹⁵³ Public welfare offenses typically carry a light penalty.¹⁵⁴

In *Commonwealth v. Moran*,¹⁵⁵ for example, the Pennsylvania Supreme Court refused to impose strict liability for a violation of Section 4701,¹⁵⁶ bribery, on the reasoning that “[Section] 4701 is not a regulatory measure aimed at safeguarding the public welfare and health, nor is its penalty light.”¹⁵⁷ Notably, bribery is a “third degree felony punishable by up to three years imprisonment.”¹⁵⁸ The court instead relied on the “long-standing tradition, which is reflected in the plain language of [Section] 302, that criminal liability is not to be imposed absent some level of culpability.”¹⁵⁹ As a result, the court applied Section 302’s culpability requirements to bribery and determined that the trial court erred in refusing to instruct the jury as to a mens rea element.¹⁶⁰

Following the reasoning of *Moran*, neither rape nor IDSI qualify as a public welfare offense. Both offenses are criminal, first-degree felonies carrying a maximum of 20 years’ imprisonment.¹⁶¹ Public welfare offenses are limited to “non-criminal” offenses where conduct is penalized merely to allow the criminal justice system to enforce civil social regulations.¹⁶²

Further, the Pennsylvania Supreme Court has acknowledged that other sexual offenses in the same Chapter of the Pennsylvania Crimes Code where rape is criminalized require a mens rea.¹⁶³ In *Commonwealth v. Hacker*,¹⁶⁴ the court considered whether mistake

153. *Id.* (quoting *Commonwealth v. Koczvara*, 155 A.2d 825, 827–28 (Pa. 1959)).

154. *Id.*

155. *Commonwealth v. Moran*, 104 A.3d 1136 (Pa. 2014).

156. 18 PA. CONS. STAT. § 4701 (2016).

157. *Moran*, 104 A.2d at 1149. *See also* *Commonwealth v. Giordano*, 121 A.3d 998, 1006 (Pa. Super. Ct. 2015) (finding that the offense of possession of a weapon on school property, which is a misdemeanor, requires at least recklessness under Section 302 because the offense is not a “regulatory measure or a non-criminal social regulation”).

158. *Moran*, 104 A.2d at 1149.

159. *Id.* (quoting *Commonwealth v. Gallagher*, 924 A.2d 636, 639 (Pa. 2007)).

160. *Id.* at 1150.

161. § 3121(a) (providing that rape is a first-degree felony); § 3123(a) (providing that IDSI is a first-degree felony); § 1103(1) (providing that first-degree felonies carry a maximum of 20 years’ imprisonment).

162. *See Moran*, 104 A.3d at 1149 (“[T]his Court has recognized the legislature may create statutory offenses dispensing with a mens rea in fields that are essentially non-criminal in order ‘to utilize the machinery of criminal administration as an enforcing arm for social regulations of a purely civil nature’” (quoting *Commonwealth v. Koczvara*, 155 A.2d 825, 827–28 (Pa. 1959))).

163. *See Commonwealth v. Hacker*, 15 A.3d 333, 335–36 (Pa. 2011).

164. *Commonwealth v. Hacker*, 15 A.3d 333 (Pa. 2011).

of age is a defense to solicitation related to Section 3121(c), rape of a child.¹⁶⁵ Section 3121(c) has only two explicit elements: (1) “sexual intercourse” and (2) “with a complainant who is less than 13 years of age.”¹⁶⁶ The court considered only the age element but acknowledged in dicta that “[a]s to the first element, no one argues a conviction may be had without some level of mens rea; one must intend to have (or cause) sexual intercourse.”¹⁶⁷ Why a lower-graded sexual offense would undoubtedly require a mens rea though none exists in the statute, while rape and IDSI do *not* require a mens rea on the reasoning that none exists in the respective statutes, remains a mystery.

3. *Because Neither Section 302 Exception Applies, Section 302 Requires a Formal Finding of Mens Rea*

The courts may be silently assuming that a defendant must have acted with some level of intent where the defendant uses “forcible compulsion” as required under both the rape¹⁶⁸ and IDSI¹⁶⁹ provisions—and thus even where mens rea is not submitted to the jury as an element, a court might assume that mens rea must exist where “forcible compulsion” is met. However, two problems remain: (1) Section 302 does not make an exception to the imputation of a mens rea where a judge believes the mens rea is obvious,¹⁷⁰ and (2) the expanded definition of “forcible compulsion” since *Williams* makes a presumption of mens rea problematic in terms of fairness.¹⁷¹

First, with respect to the possibility that courts are silently presuming that some mens rea exists from the finding of “forcible compulsion” alone, the *Carter* decision¹⁷² is instructive. Though “forcible compulsion” was not an element of the sexual offense at issue in *Carter*, the court ruled that the trial court’s failure to instruct the jury as to the defendant’s mens rea “effect[ively] in-

165. *Id.* at 335.

166. § 3121(c); *Hacker*, 15 A.3d at 335–36.

167. *Hacker*, 15 A.3d at 336.

168. § 3121.

169. § 3123.

170. *See* § 302.

171. At the time of the *Williams* decision, the force constituting “forcible compulsion” under rape and IDSI had to be physical force. *See Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986) (holding, four years after *Williams*, that “forcible compulsion” includes force outside of “physical force or violence” and rejecting a more limited definition that includes only physical force).

172. *Commonwealth v. Carter*, 418 A.2d 537 (Pa. Super. Ct. 1980). *See* Part II.A for a fuller discussion of *Carter*.

structed that [the defendant's] intent was of no consequence."¹⁷³ The resulting problem, according to the *Carter* court, is that despite the fact that the evidence was sufficient to find at least recklessness, it was for the jury alone to draw that inference.¹⁷⁴

With respect to fairness concerns, "forcible compulsion" is defined to include more than just physical force—a force more readily susceptible to a finding of some level of intent.¹⁷⁵ Though failure to instruct the jury on a mens rea element is error under Section 302 regardless of the type of force alleged, the *Fischer* court's concerns are implicated most dramatically in cases where the force is "moral, emotional or psychological force, either express or implied."¹⁷⁶ The *Fischer* court noted that the *Williams* rule refusing an instruction on mistake of fact would be "inappropriate" where the force is non-physical:

[T]here may be cases, especially now that *Rhodes* has extended the definition of force . . . where a defendant might non-recklessly or even reasonably, but wrongly, believe that his words and conduct do not constitute force or the threat of force and that a non-resisting female is consenting. An example might be "date rape" resulting from mutual misunderstanding. The boy does not intend or suspect the intimidating potential of his vigorous wooing. The girl, misjudging the boy's character, believes he will become violent if thwarted; she feigns willingness, even some pleasure. In our opinion the defendant in such a case ought not to be convicted of rape.¹⁷⁷

However, even cases where the "force" is physical are susceptible to a mistake as to consent. The mere use of "force" does not transform lawful conduct into unlawful conduct: Consent is the relevant inquiry when determining whether a defendant uses "forcible compulsion" to overcome consent.¹⁷⁸ Thus, where a defendant's mens rea would negate a finding of consent, which can occur rape

173. *Carter*, 418 A.2d at 540.

174. *Id.* A jury instruction indicating that a jury may presume a defendant's mens rea by the defendant's objective act, such as "forcible compulsion," raises a federal constitutional issue implicating the right to have all elements submitted to the jury. See generally *Sandstrom v. Montana*, 442 U.S. 510 (1979). This issue, among other constitutional implications, is addressed in Part III.B.

175. § 3101 (defining "forcible compulsion" as "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied").

176. *Id.*; see *Commonwealth v. Fischer*, 721 A.2d 1111, 1118–19 (Pa. Super. Ct. 1998).

177. *Fischer*, 721 A.2d at 1117–18.

178. See *Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986) (citing *Commonwealth v. Irvin*, 393 A.2d 1042, 1044 (Pa. Super. Ct. 1978)).

and IDSI in *any* case—regardless of the type of force used—the mistake of fact defense must be available.¹⁷⁹

*B. Failure to Impute a Mens Rea Element to Rape and IDSI
Raises Constitutional Doubts*

The United States Supreme Court has consistently cautioned that “wrongdoing must be conscious to be criminal”¹⁸⁰ in review of statutory provisions omitting a mens rea requirement.¹⁸¹ Two principles support the tradition of a mens rea requirement for offenses lacking clear indicia of legislative intent to dispense with the requirement: (1) Offenses lacking a mens rea requirement risk criminalizing a broad range of otherwise innocent conduct;¹⁸² and (2) the *fact-finder* must find that each element has been proven, meaning that mens rea cannot be presumed.¹⁸³

1. The Tradition of a Mens Rea Requirement

In 1952, the Supreme Court in *Morissette* stated, “[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion.”¹⁸⁴ By requiring some level of mens rea for criminal offenses, courts “have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.”¹⁸⁵ The defendant in *Morissette* was convicted of stealing property from government land when he removed shell casings from government property while hunting, believing the casings were abandoned.¹⁸⁶ The trial court refused to allow counsel to argue to the jury that the defendant lacked criminal intent, and instead effectively instructed the jury that his criminal intent could be presumed by his own act.¹⁸⁷

The Court considered whether the instruction was error, and refused to interpret the omission of an explicit mens rea requirement in the text of the statute as the legislature’s intent to dispense

179. See § 305 (providing for mistake of fact defense). No exception is made for when “forcible compulsion” is an element. See *id.*

180. *Morissette v. United States*, 342 U.S. 246, 252 (1952).

181. See, e.g., *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[T]his principle is ‘as universal and persistent in mature systems of law as belief in freedom of the human will’” (quoting *Morissette*, 342 U.S. at 250)); *Staples v. United States*, 511 U.S. 600, 605 (1994) (“[T]he requirement of some mens rea for a crime is firmly embedded.”); *Morissette*, 342 U.S. at 252.

182. See *infra* Part III.B.2.

183. See *infra* Part III.B.3.

184. *Morissette*, 342 U.S. at 250.

185. *Id.* at 252.

186. *Id.* at 247–48.

187. *Id.* at 249.

with it, lest the Court “radically . . . change the weights and balances in the scales of justice.”¹⁸⁸ The Court thus refused to “strip the defendant” of the presumption of innocence as to “evil purpose” solely on “judicial initiative” even where Congress required no explicit mens rea in the text of the statute.¹⁸⁹

The Court in *Morissette* further considered the omission of a mens rea requirement through the lens of tradition regarding common-law offenses.¹⁹⁰ The Court refused to construe the omission of an explicit mens rea element as Congress’s intention to dispense with it on the reasoning that the offense in question was both a common-law offense¹⁹¹ and an offense criminalized in a section otherwise filled with offenses that *did* require a mens rea.¹⁹² The Court noted: “If one crime without intent has been smuggled into a section whose dominant offenses do require intent, it was put in ill-fitting and compromising company.”¹⁹³ This admonition calls up the *Hacker* decision,¹⁹⁴ wherein the Pennsylvania Supreme Court noted that for the provision criminalizing rape of a child, which is codified in the same title where rape and IDSI are codified, “no one argues a conviction may be had without some level of mens rea” notwithstanding the provision’s failure to require a mens rea explicitly.¹⁹⁵ Nonetheless, the *Williams* rule still stands—because neither rape nor IDSI require a mens rea in the text of the respective statutes, the *Williams* court ruled that none is required.¹⁹⁶

More recently, in 1994, the United States Supreme Court in *Staples v. United States*¹⁹⁷ reiterated the tradition of requiring a mens rea.¹⁹⁸ The Court refused to accept the statute’s silence as to

188. *Id.* at 263.

189. *Id.*

190. *Id.* at 254–62. Common-law offenses are offenses “against the state, the person, property, or public morals” and those “in the nature of positive aggressions or invasions” that carry high penalties and cast “infamy” on the felon. *Id.* at 255, 260.

191. *Id.* at 261–63.

192. *Id.* at 267–69.

193. *Id.* at 269.

194. See *supra* Part III.A.2 for a fuller discussion of *Hacker*.

195. *Commonwealth v. Hacker*, 15 A.3d 333, 335–36 (Pa. 2011).

196. See *Commonwealth v. Williams*, 439 A.2d 765, 769 (Pa. Super. Ct. 1982).

197. *Staples v. United States*, 511 U.S. 600 (1994).

198. The Court considered the relevance of whether or not a defendant had knowledge that a firearm in his possession was capable of firing automatically, such that he must register the weapon with the National Firearms Registration. *Id.* at 602–03. At trial, the defendant testified that he did not know his rifle fired automatically and never observed it do so, but the trial court concluded his knowledge of the weapon’s physical properties was irrelevant. *Id.* at 603–04.

mens rea as dispositive regarding legislative intent to dispense with the requirement.¹⁹⁹ Instead, the Court looked to tradition:

[W]e must construe the statute in light of the background rules of the common law, in which the requirement of some mens rea for a crime is firmly embedded. As we have observed, “the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.”²⁰⁰

Because offenses without mens rea requirements are “disfavored,” the Supreme Court has recognized such offenses only in “limited circumstances.”²⁰¹ The Court noted, “[i]t is unthinkable” that Congress intended to impose a ten-year sentence on an individual who reasonably believed his conduct lawful.²⁰²

Fascinatingly, the Pennsylvania Supreme Court has considered whether the *Staples* line of cases requires institutional sexual assault to have a mens rea requirement despite the element’s absence from the text of the statute.²⁰³ In *Commonwealth v. Mayfield*,²⁰⁴ the trial court ruled that the institutional sexual assault provision²⁰⁵ violated due process because of the *Staples* decision requiring a mens rea requirement in criminal statutes absent congressional intent to dispose of the element.²⁰⁶ On review, the Pennsylvania Supreme Court determined that “[t]he trial court’s foray into a *Staples* analysis was unnecessary” because legislative intent to impose a mens rea is clear via Section 302 of the Pennsylvania Crimes Code, which imputes at least recklessness to provisions lacking an express mens rea requirement.²⁰⁷ Consequently, the *Mayfield* court ruled that Section 302’s imputation of a mens rea saved the institutional sexual assault provision from unconstitutionality.²⁰⁸

Regardless of the Pennsylvania courts’ puzzling refusal to impute a mens rea into the rape and IDSI provisions via Section 302, United States Supreme Court precedent requires that both have mens rea elements.²⁰⁹

199. *Id.* at 605.

200. *Id.* (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978)).

201. *Id.* at 606–07.

202. *Id.* at 615 (quoting *United States v. Anderson*, 885 F.2d 1248, 1254 (5th Cir. 1989)).

203. *See Commonwealth v. Mayfield*, 832 A.2d 418, 427 (Pa. 2003).

204. *Commonwealth v. Mayfield*, 832 A.2d 418 (Pa. 2003).

205. 18 PA. CONS. STAT. § 3124.2 (2016).

206. *Mayfield*, 832 A.2d at 426.

207. § 302; *Mayfield*, 832 A.2d at 427.

208. § 302; *Mayfield*, 832 A.2d at 427.

209. *See infra* Part III.B.2-3.

2. *Offenses Lacking a Mens Rea Requirement Risk Criminalizing a Broad Range of Conduct*

On a more concrete basis for requiring a mens rea than tradition, the Supreme Court has required that a mens rea requirement be “read into” an offense because without the requirement, the offense risks criminalizing innocent conduct.²¹⁰ In *United States v. X-Citement Video*,²¹¹ the defendants were convicted of knowingly transporting, shipping, receiving, distributing, or reproducing a “visual depiction[] of minors engaged in sexually explicit conduct.”²¹² The issue before the Supreme Court was which elements “knowingly” applies to—specifically, whether defendants must have known the actors were minors.²¹³

The Court first determined that the child pornography offense could not be a public welfare offense, because individuals “do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation” and the penalty is up to 10 years’ imprisonment.²¹⁴ The Court thus imposed the mens rea requirement on “the crucial element separating legal innocence from wrongful conduct”—the age of the performers in the material the defendants possessed²¹⁵—on the reasoning that “a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts.”²¹⁶

More recently, in *United States v. Elonis*,²¹⁷ the Court reiterated: “We have repeatedly held that ‘mere omission from a criminal enactment of any mention of criminal intent’ should not be read as dispensing with it.”²¹⁸ Relying again on the principle that wrongdoing generally requires a subjective element for guilt,²¹⁹ the Court “read into the statute ‘only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct.’”²²⁰

210. See *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994); *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015).

211. *United States v. X-Citement Video*, 513 U.S. 64 (1994).

212. *Id.* at 65–66.

213. *Id.* at 68.

214. *Id.* at 71–72.

215. *Id.* at 72–73.

216. *Id.* at 78.

217. *Elonis v. United States*, 135 S. Ct. 2001 (2015).

218. *Id.* at 2009 (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

219. *Id.* (“[W]rongdoing must be conscious to be criminal.” (quoting *Morissette*, 342 U.S. at 252)).

220. *Id.* at 2010 (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)).

The defendant in *Elonis* was convicted of communicating a threat to injure another person²²¹ after posting threatening statements on social media.²²² The trial court instructed the jury that the defendant could be found guilty if “a reasonable person would foresee that the statement would be interpreted” as a threat, though the defendant requested a more demanding jury instruction requiring the government to prove he intended to communicate a threat.²²³ On certiorari, the Supreme Court concluded that because communicating something, in itself, is not wrongful, “‘the crucial element separating legal innocence from wrongful conduct’ is the threatening nature of the communication.”²²⁴ Thus, the defendant must have some level of mens rea that the communication contains a threat, and the jury instruction had to reflect the same.²²⁵

The United States Supreme Court’s repeated concern for criminalizing innocent conduct is reminiscent of the Pennsylvania Superior Court’s concerns expressed in *Fischer*.²²⁶ In addition to the grading and severe punishment for both rape and IDSI—both first-degree felonies punishable by up to 20 years’ imprisonment²²⁷—the inquiry of why rape and IDSI are criminalized supports a mens rea requirement for those offenses. For example, the elements constituting rape are, in relevant part: (1) sexual intercourse and (2) “forcible compulsion,”²²⁸ the latter of which the courts determine only by examining its effect on victim consent.²²⁹ Where consent is legitimate, the “forcible compulsion” element is not met.²³⁰ Where the “forcible compulsion” element is not met, the only remaining element is sexual intercourse—which is otherwise innocent conduct.²³¹ Even more, since the Pennsylvania legislature’s expansion of the definition of “forcible compulsion,” defendants can accomplish “forcible compulsion” without physical contact—via “intellectual, moral, emotional or psychological force,

221. 18 U.S.C. § 875(c) (2012).

222. *Elonis*, 135 S. Ct. at 2007.

223. *Id.*

224. *Id.* at 2011 (quoting *United States v. X-Citement Video*, 513 U.S. 64, 73 (1994)).

225. *Id.*

226. *See Commonwealth v. Fischer*, 721 A.2d 1111, 1117–18 (Pa. Super. Ct. 1998) (noting that the *Williams* rule would be inappropriate where the defendant reasonably, but mistakenly, believes the victim consents, and the victim mistakenly fears that resistance will trigger violence).

227. *See* 18 PA. CONS. STAT. §§ 1103(1), 3121, 3123 (2016).

228. § 3121(a)(1)-(2).

229. *See Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986).

230. *See id.* *See supra* Part II.B for a fuller discussion of the interplay between consent and “forcible compulsion.”

231. *See* § 3121(a).

either express or implied.”²³² Because “forcible compulsion” does not require physical force, proving a defendant’s mens rea is required to separate lawful sexual activity from criminal conduct.²³³ In *Elonis*, the Court reasoned that a communication itself is not unlawful, and thus a defendant must have mens rea as to the threatening nature of the communication to separate wrongful from lawful conduct.²³⁴ Similarly, sexual activity is not unlawful; thus, a defendant must have mens rea as to the “forcible compulsion” used to engage in it.²³⁵

3. *Due Process Requires that Each Element Be Submitted to the Jury Rather than Presumed by the Defendant’s Acts*

Again concerned with more than breaking the tradition of mens rea, “as universal and persistent in mature systems of law as belief in freedom of the human will,”²³⁶ the United States Supreme Court has taken further issue with trial courts’ failure to instruct juries on mens rea requirements: The fact-finder must determine if all elements are met.²³⁷

In *Sandstrom v. Montana*,²³⁸ the Court ruled that mens rea could not be presumed from a voluntary act and must be submitted to the jury as a separate element.²³⁹ The defendant was convicted of deliberate homicide, and the trial court instructed the jury, “the law presumes that a person intends the ordinary consequences of his voluntary acts.”²⁴⁰ The Supreme Court ruled that the instruction was constitutional error because it violated the Court’s holding in *In re Winship*²⁴¹: “[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”²⁴²

232. § 3101 (defining “forcible compulsion”).

233. *See id.*; *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015).

234. *Elonis*, 135 S. Ct. at 2011.

235. *See* § 302 (requiring that a person act at least recklessly as to each material element); *Elonis*, 135 S. Ct. at 2011 (requiring a mens rea to separate innocent from unlawful conduct).

236. *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

237. *See Sandstrom v. Montana*, 442 U.S. 510, 520–21 (1979); *see also In re Winship*, 397 U.S. 358, 364 (1970).

238. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

239. *Id.* at 521.

240. *Id.* at 512–13.

241. *In re Winship*, 397 U.S. 358 (1970).

242. *Sandstrom*, 442 U.S. at 520–21 (quoting *In re Winship*, 397 U.S. at 364).

A jury instruction failing to properly address an element “reliev[es] the State of [its] burden of proof.”²⁴³ The Court determined that the presumption that the defendant had the requisite mens rea based solely on a finding of other required elements conflicts with the presumption of innocence, which “extends to every element of the crime,” and invades the province of the jury to determine if every element is established.²⁴⁴

With respect to rape and IDSI, two problems exist with the argument that a defendant’s mens rea may be presumed by a finding that the “forcible compulsion” element is met—one practical and one enunciated by the Supreme Court. As a practical matter, since the expansion of the statutory definition of “forcible compulsion,” a defendant’s conduct may satisfy the element without physical force²⁴⁵ and thus leave undisturbed the scenarios like those the Superior Court in *Fischer* cautioned were suspect as to legitimate guilt.²⁴⁶ Without making comment on the frequency of such scenarios, the *Fischer* court was concerned that situations can arise where the victim mistakenly believes her explicit non-consent will cause her harm, and the defendant “reasonably, but wrongly,” believes the victim has consented.²⁴⁷ In such encounters, the defendant may have a colorable defense that he reasonably believed the victim consented. A prosecutor can, notwithstanding a mistake of fact instruction, nonetheless prove the “forcible compulsion” element is satisfied by testimony as to the surrounding circumstances of the encounter.²⁴⁸

The second issue with presuming a mens rea by the sexual act alone is that expressed in *Sandstrom*: Defendants have the right, as enunciated in *In re Winship*, to have each element submitted to the jury for a finding beyond reasonable doubt pursuant to the Due Process Clause, regardless of how obvious the mens rea may be considering findings of other elements.²⁴⁹ Furthermore, the failure

243. *Id.* at 521.

244. *Id.* at 523 (quoting *Morissette v. United States*, 342 U.S. 246, 275 (1952)).

245. See 18 PA. CONS. STAT. § 3101 (2016) (defining “forcible compulsion” as “compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied”).

246. See *Commonwealth v. Fischer*, 721 A.2d 1111, 1117–18 (Pa. Super. Ct. 1998) (noting that the *Williams* rule would be inappropriate where the defendant reasonably, but mistakenly, believes the victim consents, and the victim mistakenly fears that resistance will trigger violence).

247. See *id.*

248. See *Liparota v. United States*, 471 U.S. 419, 434 (1985); see also *infra* Part III.B.4.

249. See *Sandstrom*, 442 U.S. at 520–21; *In re Winship*, 397 U.S. 358, 364 (1970).

to instruct juries on a mens rea element for rape and IDSI is even more serious than the precise issue in *Sandstrom*. In *Sandstrom*, the jury was instructed that there was a “presumption” that a defendant has mens rea with respect to his voluntary acts.²⁵⁰ For rape and IDSI, defendants are not entitled to a mens rea instruction at all.²⁵¹

In some cases, of course, the failure to require the Commonwealth to prove the defendant had mens rea with respect to each material element may be found to be harmless error on appeal.²⁵² Specifically, it may be the case in certain circumstances that considering other evidence, including evidence concerning the type of force used to meet the “forcible compulsion” element, no reasonable jury could have found that the defendant lacked the requisite mens rea to use that force. The Pennsylvania courts, however, *categorically* refuse to impute mens rea to rape and IDSI and *categorically* refuse a mistake of fact instruction.²⁵³

Further, as noted in Part III.B.2, for offenses like rape and IDSI, where one element stands between wrongful and innocent conduct—“forcible compulsion,” or the inquiry into victim consent²⁵⁴—the Supreme Court’s rulings require the a mens rea element attach to avoid criminalizing innocent sexual conduct.²⁵⁵

250. *Sandstrom*, 442 U.S. at 515.

251. See *Commonwealth v. Williams*, 439 A.2d 765, 769 (Pa. Super. Ct. 1982). See also PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS 15.3121A, 15.3123A (PA. BAR INST. 2016) (lacking any suggestion of a required mens rea for rape or IDSI).

252. The “*Sandstrom* error,” or effectively instructing the jury to presume the defendant had mens rea based on his objective acts (for example, the use of force in the case of rape or IDSI), is subject to harmless error analysis. *Carella v. California*, 491 U.S. 263, 266 (1989). The Supreme Court reasoned:

In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant act but did not *intend* to cause injury. . . . In that event the erroneous instruction is simply superfluous: the jury has found, in *Winship*’s words, ‘every fact necessary’ to establish every element of the offense beyond a reasonable doubt.’

Id. (quoting *Rose v. Clark*, 478 U.S. 570, 580–81 (1986)).

253. See, e.g., *Commonwealth v. Callahan*, No. 629 EDA 2016, 2017 Pa. Super. Unpub. LEXIS 3199 (Pa. Super. Ct. Aug. 23, 2017). In *Callahan*, the defendant argued on appeal that the trial court erred in eliminating the mens rea requirement for rape and in failing to instruct the jury as to a mistake of fact defense. *Id.* at *7. The Superior Court cited *Williams* for the rule that “mistake of fact is not a defense to rape,” nor is “the defendant’s state of mind.” *Id.* at *11 (citing *Williams*, 439 A.2d 765).

254. See *Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986). See *supra* Part II.B for a discussion on the interplay between consent and “forcible compulsion.”

255. See *United States v. X-Citement Video*, 513 U.S. 64, 72–73 (1994).

4. *Requiring a Mens Rea Is Not Unduly Burdensome*

In *Liparota v. United States*,²⁵⁶ the Supreme Court again imposed a mens rea requirement absent an express mens rea requirement in the text of the statute in question.²⁵⁷ The Court noted that a mens rea requirement does not require “extraordinary evidence that would conclusively demonstrate [a defendant’s] state of mind” or evidence the defendant knew of the particular provisions criminalizing his conduct.²⁵⁸ Instead, “as in any other criminal prosecution requiring mens rea, the government may prove by reference to facts and circumstances surrounding the case that petitioner knew that his conduct was unauthorized or illegal.”²⁵⁹

With regard to rape and IDSI, a jury instruction regarding the defendant’s mens rea is not unduly burdensome. No extraordinary evidence is required, but rather “the facts and circumstances” surrounding the sexual encounter can suffice to show the defendant’s mens rea.²⁶⁰ In fact, a finding of recklessness would be satisfied where the circumstances of the encounter suggest that the defendant “consciously disregard[ed] a substantial and unjustifiable risk”²⁶¹ that the victim did not consent; the mere *risk* that the victim is not consenting satisfies the element rather than a heightened knowledge-of-non-consent requirement.²⁶² Without an instruction on mens rea, however, the jury is effectively not even permitted to consider the possibility that the defendant believed his conduct lawful or that he was mistaken as to the consent.²⁶³

IV. CONCLUSION

The Pennsylvania courts’ refusal to recognize mens rea as a required element of both rape and IDSI violates the express mandate of Section 302 of the Pennsylvania Crimes Code to impute a mens rea of at least recklessness into offenses lacking an explicit mens rea requirement in the text of the statute.²⁶⁴ Without a mens rea requirement, rape and IDSI become strict liability crimes in Pennsylvania—a category of offenses permitted only where the leg-

256. *Liparota v. United States*, 471 U.S. 419 (1985).

257. *Id.* at 433.

258. *Id.* at 434.

259. *Id.*

260. *Id.*

261. See 18 PA. CONS. STAT. § 302(b)(3) (2016).

262. See *id.*

263. See *Commonwealth v. Carter*, 418 A.2d 537, 540 (Pa. Super. Ct. 1980) (ruling that the trial court’s failure to instruct the jury as to the defendant’s mens rea “effect[ively] instructed that [the defendant’s] intent was of no consequence”).

264. See *supra* Part III.A.

islature has expressed affirmative intent to dispense with a mens rea requirement.²⁶⁵ The Pennsylvania legislature has, however, expressed affirmative intent to require a mens rea for both rape and IDSI via Section 302's imputation of a mens rea for offenses lacking an express requirement in the text of the statute.²⁶⁶

Because Section 302 must impute at least recklessness to each material element of both the rape and IDSI statutes, a mistake of fact as to consent must be made available to defendants pursuant to the clear mandate of Section 304.²⁶⁷ The *Williams* court's refusal to "create" a mistake of fact defense plainly ignores the existing legislative directive to allow the defense.²⁶⁸

Importantly, and regardless of Section 302, the United States Supreme Court has repeatedly held that a finding of mens rea is required to avoid constitutional doubts—that the tradition of requiring a guilty mind is far from a new concept, and ensures that wrongful conduct is separated from lawful conduct.²⁶⁹ Further, because both rape and IDSI must require a mens rea element pursuant to Section 302 of the Pennsylvania Crimes Code as well as Pennsylvania courts' and the United States Supreme Court's tradition of requiring consciousness of criminal conduct, defendants are denied substantive due process without the benefit of submission of the mens rea element to the jury.²⁷⁰

Any argument that a defendant necessarily had the requisite mens rea regarding non-consent via a finding of "forcible compulsion" ignores the established rule that all elements be submitted to the jury.²⁷¹ The jury remains free to disbelieve the mistake or, regardless of any mistake, that the defendant was nonetheless aware of the *mere risk* he lacked consent.²⁷² As the *Williams* rule presently functions, a jury is not permitted to even *consider* the possibility that, given the circumstances of the encounter, the defendant believed his conduct lawful.²⁷³ Contrary to all controlling law outside of *Williams* and its loyal-follower progeny, Pennsylvania defendants tried for rape or IDSI can, have, and will be convicted without any showing of guilty mind.²⁷⁴

265. *See supra* Part III.A.2.

266. *See supra* Part III.A.

267. *See supra* Part III.A.

268. *See supra* Parts II.A, III.A.

269. *See supra* Part III.B.1–2.

270. *See supra* Part III.B.3.

271. *See supra* Part III.B.3.

272. *See supra* Part III.B.4.

273. *See supra* Part III.B.4.

274. *See supra* Part III.B.