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# TONIC IMMOBILITY: THE FEAR-FREEZE RESPONSE AS A FORGOTTEN FACTOR IN SEXUAL ASSAULT LAWS

*Moriah Schiewe\**

## Introduction

It is 2019 and sexual assault is an epidemic. Social media, red carpet events, newspapers, magazines, and talk shows are all abuzz with stories of “the silence breakers” sharing their harrowing accounts of sexual harassment, exploitation, and violence.<sup>1</sup> However, in the courtroom, the conversation remains unchanged. Ninety-nine percent of perpetrators of sexual violence will walk free.<sup>2</sup> Judges perpetuate gender stereotypes and unrealistic expectations of resistance by survivors of sexual assault. Reasoning in sexual assault cases centers around the presumed consent of silenced victims, which mirrors the predatory chants heard on Yale University’s campus in 2011, that, when it comes to consent, “No means yes”.<sup>3</sup>

Originally, state laws defined rape as “the carnal knowledge of a woman when achieved by force by a man other than her husband.”<sup>4</sup> Under the legal principle of coverture, a wife lived in submission to her husband’s authority, so, a wife had no legal right to withhold sex from her

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<sup>1</sup> Stephanie Zacharek, et. al., *Time Person of the Year 2017: The Silence Breakers*, Time Magazine (December 18, 2017). <http://time.com/time-person-of-the-year-2017-silence-breakers/>

\* DePaul University College of Law, J.D. candidate 2019; University of Idaho, B.A. 2015. I dedicate this Note to the numerous sexual assault victims, heard and unheard, who have suffered in silence due to tonic immobility. I am one of you.

<sup>2</sup> Alanna Vagianos, *30 Alarming Statistics That Show The Reality Of Sexual Violence In America*, Huffington Post (April 5, 2017). [https://www.huffingtonpost.com/entry/sexual-assault-statistics\\_us\\_58e24c14e4b0c777f788d24f](https://www.huffingtonpost.com/entry/sexual-assault-statistics_us_58e24c14e4b0c777f788d24f)

<sup>3</sup> John F. Decker and 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 (Fall 2011).

<sup>4</sup> Alanna Vagianos, *30 Alarming Statistics That Show The Reality Of Sexual Violence In America*, Huffington Post (April 5, 2017). [https://www.huffingtonpost.com/entry/sexual-assault-statistics\\_us\\_58e24c14e4b0c777f788d24f](https://www.huffingtonpost.com/entry/sexual-assault-statistics_us_58e24c14e4b0c777f788d24f)

husband and marital rape was perfectly legal.<sup>5</sup> Likewise, slaves had no right to refuse their masters' sexual advances nor could they testify against their masters in court.<sup>6</sup>

In order to secure a rape conviction under common law, there had to be proof that the defendant used force or threat of force.<sup>7</sup> Force is typically defined in terms of the victim's resistance.<sup>8</sup> Today, many states continue to require evidence of force in rape cases.<sup>9</sup> Other states follow a non-consent standard that, on its face, does not require evidence of force in situations where the prosecutor can prove the victim did not give consent to the defendant.<sup>10</sup> However, some non-consent states continue to require proof of forcible compulsion in sexual assault cases that do not involve actual penetration, such as the molestation of a victim.<sup>11</sup>

Perhaps even more shocking are the non-consent states that appear to support convictions where the defendant lacked affirmative consent of the victim, but in reality still require the prosecution to prove "lack of consent" through either the use of force or lack of capacity.<sup>12</sup> Even Illinois, which is one of only a few states that "supposedly" utilizes an affirmative consent standard, continues to require the prosecution to prove lack of affirmative consent through evidence of force.<sup>13</sup> Alternatively, New Jersey is the only state that applies an affirmative consent standard that not only requires consent to be both affirmative and freely given, but also allows penetration alone to satisfy the required proof of force in rape cases.<sup>14</sup>

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<sup>5</sup> Estelle B. Freedman, *Women's long battle to define rape*, THE WASHINGTON POST (August 24, 2012), [https://www.washingtonpost.com/opinions/womens-long-battle-to-define-rape/2012/08/24/aa960280-ed34-11e1-a80b-9f898562d010\\_story.html?utm\\_term=.7464f22ec4d6](https://www.washingtonpost.com/opinions/womens-long-battle-to-define-rape/2012/08/24/aa960280-ed34-11e1-a80b-9f898562d010_story.html?utm_term=.7464f22ec4d6)

<sup>6</sup> *Id.*

<sup>7</sup> John F. Decker and 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 (Fall 2011).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1083

<sup>10</sup> *Id.* at 1084

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1085

<sup>13</sup> *Id.*

<sup>14</sup> *State of New Jersey in the Interest of M.T.S.*, 129 N.J. 422 (Sup. Ct. N.J. 1992).

Additionally, the prosecution, more often than not, has to prove that a victim resisted the defendant during an attack.<sup>15</sup> Some states explicitly require proof that the victim resisted as an element of the crime, whereas other states use resistance of the victim to define force and non-consent.<sup>16</sup> Across all states, proving resistance of the victim is often a hurdle the prosecution must overcome to secure a conviction in sexual assault cases.

Given the requirement to prove resistance, courts often digress into an analysis of whether or not the victim made any effort to resist the defendant and, if so, whether or not that resistance was enough to put the defendant on notice of the victim's refusal to consent.<sup>17</sup> In reality, the requirement of resistance is difficult to satisfy. For example, in *State v. Alston*, the Supreme Court of North Carolina overturned a second-degree rape conviction because the Court found that, even though the defendant engaged in intercourse against the victim's will, the prosecution lacked sufficient evidence of physical resistance by the victim.<sup>18</sup> Similarly, in *Commonwealth v. Berkowitz*, the Supreme Court of Pennsylvania overturned a conviction of forcible rape. Despite the victim's verbal resistance of repeatedly saying "no" there was enough evidence to prove forcible compulsion.<sup>19</sup> The Court noted lack of consent is not equal to forcible compulsion, because forcible compulsion requires proof that the defendant's use or threat of force was severe enough to prevent resistance by a reasonable person.<sup>20</sup>

The requirements to prove force and resistance in sexual assault cases has sparked much debate in the legal community. Most of this debate is founded on the assumption that victims,

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<sup>15</sup> John F. Decker and 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, 1101 (Fall 2011).

<sup>16</sup> *Id.* at 1102

<sup>17</sup> See *State v. Alston*, 310 N.C. 399 (Sup. Ct. N.C. 1984), See also *Com. v. Berkowitz*, 537 Pa. 143 (Sup. Ct. Penn. 1994).

<sup>18</sup> *State v. Alston*, 310 N.C. 399 (Sup. Ct. N.C. 1984).

<sup>19</sup> *Com. v. Berkowitz*, 537 Pa. 143 (Sup. Ct. Penn. 1994).

<sup>20</sup> *Id.*

when faced with the risk of harm, are able to actively respond through either fight or flight to perpetrator's actions. However, one piece of the puzzle that has been left out of the discussion is tonic immobility.

Tonic immobility ("TI") is a natural freezing response to trauma found in animals and humans.<sup>21</sup> There are three possible responses to trauma: fight, flight, or tonic immobility.<sup>22</sup> When they believe that they are able to overcome their aggressor then they will stay and fight the aggressor.<sup>23</sup> When a victim believes that they are capable of escaping a dangerous situation they will often respond to an aggressor's threat with flight.<sup>24</sup> However, when a victim finds themselves in a dangerous situation in which they can neither escape nor overcome tonic immobility is triggered.

Tonic immobility is characterized by physical immobility, muscular rigidity, and lack of response to stimulation.<sup>25</sup> This response renders the victim incapable of responding to their aggressor. While the victim may physically freeze, tonic immobility does not affect the mental awareness or cognition of the victim. Thus, "although unable to resist or flee" victims oftentimes "are actively processing features of the event and the environment".<sup>26</sup> Researchers discovered tonic immobility is a product of evolutionary adaption that provides prey with a plethora of benefits, such as avoidance of attacks, lower kill rates, and decreased blood loss.<sup>27</sup>

In scientific and medical communities, tonic immobility is widely associated with sexual assault victims. This is what was originally described as "rape-induced paralysis".<sup>28</sup> The

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<sup>21</sup> Brian P. Marx, et. al., *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivor*, *Clinical Psychology: Science and Practice* 74-90 (February 16, 2008).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

scientific community widely accepts the fact that many victims of sexual assault experience some variation of tonic immobility that renders the victim incapable of moving, escaping, fighting back, or calling out during instances of sexual assault.<sup>29</sup>Victims who respond to trauma with tonic immobility are oftentimes repeat victims of sexual abuse and are at a higher risk of developing post-traumatic stress disorders.<sup>30</sup>

Despite the overwhelming scientific research and studies linking sexual assault to experiences of tonic immobility, states continue to require proof of victim resistance to demonstrate the elements of force and non-consent in sexual assault cases. State laws and the judges who interpret and apply those laws continue to hold prosecutors to a high standard of proof based on the faulty assumption that victims are capable of actively responding to threats of sexual assault. Research supports that tonic immobility in victims essentially renders the prosecution incapable of proving resistance, force, and non-consent in cases of sexual assault. Given the current research that supports the natural response of tonic immobility in victims of sexual assault, states must reform their current sexual assault laws by incorporating TI into their existing incapacity-to-resist-or-consent provisions, integrating a resistance exemption for cases involving TI, and adopting a *per se* non-consenting provision for victims who are able to establish an occurrence of TI in their case.

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<sup>29</sup> *Id.*, See also Sunda Friedman TeBockhorst et. al., *Tonic immobility among survivors of sexual assault*, Psychological Trauma: Theory, Research, Practice, and Policy, Vol 7(2), 171-178 (March 2015), A.W. Coxell and M.B. King, *Adult male rape and sexual assault: prevalence, re-victimisation and tonic immobility response*, Sexual & Relationship Therapy, 372-379 (November 2010), Arturo Bados, et. al., *Traumatic Events and Tonic Immobility*, The Spanish Journal of Psychology, Vol. 11, 516-521 (2008).

<sup>30</sup> Sunda Friedman TeBockhorst et. al., *Tonic immobility among survivors of sexual assault*, Psychological Trauma: Theory, Research, Practice, and Policy, Vol 7(2), 171-178 (March 2015), See also Brian R. Van Buren and Mariann R. Weierich, *Peritraumatic Tonic Immobility and Trauma-Related Symptoms in Adult Survivors of Childhood Sexual Abuse: The Role of Posttrauma Cognitions*, Journal of Child Sexual Abuse (November-December 2015).

## Thesis

Tonic immobility (TI) is an evolved predator defense that causes a victim to freeze when they are faced with a real the threat of danger. Despite evidence that nearly half of all sexual assault victims experience TI, it has been largely ignored by the legal community. Although most states require proof of a victim's active resistance to establish the essential elements of force and non-consent in sexual assault cases, states should reform existing sexual assault laws by (1) incorporating tonic immobility into their already existing incapacity to resist or consent provisions, (2) integrating a resistance exemption, and (3) adopting a *per se* non-consenting provision for victims who are able to establish an occurrence of TI in their case. These reforms should be enacted for several reasons, first resistance requirements are rooted in faulty, archaic notions about women as victims. Second, resistance is an impossible standard to meet in cases where the victim experienced tonic immobility, since recent medical and scientific research indicates that tonic immobility renders almost half of all victims of sexual assault incapable of responding to or resisting their attacker. Next, the continual adherence to resistance as proof of assault perpetuates a cycle of victim blaming, repeated victimization, and domination within the legal system. Finally, tonic immobility, by its very nature, is a biological corroborator of a victim's non-consent to their attacker's sexual advances.

## Evolution of Sexual Assault Laws

Throughout history, women have been subjected to unwanted sexual advances in the workplace, home, and on the streets. Along with the history of victimization comes a history of victim blaming. Women are often blamed for unwanted sexual advances and are left with little to no legal recourse. For example, slaves and household servants were historically considered responsible for their own suffering of sexual harassment and assault because they were seen by society as inherently promiscuous.<sup>31</sup>

At common law, rape was considered the “carnal knowledge of a woman forcibly and against her will”.<sup>32</sup> Originally, laws against sexual assault were created for the purpose of protecting the rights of men, not women.<sup>33</sup> At common law, women were unable to pursue legal recourse against their attacker in the form of a civil suit because sexual assault only gave rise to a tortious action for damages based on an injury to a man’s property interest in the woman who was assaulted.<sup>34</sup> For example, a father could make a claim against his daughter’s attacker or a husband against his wife’s attacker, but the actual victim was not entitled to damages.<sup>35</sup>

Nevertheless, women were required to satisfy an exceptionally high standard of proof in order to secure a rape conviction against their attacker.<sup>36</sup> The victim was required to prove three elements: the sex was nonconsensual, the sex was coerced by force and against her will, and that she exercised her “utmost resistance” but was overpowered by the attacker’s physical force.<sup>37</sup>

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<sup>31</sup> See Catharine A. MacKinnon and Reva B. Siegel, *Directions in Sexual Harassment Law: A Short History of Sexual Harassment*, Yale Press 3 (2003).

<sup>32</sup> John F. Decker and 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 (Fall 2011).

<sup>33</sup> See Catharine A. MacKinnon and Reva B. Siegel, *Directions in Sexual Harassment Law: A Short History of Sexual Harassment*, Yale Press 5 (2003).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 5.

<sup>37</sup> *Id.* at 4.



The standard of “utmost resistance” required more than physical force on behalf of the victim.<sup>38</sup>

The stringency of this standard is well documented in New York’s 1874 decision, *People v.*

*Dohring*. In *Dohring*, the court denied a rape charge where a man forcibly assaulted his 14-year-old maid after locking her in his barn.<sup>39</sup> In deciding that the young girl’s resistance was not enough to satisfy a finding of rape, the court reasoned:

Can the mind conceive of a woman, in the possession of her faculties and powers, revoltingly unwilling that this deed should be done upon her, who would not resist so hard and so long as she was able? And if a woman, aware that it will be done unless she does resist, does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant? If consent, though not express, enters into her conduct, there is no rape.<sup>40</sup>

*Dohring* is a perfect example of the long-standing interplay between the concept of rape, resistance, and consent. The presumption was women secretly desired the unwanted advances that men perpetrated against them. Thus, the only way to overcome this presumption was to show the woman exercised her utmost resistance against her perpetrator. However, utmost resistance was loosely defined as a victim striking, biting, kicking, and screaming at her attacker.<sup>41</sup> Seventeenth Century treatise stated utmost resistance required “some marks of violence upon the person of the alleged ravished women.” Further the treatises noted the victim’s “statement is greatly strengthened if the marks are found to have been present and seen by others immediately after the commission of the offense.”<sup>42</sup> These types of archaic standards placed a heavy burden of proof upon victims of sexual assault and perpetuated sexist stereotypes about promiscuous women who “cry rape.”

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<sup>38</sup> *Id.*

<sup>39</sup> *People v. Dohring*, 14 N.Y. 374 (1847).

<sup>40</sup> *Id.* at 384.

<sup>41</sup> Ira M. Moore, *A Practical Treatise on Criminal Law and Procedure in Criminal Cases Before Justices of the Peace and in Courts of Record in the State of Illinois* 299-301 (1876).

<sup>42</sup> *Id.*

## Current Sexual Assault Laws

### *Force States*

The majority of states require rape victims to prove the existence of three factors to secure a rape conviction: (1) sexual intercourse, (2) that occurred non-consensually, and (3) involved the use of or threat of force.<sup>43</sup> Force is often defined and argued within the context of the victim's resistance to a show of force by their attacker.<sup>44</sup> Thus, when determining the element of force in sexual assault cases, courts consider whether the victim made an "honest" effort to resist the attacker.<sup>45</sup>

For example, in *Commonwealth of Pennsylvania v. Berkowitz*, the defendant started to undress a college student, groped her breasts, and put his penis in her mouth without her consent.<sup>46</sup> The defendant continued his assault by pushing the victim onto his bed, taking her underwear off, and penetrating her.<sup>47</sup> The victim tried to leave the room during the assault but the defendant locked the door. The victim also testified that she repeatedly said "no" throughout the encounter.<sup>48</sup> However, the court refused to uphold a rape conviction and cited a lack of evidence regarding the use of force. The court reasoned the victim had not done enough to resist the defendant's advances.<sup>49</sup> The court emphasized that the defendant did not physically nor verbally threaten the victim and the victim made little to no effort to resist him. Overall, saying

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<sup>43</sup> John F. Decker and 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 (Fall 2011).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Com. v. Berkowitz*, 537 Pa. 143 (Sup. Ct. Penn. 1994).

<sup>47</sup> *Id.* at 147.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 148.

“no” and trying to leave the room was not enough to prove resistance and the use of force because the victim could have done more to resist the advances against her.<sup>50</sup>

### *Non-Consent States*

There are two types of non-consent states: true non-consent states and contradictory non-consent states.<sup>51</sup> True non-consent states allow some sort of sexual offense conviction without proof of force.<sup>52</sup> The prosecution only has to prove that the sexual act was non-consensual.<sup>53</sup> However, only 17 out of the 28 non-consent states allow a rape conviction without proof of force.<sup>54</sup> The remaining 11 states only allow a sexual assault conviction without proof of force for lesser offenses that do not involve actual penetration, but only sexual contact (such as molestation or sexual battery).<sup>55</sup>

Contradictory non-consent states have statutory definitions that contradict the non-consent language featured in their sexual assault laws.<sup>56</sup> Alabama, Alaska, Arizona, Delaware, Iowa, Kentucky, Montana, New York, and Texas all have at least one law in which a sexual offense appears on its face to be punishable so long as the prosecution can prove that the act was non-consensual.<sup>57</sup> Yet, these states’ feature statutory definitions that contradict and negate the meaning of non-consent laws by requiring proof of force or threat of force to prove the act was in fact non-consensual.<sup>58</sup> This, in effect, requires proof of victim resistance. For example, Alabama’s criminal code alludes that the prosecution can secure criminal convictions in sexual

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<sup>50</sup> *Id.* at 149.

<sup>51</sup> John F. Decker and 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 (Fall 2011).

<sup>52</sup> *Id.* at 1084.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1091.

<sup>58</sup> *Id.*

assault cases so long as they can prove that the act was non-consensual. However, lack of consent is defined as resulting from: “Forcible compulsion or incapacity to consent, or if the offense is sexual abuse, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor’s conduct.”<sup>59</sup> This statutory definition contradicts and functionally negates the non-consent law by still requiring proof of incapacity or force, which is argued within the context of victim resistance.

### *Affirmative Consent*

A few states, such as Illinois, Wisconsin, and New Jersey, have transitioned towards an affirmative consent standard, however, each state has a different way of defining and implementing affirmative consent. Although statutory definitions vary, affirmative consent is typically characterized as a “freely given agreement” to engage in sexual conduct.<sup>60</sup> However, Wisconsin and Illinois continue to require proof of force or threat of force to prove lack of consent.<sup>61</sup> The force requirement functionally negates the benefits of adopting an affirmative consent standard.<sup>62</sup> New Jersey is the only state that allows proof of penetration, alone, to constitute force.<sup>63</sup>

New Jersey is the only state to allow a rape conviction when there is only evidence of sexual intercourse and a lack of affirmative consent.<sup>64</sup> In New Jersey, the actual act of penetration without affirmative consent itself is allowed to be treated as proof of force.<sup>65</sup> Thus,

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<sup>59</sup> § 13A-6-70

<sup>60</sup> See 720 Ill. Comp. Stat. Ann. 5/11-1.70 (West Supp. 2011) (“a freely given agreement to the act of sexual penetration or sexual conduct...”); Wis. Stat. Ann. §940.225(4) (West 2005 & Supp. 2010) (“words or overt actions ... indicating a freely given agreement”).

<sup>61</sup> *Id.*

<sup>62</sup> John F. Decker and 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 1085 (Fall 2011).

<sup>63</sup> See *State of New Jersey in the Interest of M.T.S.*, 129 N.J. 422 (Sup. Ct. N.J. 1992).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

the prosecution does not bear the burden of proving that the victim resisted, but rather, the prosecution only has to prove that the victim did not give their express consent to the sexual acts of the defendant.<sup>66</sup>

This is seen in *State of New Jersey in the Interest of M.T.S.* In *M.T.S.*, the defendant went into the young victim's room at night, while she was asleep, and took her clothes off. The defendant then proceeded to penetrate the victim without her consent.<sup>67</sup> The victim woke up to the defendant laying on top of her while he was still penetrating her.<sup>68</sup> The victim was terrified, slapped the defendant, and told him to get off of her and get out of her room.<sup>69</sup> As a result of the assault, she screamed and cried.<sup>70</sup>

The court found the defendant guilty of rape.<sup>71</sup> The court reasoned that although the plain language of New Jersey's statute requires some proof of force in rape cases, the element of force can be satisfied by proving that the defendant penetrated the victim without the victim's affirmative consent.<sup>72</sup> Thus, the act of non-consensual penetration is, itself, an act of force. The prosecution must only prove that the defendant lacked the affirmative consent of the victim and no proof of resistance is required.

### Tonic Immobility as Proof of Non-consent

Tonic immobility should be treated as sufficient proof of non-consent in sexual assault cases. TI is an evolved predator defense that the body employs when it feels threatened, like in a situation where a predator is attacking its prey.<sup>73</sup> TI is a natural and involuntary response which

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1268.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1277.

<sup>72</sup> *Id.*

<sup>73</sup> Brian P. Marx, et. al., *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivor*, *Clinical Psychology: Science and Practice* 75 (February 16, 2008).

cannot be controlled by the victim.<sup>74</sup> It is triggered when a victim is faced with a threat and they are unable to either flee or fight off their attacker.<sup>75</sup> By its very nature, TI would only be triggered in sexual assault cases involving non-consent and intense fear on the part of the victim. So, TI does not occur in cases where the victim consents to the attacker's advances.

Therefore, TI should be treated as sufficient proof of non-consent and victims who are able to establish an occurrence of TI during sexual assault, through expert testimony or otherwise, be treated as *per se* non-consenting. At the very least, States could include TI in their already existing incapacity to consent or resist provisions. Preferably, states could reform their existing sexual assault laws to incorporate a resistance exemption and *per se* non-consenting provision for victims who are able to establish an occurrence of TI in their case.

## Proof of Resistance

At common law, victims of sexual assault were required to prove that they resisted the defendant.<sup>76</sup> Over the years, many states eliminated resistance as an explicit requirement of proving sexual assault under the facade of victim-friendly reform. However, a closer examination of current sexual assault laws reveals the active reliance on resistance as an indicator of a victim's non-consent and a defendant's use of force.<sup>77</sup> Thus, resistance is alive and well in today's courtroom.

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup>“At common law, the state had to prove beyond a reasonable doubt that the woman resisted her assailant to the utmost of her physical capacity to prove that an act of sexual intercourse was rape.” John F. Decker and 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 1101 (Fall 2011) (citing Michelle J. Anderson, Reviving Resistance in Rape Law, 1998 U. Ill. L. Rev. 953, 962).

<sup>77</sup> *Id.*

### *Resistance and Current Laws*

Some states attempted to modernize their laws by lessening the standard of resistance from common law's strict standard of "utmost resistance" to "reasonable resistance" or simple resistance.<sup>78</sup> The resistance requirement can take several different forms: (1) resistance to prove non-consent of the victim, (2) resistance to prove the defendant's use of force, and (3) resistance to prove that the victim put the defendant on notice of non-consent during the assault.<sup>79</sup>

For example, Louisiana requires the original common law standard of "utmost resistance" on the part of the victim in order to secure a rape conviction.<sup>80</sup> Eight other states continue to require victim resistance to prove either force or consent.<sup>81</sup> Seven states do not explicitly require proof of resistance, but require proof that the victim's will was overcome in some way by the defendant.<sup>82</sup> Other states appear to have eliminated resistance from their sexual assault laws, but many of these states still incorporate proof of resistance or lack thereof into sexual assault cases.<sup>83</sup> Maine's relevant statutory provision states that the victim does not have a "duty to resist" in order to demonstrate compulsion, yet the element of force or threat of force necessary to prove compulsion actually requires proof that the victim was unable to resist or "physically repel", the defendant.<sup>84</sup> Some states even define requirements, such as consent or force, through the victim's resistance.<sup>85</sup> Altogether, resistance still plays an active role in sexual assault cases.

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<sup>78</sup> *Id.* at 1103.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*, See also La. Rev. Stat. Ann. §14:42(A)(1) (2007) (requiring "the victim resist the act to the utmost" for the crime of first degree rape).

<sup>81</sup> Alabama, Delaware, Idaho, Louisiana, Montana, Nebraska, Washington, and West Virginia continue to require proof of resistance. John F. Decker and 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 1103 (Fall 2011).

<sup>82</sup> *Id.* at 1106.

<sup>83</sup> *Id.* at 1108.

<sup>84</sup> *Id.* at 1110. See also Me. Rev. Stat. Ann. tit. 17-A, §251(1)(E).

<sup>85</sup> *Id.* at 1092,1111.

### *The Myth of Resistance as Necessity*

Resistance is not necessary to corroborate a victim's testimony nor is it necessary to avoid faulty claims of TI by victims. Therefore, resistance should be disregarded in today's courtrooms.

Some argue that proof of resistance is necessary to ensure the sexual conduct was in fact, non-consensual. This argument dates back to older cases, such as *People v. Dohring*.<sup>86</sup> This traditional viewpoint asserts that resistance is necessary to corroborate a victim's account of sexual assault. The inherent assumption is that a woman's testimony about sexual assault cannot be trusted on its face. Instead, her words must be corroborated by signs of resistance in order to protect an innocent man from the false testimony of a lying woman. Resistance can also help avoid a classic "he said, she said" conflict in the courtroom.

Additionally, some proponents of more traditional rape laws, which include elements of resistance, claim that modern reforms largely ignore the male perspective and are now too female-centric.<sup>87</sup> Some believe that rape law reform victimizes men by over-sexualizing them while ignoring women's objectification of men.<sup>88</sup> Others harken back to a simpler time where fathers taught their daughters how to "properly respond" to unwanted sexual advances through actively resisting and escaping the situation.<sup>89</sup> Proponents of traditional rape laws and resistance requirements call for a rollback in recent reform because reforms lead to "he sad-she said debacles" and criminalize men "for not being able to read a girl's mind".<sup>90</sup> Hence, proof of resistance is necessary in sexual assault cases.

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<sup>86</sup> *People v. Dohring*, 14 N.Y. 374 (1847).

<sup>87</sup> Sydney Watson, *The Uncomfortable Truth About Rape*, Women Against Feminism (September 12, 2017). <http://womenagainstfeminism.com/the-uncomfortable-truth-about-rape/>

<sup>88</sup> *Id.*

<sup>89</sup> Kathleen Parker, Rape California-Style is a Woman's Prerogative, Orlando Sentinel, Jan. 12, 2003. [http://articles.chicagotribune.com/2003-01-15/news/0301150309\\_1\\_conviction-boy-girls](http://articles.chicagotribune.com/2003-01-15/news/0301150309_1_conviction-boy-girls)

<sup>90</sup> *Id.*



In reality, requiring proof of resistance not only perpetuates a cycle of victim blaming, it is also an impossible standard to meet in cases involving tonic immobility. Tonic immobility is a natural, involuntary, evolved predator defense mechanism that temporarily renders a victim incapable of resisting or responding to their attacker either physically or verbally.<sup>91</sup> Studies have shown that between 41.7% to 52% of victims experience tonic immobility during an incident of sexual assault.<sup>92</sup> This means that nearly half of all sexual assaults involve victims who are incapable of resisting their attacker. Requiring or expecting proof of victim resistance in cases involving TI is an impossible standard to meet. Furthermore, the expectation of active victim resistance in the form of either fight or flight perpetuates a cycle of victim blaming through reinforcing the idea that victims who experience TI responded inappropriately to the threat of sexual assault.

Despite the assumption that many women “cry rape”, sexual assault is one of the most underreported crimes. However, the vast majority of sexual assaults reported are found to be accurate and truthful.<sup>93</sup> Further, new advances in technology, such as DNA evidence and rape kits, help provide additional evidence to corroborate victims’ accounts and expert testimony can be used to establish the existence of TI. Moreover, once a victim is able to establish that they experienced TI, the occurrence of TI, by its very nature, acts as a biological corroborator that the

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<sup>91</sup> Brian P. Marx, et. al., *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivor*, *Clinical Psychology: Science and Practice*, 74-91 (February 16, 2008).

<sup>92</sup> See Lori A. Zoellner, *Translational Challenges With Tonic Immobility*, *Clinical Psychology: Science and Practice*, Vol. 15, pp. 98-101 (February 16 2008) (citing Heidt, J.M., Marx, B.P. & Forsyth, J.P., *Tonic immobility and childhood sexual abuse: Evaluating the sequel of rape-induced paralysis*. *Behavior Research and Therapy*, 43, p. 1157-1171 (2005), Fuse, T., Forsyth, J.P., Marx, B.P., Gallup, G.G., & Weaver, S., *Factor structure of the tonic Immobility Scale in female survivors of sexual assault: An exploratory and confirmatory factor analysis*, *Journal of Anxiety Disorders*, Marx, B.P., Forsyth, J.P., Gallup, G.G., Fuse, T. & Lexington, J.M., *Tonic Immobility as an evolved predator defense: Implications for sexual assault survivors*. *Clinical Psychology: Science and Practice*, 15, 74-90 (2008)).

<sup>93</sup> National Sexual Violence Resource Center. (2011). Child sexual abuse prevention: Overview. Retrieved from [http://www.nsvrc.org/sites/default/files/Publications\\_NSVRC\\_Overview\\_Child-sexual-abuse-prevention\\_0.pdf](http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_Child-sexual-abuse-prevention_0.pdf)

victim did not consent to the attacker's sexual advances.<sup>94</sup> Thus, proof of resistance is unnecessary since the occurrence of TI itself is conclusive evidence that the victim felt threatened by the perpetrator and their sexual conduct was non-consensual.

### ***Resistance, Consent and Force***

While many states do not explicitly require proof of resistance, most states continue to define the necessary elements of force and consent in terms of the victim's resistance or lack thereof.<sup>95</sup> State laws continue to require proof that the victim was incapable, unable, or somehow prevented from resisting their attacker in order to establish non-consent and use of force.<sup>96</sup> However, almost all incapacity to resist provisions focus on physical disability, involuntary intoxication, and the defendant's use of a weapon.<sup>97</sup> The provisions are very restrictive in their application and they do not account for incapacity due to other factors, such as TI. As a result, most victims are still expected to resist or flee from their attackers during sexual assault and lack of resistance is treated by courts as an indicator of consent or lack of force in sexual assault cases.

## Tonic Immobility

Most people are familiar with two natural responses to fear and trauma in humans: fight or flight. However, modern psychophysiological research challenges the traditional dichotomy of fight or flight by introducing a third possible response: the fear-freeze response. The fear-freeze response is known as tonic immobility.<sup>98</sup> TI is a natural freeze response that is triggered when

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<sup>94</sup> Brian P. Marx, et. al., *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivor*, Clinical Psychology: Science and Practice (February 16, 2008).

<sup>95</sup> John F. Decker and 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 1110 (Fall 2011).

<sup>96</sup> *Id.*

<sup>97</sup> Brian P. Marx, et. al., *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivor*, Clinical Psychology: Science and Practice (February 16, 2008).

<sup>98</sup> *Id.*

someone<sup>99</sup> believes that they are neither capable of escaping a dangerous situation (flight response) nor able to overcome their aggressor (fight response).<sup>100</sup> Instead of fleeing or fighting their aggressor, the fearful person will respond by freezing due to tonic immobility.

### *Characteristics of Tonic Immobility*

TI renders the victim incapable of responding or resisting their aggressor. Thus, the victim will experience automatic physical immobility and muscular rigidity. Some victims also experience “intermittent periods of eye closure, fixed, unfocused gaze or stare, Parkinsonian-like tremors in the extremities, suppressed vocal behavior, analgesia,<sup>101</sup> and waxy flexibility.”<sup>102</sup> TI is also characterized by unresponsiveness to painful stimulation<sup>103</sup> and in some cases a sensation of cold numbness.<sup>104</sup>

TI is not the same as learned helplessness.<sup>105</sup> TI is a natural and biological response that cannot be overcome by the willpower of the victim.<sup>106</sup> Additionally, it is important to note that although the victim is rendered incapable of responding to stimuli, research suggests that TI does not disrupt the victim’s memory or consciousness.<sup>107</sup> In fact, victims experiencing TI are not only well aware of their surrounding environment, they are also actively processing information, and remaining highly alert throughout the traumatic event.<sup>108</sup>

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<sup>99</sup> Tonic immobility was originally observed in animals. For the sake of this paper, I will refer to the effects of tonic immobility primarily within the context of the human experience. *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Analgesia is defined as an “insensibility to pain without loss of consciousness”. Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/analgesia> (April 29, 2018).

<sup>102</sup> See Brian P. Marx, et. al., *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivor*, *Clinical Psychology: Science and Practice* 75 (February 16, 2008).

<sup>103</sup> *Id.* at 75-76.

<sup>104</sup> See Arturo Bados, et. al., *Traumatic Events and Tonic Immobility*, *The Spanish Journal of Psychology*, Vol. 11, 517 (2008).

<sup>105</sup> See Brian P. Marx, et. al., *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivor*, *Clinical Psychology: Science and Practice* 76 (February 16, 2008).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

### ***Tonic Immobility as an Evolved Predator Defense***

TI is classified as an “evolved predator defense”.<sup>109</sup> Scientists believe that TI is an evolutionary adaptive survival strategy that offers the victim a unique set of benefits.<sup>110</sup> For example, TI actually serves as a natural signal of danger that warns others of approaching danger.<sup>111</sup> TI also functions as an effective inhibitor of aggression in predators and can actually decrease the predator’s attack-kill response.<sup>112</sup> Studies have also indicated that TI can lower the victim’s blood pressure and can actually lead to a decrease in blood loss when the victim is injured by their attacker.<sup>113</sup> In cases involving rape, TI may help the victim avoid inducing further rage in their attacker and help the victim avoid additional physical harm and brutality.<sup>114</sup> Therefore, TI acts as an effective evolutionary adaptive survival strategy that helps the victim avoid an attack, and if they are attacked helps the victim avoid massive blood loss while increasing their chances of survival.

### ***Tonic Immobility in Sexual Assault Victims***

Victims of sexual assault have historically reported loss of mobility and incapability of verbally calling out during an assault.<sup>115</sup> This response was previously known as “rape-induced paralysis”<sup>116</sup> and this freezing phenomenon was studied as early as the 1970s.<sup>117</sup> In one early study, victims of sexual assault described their experiences by saying, “I felt faint, trembling and

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<sup>109</sup> See Sunda Friedman TeBockhorst et. al., *Tonic immobility among survivors of sexual assault*, Psychological Trauma: Theory, Research, Practice, and Policy, Vol 7(2), 171 (March 2015).

<sup>110</sup> *Id.* at 76.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 79.

<sup>115</sup> *Id.* at 78.

<sup>116</sup> *Id.*

<sup>117</sup> See Michelle J. Bovin, et. al., *Does Guilt Mediate the Association Between Tonic Immobility and Posttraumatic Stress Disorder Symptoms in Female Trauma Survivors?*, Journal of Traumatic Stress, Vol. 27, 721 (December 2014).

cold... I went limp” and “My body went absolutely stiff”.<sup>118</sup> Eventually, psychologists realized that what was being described as “rape-induced paralysis” was in fact a manifestation of TI in humans.<sup>119</sup> In fact, the manifestation of TI in humans was first identified and studied in victims of sexual assault.<sup>120</sup> However, it is worth noting that TI is not exclusively experienced in victims of sexual assault but can also be found in people experiencing other forms of extreme trauma.<sup>121</sup>

The prevalence of TI in sexual assault victims<sup>122</sup> is largely credited to the fact that incidents of sexual assault incorporate elements of fear, contact, and restraint.<sup>123</sup> Each of these elements plays a key role in triggering the TI response in sexual assault victims.<sup>124</sup> Women<sup>125</sup> who experience tonic immobility during incidents of sexual assault remain mentally alert but are

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<sup>118</sup> *Id.*, See also A.W. Burgess and L.L. Holmstrom, *Coping behavior of the rape victim*, American Journal of Psychiatry 233,416 (1976).

<sup>119</sup> Brian P. Marx, et. al., *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivor*, Clinical Psychology: Science and Practice 78 (February 16, 2008).

<sup>120</sup> See Michelle J. Bovin, et. al., *Does Guilt Mediate the Association Between Tonic Immobility and Posttraumatic Stress Disorder Symptoms in Female Trauma Survivors?*, Journal of Traumatic Stress, Vol. 27, 721 (December 2014).

<sup>121</sup> See Arturo Bados, et. al., *Traumatic Events and Tonic Immobility*, The Spanish Journal of Psychology, Vol. 11, pp. 517 (2008). A study at the University of Barcelona indicates that tonic immobility may not be limited to experiences of sexual assault. In 2008, researchers conducted a study of students at the University of Barcelona. The participants were primarily single (88%) female (87%) students. The questionnaire assessed the occurrence of traumatic events in the lives of each participant and their experience with each traumatic event. The study indicated that tonic immobility occurs most often when a person has a direct experience with personal trauma, rather than receiving news of traumatic event second hand (i.e. receiving news of a violent or sudden death of a loved one). The study also concluded that tonic immobility is not exclusively experienced in sexual assault victims but may also occur in victims of other types of trauma. However, very limited research has been done on the occurrence of tonic immobility in humans who experience trauma unrelated to sexual assault.

<sup>122</sup> Recent studies have indicated high rates of TI in sexual assault victims. Studies indicate that anywhere between 41.7% to 52% of survivors have experienced TI during an incident of sexual assault. See Lori A. Zoellner, *Translational Challenges With Tonic Immobility*, Clinical Psychology: Science and Practice, Vol. 15, 98-101 (February 16 2008) (citing Heidt, J.M., Marx, B.P. & Forsyth, J.P., *Tonic immobility and childhood sexual abuse: Evaluating the sequel of rape-induced paralysis*. Behavior Research and Therapy, 43, 1157-1171 (2005), Fuse, T., Forsyth, J.P., Marx, B.P., Gallup, G.G., & Weaver, S., *Factor structure of the tonic Immobility Scale in female survivors of sexual assault: An exploratory and confirmatory factor analysis*, Journal of Anxiety Disorders, Marx, B.P., Forsyth, J.P., Gallup, G.G., Fuse, T. & Lexington, J.M., *Tonic Immobility as an evolved predator defense: Implications for sexual assault survivors*. Clinical Psychology: Science and Practice, 15, 74-90 (2008)).

<sup>123</sup> *Id.* at 79.

<sup>124</sup> *Id.*

<sup>125</sup> Although not as common, tonic immobility is also experienced in male victims of sexual assault. See A.W. Coxell and M.B. King, *Adult male rape and sexual assault: prevalence, re-victimisation and tonic immobility response*, Sexual & Relationship Therapy 372-379 (November 2010).

incapable of actively resisting their aggressor.<sup>126</sup> Victims who experience TI typically have shared symptoms and have similar experiences during and after the sexual assault. For example, victims experience overwhelming confusion, extreme terror, eye closure or avoidance of eye contact with the perpetrator, paralysis, an intense urge to flee, physical numbness, and vivid memories of the sexual assault and the perpetrator's departure.<sup>127</sup> Following sexual assault, victims that experienced TI often suffer from feelings of intense guilt and shame followed by an ongoing fear of TI reoccurrence, known as "the shadow of tonic immobility".<sup>128</sup>

As mentioned above, most victims who experience TI have extraordinarily clear, vivid, and intense sensory memories of their sexual assault.<sup>129</sup> Studies indicate TI actually enhances the quality of a victim's memory and victims who experienced TI are more likely to be haunted by reoccurring vivid memories of the sexual assault.<sup>130</sup> Although victims who experience TI are rendered incapable of resisting or responding to their attacker, their accounts of the incident remain credible.

Moreover, since TI is an evolved predator defense, it is only triggered in victims who perceived their attacker as a threat to their own safety. Thus, TI itself is a clear indicator that a victim did not consent to the sexual advances of their attacker. Instead, TI acts as a biological marker denoting a victim's non-consent.

## Cyclical Victimization and Domination

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<sup>127</sup> Sunda Friedman TeBockhorst et. al., *Tonic immobility among survivors of sexual assault*, Psychological Trauma: Theory, Research, Practice, and Policy, Vol 7(2), 173 (March 2015).

<sup>128</sup> *Id.* at 173-174.

<sup>129</sup> *Id.* at 173.

<sup>130</sup> *Id.* at 176 (citing Bovin, M.J., et. al., *Tonic immobility mediates the influence of peritraumatic fear and perceived inescapability on posttraumatic stress symptom severity among sexual assault survivors*, Journal of Traumatic Stress, 21, 402-409 (2008)).

### ***Repeat Victimization and the Blame Game***

Women who experience TI during sexual assault are often characterized by repeat victimization and are marked by society with a scarlet letter of guilt and shame. Women with a history of prior sexual abuse and victimization have a much higher chance of experiencing TI during an incident of sexual assault.<sup>131</sup> One possible explanation for the higher risk of TI in repeat victims of abuse is the past victimization has lessened the victim's perceived ability to fight off the attack and avoid sexual assault.<sup>132</sup> Although not entirely understood, research indicates that a woman's weaker perception of her ability to overcome the attacker may affect the defense mechanism employed by her body when she is faced with danger.<sup>133</sup> Another possible explanation is the idea that repeat victims of abuse may have trouble readily recognizing that an assailant poses a real risk or threat to their safety.<sup>134</sup> Whatever the reason, repeat victims are at a higher risk of experiencing TI during sexual assault.

Additionally, sexual assault victims who experience TI have a higher risk of developing depression, anxiety, and Posttraumatic Stress Disorder ("PTSD").<sup>135</sup> Although TI's connection to depression, anxiety, and PTSD has not been fully developed, some researchers understand the link between these phenomena. A recent study published in the *Journal of Traumatic Stress* indicated TI's link to higher rates of PTSD may be a byproduct of intense guilt and shame, which

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<sup>131</sup> Christine A. Gidycz, et. al., *Prediction of Women's Utilization of Resistance Strategies in Sexual Assault Situation: A Prospective Study*, *Journal of Interpersonal Violence*, 573, 581 (February 13, 2008).

<sup>132</sup> *Id.* at 573, 581.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 584.

<sup>135</sup> See Brian P. Marx, et. al., *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivor*, *Clinical Psychology: Science and Practice*, p. 75 (February 16, 2008), See also Michelle J. Boivin, et. al., *Does Guilt Mediate the Association Between Tonic Immobility and Posttraumatic Stress Disorder Symptoms in Female Trauma Survivors?*, *Journal of Traumatic Stress*, Vol. 27, 721 (December 2014), Brian R. Van Buren and Mariann R. Weierich, *Peritraumatic Tonic Immobility and Trauma-Related Symptoms in Adult Survivors of Childhood Sexual Abuse: The Role of Posttrauma Cognitions*, *Journal of Child Sexual Abuse* (November-December 2015).

is common among victims who experience TI.<sup>136</sup> The study further indicated many victims suffer from feelings of intense guilt and shame because they were unable to take action when faced with the threat of sexual assault.<sup>137</sup> Due to the lack of understanding of TI and its involuntary nature, many victims blame themselves for inaction during the assault.<sup>138</sup>

A recent study conducted in Sweden indicated that 70% of the female sexual assault victims who entered an emergency clinic in Stockholm reported having experienced significant immobility during the attack and failed to react verbally or physically.<sup>139</sup> Their experiences denote the occurrence of TI.<sup>140</sup> The study also found that victims with pre-existing PTSD were twice as likely to experience TI at the time of assault.<sup>141</sup> TI victims were also twice as likely to suffer from PTSD and three times as likely to suffer from severe depression in the months following the assault.<sup>142</sup> The study indicated that victims who experience extreme paralysis as a result of TI were more likely to suffer from PTSD.<sup>143</sup> While the causal connection between PTSD and TI is clear, the reason behind this causal connection remains undeveloped.<sup>144</sup>

It is crucial to educate people on the natural and involuntary nature of TI and its effect in order to challenge traditional ideas of trauma-related reactions and reduce feelings of guilt, shame, and self-blame among victims. This modern approach will help diminish symptoms of

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<sup>136</sup> Michelle J. Bovin, et. al., *Does Guilt Mediate the Association Between Tonic Immobility and Posttraumatic Stress Disorder Symptoms in Female Trauma Survivors?*, *Journal of Traumatic Stress*, Vol. 27, 721 (December 2014).

<sup>137</sup> *Id.* at 721.

<sup>138</sup> *Id.* at 723.

<sup>139</sup> See [Anna Möller](#), et. al., *Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression*, [Acta Obstetricia et Gynecologica Scandinavica](#) Vol. 96 (8) (June 7, 2017).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*



PTSD.<sup>145</sup> One study even called for active efforts to validate and normalize the different ways that people respond to trauma, including TI, noting that “education and information may be enormously valuable contributions to *post facto* attributions that survivors make about their experiences.”<sup>146</sup>

The professionals who are treating victims of sexual assault are calling for reform in the way of education and acknowledgement of TI, but unfortunately lawmakers continue to holdfast to the traditional dichotomy of fight and flight. Laws that require proof of resistance as an indicator of force or non-consent reflect a traditional belief that a victim can and will respond with either fight or flight. These legal standards impose an unrealistic expectation upon victims, many of whom experience TI, to actively respond in one way or another to the actions of their attacker. Yet, the law currently ignores the reality that many victims are rendered incapable of responding at all. By upholding these laws, the legal community is not only refusing to acknowledge decades of sound research, but also is emphasizing the cycle of re-victimization by endorsing the idea that victims who experienced TI somehow responded inappropriately to the threat against them. Thus, laws that reflect an expectation of fight or flight perpetuate a cycle of ignorance and victim blaming.

### ***Domination of Female Victims***

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<sup>145</sup> *Id.* See also Lori A. Zoellner, *Translational Challenges With Tonic Immobility*, *Clinical Psychology: Science and Practice*, Vol. 15, 98-99 (February 16 2008) (Another study advocating for educating people on the natural, involuntary nature of TI in order to normalize it as trauma-related reaction, which would help mitigate against feelings of guilt and self-blame and help treat sexual assault victims that experience TI.).

<sup>146</sup> Sunda Friedman TeBockhorst et. al., *Tonic immobility among survivors of sexual assault*, *Psychological Trauma: Theory, Research, Practice, and Policy*, Vol 7(2), 176 (March 2015).

The vast majority of sexual assault victims are women,<sup>147</sup> most of whom will never see their attacker put behind bars.<sup>148</sup> Although there are some notable changes in sexual assault laws, these “substantial shifts in rhetoric and rules may not bring about major improvements in women’s lives.”<sup>149</sup> One way to understand the gap between surface-level statutory changes, the reality of underreporting, and ineffective prosecution of sexual assault perpetrators is through the lens of systematic domination. Dominance theory is aimed at “uncovering how male dominance is reproduced and how new rationales and discourses develop to justify the continuing gender disparities.”<sup>150</sup>

Sexual assault laws were originally drafted with the goal of protecting rights of men, not women.<sup>151</sup> They were not intended to protect the victims themselves. As sexual assault laws began to change to reflect a more modern view, states held onto vestiges of the traditional male-centric approach to sexual assault cases. Despite other reforms, many states along with the Model Penal Code continued to uphold the validity of marital rape exemptions through the 1980s citing that the exemption was necessary to avoid an “unwanted intrusion of the penal law into the life of the family.”<sup>152</sup>

The persistent expectation of victim resistance is another vestige of the traditional male-centric approach to sexual assault cases. Laws that require evidence of resistance to prove force

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<sup>147</sup> Women make up 94% of all rape victims. Rennison, C. M., *Rape and sexual assault: Reporting to police and medical attention, 1992-2000* [NCJ 194530]. Retrieved from the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics: <https://www.bjs.gov/content/pub/pdf/rsarp00.pdf>

<sup>148</sup> Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2009* (accessed 2013).

<sup>149</sup> Martha Chamallas, *Introduction to Feminist Legal Theory*, 12 (3rd ed. 2013).

<sup>150</sup> *Id.* at 13.

<sup>151</sup> See Catharine A. MacKinnon and Reva B. Siegel, *Directions in Sexual Harassment Law: A Short History of Sexual Harassment*, Yale Press 5 (2003).

<sup>152</sup> Matthew R. Lyon, *No Means No? Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape*, 95 *J. Crim. L. & Criminology* 282-283 (2004) (citing Model Penal Code and Commentaries, §213.1(1) cmt. at 345 (1980)).

or non-consent continue to place the emphasis on protecting the rights of men at the expense of women. The need for resistance is justified by the sexist assumption that women have a tendency to “cry rape” and accuse innocent men of sexual assault. In reality, sexual assault remains one of the most under-reported crimes<sup>153</sup> and false reports only represents between 2%-10% of all reported incidents.<sup>154</sup> Therefore, women seldom report incidents of sexual assault and when they do their reports are almost always accurate.

Moreover, an expectation of a victim’s ability to resist when attacked perpetuates victim blaming by labeling fight or flight as the only appropriate way for women to respond to sexual assault. Built into the existing sexual assault laws is the age-old assumption that a victim who does not actively resist her attacker must have consented to the sexual advances.<sup>155</sup> In reality, many victims of sexual assault experience TI which renders them incapable of resisting their attacker. Yet, the legal community has by and large ignored the existence of TI. Through the lens of domination, it becomes clear that this ignorance is the product of a legal system that may have put a new coat of paint on its sexual assault laws but remains male-centric at its core. In other words, the more things change, the more they stay the same.

## Conclusion

Despite the plethora of evidence indicating high rates of TI in sexual assault victims, the legal community largely ignores this freezing phenomenon in sexual assault cases. Instead, courts continue to adhere to traditional standards of resistance, force, and non-consent. These

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<sup>153</sup> Rennison, C. M. (2002). Rape and sexual assault: Reporting to police and medical attention, 1992-2000 [NCJ 194530]. Retrieved from the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics: <https://www.bjs.gov/content/pub/pdf/rsarp00.pdf>

<sup>154</sup> National Sexual Violence Resource Center, Child sexual abuse prevention: Overview (2011). Retrieved from [http://www.nsvrc.org/sites/default/files/Publications\\_NSVRC\\_Overview\\_Child-sexual-abuse-prevention\\_0.pdf](http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_Child-sexual-abuse-prevention_0.pdf)

<sup>155</sup> See *People v. Dohring*, 14 N.Y. 374 (1847).

legal standards reflect centuries of male-centric sexual assault laws that are aimed at protecting the rights of men at the expense of women. Sexual assault laws were never created for the purpose of protecting women as victims, but instead, the laws were originally created to protect the rights of men and men only. Though there have been incremental improvements in sexual assault laws over the years, today's laws continue to contribute to a systematic domination of women through heightened standards of proof and victim blaming. The laws requiring proof of resistance, force, and non-consent continue to be more concerned with corroborating the accounts of sexual assault victims, most of whom are women, than they are concerned with the actual reality of sexual assault.

One such reality is the common occurrence of Tonic Immobility in victims of sexual assault. The prevalence and legitimacy of TI in sexual assault victims is widely accepted in the scientific and medical communities but remains overlooked by the legal community. It is high time that the legal community grapples with the implications of TI on current sexual assault laws in the United States. States should embrace the reality that TI is an involuntary, natural response to trauma that renders countless victims of sexual assault incapable of resisting or responding to their attacker either physically or verbally. Victims who experience TI are rendered incapable of consenting or resisting by the very fact that they feel threatened and that threat is so extreme that their bodies respond by employing an evolved predator defense mechanism in hopes of protecting them from apparent danger.

Thus, states should incorporate TI into their lack of capacity to consent or resist provisions, and victims who experience TI should be treated under the law as *per se* non-consenting victims of sexual assault. If a victim was consenting to their perpetrator's sexual

advances, then the victim's body would never respond with TI. Therefore, evidence of TI is a evidence of non-consent.