Consent, Resistance, and the Physically Helpless Victim: Modernizing North Carolina's Second-Degree Rape Statute in Light of *State v. Huss*[*]

INTRODUCTION

In January 2013, dozens of students and a former dean at the University of North Carolina at Chapel Hill ("UNC") filed a lawsuit asserting that the school urged her to under-report sexual violence cases.[1] One student victim[2] shared her experience in reporting her rape, noting the lack of support and understanding from the administration.[3] In particular, she highlighted her feeling that the student-run Honor Court "had no idea what sexual assault is, what consent is."[4]

This observation is unfortunately not unique—scholars have noted a steady decline in the public awareness and "salience of rape as a social problem" since the legal rape reforms of the 1970s.[5] These reforms were limited in the extent to which they promoted victims' rights and empowerment, partially because even "reformed" jurisdictions did not eliminate all discriminatory and archaic provisions of their rape laws.[6] Many of these flaws remain in North Carolina's laws. The state's statutory scheme fails to adequately consider consent in rape cases. In addition, the current statutes can lead to mismanagement of criminal prosecutions because consent is not given proper weight.

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1. *See* Katie J.M. Baker, *College Rape Survivor Faces Potential Expulsion for 'Intimidating' Her Rapist*, JEZEBEL (Feb. 25, 2013, 11:25 AM), http://jezebel.com/5986693/college-rape-survivor-faces-potential-expulsion-for-intimidating-her-rapist.

2. This Recent Development will use the word "victim" instead of "survivor" for the sake of clarity since the former term is used throughout the legal profession and literature. The word "survivor" is the preferred term outside of the legal profession. The author also acknowledges that sexual offenses can be perpetrated against anyone irrespective of gender. Feminine pronouns are used throughout this Recent Development for simplicity and because the victims in the cases discussed are all female.

3. *See* Baker, *supra* note 1.

4. Caitlin McCabe, *UNC Sexual Assault Victims Speak Up About Imperfect System*, DAILY TAR HEEL (Dec. 5, 2012), http://www.dailytarheel.com/article/2012/12/victims-speak-up-on-assault.

5. SUSAN CARINGELLA, ADDRESSING RAPE REFORM IN LAW AND PRACTICE 1 (2009).

6. *See id.* at 29.

The recent case of *State v. Huss*[7] demonstrates the problems associated with discriminatory and archaic provisions in state rape statutes. In the case, the North Carolina Court of Appeals was tasked with interpreting a specific provision of the state's second-degree rape statute.[8] Normally, the State would have to prove the elements of force and a lack of consent in order to sustain a second-degree rape conviction. However, under the "physically helpless" theory, the State must show the defendant committed a sexual offense against a victim who is "physically helpless" because she is "unable to *resist* an act of vaginal intercourse or a sexual act or *communicate unwillingness to submit to* the act of vaginal intercourse or a sexual act."[9] In this way, the "physically helpless" provision is analogous to a statutory rape statute because the prosecution's burden is only to show the victim is a member of a particular class.[10]

In *Huss*, the court grappled with the question of who qualifies as a physically helpless victim. The Court of Appeals reversed Huss's conviction for second-degree rape on the grounds that Huss's victim was not "physically helpless."[11] However, the court also observed that appropriate and sufficient evidence existed to support a conviction if the State had pursued its case under the traditional theory of rape,[12] which requires the prosecution to prove the elements of force and lack of consent.[13] Proper application of the physically helpless provision post-*Huss* was further muddled by the Supreme Court of North Carolina's tied vote in the case on appeal, resulting in the Court of Appeals' *Huss* decision having no precedential value.[14]

In analyzing the North Carolina Court of Appeals' decision in *Huss*, this Recent Development seeks to highlight the flawed approach of the physically helpless provision under the state's second-degree rape statute.[15]

7. __ N.C. App. __, 734 S.E.2d 612 (2012), *aff'd by an equally divided court*, __ N.C. __, 749 S.E.2d 279 (2013) (per curiam).

8. *Id.* at __, 734 S.E.2d at 615.

9. N.C. GEN. STAT. § 14-27.1(3)(ii) (2013) (emphasis added); *see Huss*, __ N.C. App. at __, 734 S.E.2d at 615.

10. *See infra* notes 107–12 (comparing burdens of proof of statutory rape and second-degree rape of a physically helpless victim).

11. *Huss*, __ N.C. App. at __, 734 S.E.2d at 616.

12. *Id.*

13. *See* § 14-27.3(a)(1) ("A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person . . . [b]y force and against the will of the other person . . . .").

14. State v. Huss, __ N.C. __, __, 749 S.E.2d 279, 280 (2013) (per curiam). Justice Beasley did not participate in deciding the case, leaving three justices in favor of reversing and three justices in favor of affirming the Court of Appeals' decision. *Id.*

15. This Recent Development consistently refers to the second-degree rape statute for ease and space considerations, but the arguments are all equally applicable to the parallel physically helpless provision in North Carolina's second-degree sexual offense statute. *See* § 14-27.5(a)(2)

This "physically helpless" provision in the statute is rooted in the archaic notion that a victim has a duty to actively resist her aggressor.[16] This Recent Development argues that the physically helpless provision and corresponding case law are harmfully outdated in relying on notions of resistance and ignoring matters of consent. Part I discusses the current state of North Carolina rape law, considering the roles of consent and resistance in understanding the "physically helpless" victim provision of North Carolina's second-degree rape statute. This Part also discusses the two North Carolina cases that interpreted this provision prior to *Huss*. Part II reviews the facts of *Huss* and presents the Court of Appeals' reasoning in deciding the case. Part III considers lack of consent[17] as an element in the physically helpless theory of second-degree rape and evaluates the role consent should play in such cases. Part IV argues that as a solution to the confusion surrounding who is a physically helpless victim, the North Carolina General Assembly should amend the second-degree rape and sexual offense statutes to clarify that physical helplessness is understood only, if at all, within the context of consent. In doing so, this Part briefly considers analogous statutes and cases in other jurisdictions to show how and why consent should play a central role in such rape cases and concludes with recommendations for altering the North Carolina second-degree rape statute.

I. UNDERSTANDING NORTH CAROLINA'S EMPHASIS ON RESISTANCE AND SILENCE ON CONSENT

Although the defendant in *Huss* was accused of second-degree rape, which traditionally involves non-consensual and forceful sexual contact,[18] the *Huss* court barely considered or mentioned the element of the victim's lack of consent, partially because of how the prosecution pursued the physically helpless victim theory. An in-depth understanding of the roles of consent and resistance is necessary to appreciate the importance of this

("A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person . . . [w]ho is . . . physically helpless.").

16. *See Huss*, __ N.C. App. at __, 734 S.E.2d at 615.

17. While this phraseology may seem odd—an element of a crime being defined as the absence or lack of something—North Carolina has defined rape using the term "lack of consent" or "unwillingness." *See infra* notes 25–27 and accompanying text. This element is sometimes referred to as nonconsent, but affirmatively communicating nonconsent is arguably different from a lack or absence of consent. *See, e.g.*, CARINGELLA, *supra* note 5, at 66, 99–100.

18. *See* John F. Decker & Peter G. Baroni, *"No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1083 (2011) (describing that at common law, rape convictions required "force against the victim" and "an inability to appraise or understand a situation involving a sexual act" by the victim).

oversight. This Part proceeds in two sections. Section A begins with an evaluation of the traditional understanding of rape and resistance in North Carolina and introduces the North Carolina second-degree rape statute. Section B then reviews the limited North Carolina precedent regarding physically helpless victims under the statute.

A. *The Pervasive Element of Resistance*

Traditionally, the crime of rape has been defined as vaginal intercourse by force and without consent.[19] At common law, rape only existed if the victim physically resisted her attacker.[20] This resistance element lingers in many jurisdictions, either expressly in the statutes or implicitly in the factors courts consider in deciding rape cases.[21] While North Carolina ostensibly has eliminated resistance requirements from its rape statutes,[22] this archaic factor perseveres in North Carolina's definition of "physically helpless"[23] and in the analysis of courts that have attempted to apply the physically helpless theory of the second-degree rape statute.[24]

The North Carolina second-degree rape statute contains two disjunctive theories for establishing the elements of second-degree rape:

19. *See* State v. Atkins, 193 N.C. App. 200, 203–04, 666 S.E.2d 809, 812 (2008); *see also* Decker & Baroni, *supra* note 18, at 1083 (describing the traditional elements of force and the inability to consent required at common law); Erin G. Palmer, Recent Development, *Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Post-Penetration Rape Should Be a Crime in North Carolina*, 82 N.C. L. REV. 1258, 1269 (2004) (combining "by force" and "against the person's will" to make up the third element of a second-degree rape conviction in North Carolina (citing INST. OF GOV'T, UNIV. OF N. CAROLINA AT CHAPEL HILL, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 144 (Robert L. Farb ed., 5th ed. 2001)). For an up-to-date version of the *North Carolina Crimes* text, see generally JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME (7th ed. 2012).

20. *See* Decker & Baroni, *supra* note 18, at 1101–03.

21. *See id.* at 1101–19 ("Eight states still have legislation explicitly requiring victim resistance to rape, and six others have comparable language. An additional sixteen states continue to define the elements of force, consent, or specific sex offenses in terms of a victim's resistance. Nearly half of all state statutes are silent as to whether or not resistance is required, allowing courts to assume that the common law rule demanding victim resistance still applies. Today's sex offense laws largely require the victim to vigorously assert non-consent or resist, rather than require the defendant to obtain consent before committing a sexual act."); *see also* Palmer, *supra* note 19, at 1260 n.21 (describing the high threshold for demonstrating nonconsent).

22. *See* Palmer, *supra* note 19, at 1261 & n.24.

23. N.C. GEN. STAT. § 14-27.1(3) (2013) (defining "physically helpless" as when a person is either unconscious or "physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act"). Interestingly, the courts have consistently overlooked the latter section of the definition pertaining to the ability to "communicate unwillingness" or de-emphasized it in relation to ability to resist component. *See infra* notes 67–72 and accompanying text.

24. *See infra* Part I.B.

> A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.[25]

In turn, "physically helpless" is defined elsewhere in the statute as meaning "(i) a victim who is unconscious; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act."[26] As discussed below, the North Carolina courts have largely read out the "unable to . . . communicate unwillingness" aspect of the statute, instead limiting their consideration to the physical resistance element.[27] As the next Section shows, the pre-*Huss* case law interpreting this definition and the second-degree rape statute as a whole is murky at best.

B. A Case-by-Case Analysis of the Physically Helpless Victim in North Carolina

The State relied on the physically helpless victim theory in two appellate decisions prior to *Huss*.[28] This theory was pursued even though consent seemed clearly absent in both cases, which likely means that the State could have prevailed under the traditional rape theory.[29] In any event, despite the reliance on the physically helpless theory, neither of the previous cases provides any clear, prospective guidance as to who qualifies as a physically helpless victim.

25. § 14-27.3(a) (emphasis added).

26. *Id.* § 14-27.1(3).

27. *See infra* Parts I.B (discussing the pre-*Huss* case law), Part II (discussing the *Huss* decision itself).

28. State v. Atkins, 193 N.C. App. 200, 204–05, 666 S.E.2d 809, 812 (2008); State v. Joines, 66 N.C. App. 459, 459, 311 S.E.2d 49, 49, *rev'd on other grounds*, 311 N.C. 398, 31 S.E.2d 282 (1984). These two cases and the *Huss* decision are the only cases to consider a conscious but purportedly physically helpless victim. Other cases have defined sleeping victims as physically helpless. *See, e.g.*, State v. Moorman, 320 N.C. 387, 392, 358 S.E.2d 502, 505–06 (1987) ("As can be seen from the foregoing cases, the common law implied in law the elements of force and lack of consent so as to make the crime of rape complete upon the mere showing of sexual intercourse with a person who is asleep, unconscious, or otherwise incapacitated and therefore could not resist or give consent. Our rape statutes essentially codify the common law of rape.")

29. *See supra* note 16 and accompanying text.

In *State v. Joines*,[30] the victim suffered from multiple sclerosis, and the case was prosecuted under the physically helpless theory.[31] The jury convicted Joines of second-degree rape against a physically helpless person and of second-degree sexual offense against a physically helpless person.[32] However, the defendant did not raise the physically helpless determination on appeal[33] and the Court of Appeals' decision provides no interpretation or direction about application of the "physically helpless" provision aside from indicating that a person suffering from multiple sclerosis was not challenged as being outside the scope of the statute.[34]

Twenty-four years after uncontroversially applying the physically helpless provision in *Joines*, the Court of Appeals considered the meaning and purpose of this theory in *State v. Atkins*.[35] In *Atkins*, an eighty-three year-old frail, arthritic woman, largely dependent on others for her basic needs, was violently raped by Atkins after he broke into her home through her bedroom window.[36] The jury convicted Atkins of two counts of second-degree rape based on the physically helpless victim theory.[37] On appeal, the defendant claimed that the rape charges should have been dismissed for the State's failure "to produce sufficient evidence that [the victim] was 'physically helpless.' "[38] In upholding Atkins's convictions based on the "physically helpless" theory, the court analyzed the scope and purpose of the provision but provided only limited guidance for proper application of the theory in the future. The court identified the provision as protecting a "special class of victims, who are deemed by law incapable of resisting or withholding consent; thus, force and the absence of consent need not be proved by the State, as they are implied in law."[39] The *Atkins* court also turned to the legislative history of the statute, which revealed that the purpose of the physically helplessness theory was intended to be "basically a statutory rape section in cases where someone engages in a sex act with a

30. 66 N.C. App. 459, 311 S.E.2d 49, *rev'd on other grounds*, 311 N.C. 398, 31 S.E.2d 282 (1984).

31. *Id.* at 459, 311 S.E.2d at 49.

32. *Id.*

33. The Court of Appeals addressed two of the defendant's arguments, determining (1) the results of a polygraph should have been suppressed and accordingly the defendant was entitled to a new trial and (2) the evidence at trial was sufficient to go to the jury and thus the trial court did not err in denying the defendant's motion to dismiss the charges against him. *Id.* at 460–61, 311 S.E.2d at 50.

34. *See id.* at 459–61, 311 S.E.2d at 50.

35. 193 N.C. App. 200, 203–04, 666 S.E.2d 809, 812 (2008).

36. *Id.* at 202, 666 S.E.2d at 811.

37. *Id.* at 203, 666 S.E.2d at 811.

38. *Id.*

39. *Id.* at 204, 666 S.E.2d at 812.

person who is, in fact, incapable of resisting or communicating resistance."[40]

While the court in *Atkins* quoted the entirety of the "physically helpless" definition in section 14-27.1(3)(ii) of the North Carolina General Statutes, including both the language pertaining to physical resistance and the language regarding an inability to communicate, the *Atkins* court largely went on to ignore the communication language.[41] Instead, the court focused solely on the meaning of "resist," and determined that "a 'physically helpless' victim, as used within [the statute], is a victim who is *physically unable to strive or work against; oppose actively* an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act."[42] Conversely, the court did not expound upon the meaning of "communicate unwillingness" in a similar manner. By focusing on defining and emphasizing the meaning of resistance, the court gave more weight to the unable-to-resist physically helpless victim than the unable-to-communicate physically helpless victim.

As is discussed in the next Part, the *Huss* court followed the *Atkins* court in ignoring the communication aspect of the physically helpless victim definition and in instead making resistance the determinative consideration.

II. REJECTING PHYSICAL HELPLESSNESS AS A RELATIONAL DETERMINATION IN *STATE V. HUSS*

The victim in *Huss* first met the defendant in the fall of 2006 when she attended a self-defense class taught by him.[43] The victim was employed at that time at a nonprofit organization called Central Latino, serving as a director for one of its after-school programs.[44] A few months after they first met, the victim invited Huss to teach self-defense classes at her place of work.[45] The two became romantically involved soon after and continued dating until March of 2007.[46] At that point, Huss and the victim began having disagreements about the nature of their relationship, with the victim wanting more space from Huss, and Huss in turn complaining about the

40. *Id.* (quoting Bill Books File, H.B. 800, at 3 (1979) (providing the transcript of the May 22, 1979 Senate Debate on the sex offense bill)).

41. *See id.* at 205, 666 S.E.2d at 812–13.

42. *Id.* (emphasis added) (internal quotations omitted). The court relied on the American Heritage dictionary in crafting its definition. *Id.* (citing AMERICAN HERITAGE DICTIONARY 1052 (2d ed. 1982) (defining "resist" as "[t]o strive or work against; oppose actively")).

43. State v. Huss, __ N.C. App. __, __, 734 S.E.2d 612, 613 (2012), *aff'd by an equally divided court*, __ N.C. __, 749 S.E.2d 279 (2013) (per curiam).

44. *Id.*

45. *Id.*

46. *Id.*

victim remaining in contact with her ex-boyfriend.[47] The two seemingly came to a mutual agreement to end their relationship but also agreed to meet at Huss's home on May 9, 2007.[48]

Unbeknown to the victim, Huss videotaped their interactions at this meeting.[49] The victim stated that at this meeting Huss insisted on the two having sex, and that "she realized he wasn't going to let her go unless she did."[50] In contrast, Huss asserted that the two engaged in consensual sex, employing various toys and restraints as was typical in their relationship.[51] Huss was arrested on August 1, 2007, and charged with first-degree kidnapping, second-degree sexual offense, and second-degree rape.[52] At trial, the State argued that the victim was physically helpless at the time of the sexual acts, thus pursuing a theory of guilt based solely on the second theory of the North Carolina second-degree rape statute.[53] The jury convicted the defendant of all charges.[54]

Huss appealed, arguing that the victim was not "physically helpless" as defined by the statute and accordingly the trial court erred in denying the motion to dismiss the charges at the close of evidence.[55] The State discussed the evidence in support of its physical helplessness theory by considering the characteristics of the victim relative to the defendant in this case comparing the parties' sizes, strength, and experiences.[56] In particular, the State highlighted that Huss was an experienced martial arts instructor and professional fighter, weighing 250 pounds to the victim's 130, and that Huss tied the victim's hands behind her back with a martial arts belt.[57] The Court of Appeals dismissed the argument that physical helplessness was

47. *Id.* at __, 734 S.E.2d at 613–14.

48. *Id.* at __, 734 S.E.2d at 614.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* The Court of Appeals noted in its opinion that the victim did not report the incident until she encountered Huss at a community festival a few days later. *See id.*

53. *See id.* at __, 734 S.E.2d at 615; *see also* N.C. GEN. STAT. §§ 14-27.3(a)(2), -27.5(a)(2) (2013) (stating the requirements for a defendant to be found guilty of second-degree rape or second-degree sexual offense under the "physically helpless" theory). There is no explanation in the Court of Appeals decision as to why the State elected to pursue only this theory.

54. *Huss*, __ N.C. App. at __, 734 S.E.2d at 614.

55. *Id.* The defendant's remaining arguments not addressed by the court were that there was "insufficient evidence of a restraint separate from any rape or sex offense"; the trial court should have intervened *ex mero motu* due to the prosecution's inappropriate closing remarks; and the trial court committed plain error by "failing to instruct the jury that lack of consent is an element of rape and sexual offense of a 'physically helpless' person." *Id.* If the court had elected to address this fourth and final issue, it could have clarified the purpose and proper application of the "physical helplessness" theory of the rape statute.

56. *Id.* at __, 734 S.E.2d at 616.

57. *Id.*

determined by the circumstances and relative attributes of the parties involved, holding that physical helplessness is dependent upon "factors and attributes unique and personal of *the victim*."[58]

Under this interpretation of physical helplessness, size or strength is not a personal attribute since it is only relevant in relation to another person; for example, a 130 pound woman may be weak in comparison to a 200 pound man, but not in comparison to a 90 pound child. In contrast, a victim's unconsciousness or paralysis does not alter in relation to another person. Accordingly, the restraints used on the victim in *Huss* and the victim's smaller size were irrelevant under the physically helpless theory because she did not have a unique and personal reason for being unable to resist the sexual act. In determining whether the victim was "physically helpless" within the meaning of the statute, the court only focused on the victim's ability to resist a sexual act, never mentioning the definition as including "a victim who is physically unable to . . . communicate unwillingness to submit to . . . a sexual act."[59] In other words, the court did not consider the victim's ability or inability to communicate consent an important factor of its determination.

Because the State did not provide sufficient evidence that the victim was physically helpless as determined by "factors and attributes unique and personal of *the victim*," the Court of Appeals reversed the judgments of the trial court.[60] In so doing, the court alluded to its belief that the prosecution seemed to have sufficient evidence to "establish that defendant engaged in sexual acts with the victim by force and against her will," as required under the traditional, common law form of rape codified in the first theory of the second-degree rape statute.[61]

In the summer of 2013, the Supreme Court of North Carolina granted the State's petition for discretionary review of the Court of Appeals' decision.[62] In November 2013, the justices participating in the decision were evenly split; three voted for reversing the Court of Appeals and three voted for affirming the lower court's decision.[63] The result is the Court of Appeals' decision "stands without precedential value."[64] Nonetheless, the

58. *Id.*

59. N.C. GEN. STAT. § 14-27.1(3)(ii) (2013); *see Huss*, __ N.C. App. at __, 734 S.E.2d at 615.

60. *Huss*, __ N.C. App. at __, 734 S.E.2d at 616.

61. *Id.*; *see* N.C. GEN. STAT. § 14-27.3(a)(1). The court also noted that when the State has evidence to pursue its case under the first theory, the State should prosecute the case under the first theory and not under the second theory. *See Huss*, __ N.C. App. at __, 734 S.E.2d at 616.

62. State v. Huss, __ N.C. __, 743 S.E.2d 179 (2013).

63. State v. Huss, __ N.C. __, __, 749 S.E.2d 279, 280 (2013) (per curiam). Justice Beasley did not participate in the case. *See id.*

64. *Id.*

fact that the Supreme Court could not agree on a common analysis for the physically helpless victim determination indicates this provision is controversial and ambiguous. At the very least, three justices on the Supreme Court of North Carolina agreed with the Court of Appeals' decision, suggesting that the arguments and analysis in *Huss* may be feasible in a future case.

III. HOW *JOINES*, *ATKINS*, AND *HUSS* UNDERMINE THE IMPORTANCE OF CONSENT

Resistance as an element of rape should remain a relic. Such a requirement is contrary to modern understandings of rape,[65] with most jurisdictions having abandoned or substantially retreated from any resistance requirement.[66] However, in emphasizing resistance as a way of understanding the facts of a rape case and in neglecting the element of consent, the reasoning of *Huss* exemplifies a harmful, outdated discourse in the area of rape law and demonstrates the inadequacies of the current statute. This Part examines the ramifications of *Huss* and its predecessor cases, first by exploring the role of resistance in the context of the North Carolina statute and accompanying case law, and second, by analyzing how focusing on consent could clarify the physically helpless victim cases and lead to clearer applications of the law.

A. The Harms of the Misplaced Emphasis on Resistance and the Ambiguous Physically Helpless Victim

While active resistance against an aggressor can serve as an indication of lack of consent, the focus in rape cases should not be on the victim's active resistance of the aggressor but on the victim's lack of consent.[67] Yet, by defining a physically helpless person as being "physically unable to resist,"[68] the North Carolina statute continues to direct juries, judges, and lawyers to consider and often focus on whether a victim was capable of

65. *See* Palmer, *supra* note 19, at 1272–73 (discussing the problems with a physical resistance requirement specifically in the context of spousal rape, noting that such a "physical resistance [requirement] is inconsistent with North Carolina law and modern rape law generally" (footnotes omitted)); *see also* CARINGELLA, *supra* note 5, at 14–15 (documenting that "resistance requirements . . . have also been repealed or relaxed in many jurisdictions," and describing a movement toward "[r]eliance . . . on the characteristics of the offense rather than on victim behavior (such as resistance)").

66. *See* CARINGELLA, *supra* note 5, at 14.

67. *See* Palmer, *supra* note 19, at 1260 ("At the core of the crime of rape is the question of the victim's consent."); *see also* N.C. GEN. STAT. §§ 14-27.2 to -27.3 (2013) (including the element of consent in the first-degree rape statute and the first theory of the second-degree rape statute with the phrase "against the will of the [victim]").

68. § 14-27.1(3).

resistance or did in fact actively resist.[69] This approach deemphasizes the element of consent, which should be central to the inquiry of whether rape occurred.[70] However, as discussed in greater detail *infra*, the theory of the second-degree rape statute containing the physically helpless provision was intended to act as a sort of "statutory" rape provision for certain protected classes of victims.[71] Thus, if the prosecution can prove a victim falls within a protected class under the statute, lack of consent and force do not need to be proven.[72]

As in *Huss*, the second-degree rape statute tempts prosecutors to fit their case within this "per se" or pseudo-statutory rape provision to avoid having to prove the elements of lack of consent and force.[73] This strained characterization does a disservice to the victim in belittling the import of her[74] lack of consent and instead focusing on her alleged weakness.[75] It also does a disservice to both victim and defendant in focusing less on the actual events of the alleged rape and instead on the victim's characteristics that purportedly prevented her from resisting. In the case of *Huss*, if the victim's statement of the facts were true, this ultimately resulted in a rapist going free because the prosecution erroneously pursued the physical helplessness theory. By refocusing prosecutions on the victim's consent and ability to consent, such confusion could be mitigated. This result could

69. *See supra* Part I.A.

70. *See generally* CARINGELLA, *supra* note 5, at 62–95, 99–105 (highlighting the central role consent must play in rape law and discussing several different theories of rape and consent). Indeed, other jurisdictions with a similar provision for physically helpless victims define physical helplessness in the context of consent, either explicitly in statute or by case law interpreting the statute. *See infra* Part IV.A.

71. *See infra* notes 107–12 and accompanying text.

72. This characterization is not entirely accurate. While unconscious victims are covered under the statute and a person can be definitively declared conscious or unconscious, the definition for the non-unconscious physically helpless victim provides no clear demarcation, defining such a victim as "physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act." § 14-27.1(3). This Recent Development contends that physically helpless victims do not comprise enough of a discrete, easily identifiable class to be included in a pseudo-statutory rape section.

73. *Cf.* CARINGELLA, *supra* note 5, at 97 (noting that approximately three-quarters of rape cases are acquaintance rape cases, without the brutal details commonly associated with rape, and that these cases often come down to a "he said" versus "she said" dispute). If faced with a case that hinged upon whether the jury believed the defendant's or the victim's account of events, the prosecution would understandably prefer to remove the consent variable in favor of a statutory or per se theory of rape.

74. The author acknowledges that sexual offenses can be perpetrated against anyone irrespective of gender. Feminine pronouns are used here for simplicity and because the victims in the cases discussed are all female. *See supra* note 2.

75. *See* CARINGELLA, *supra* note 5, at 259 ("Victims are, historically speaking, nothing more than witnesses for the prosecution and have been treated thus. . . . This . . . compounds the theft of control they first experienced from rape victimization, leaving them, once again, without power or influence over what happens to them or their case.").

be achieved one of two ways: Either prosecutors could simply elect to pursue a traditional theory of rape—focusing on force and consent—regardless of the victim's characteristics, or the statute could be amended to clarify the central role consent should play in all rape cases.[76] In such emotionally charged and difficult situations as rape cases, the more the justice system can focus on whether consent was given, instead of focusing on whether a person falls into a particular class, the better all parties will be served.

The string of physically-helpless victim cases comprised of *Joines*, *Atkins*, and *Huss*, establishes a largely ad-hoc, "we know it when we see it" test[77] for who qualifies as a physically helpless victim. To summarize the case law, the relation between victim and offender might not determine physical helplessness.[78] Instead, the unique characteristics of the victim will likely determine whether he or she is physically helpless.[79] But which characteristics pass this test? Size and strength are insufficient under *Huss*,[80] but being elderly and frail or suffering from multiple sclerosis satisfied the physical helplessness test in *Atkins* and *Joines*, respectively.[81] The two latter victims' characteristics defining them as physically helpless were permanent characteristics; the *Huss* court rejected the possibility that removable physical restraints could render a victim temporarily physically helpless.[82] But the court's definition leaves open the question of whether a victim could be *temporarily* physically helpless based on an intrinsic quality of the victim. For example, could a person experiencing a panic attack, immobilized by fear, or otherwise suffering from a temporary ailment pass muster under the current "physically helpless" definition? Without clarification, prosecutors will likely try cases under the physically helpless theory to explore the theory's limits, even though a different theory would have better-served the State's case. Alternatively, the prosecution may mistakenly try a case under the physically helpless theory believing a victim—such as the one in *Huss*—qualifies as physically

76. *See infra* Part IV.

77. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (remarking "I know it when I see it" as a test for determining obscenity of materials).

78. *See* State v. Huss, __ N.C. App. __, __, 734 S.E.2d 612, 616 (2012), *aff'd by an equally divided court*, __ N.C. __, 749 S.E.2d 279 (2013).

79. *See id.* ("[I]n determining whether a victim is 'physically helpless,' this Court looks to factors and attributes unique and personal of *the victim*."); *see also* State v. Atkins, 193 N.C. App. 200, 205–06, 666 S.E.2d 809, 812–13 (2008) (describing the standard for physically helpless and focusing on the victim's characteristics in meeting the standard).

80. *See Huss*, __ N.C. App. at __, 734 S.E.2d at 616.

81. *See supra* Part I.B.

82. *See Huss*, __ N.C. App. at __, 734 S.E.2d at 616 (finding that temporarily restraining the victim in a "submissive hold" and tying victim's hands behind her back does not render the victim "physically helpless" under the meaning of the statute).

helpless because of situational helplessness rather than having an inherent characteristic of physical helplessness. Either approach runs the risk of a result similar to *Huss*, where the conviction was reversed despite sufficient evidence to prove rape occurred under the traditional theory involving lack of consent and force.

B. Refocusing North Carolina on the Issue of Consent

In light of *Huss* and the current resistance-focused construction of the physically helpless provision, imagining a situation in which a rape violates the physically helpless test[83] but not the traditional force and lack of consent test[84] is difficult. In *Huss*, the Court of Appeals intimated that there was "evidence sufficient to establish that the defendant engaged in sexual acts with the victim by force and against her will."[85] If true, the case could have been prosecuted under the traditional theory of rape under subsection 14-27.3(a)(1), refocusing the inquiry on the victim's consent or lack thereof.

Similarly, in both *Joines* and *Atkins*, the victims were declared "physically helpless" but in each instance there seemed to be clear evidence of the elements of force and lack of consent.[86] In *Atkins*, the defendant "threw" the victim onto a bed, and the victim "hollered, screamed, and begged for him to stop."[87] There can be little doubt that the sexual acts were committed against the victim's will, and the element of force is present in the fact that she was "thrown" upon a bed.[88] Moreover, if the spirit of the physically helpless statute were followed—requiring the helplessness to be evaluated in the context of consent—the victim in *Atkins* was not so physically helpless as to be "unable to . . . communicate unwillingness to submit to an act of vaginal intercourse or a sexual act."[89]

83. *See* N.C. GEN. STAT. § 14-27.3(a)(2) (2013).

84. *See id.* § 14-27.3(a)(1).

85. *Huss*, __ N.C. App. at __, 734 S.E.2d at 616.

86. *See* State v. Atkins, 193 N.C. App. 200, 202, 666 S.E.2d 809, 811 (2008); State v. Joines, 66 N.C. App. 459, 459, 311 S.E.2d 49, 49, *rev'd on other grounds*, 311 N.C. 398, 319 S.E.2d 282 (1984).

87. *Atkins*, 193 N.C. App. at 202, 666 S.E.2d at 811.

88. North Carolina recognizes the theory of constructive force, meaning that the element of force does not have to be shown through a physically aggressive action, but can also be established through evidence of threats or coercion, whether explicit or implicit, or inferred from surrounding circumstances. *See, e.g.*, State v. Scercy, 159 N.C. App. 344, 352, 583 S.E.2d 339, 344 (2003); State v. Black, 111 N.C. App. 284, 296–97, 432 S.E.2d 710, 718–19 (1993); *see also* Renée Madeleine Hom, Recent Development, State v. Moorman*: Can Sex with a Sleeping Woman Constitute Forcible Rape?*, 65 N.C. L. REV. 1246, 1255 (1987) (discussing North Carolina's theory of constructive force and citing cases).

89. § 14-27.1(3)(ii).

The issue of physical helplessness was not in contention in *Joines*.[90] However, the defendant entered the victim's home "without her permission."[91] If the defendant was in her home against her will, one might infer that the subsequent sexual intercourse was also against the victim's will, and the elements of force and lack of consent would likely not be difficult to prove.

This invites the question: Is the physically helpless theory necessary? This Recent Development does not dispute the importance of the first sub-definition of physically helpless which includes "a victim who is unconscious,"[92] but the second sub-definition—pertaining to the victim's physical inability to resist *or* communicate nonconsent[93]—seems duplicative and leads to unnecessary confusion in the realm of rape law.[94] Further, the second sub-definition's strangely disjunctive organization—effectively creating two separate categories for resistance and consent—reinforces the now-obsolete element of resistance and deemphasizes the importance of a victim's lack of consent.[95] This "either/or" definitional test muddies the law without addressing the likely situation in which one is true but not the other: for example, should the definition cover a victim who is physically unable to resist, but who is clearly communicating her lack of consent?[96] Implicit in the holding of *Atkins* is that the ability to communicate does not "cancel out" that the victim was too infirm to resist.[97] Similarly, a victim who is actively resisting an unwanted sexual act is exercising her ability to communicate her lack of consent, albeit through nonverbal cues; this illustrates how as a practical matter, the "unable to resist" category is unnecessary.

90. *See Joines*, 66 N.C. App. at 460–61, 311 S.E.2d at 50 (noting that this case was appealed on a denial of a motion to suppress a polygraph test and a denial of a motion to dismiss).

91. *Id.* at 459, 311 S.E.2d at 49.

92. § 14-27.1(3)(i); *see also* State v. Moorman, 320 N.C. 387, 392, 358 S.E.2d 502, 505–06 (1987) ("[T]he common law implied in law the elements of force and lack of consent so as to make the crime of rape complete upon the mere showing of sexual intercourse with a person who is asleep, unconscious, or otherwise incapacitated and therefore could not resist or give consent. Our rape statutes essentially codify the common law of rape.").

93. § 14-27.1(3)(ii) (defining as physically helpless "a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act").

94. *See supra* Part I.B (discussing the inconsistent precedent and lack of a clear legal rule in defining a physically helpless victim under subsection (ii) of the statutory physically helpless definition).

95. *See infra* notes 101–12 and accompanying text (highlighting how case law has read out the inability to consent definition and relied solely on the inability to resist definition).

96. *See, e.g.*, State v. Atkins, 193 N.C. App. 200, 202, 205–06, 666 S.E.2d 809, 811, 813 (2008) (finding that the victim communicated her lack of consent through yelling, screaming, and begging although she was deemed to be physically helpless due to her inability to physically resist).

97. *See Atkins*, 193 N.C. App at 205–06, 666 S.E.2d at 813.

These distinctions may seem inconsequential, but the factual circumstances present in *Huss* highlight their importance. The ambiguity and confusion in how to interpret and apply this statute led to the reversal of Huss's conviction despite the existence of evidence supporting the traditional theory of rape.[98] The more clearly defined the statute, the easier and better it will be applied so as to give both defense counsel and the prosecution a clear understanding of how to proceed. Similarly, jurors will be better able to assess the facts of the case in light of the applicable statute if the statute is clear. The record on appeal in *Huss* illustrates that the judge, the prosecutor, and the defense all agreed that consent was central to the outcome of the case, yet the jury instructions did not communicate any requirements regarding consent.[99] Unfortunately, the Court of Appeals did not reach this issue on appeal[100] and so the confusion around the statute perseveres. In *Atkins*, *Joines*, and *Huss*, the victims would have been able to communicate their consent. A trial court's failure to acknowledge this ability to consent could make the victim feel powerless by implying she is incapable of consenting to sex. An eighty year-old person, as in *Atkins*, or a physically ill person, as in *Joines*, can have consensual sex and suggesting she cannot consent is demeaning.

Beyond the courts' interpretation of the meaning of "physically helpless," North Carolina minimizes the importance of consent on the face of its second-degree rape statute in at least three ways. First, neither the statute nor the corresponding definitional section mention consent.[101] The definition comes close by stating that a victim is physically helpless when "unable to resist . . . *or communicate unwillingness to submit*,"[102] but lack

98. *See* State v. Huss, __ N.C. App. __, __, 734 S.E.2d 612, 616 (2012) ("This Court has held that '[w]here there is evidence that a rape has been effectuated by force and against the will of the victim, the best practice is for the State to prosecute the defendant under the theory codified by N.C. Gen. Stat. § 14-27.3(a)(1)' and not under N.C. Gen. Stat. § 14-27.3(a)(2)." (quoting *Atkins*, 193 N.C. App. at 206 n.1, 666 S.E.2d at 813 n.1)), *aff'd by an equally divided court*, __ N.C. __, 749 S.E.2d 279 (2013) (per curiam).

99. *See* Record on Appeal at 28–70, *Huss*, __ N.C. App. __, 734 S.E.2d 612 (No. COA12-250), *available at* http://www.ncappellatecourts.org/show-file.php?document_id=120691. The judge defined physical helplessness only in relation to ability to resist. *See id.* at 35–36.

100. *See Huss*, __ N.C. App. at __, 734 S.E.2d at 614. The defendant's fourth argument on appeal was that "[t]he trial court committed plain error by failing to instruct the jury that lack of consent is an element of rape and sexual offense of a 'physically helpless' person." *Id.* The court did not reach this argument because it agreed with and decided the case based on the defendant's first argument that the victim did not fall into the class of "physically helpless" people envisioned by the statute. *Id.*

101. *See* N.C. GEN. STAT. § 14-27.1(3) (2013) (defining "physically helpless" without using the word "consent"); *id.* § 14-27.3(a)(2) (establishing the physically helpless theory of second-degree rape without mentioning "consent").

102. *Id.* § 14-27.1(3)(ii) (emphasis added).

of consent and unwillingness are not equivalent.[103] Consent is an affirmation and suggests the alleged aggressor has the duty of obtaining consent, while unwillingness to submit subtly places the responsibility on the victim to show she did not "give in" willingly.[104] Second, the definitional section focuses on the ability of the victim to resist; even the second half of the definition pertaining to "unwillingness to submit" connotes inaction on the part of the victim, and is arguably a restatement of the same idea of the victim's resistance to the act. Third, even if "unwillingness to submit" were the same as a lack of consent, the statute removes this as a focal point by not including it as an element of the crime within the physically helpless theory of the second-degree rape statute.[105] By comparison, the traditional theory of second-degree rape articulated in the first subsection of the statute clearly defines rape as being "against the will of the other person."[106]

The legislative history of North Carolina's second-degree rape statute and authority from other jurisdictions[107] illustrate that physical helplessness was intended to be, and should be, interpreted in the consent context. As previously noted by the Supreme Court of North Carolina, the state's rape statutes "essentially codify the common law."[108] At common law, force and lack of consent were implied in law—and thus not required to be proven by the prosecution—when the victim was "asleep, unconscious, or otherwise incapacitated."[109] This rule is reflected in the first part of the definition of a physically helpless victim.[110] The legislative history behind the second-degree rape statute reinforces this idea, with Senator Mathis noting that the second theory of the statute is "basically a statutory rape section" for when the victim is "mentally defective, mentally incapacitated, and physically helpless."[111] The legislative history does not distinguish between the two categories of physically helpless victims—unable to resist and unable to

103. *See generally* CARINGELLA, *supra* note 5, at 99–108 (situating different theories of consent on a continuum and arguing that phrases such as "unwillingness to submit" or "against the will" do not capture true consent but instead give greater flexibility to the defendant in arguing the case).

104. *See id.* For example, in instances of threats or coercion, someone could be silent—i.e. not communicating willingness—but still not be consenting to the act. *See id.* at 78.

105. *See* § 14-27.3(a)(2).

106. *Id.* § 14-27.3(a)(1). Even here, North Carolina should be clearer and replace "against the will" with "without the consent." As Caringella explains "against her will" is a somewhat ambiguous term associated with "traditional kinds of force, injury, and so on." *See* CARINGELLA, *supra* note 5, at 102.

107. *See infra* Part IV.A.

108. State v. Moorman, 320 N.C. 387, 392, 358 S.E.2d 502, 506 (1987).

109. *Id.* at 392, 358 S.E.2d at 505.

110. § 14-27.1(3)(i).

111. State v. Atkins, 193 N.C. App. 200, 204, 666 S.E.2d 809, 812 (2008) (quoting Bill Books File, H.B. 800, at 3 (1979) (containing the quote by Senator Mathis)).

communicate—as does the statute, but the legislative history provides that the intent of the statute was to cover "cases where someone engages in a sex act with a person who is, in fact, *incapable of resisting or communicating resistance*."[112] This language suggests that when the statute was codified, the legislators were still considering rape within the resistance paradigm and, as mentioned above, this relic remains in the statute. The reliance on resistance reinforces the outdated nature of the statute.

Even if the purpose of the statute is to ease the prosecutorial burden of proving the elements of rape, the physically helpless definition of inability to resist or communicate unwillingness fails to achieve that goal as the meaning of "physically helpless" is currently defined through litigation. Unless there is a bright line—i.e., the victim was under a certain age, or the victim was asleep or unconscious—the physically helpless provision cannot effectively serve as a pseudo-statutory rape section.

IV. A CALL TO CLARIFY NORTH CAROLINA'S SECOND-DEGREE RAPE STATUTE BY RELEGATING RESISTANCE AND EMPHASIZING CONSENT

This Part compares North Carolina's physically helpless statute with statutes and case law of other jurisdictions and offers suggested language for amending North Carolina's second-degree rape and sexual offense statutes in light of the problems with the statute as most recently exemplified in *Huss*. An exhaustive survey of every state's rape statutes and jurisprudence regarding physically helpless victims is beyond the scope of this Recent Development. However, even a selective examination of rape law in other jurisdictions illustrates how the North Carolina statutes can be modified and applied to conform with modern rape laws that focus on consent, not resistance. This Part will suggest two changes. First, the North Carolina General Assembly should emulate these consent-driven jurisdictions. Second, North Carolina's courts should look to the case law of these jurisdictions in interpreting the state's current rape statutes and any modifications made by the General Assembly—such as by actually applying the ability to communicate piece of the physically helpless definition, rather than solely relying on the resistance aspect.

A. Physical Helplessness and Consent in Other Jurisdictions

Unlike North Carolina's statute, statutes in other jurisdictions clearly define physical helplessness in the context of consent.[113] For example, New

112. *Id.* (emphasis added).

113. *See, e.g.*, ARK. CODE ANN. § 5-14-103(a) (2006 & Supp. 2011) ("A person commits rape if he or she engages in sexual intercourse . . . with another person . . . [w]ho is incapable of

York's first-degree rape statute criminalizes sexual intercourse with a person "incapable of consent by reason of being [p]hysically helpless."[114] This formulation provides clearer guidance to prosecutors as to what physically helpless means—for example, the facts in *Huss* would not qualify. While the victim was physically restrained, she was not physically incapable of consenting to the acts.[115] Accordingly, under such a statute, the prosecution in a case like *Huss* would not be tempted to pursue a conviction under the "physically helpless" provision and would instead focus time and energy on proving the case under the traditional theory of rape. The New York statute also clearly emphasizes consent while making no mention of the victim's ability to resist.[116]

Case law from other jurisdictions further underscores how physical helplessness can and should be understood in the context of consent. For example, New York courts have interpreted New York's definition of physically helpless—a victim who "is unconscious or for any other reason is physically unable to communicate unwillingness to an act"[117]—as requiring an inquiry of whether the victim was capable of communicating consent.[118] This definition is similar to the oft-ignored second half of North Carolina's definition of physically helpless, but the New York statute does not include the North Carolina "resist" language and has been interpreted solely in the context of the victim's ability to consent.[119] Cases from

consent because he or she is: [p]hysically helpless . . . ."); KY. REV. STAT. ANN. § 510.040(1) (LexisNexis 2008 & Supp. 2012) ("A person is guilty of rape . . . when . . . [h]e engages in sexual intercourse with another person who is incapable of consent because he: [i]s physically helpless . . . ."); N.Y. PENAL LAW § 130.35(2) (McKinney 2009 & Supp. 2013) ("A person is guilty of rape . . . when he or she engages in sexual intercourse with another person . . . [w]ho is incapable of consent by reason of being physically helpless . . . ."). *But cf.* VA. CODE ANN. § 18.2-61 (2009 & Supp. 2013) (stating that a person is guilty of rape of a physically helpless person when the perpetrator accomplishes the rape "through the use of the complaining witness's mental incapacity or physical helplessness"). New York and Kentucky place their physically helpless provisions under their first-degree rape statutes rather than their second-degree rape statutes.

114. N.Y. PENAL LAW § 130.35(2).

115. *See* State v. Huss, __ N.C. App. __, __, 734 S.E.2d 612, 616 (2012), *aff'd by an equally divided court*, __ N.C. __, 749 S.E.2d 279 (2013).

116. *See* N.Y. PENAL LAW § 130.35(2); *see also* statutes cited *supra* note 113 (defining physical helplessness in the context of consent).

117. N.Y. PENAL LAW § 130.00(7).

118. *See, e.g.*, People v. Fuller, 854 N.Y.S.2d 594, 598 (App. Div. 2008) (holding that a victim who was wavering in and out of consciousness due to intoxication was " 'physically helpless' for the purposes of consent[]"); People v. Clyburn, 623 N.Y.S.2d 448, 449 (App. Div. 1995) (holding that a victim suffering from Huntington's Chorea was not physically helpless but was forcibly raped under the first-degree rape statute).

119. *See, e.g.*, People v. Morales, 528 N.Y.S.2d 286, 286–87 (Crim. Ct. 1988) (denying, at the close of the State's case, the defendant's motion for dismissal of the charge of forcible rape, but dismissing the charge of rape of a physically helpless victim because—while the victim could not physically resist the attack due to her muscular dystrophy—she was able to and did verbally communicate her lack of consent).

Washington[120] and Florida—where the physically helpless victim statutes are practically identical to New York's—have similarly interpreted physical helplessness as relative to the victim's ability to give consent.[121]

While the statutes and cases in these three states focus on a victim's lack of consent without regard to the victim's ability to physically resist, which is an improvement from North Carolina's approach, cases in these states highlight a disturbing trend not captured by the language of the New York, Florida, and Washington statutes. Despite the Washington statute's plain language—and similar language in Florida and New York—defining a physically helpless victim as "a person who is unconscious or for any other reason . . . unable to communicate unwillingness to an act,"[122] cases continue to arise in which the prosecution pursues this theory even when the victim was capable of communicating her lack of consent, and in many instances, despite the existence of ample evidence that the victim vociferously protested the sexual act.[123]

For instance, in the Florida case of *Davis v. State*,[124] the defendant raped his thirteen year-old daughter, who was unable to use her legs due to her muscular dystrophy.[125] The prosecution pursued the case under the theory that the daughter was physically helpless, despite the "state's own evidence . . . show[ing] . . . that the victim was able to, and did, physically communicate her unwillingness by telling [her father] to stop and hitting him while screaming for help."[126] The Florida Court of Appeals reversed the defendant's conviction because the victim was not physically helpless as argued by the State, remanding with instructions to acquit.[127] Courts in

120. *See* State v. Bucknell, 183 P.3d 1078, 1081 (Wash. Ct. App. 2008).

121. *See, e.g.*, Bullington v. State, 616 So. 2d 1036, 1038 (Fla. Dist. Ct. App. 1993) (finding that the victim was not physically helpless because "the State failed to prove lack of consent" when the "[the victim] was able to communicate orally and had full use of her legs"); Davis v. State, 538 So. 2d 515, 516 (Fla. Dist. Ct. App. 1989) (finding that the victim who suffered from muscular dystrophy and was thus physically unable to escape or resist the attack was not physically helpless because she was capable of and did "physically communicate her unwillingness by telling [her attacker] to stop and hitting him while screaming for help"); *Bucknell*, 183 P.3d at 1079, 1081 (finding that a bedridden victim with Lou Gehrig's disease who could not move from the chest down was not physically helpless because she could "communicate orally, despite her physical limitations").

122. WASH. REV. CODE ANN. § 9A.44.010(5) (West 2009 & Supp. 2013); *see* FLA. STAT. ANN. § 794.011(1)(e) (West 2007 & Supp. 2013); N.Y. PENAL LAW § 130.00(7); *see also Bucknell*, 183 P.3d at 1081 (noting that the definition of a physically helpless victim is the same in all three jurisdictions, and proceeding to review case law from Florida and New York in making its determination).

123. *See, e.g.*, *Davis*, 538 So. 2d at 516 (noting that the victim verbally communicated her complete lack of consent to the sexual acts).

124. 538 So. 2d 515 (Fla. Dist. Ct. App. 1989).

125. *Id.* at 516.

126. *Id.*

127. *Id.*

other jurisdictions have been able to order entry of a lesser or different offense when the physically helpless theory was erroneously argued.[128] However, even if the prosecution's mistaken theory of a case is "corrected" on appeal, judicial resources are wasted, the victim is forced to endure more waiting for a final judgment, and the defendant may arguably not be punished severely enough. This cursory review of other jurisdictions illustrates that even if North Carolina were to modify its rape statute to define physical helplessness as only an inability to communicate, cases nonetheless might be pursued needlessly on a theory of physical helplessness only to have a conviction reversed on appeal, as happened in *Huss*.

These other jurisdictions' cases, along with North Carolina's cases on point, also demonstrate the folly in attempting to create a form of statutory rape based on physical helplessness, since physical helplessness is an inherently fact-intensive and specific determination, unlike traditional statutory rape, which is characterized by an age-based, bright-line rule.[129] With traditional statutory rape, the only question is the respective ages of the defendant and the victim, which is objectively verifiable independent of the facts of the case.[130] With physical helplessness, the question of whether the victim was physically helpless is still context-driven and determined subjectively on a case-by-case basis, necessitating extensive evidence gathering. For example, in *Huss*, the North Carolina Court of Appeals attempted to adhere to the spirit of a traditional statutory rape provision by holding that physical helplessness is not a relational determination but is instead based upon unique characteristics of the victim.[131] However, there are no objective criteria for evaluating which characteristics suffice, thus leaving this determination to continue to be made on a case-by-case basis and in turn allowing prosecutors to pursue this theory in an attempt to establish which diseases or disabilities qualify.

128. *See, e.g.*, State v. Bucknell 183 P.3d 1078, 1081–82 (Wash. Ct. App. 2008) (holding that the victim was not physically helpless as argued by the prosecution, but because there was evidence in the record to support a charge of third-degree rape, the court reversed and remanded with an order to enter such a judgment).

129. *Compare* State v. Atkins, 193 N.C. App. 200, 205, 666 S.E.2d 809, 812–813 (2008) (defining "physically helpless" and conducting a factual review to determine whether the victim was, in-fact, physically helpless), *with* State v. Anthony, 351 N.C. 611, 616, 528 S.E.2d 321, 323 (2000) (holding that age-based rape laws create strict liability).

130. *See, e.g.*, N.C. GEN. STAT. § 14-27.2A(a) (2013) ("A person is guilty of rape of a child if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years.").

131. *See* State v. Huss, __ N.C. App. __, __, 734 S.E.2d 612, 615–16 (2012), *aff'd by an equally divided court*, __ N.C. __, 749 S.E.2d 279 (2013).

B. Eliminating the North Carolina Physically Helpless Victim Provision

The North Carolina second-degree rape statute, as well as case law interpreting the statute, retains an outdated focus on resistance and consequently deemphasizes the victim's lack of consent. Further, the pseudo-statutory rape statute for physically helpless victims devalues the victim's consent by encouraging the legal system to find a way to label the victim based on physical characteristics that make her weak or helpless, rather than considering her mental state and whether or not she consented to the sexual act at issue.[132] Arguably, *Huss* could serve as a warning to prosecutors to shy away from attempting to use the physically helpless victim theory. However, in light of the limited case law and unsatisfactory definition of who qualifies as a physically helpless victim, prosecutors may be tempted in the future to test whether a specific case's facts fit the physically helpless victim mold, particularly with the *Huss* decision itself providing no precedential value.

To refocus North Carolina law on the issues of consent and empowering the victim, the North Carolina General Assembly should amend the second-degree rape statute in one of two ways. First, the General Assembly could remove from the statute any mention of resistance or ability to resist and instead pair physical helplessness with the element of consent, as has been done in jurisdictions such as New York.[133] Both the definitional[134] and criminal[135] provisions of the statute should be modified for the sake of clarity, but at a minimum, the definitional section should be amended to read as follows:

> "Physically helpless" means (i) a victim who is unconscious; or (ii) a victim who is physically unable ***to consent*** to ~~resist~~ an act of vaginal intercourse or a sexual act ~~or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act~~.[136]

The criminal section could similarly include a clear reference to the victim's inability to consent due to physical limitations:

> A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person . . . who is ***unable to consent due to being*** mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or

132. *See supra* Part III.

133. *See supra* notes 113–19 and accompanying text.

134. N.C. GEN. STAT. § 14-27.1(3).

135. *Id.* § 14-27.3(a).

136. Stricken through text represents deletions from the current language of the statute and bolded and italicized text represents additions to the current language. *Cf. id.* § 14-27.1(3) (stating the current statutory definition of "physically helpless").

> should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.[137]

These modifications would clarify the statute so that if a victim did in fact communicate a lack of consent, the prosecution would not be tempted to try the case under a physically helpless theory but would instead rely on force and the lack of consent to pursue the case under the traditional theory of rape. In turn, this would comport with the North Carolina Court of Appeals' direction to prosecutors to pursue the traditional theory of rape when there is evidence to support that theory.[138]

Second, the General Assembly could abolish altogether the physically helpless victim provision. Such a change is bolder, but it would serve to clarify the statute and is not unprecedented.[139] In such a scenario, the definitional and criminal sections should retain the reference to unconscious victims.[140] As mentioned previously, in the two North Carolina cases to uphold a conviction based on the physically helpless victim theory, there was ample evidence that the rape was perpetrated with force and against the consent of the victim.[141] The counterargument to such a change is that the State's burden of proof is less when proving that a victim is physically helpless regardless of her ability to communicate, and thus retaining the physical helplessness provision is better for the State and for victims. However, even if there will be a heightened burden for the State in proving lack of consent and force in such cases, such a result is preferable

137. Bolded and italicized text represents additions to the current language. *Cf. id.* § 14-27.3(a) (stating the current statutory requirements for second-degree rape). While this Recent Development has focused on pairing an inability to consent with a physically helpless victim, many of the arguments pertaining to focusing on the victim's consent are equally applicable to mentally disabled and mentally incapacitated victims. However, an analysis of the relationship between consent and mentally disabled and mentally incapacitated victims is beyond the scope of this Recent Development. Nonetheless, the statute could also be amended to insert the words "incapable of consent" directly in front of "physically helpless" so as not to impact the effect of the statute on mentally disabled or mentally incapacitated victims.

138. *See* State v. Huss, __ N.C. App. __, __, 734 S.E.2d 612, 616 (2012), *aff'd by an equally divided court*, __ N.C. __, 749 S.E.2d 279 (2013).

139. *See, e.g.*, CAL. PENAL CODE § 261(a) (West 2009 & Supp. 2014) (containing no physically helpless victim provision in listing multiple different circumstances that constitute rape, including an act against a victim who "is at the time unconscious of the nature of the act," with clearly articulated criteria for determining such a state of unconsciousness).

140. The definition of physically helpless could either be completely removed or replaced with a definition of an unconscious victim. *See* N.C. GEN. STAT. § 14-27.1(3). With either definitional modification, the phrase "physically helpless" would be replaced by "unconscious" in the criminal section. *See id.* § 14-27.3(a).

141. *See supra* notes 86–91 and accompanying text.

to the confusion and potential for misprosecuted cases—as in *Huss*—that can result from such an ambiguous statute.[142]

CONCLUSION

The recent case of *State v. Huss* sheds light on an archaic and deficient theory of the second-degree rape statute that focuses on the outdated belief that rape is proven through a victim's resistance, not her lack of consent. That Huss's conviction was reversed on appeal, despite apparently ample evidence in the record to support a conviction under a traditional theory of rape, demonstrates the damaging effects of maintaining the physically helpless victim provision as it is currently written. In order to better empower victims and protect their rights, North Carolina's second-degree rape statute should be rewritten either to contextualize physical helplessness in relation to consent, or to completely eliminate the physically helpless provision. Absent such an amendment, North Carolina prosecutors should approach potential physically helpless victim cases with caution, erring on the side of using a traditional theory focused on consent of the victim, and courts should give greater weight to the physically helpless definition's ability to communicate factor.

Rewriting this single provision should not be the end of the inquiry in altering North Carolina's rape laws. As the current investigation into the University of North Carolina's management of sexual violence cases illustrates, rape and sexual offenses need to be better understood and recognized by the public and the legal system. This Recent Development has modestly attempted to tackle one outdated provision, but there is much more work to be done in adequately reforming North Carolina's and other jurisdictions' rape laws.[143]

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142. This move away from any physically helpless provision would also protect against the possibility of the prosecution misinterpreting a provision defining physical helplessness in the context of consent. *See supra* notes 113–16 and accompanying text.

143. *See generally* CARINGELLA, *supra* note 5 (outlining past and current rape law reforms and advocating new model theory of rape laws to better capture issues of consent and victim's rights).

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