

Testimony of Quinnipiac University School of Law Civil Justice Clinic

In Support of Raised Bill No. 6641

Judiciary Committee
March 25, 2013

Good morning distinguished Committee Members. My name is Lauren MacDonald, and I am a second-year law student at Quinnipiac University School of Law and a resident of Hamden, Connecticut. I am also a student in the Law School's Civil Justice Clinic, which provides free legal services to indigent people, many of whom have intellectual and physical disabilities. We care about the law's treatment of people with disabilities and we support Raised Bill No. 6641, "An Act Concerning the Sexual Assault of Persons Whose Ability to Communicate Lack of Consent is Substantially Impaired."¹

I. The Current Definition of "Physically Helpless" is an "Unusual and Very Limited Definition."

Connecticut law makes it a crime to engage in sexual intercourse with, or to intentionally subject to sexual contact, a person who is "physically helpless."² "Physically helpless," in turn, has "an unusual and very limited definition."³ Under Connecticut law, a person is "physically helpless" if the person is "unconscious or for any other reason is physically unable to communicate unwillingness to act."⁴ As the Connecticut Supreme Court made clear in the case of *State v. Fournin* last fall, "[t]he term 'physically helpless' has a particular statutory meaning that requires *more* than a showing that a victim is totally physically incapacitated."⁵ As a result, it is not enough that a person is unable to resist unwanted sexual advances; to be considered "physically helpless," a victim must be unable to communicate. As discussed below, few people meet this demanding standard for qualifying as "physically helpless."

A. If you can speak, you are most likely not "physically helpless."

- In *People v. Morales*, a woman with muscular dystrophy, who was paralyzed from the neck down and used a wheelchair, was sexually assaulted by a man who broke into her apartment. The woman verbally protested during the assault but was unable to physically resist the attack due to her paralysis. A New York trial court held that she was not "physically helpless" because she screamed for help.⁶

¹ An Act Concerning the Sexual Assault of Persons Whose Ability to Communicate Lack of Consent is Substantially Impaired, Raised Bill No. 6641 (proposed Jan. 2013) [hereinafter Raised Bill No. 6641], *available at* <http://www.cga.ct.gov/2013/TOB/H/2013HB-06641-R00-HB.htm>.

² CONN. GEN. STAT. ANN. § 53a-71 (West 2011) (second degree sexual assault); CONN. GEN. STAT. ANN. § 53a-73a (West 2011) (fourth degree sexual assault).

³ *State v. Fournin*, 52 A.3d 674, 682 n.14 (Conn. 2012) (quoting *Coley v. State*, 616 So. 2d 1017, 1020 (Fla. Dist. Ct. App. 1993)).

⁴ CONN. GEN. STAT. ANN. § 53a-65 (West 2009).

⁵ *Fournin*, 52 A.3d at 689 (emphasis added); *see also id.* at 681 ("[T]otal physical incapacity does not, by itself, render an individual physically helpless.").

⁶ *People v. Morales*, 528 N.Y.S.2d 286, 287 (Sup. Ct. 1988).

- In *State v. Hufford*, a woman suffering from hyperventilation was strapped to a gurney and sexually assaulted by a paramedic in the back of an ambulance. The Connecticut Supreme Court held that she was not physically helpless because she told the paramedic to stop touching her.⁷
- In *People v. Orda*, a man who was paralyzed from the neck down was sexually assaulted by a home health aide, who removed him from his wheelchair and performed oral sex on him. A New York trial court held that the man was not “physically helpless” because he spit and screamed in protest.⁸
- In *State v. Bucknell*, a woman with Lou Gehrig’s disease, who was paralyzed from the chest down, was sexually assaulted by her brother, who threatened to hurt her if she told anyone. The Washington Court of Appeals held that she was not “physically helpless” because she was able “to talk [and] answer questions.”⁹
- In *People v. Clyburn*, a woman with Huntington’s Disease, which caused her to experience involuntary writhing movements, was sexually assaulted by a man who broke into her bedroom. A New York appeals court held that she was not “physically helpless” because she addressed the man that assaulted her and discussed the assault with two police officers who responded to the scene.¹⁰

B. If you cannot speak, but you can move your body—even just a little—you are most likely not “physically helpless.”

- In *State v. Fourtin*, a woman with cerebral palsy, intellectual disabilities,¹¹ and hydrocephalus, was sexually assaulted by her mother’s boyfriend. Even though she could not speak and could not walk or stand on her own, the Connecticut Supreme Court held that she was not “physically helpless” because she could bite, kick, scratch, screech, groan, and gesture, and she could communicate through the use of an icon-based electronic communication board.¹²
- In *People v. Huurre*, a woman with cerebral palsy, epilepsy, intellectual disabilities,¹³ and “no understandable speech” was sexually assaulted. The Court of Appeals of New York upheld the determination of a lower court that she was not “physically helpless” because she could “make guttural noises” and “understand[] . . . a few signs.”¹⁴

⁷ *State v. Hufford*, 533 A.2d 866, 873 (Conn. 1987).

⁸ *People v. Orda*, 690 N.Y.S.2d 822, 826 (Sup. Ct. 1999).

⁹ *State v. Bucknell*, 183 P.3d 1078, 1081 (Wash. Ct. App. 2008).

¹⁰ *People v. Clyburn*, 623 N.Y.S.2d 448, 449 (App. Div. 1995).

¹¹ A clinical psychologist compared the victim’s “total functioning” to that of a two- to five-year-old child. *Fourtin*, 52 A.3d at 677 n.7.

¹² *Id.* at 695.

¹³ A psychiatrist testified that the victim had the cognitive capacity of a three-year-old child. *People v. Huurre*, 603 N.Y.S.2d 179, 180 (App. Div. 1993), *aff’d*, 645 N.E.2d 1210 (1994).

¹⁴ *Id.*

C. So long as you are awake and can move *something*, you are probably not “physically helpless.”

Because of the high level of limitation necessary to qualify as “physically helpless,” very few people fall within this definition. Generally speaking, in order to be considered “physically helpless,” one must be unconscious, asleep, or incapacitated as a result of drugs or alcohol.¹⁵ Therefore, so long as a person is awake and can move *something*, that person is probably not “physically helpless.”

The *Hufford* and *Fourtin* cases perfectly illustrate just how demanding the “physically helpless” standard is. The victim in *Hufford*, who was completely immobilized after being strapped to a gurney, was not considered “physically helpless” because she could speak. The victim in *Fourtin* could not speak, but she was likewise not considered “physically helpless” because she could communicate “by various [non-verbal] means, including the use of a communication board, as well as by gestures, biting, kicking and screaming.”¹⁶

Given this demanding standard for qualifying as “physically helpless,” one wonders whether a person like world-renowned physicist, Stephen Hawking, would be covered by the law. As a result of amyotrophic lateral sclerosis (ALS), Mr. Hawking is almost completely paralyzed. He uses a wheelchair and speaks through speech-generating computer software that he operates by twitching his cheek.¹⁷ If Mr. Hawking were sexually assaulted, chances are that he would not be considered “physically helpless” because he can move his cheek (not to mention his eye brows and mouth) and use speech-generating computer software.¹⁸

II. The Demanding Standard for Qualifying as “Physically Helpless” Fails to Protect People with Disabilities.

The current definition of “physically helpless” does not adequately protect people with disabilities from sexual assault. By creating an inappropriately demanding standard for qualifying as “physically helpless,” the current definition deprives protection to those who need it most.

¹⁵ See *Fourtin*, 52 A.3d at 684.

¹⁶ *Id.* at 689.

¹⁷ See Damien Gayle, *Stephen Hawking's voice technology overhauled to help his speech keep up with his super-sharp mind*, MAIL ONLINE (Jan. 22, 2003), <http://www.dailymail.co.uk/sciencetech/article-2266289/Stephen-Hawkings-talking-technology-overhauled-help-speech-super-sharp-mind.html>.

¹⁸ In *Fourtin*, the Connecticut Supreme Court explicitly reserved the question of whether a victim who “could communicate via [a] communication board *only*” would be considered “physically helpless.” *Fourtin*, 52 A.3d at 690 n.21 (emphasis added).

A. People with disabilities deserve protection from sexual assault.

According to Connecticut's Office of Protection and Advocacy, people with disabilities are twice as likely to be sexually assaulted as those without disabilities.¹⁹ Research shows that individuals with disabilities are victimized not only by criminals but also by police, who do "not respond to about twenty three percent of [violent] crimes against victims with disabilities."²⁰ Furthermore, these crimes are usually underreported and "those that are reported are rarely prosecuted."²¹

B. The demanding standard for qualifying as "physically helpless" deprives people with disabilities of protection from sexual assault, creating a tragic paradox.

The demanding standard for qualifying as "physically helpless" creates a tragic paradox for many people with disabilities. They are disabled "enough" to be preyed upon, but not disabled "enough" to be protected by laws prohibiting such conduct. As a result, people with disabilities who are sexually assaulted now find themselves in a Catch-22: they can say nothing and allow the violator to offend with impunity, or they can tell someone and find they are not protected under the law because they are not "physically helpless." No matter what they do, people with disabilities find no justice. As Justice Norcott noted in his dissenting opinion in *Fourtin*, unless the definition of "physically helpless" is changed, "individuals with disabilities who are victims of sex crimes will not come forward."²²

III. Raised Bill No. 6641 Protects People with Disabilities by Lowering the Standard for Qualifying as "Physically Helpless."

Raised Bill No. 6641 rightly lowers the standard for qualifying as "physically helpless" under Connecticut law by protecting individuals who are "physically unable to resist an act of sexual intercourse or sexual contact."²³ The Defendant in *Fourtin*, the man who sexually assaulted his girlfriend's daughter, successfully argued to the Connecticut Supreme Court that "[s]tatutes have to mean something and their effects have to have limits."²⁴ This is true as far as it goes, but our argument to you, the legislature, is that those limits must be *reasonable* ones. If the effect of a statute is too constrained, the statute means nothing. That is what has happened here. The demanding standard for qualifying as "physically helpless" deprives protection to virtually anyone who is awake and able to move. This is *not* a reasonable limit, and this is why we need Raised Bill No. 6641.

In conclusion, Connecticut law should not deprive people with disabilities of protection against sexual assault by requiring that they meet a demanding standard for qualifying as "physically

¹⁹ Brief of Amici Curiae Office of Protection and Advocacy for Persons with Disabilities, ARC of Connecticut, and Developmental Disabilities Council of Connecticut, *State v. Fourtin*, 52 A.3d 674 (2012) (No. 18523), 2011 WL 5075537, at *2 [hereinafter Brief of OPA].

²⁰ *Id.*

²¹ *Id.* at *4.

²² *Fourtin*, 52 A.3d at 701 n.22 (quoting Brief of OPA, *supra* note 19).

²³ Raised Bill No. 6641, *supra* note 1.

²⁴ Brief of the Defendant/Appellee, *State v. Fourtin*, 52 A.3d 674 (2012) (No. 18523), 2010 WL 7800158, at *27.

helpless.” The victim in *Fourtin* and the people of Connecticut deserve better, and our laws ought to do better. We urge this Committee to do justice and approve Raised Bill No. 6641.²⁵

Thank you very much for your time and for the opportunity to present this testimony.

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²⁵ Raised Bill No. 6641, *supra* note 1.