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The Military's Sexual Assault Blind Spot

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THE MILITARY'S SEXUAL ASSAULT BLIND SPOT

*Eric R. Carpenter**

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Introduction

The American military is in a well-publicized struggle to address its sexual assault problem. After the Tailhook scandal in 1991, military

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leaders repeatedly and publically assured Congress that they would change the culture that previously condoned sexual discrimination and turned a blind eye to sexual assault. Over the past two decades, new sexual assault scandals have been followed by familiar assurances and Congress's patience has finally run out. As a result, the Uniform Code of Military Justice is currently undergoing its most significant restructuring since it went into effect in 1951.

The central issue is who is going to run the military justice system: military commanders, or someone else. As it stands, military commanders (also called convening authorities) make the ultimate decision on whether a case goes to trial.¹ Commanders receive the advice of military lawyers throughout the process and routinely follow that advice, but they do not have to.

This reform effort is based on the assumption that commanders look at sexual assault cases differently than other cases. Critics say that those who run the military justice system have a bias against the victims in these cases, where that bias is likely related to some form of sexism.² Critics claim that when faced with the decision to prosecute these sexual assault cases, commanders face a conflict between their loyalty to someone that otherwise looks like a good soldier³ and their duty to seek justice for a victim who may have behaved in ways that commanders disapprove of, like liberal sexual behavior or prohibited conduct like underage drinking.⁴

This article explores that problem. Why is it that those in the military say they are taking the problem seriously, but after more than twenty years, it does not seem like much has changed? To answer this question, we need to understand how people cognitively process legal problems that involve rape. If there are problems within that cognitive process, and if those

1. See LAWRENCE J. MORRIS, *MILITARY JUSTICE: A GUIDE TO THE ISSUES* 41, 45, 47–48 (2010).

2. See generally Regina F. Titunik, *The Myth of the Macho Military*, 40 *POLITY* 137, 144–45 (2008). I am not exploring whether there is a rape culture in the military in that there is a higher percentage of rapists in the military than in the general public, either because rapists are attracted to the military or there is something about military culture that changes men who otherwise would not rape into rapists. For a thorough discussion of this issue, see generally Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 *DUKE L. J.* 651 (1996).

3. U.S. COMM'N ON CIVIL RIGHTS, *SEXUAL ASSAULT IN THE MILITARY* 64–65 (2013), available at http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf.

4. See generally *id.*, at 31–39.

problems are amplified within the military population, then that could be the source of the critics' concerns.

Part I provides background on social cognition and defines the rape problem that we will address. Part II identifies two potential groups (those with traditional gender role expectations and who label themselves as conservative) that tend to subscribe to certain beliefs about rape; discusses how those belief systems work to control behavior within those groups; and then drills down to the particular cognitive processes that people use to resolve these legal problems, focusing on how people actually use those beliefs about rape to get to an answer. Part III explains that those beliefs about rape are inaccurate, which leads to a faulty legal reasoning process.

Part IV first shows social cognition principles still apply in the military context. This section then presents data from two studies that suggest that the military population that handles sexual cases and that develops sexual assault policy is more traditional and more conservative than the general population and so would be more likely to use inaccurate rape beliefs. This section also shows that several inaccurate rape beliefs are amplified in the military context.

From that, it appears that the critics appear to be right. Those in the military who are responsible for the rape problem do not fully understand it. They have difficulty recognizing that a good soldier might be a rapist, and that a woman who "parties" might be a victim. They cannot see the problem for what it really is. They have a blind spot.

Part V concludes by discussing how this research can inform the public policy debate about who should run the military justice system. The primary criteria for deciding who will have responsibility for military justice—from the investigator to the person exercising prosecutorial discretion to the panel member or juror—must be designed to identify and minimize this blind spot. The issue is not whether the person responsible is a civilian or in the military—the issue is whether that person will use inaccurate rape beliefs when resolving these cases.

I. Background

A. Overview of Social Cognition

Social cognition is "the process by which people think about and make sense of other people, themselves, and social situations."⁵ Within the

5. SUSAN T. FISKE, *SOCIAL BEINGS: CORE MOTIVES IN SOCIAL PSYCHOLOGY* 123 (3d

broader field of social cognition, the social identity perspective provides a useful framework for understanding how people make sense of social situations.⁶ Generally speaking, people group themselves together based on shared, distinguishing features.⁷ Those within a group are “motivated to emphasize and secure the ways in which their group is positively distinct from other groups.”⁸

These group categories “provide[] a way of organizing socially relevant information, and help[] in the process of both understanding and predicting behavior.”⁹ People tend to have more positive expectations about the group to which they belong (the “ingroup”) than to the groups to which they do not (the “outgroup”).¹⁰ Those within the ingroup share generalizations and social schemas about human behavior: “Through the process of self-categorization, the individual constructs the meaning of this social identity, along with adopting the norms (appropriate behavior) guiding performance in this particular group.”¹¹ These expectations help to form group cohesion within those ingroups.¹²

Those in the ingroup may “stigmatize others who threaten the effective functioning of their own group”,¹³ people like counter-socializers who “undermine ingroup values”¹⁴ and threaten the ingroup’s sense of control. Those in the outgroup pose a threat to the ingroup, and the shared generalizations that the ingroup has about the outgroup “creates a sense of ingroup prediction and possibly control over external threats” and “also protects the ingroup’s superior position, maintaining status and power”.¹⁵

ed. 2014).

6. See generally Matthew J. Hornsey, *Social Identity Theory and Self-categorization Theory: A Historical Review*, 2 SOC. & PERSONALITY PSYCHOL. COMPASS 204 (2008).

7. Naoi Ellemers & S. Alexander Haslam, *Social Identity Theory*, in HANDBOOK OF THEORIES OF SOCIAL PSYCHOLOGY: VOLUME II 379, 380 (Paul A.M. Van Lange et al. eds., 2012).

8. *Id.*, at 382.

9. *Id.*, at 381.

10. FISKE, *supra* note 5, at 420, 426.

11. Russell F. Korte, *A Review of Social Identity Theory with Implications for Training and Development*, 31 J. EUR. INDUSTRIAL TRAINING 166, 169 (2007); see generally FISKE, *supra* note 5, at 155, 420; John C. Turner & Katherine J. Reynolds, *Self-Categorization Theory*, in HANDBOOK OF THEORIES OF SOCIAL PSYCHOLOGY: VOLUME II 399, 406 (Paul A.M. Van Lange et al. eds., 2012).

12. FISKE, *supra* note 5, at 424–25.

13. *Id.*, at 425.

14. *Id.*, at 425.

15. *Id.* at 426.

The discrete social schemas include expectations about specific kinds of people and the social roles they play¹⁶ (a brain, an athlete, a basket-case, a princess, and a criminal).¹⁷ Social schemas also include expectations about social events, often called scripts.¹⁸ These are the expectations about what happens and in what sequence during social situations, like going out to dinner or having a consensual sexual encounter.

People use these social schemas to solve legal problems. Within a limited information environment, legal problem solvers have to use inferences to get from the limited information to the required conclusions or outcome judgments.¹⁹ The building blocks for these inferences are those social schemas—the person's expectations or generalizations about how the world works.²⁰

When solving these legal problems, people take the available information and then use their schemas to construct a story (or hypothesis) that makes sense.²¹ People then test the conflicting stories presented in the case against that story hypothesis to determine which of those conflicting stories is likely to be true.²² If information does not exist, the person will likely infer that facts did exist that are consistent with these schemas. Note that if the underlying schemas that people use to generate these hypotheses are inaccurate, the reasoning process will be compromised.

Heuristics are inferential shortcuts used to evaluate an event and arrive at the required outcome judgment. People often use the representativeness heuristic, which is judging the probability that an event happened based on its similarity to those schemas.²³ If the event matches the schemas, then the event very likely happened. If the event does not match the schemas, then the event very likely did not happen.²⁴

16. *Id.* at 154; Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 U.C.L.A. L. REV. 273, 281 (1989).

17. THE BREAKFAST CLUB (Universal Pictures 1985).

18. FISKE, *supra* note 5, at 155–56.

19. *See generally* FISKE, *supra* note 5, at 138; Moore, *supra* note 16, at 280.

20. *See generally* FISKE, *supra* note 5, at 151–53, 420; MICHAEL W. EYSENCK & MARK T. KEANE, COGNITIVE PSYCHOLOGY: A STUDENT'S HANDBOOK 501, 504–05 (6th ed. 2010); Moore, *supra* note 16, at 279–80.

21. *See generally* FISKE, *supra* note 5, at 141; EYSENCK & KEANE, *supra* note 20, at 501, 504–05; Moore, *supra* note 16, at 279–80.

22. *See generally* Moore, *supra* note 16, at 279–80.

23. FISKE, *supra* note 5, at 142; Moore, *supra* note 16, at 285–86. “According to the logic of the representativeness heuristic, a story is believable if it is similar to the [person]’s actual or vicarious experiences.” *Id.* at 276.

24. *See generally* Moore, *supra* note 16, at 293–300.

When solving problems, these schemas guide people toward outcome judgments that are consistent with their ingroup identity, that minimize their own cognitive dissonance, and that minimize conflict within their cultural group.²⁵ Further, these schemas guide people toward outcome judgments that are consistent with just world theory, which is the idea that “good things happen to good people and bad things happen only to those who deserve them.”²⁶ The idea is that when faced with the task of solving problems like these, people will solve them in a way that makes them feel safe in the world around them. If the outcome judgment is consistent with the idea that bad things only happen to people from the outgroup, then the problem solver feels safe because she is in the ingroup and so that bad thing cannot happen to her.

The basic model, then, is that those in the ingroup tend to share norms and schemas about social behavior. When presented with a legal problem in a limited information environment, these people will use those schemas to arrive at an outcome judgment that is consistent with their group identities and worldviews.

Deciding what happened in a sexual assault case is a social cognition problem. In a rape case, the legal problem solver has to make sense of the social actions of unfamiliar people and has to make sense of a social situation for which there are probably no outside witnesses. We should expect that the problem solver will need to rely on social schemas to solve the problem, will use the social schemas that reflect their group identity, and will solve the problem in a way that is consistent with that group identity.

B. What Kind of Rape Are We Talking About?

Throughout this article I will use “rape” and “sexual assault” interchangeably to describe penetrative, non-consensual sexual acts. However, when I use those terms, I will be focusing on a subset of rapes or

25. Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 732 (2010); see generally FISKE, *supra* note 5, at 249–55, 426–27; Michael A. Hogg et al., *A Tale of Two Theories: A Critical Comparison of Identity Theory with Social Identity Theory*, 58 SOC. PSYCHOL. Q. 255, 257 (1995).

26. Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths: In Review*, 18 PSYCHOL. WOMEN Q. 133, 136 (1999) [hereinafter *Rape Myths*]; see also Mark A. Whatley, *Victim Characteristics Influencing Attributions of Responsibility to Rape Victims: A Meta-Analysis*, 1 AGGRESSION & VIOLENT BEHAV. 81, 83 (1996).

sexual assaults. I will be focusing on sexual assault by an adult man of an adult woman²⁷ where society would recognize that consensual sex between those two is plausible. This category includes assaults by offenders who are friends, acquaintances, current and former dates and boyfriends, current and former husbands, employers, fellow employees, and the like. Research suggests that this category makes up roughly half to three-quarters of all rapes.²⁸ This category excludes the remaining rapes that are committed by offenders who are otherwise related to the victim (fathers, step-fathers, uncles, etc.) or who are strangers.

This is the category that the military's critics have in mind: male service members assaulting female service members, as employers, co-workers, dates, friends, acquaintances. To the critics, this is the category that the military does not take seriously.

This category is difficult to name. It is narrower than "non-stranger" and broader than "acquaintance" or "date." And the real dividing line is not related to the type of offender or the characteristics of the victim, but whether an outsider might think that consent was a possibility. We generally do not think consent is relevant in incest or stranger rape, but we do for the rest.

In this "consent is relevant" category, the basic legal conflicts are whether the woman consented, and if she did not consent, whether the man was reasonably mistaken about that lack of consent. While force is still an element of rape in many statutes, in the common law force really just served a notice function (if the man has to use that much force, enough to overcome reasonable resistance, then he was on notice that the woman was not consenting and so could not be reasonably mistaken)²⁹ and in many

27. Recognizing that men are also victims of sexual assault and women can commit sexual assault, this article is limited to a discussion of men assaulting women. In 2013, 86% of the victims who filed unrestricted reports in the Department of Defense were female. U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 90 (2013). Only 3% of the subjects in completed investigations were female. *Id.* at 92.

28. Estimates are that 10–16% of women will be sexually assaulted in their lifetime. *See generally* JODY RAPHAEL, RAPE IS RAPE 86 (2013). In one study, victims reported the following relationships with their offenders: stranger, 22%; father or step-father, 11%; other relatives, 16%; boyfriend or ex-boyfriend, 10%; other non-stranger, non-relatives, 29%. NAT'L VICTIM CTR., RAPE IN AMERICA: A REPORT TO THE NATION 4 (1992). Another study of forcible rapes found the following relationships: stranger, 6%; husbands and ex-husbands, 3%; fathers, step-fathers, and other relatives, 19%; boyfriends, 26%; friend and classmates, 29%; other nonrelatives, 15%. DEAN G. KIPATRICK ET AL., DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL SURVEY 30–31 (2007).

29. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1107–08, 1131 (1986).

modern statutes force now serves as an aggravating factor.³⁰ The central legal issues are consent and mistake as to consent.

II. Social Cognition in Legal Problems Involving Rape

To solve the central legal issues of consent or mistake as to consent, people use social schemas that are consistent with their group identities and choose outcome judgments that will minimize dissonance and leave them feeling safe within the world. Unfortunately, many of those schemas—commonly called rape myths—are inaccurate. Kimberly Lonsway and Louise Fitzgerald define rape myths as those attitudes and beliefs about sexual assault “that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women.”³¹ The first part of that definition describes the schemas while the second describes the function served by those schemas: ingroup control of an outgroup.

A. The Ingroups

Lonsway and Fitzgerald reviewed rape myth acceptance literature and identified a potential ingroup: those who hold traditional gender role beliefs.³² To the extent that “traditional gender role beliefs” constitutes a measurable global construct,³³ that construct has many facets.

30. See, e.g., FLA. STAT. § 794.011 (2014).

31. Lonsway & Fitzgerald, *Rape Myths*, *supra* note 26, at 134 (emphasis omitted).

32. *Id.*, at 155.

33. Several scales measure traditional sex roles belief: the Sex Role Stereotyping scale (SRS), Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL. 217 (1980) [hereinafter *Cultural Myths and Supports for Rape*]; the Ambivalent Sexism Inventory – Benign Sexism (ASI-BS), Peter Glick & Susan T. Fiske, *The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism*, 70 J. PERSONALITY & SOC. PSYCHOL. 491 (1996) [hereinafter *The Ambivalent Sexism Inventory*]; the Attitudes Toward Women Scale (AWS), Janet T. Spence et al., *A Short Version of the Attitudes toward Women Scale (AWS)*, 2 BULL. PSYCONOMIC SOC'Y 218 (1973); the Sex-Role Egalitarianism Scale (SRES), Carole A. Beere et al., *The Sex-Role Egalitarian Scale: A Measure of Attitudes Toward Equality Between the Sexes*, 10 SEX ROLES 563 (1984), Lynda A. King & Daniel W. King, *Sex-Role Egalitarianism Scale: Development, Psychometric Properties, and Recommendations for Future Research*, 21 PSYCHOL. WOMEN Q. 71 (1997); the Gender Role Beliefs Scale (GRBS), Paula S. Kerr & Ronald R. Holden, *Development of the Gender Role Beliefs Scale (GRBS)*, 11 J. SOC. BEHAV. & PERSONALITY 3 (1996); the Sexist Attitudes Toward Women Scale (SATWS), Peter L. Benson & Steven Vincent, *Development and Validation of the Sexist Attitudes Toward Women Scale (SATWS)*, 5

Those who hold traditional gender role beliefs may believe that the family should be structured as a patriarchy, where the man ultimately makes the important decisions.³⁴ They may also believe that, even if decisions should be made equally, the family labor should be divided such that women should work at home, possibly believing that women are better caregivers for the children and better at managing the household, while men have higher income earning potential (or both).³⁵ One step beyond that (and possibly more hostile) is that women should not have an equal role in male-dominated occupations.³⁶

Another facet encompasses the courtship ritual, with the expectation that the man is the aggressive pursuer while the woman is passive and chooses among those who are pursuing her.³⁷ Last, a facet could be sexual conservatism, or more accurately, female sexual conservatism—that is, “restrictions on the appropriateness of sexual partners, sexual acts, conditions or circumstances under which sex should occur, and so on.”³⁸ Very likely, sexual conservatism is measured by a subconstruct of Peter Glick and Susan Fiske’s Benign Sexism scale, which they label “complimentary gender differentiation.”³⁹ This is the idea that women are pure, moral, and ladylike and we should respect that femininity.⁴⁰ Women who are pure, moral, and ladylike are on one end of the spectrum. The sexually liberated are on the other.

Note that traditional gender role beliefs differ from hostile sexism. Hostile sexism is based on beliefs that women are inferior, and on hostile emotions toward women.⁴¹ Traditional sex role beliefs (or benevolent or

PSYCHOL. WOMEN Q. 276 (1980); and the Neosexism Scale, Francine Tougas, *Neosexism: Plus Ça Change, Plus C'est Pareil*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 842 (1995).

34. The SRS, SRES, AWS, GRBS, and SATWS all contain an item that reflects this facet.

35. See Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56 AM. PSYCHOLOGIST 109, 110 (2001) [hereinafter *An Ambivalent Alliance*]. The SRS, AWS, SRES, GRBS, SATWS all contain items that test this facet.

36. The SRES, AWS, GRBS, and SATWS contain items that measure this facet. The Neosexism scale measures this facet more directly.

37. The SRS, SRES, and GRBS all contain items that measure this facet.

38. *Cultural Myths and Supports for Rape*, *supra* note 33, at 219. Scales with items that test sexual conservatism include the AWS, GRBS, and SATWS.

39. *An Ambivalent Alliance*, *supra* note 35, at 111.

40. *The Ambivalent Sexism Inventory*, *supra* note 35, at 512. The SRS, GRBS, SATWS also contain items that measure this facet.

41. Gordon B. Forbes et al., *First—and Second—Generation Measures of Sexism, Rape Myths and Related Beliefs, and Hostility Toward Women*, 10 VIOLENCE AGAINST

benign sexism) are based on beliefs about the best roles for each sex and on positive emotions related to protection, being protected, and affection.⁴² Both hostile and benevolent sexism perpetuate patriarchy: “Hostile sexist beliefs in women’s incompetence at agentic tasks characterize women as unfit to wield power over economic, legal, and political institutions, whereas benevolent sexism provides a comfortable rationalization for confining women to domestic roles.”⁴³ Benevolent sexism “promises that men’s power will be used to women’s advantage”⁴⁴ by securing women protection and providing them comforts.

When looking at the “nomological net” of rape myth acceptance, Lonsway and Fitzgerald found “at its core gender, traditional gender role attitudes [and] negative attitudes toward women”.⁴⁵ Lonsway and Fitzgerald also found that the “critical construct in understanding rape myth acceptance is a general hostility toward women.”⁴⁶ Generally, this has to do with the male actors (the rapists) in the events, and not those who judge the events. The relationship between men who score high on hostile sexism scales and their involvement in coercive sexual assault experiences is well established.⁴⁷

However, for our purposes, overtly hostile sexists and misogynists are not the relevant ingroup. They may make up a small group (which might have a higher percentage of rapists) but they are now an outgroup. It is unlikely that those who are charged with solving these legal problems (investigators, district attorneys, judges, and jurors), with a narrow focus on consent or mistake of fact about consent would use overtly misogynistic schemas to solve those problems any more than they would rely on overtly racist schemas to solve other legal problems.⁴⁸ The outliers who do rely on these beliefs are exposed and ridiculed.⁴⁹

WOMEN 236, 240 (2004); *An Ambivalent Alliance*, *supra* note 35, at 110.

42. See *The Ambivalent Sexism Inventory*, *supra* note 353, at 491; see also *An Ambivalent Alliance*, *supra* note 35; Forbes et al., *supra* note 41, at 239.

43. *The Ambivalent Sexism Inventory*, *supra* note 42, at 492.

44. *An Ambivalent Alliance*, *supra* note 35, at 111.

45. *Rape Myths*, *supra* note 26, at 155.

46. Kimberly A. Lonsway & Louise F. Fitzgerald, *Attitudinal Antecedents of Rape Myth Acceptance: A Theoretical and Empirical Reexamination*, 68 J. PERSONALITY & SOC. PSYCHOL. 704, 705 (1995); see generally Forbes et al., *supra* note 41, at 240–42.

47. See Forbes et al., *supra* note 41, at 251; Eliana Suarez & Tahany M. Gadalla, *Stop Blaming the Victim: A Meta-Analysis on Rape Myths*, 25 J. INTERPERSONAL VIOLENCE 2010, 2025 (2010).

48. See generally Forbes et al., *supra* note 41, at 238.

49. See, e.g., *Judge Publically Reprimanded Over Teen Rape Comments*, CBS NEWS

While men tend to accept inaccurate rape schemas more than women, men as a category are not the relevant ingroup, either. Glick and Fiske argue that the unique relationship between men and women, where both need each other and where women share dyadic power, prevents an ingroup/outgroup separation along sex lines.⁵⁰ Men do not feel like they are exploiting women (they are providing for and protecting them) and women in this ingroup do not feel exploited (they play an important social role and are protected).

Rather, the potential ingroup consists of those who share those traditional gender role beliefs, both men and women,⁵¹ while the outgroup consists of those who threaten it—those with nontraditional gender role beliefs.⁵²

Another potential ingroup/outgroup divide is conservatism. This construct has three major facets: status-quo conservatism (“an enduring inclination to favor stability and preservation of the status quo over social change”); laissez-faire conservatism (“persistent preference for a free market and limited government intervention in the economy”) and social conservatism (“an enduring predisposition, in all matters political and social, to favor obedience and conformity (oneness and sameness) over freedom and difference.”)⁵³ That last facet, social conservatism, includes an

(Jul. 22, 2014), <http://www.cbsnews.com/news/montana-judge-to-be-publicly-reprimanded-over-teen-rape-comments/>; Debra Cassens Weiss, *Judge Sentences Rapist to Community Service at Rape Crisis Center; Says Victim, 14, Wasn't Virgin*, ABA J. (May 6, 2014), http://www.abajournal.com/mobile/article/judge_sentences_rapist_to_community_service_at_rape_crisis_center_says_victim; Kristine Guerra, *Controversial Rape Sentence Puts Judge in Spotlight*, USA TODAY (May 27, 2014), <http://www.usatoday.com/story/news/nation/2014/05/27/judge-rape-sentence-home-detention/9630267/>.

50. *The Ambivalent Sexism Inventory*, *supra* note 33, at 492. Glick and Fiske theorize that because sexism includes both a subtle, hostile component and a benign component, that sexism is ambivalent. *Id.* at 491–92. They developed the Ambivalent Sexism Inventory which contains two subscales, Hostile Sexism (ASI-HS) and Benevolent Sexism (ASI-BS). *Id.* at 500. Their ASI-HS scale is not measuring overtly misogynistic and adversarial beliefs like those measured by Martha Burt’s Adversarial Sexual Beliefs scale—it measures much more subtle (but hostile) beliefs. *See also Cultural Myths and Supports for Rape*, *supra* note 33, at 219.

51. *The Ambivalent Sexism Inventory*, *supra* note 42, at 507; Kathryn B. Anderson et al., *Individual Differences and Attitudes Toward Rape: A Meta-Analytic Review*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 295, 312 (1997).

52. *The Ambivalent Sexism Inventory*, *supra* note 42, at 492.

53. Karen Stenner, *Three Kinds of “Conservatism”*, 20 PSYCHOL. INQUIRY 142, 142 (2009). Two scales, the Right-Wing Authoritarianism Scale and the Social Dominance Orientation Scale, are often used to measure facets of conservatism. *See generally* Bernard E. Whitley, Jr., *Right-Wing Authoritarianism, Social Dominance Orientation, and Prejudice*, 77 J. PERSONALITY & SOC. PSYCHOL. 126 (1999).

anti-hedonist component,⁵⁴ which is a “tendency to regard pleasure as necessarily bad or ‘sinful’ . . . This applies particularly to sex”⁵⁵

While these two ingroup constructs do not perfectly overlap, the constructs do share conceptual common ground. Social conservatism, a facet of conservatism, likely includes a facet related to traditional gender role beliefs, where social conservatism serves as an emergent variable with traditional gender role beliefs as a sub-facet. In particular, a facet of social conservatism (sexual conservatism or anti-hedonism) overlaps with a facet of benign sexism or traditional gender role expectations (sexual conservatism or complimentary gender differentiation). We should expect that the constructs of conservatism and traditional gender role beliefs will be correlated, and conservatism has been found to be highly correlated with traditional sex role beliefs.⁵⁶

B. Group Membership, Rape Schema Acceptance, and Legal Control

Members of the ingroup identify with each other according to their beliefs and these larger belief systems translate into discrete schemas that serve to enforce that group cohesion. Here, the ingroup consists of those who share beliefs about how men and women should behave and those who are conservative, where the two likely overlap and where sexual conservatism plays a central role. Not surprisingly, those with traditional gender role beliefs tend to endorse certain rape schemas more than those with non-traditional gender role beliefs,⁵⁷ as do those with conservative worldviews compared to those with liberal worldviews.⁵⁸

54. Glenn D. Wilson, *The Factor Structure of the C-Scale*, in *THE PSYCHOLOGY OF CONSERVATISM* 89 (Glenn D. Wilson ed., 1973).

55. Glenn D. Wilson, *The Concept of Conservatism*, in *THE PSYCHOLOGY OF CONSERVATISM* 8 (Glenn D. Wilson ed., 1973).

56. Knud S. Larsen & Ed Long, *Attitudes Toward Sex Roles: Traditional or Egalitarian?*, 19 *SEX ROLES* 1, 10 (1988); William D. Walker et al., *Authoritarianism and Sexual Aggression*, *J. PERSONALITY & SOC. PSYCHOL.* 1036, 1038 (1993) (using the Right Wing Authoritarianism scale).

57. See Dominic Abrams et al., *Perceptions of Stranger and Acquaintance Rape: The Role of Benevolent and Hostile Sexism in Victim Blame and Rape Proclivity*, 84 *J. PERSONALITY & SOC. PSYCHOL.* 111, 111 (2003) (noting the correlation between ASI-BS and RMA); Anderson et al., *supra* note 51, at 312; Forbes et al., *supra* note 41, at 250 (linking Neosexism, AWS, and for women only, ASI-BS); G. Tendayi Viki & Dominic Abrams, *But She Was Unfaithful: Benevolent Sexism and Reactions to Rape Victims Who Violate Traditional Gender Role Expectations*, 47 *SEX ROLES* 289 (2002) (noting a correlation between ASI-BS to RMA).

58. Anderson et al., *supra* note 51, at 312; Walker et al., *supra* note 56, at 1037–38

These rape schemas fall into two broad categories: schemas that excuse the man, and schemas that blame the woman. Schemas that excuse the man include schemas related to beliefs that only deviant men rape, and therefore normal-looking men do not mean to rape anyone. Schemas that blame the woman include schemas related to beliefs that women ask for it by the way they behave sexually, or that women secretly want to be forced to have intercourse. Some schemas connect two. These are beliefs that women consent to sex (as shown by their other sexual behavior) but then lie about it afterward.⁵⁹

In a broad sense, these generalizations about how men and women behave control behavior within the ingroup.⁶⁰ For example, "Benevolent sexism is directed toward traditional women who adhere to narrow gender roles: housewives, in particular . . . [Sexism] support[s] the status quo for women, by rewarding subordinate women with male protection and appreciation for their alleged purity but threatening uppity women with dislike and exclusion."⁶¹ Further, "The correlation between [sexist] beliefs and acceptance of rape myths probably reflects the self-protection perception that women who follow traditional roles will be protected by men and that only women who depart from these roles are victims of rape."⁶²

Building on Glick and Fiske's subconstructs within the Ambivalent Sexism Inventory and Ambivalence Toward Men Inventory, Kristine Chapleau and her colleagues hypothesized that "it might be the case that some people are tougher on rape victims and more lenient toward rapists because they believe that women should be ladies."⁶³ They found that the subcomponent that women should behave like ladies was responsible for the association between benevolent sexism toward women and rape myth

(using the Right Wing Authoritarianism scale).

59. See generally Diana L. Payne et al., *Rape Myth Acceptance: Exploration of Its Structure and Its Measurement Using the Illinois Rape Myth Acceptance Scale*, 33 J. RES. PERSONALITY 27 (1999); Martha Burt, *Rape Myths and Acquaintance Rape*, in ACQUAINTANCE RAPE: THE HIDDEN CRIME 27 (Andrea Parrot & Laurie Bechhofer eds., 1991). The scale items used in the Illinois Rape Myth Acceptance Scale are examples of the discrete schemas.

60. FISKE, *supra* note 5, at 442–43.

61. FISKE, *supra* note 5, at 436–37.

62. Forbes et al., *supra* note 41, at 250.

63. Kristine M. Chapleau et al., *How Ambivalent Sexism Toward Women and Men Support Rape Myth Acceptance*, 57 SEX ROLES 131, 132 (2007).

acceptance⁶⁴—which is consistent with this being a marker of which women are ingroup (the ladylike) and which are outgroup (the un-ladylike).

They also hypothesized that some people are tougher on rape victims and more lenient toward rapists because they believe that “men are chivalrous toward women and thus would not act inappropriately unless invited by the woman”.⁶⁵ They found that a subcomponent of benevolent sexism toward men, “the belief that a woman is incomplete without the love of a man” was the strongest predictor for rape myth acceptance among those subcomponents, and that “suggests that participants may view the aggressor as a potential romantic partner, rather than a rapist.”⁶⁶ Further, participants who responded positively to a subcomponent that measured admiration for men “for their masculine attributes of strength, risk-taking, and stoicism are less likely to hold men accountable for rape.”⁶⁷ Both of these are consistent with attitudes toward ingroup men—men with those features are “good” guys.

For conservatism, these schemas also enhance ingroup cohesion and outgroup control. The authors of one study suggest that this is because “conservative political ideologies that place the responsibility on the individual for his or her plight may lead one to believe in women’s responsibility for sexual victimization.”⁶⁸

One mechanism for this social control is the law. Those schemas and the operationalization of those schemas within the legal system (by not pursuing charges against the man or by acquitting him) allow the ingroup to control both its members and the outgroup members.⁶⁹ The social contract is: Men, if you behave in the way we expect (stay ingroup, do not jump out of the bushes and attack women), then we will extend you the fullest protection of the law. You have to really mess up (have an unreasonable belief that the woman is not consenting) before you will face sanctions.

And women, if you behave in ways we do not approve of (you follow non-traditional gender roles or are sexually liberal), then in most cases, we will not extend you the protection of the law—we will infer that you consented and are lying, or that you behaved in a way that a good guy

64. *Id.* at 135.

65. *Id.* at 132.

66. *Id.* at 135.

67. *Id.* at 135–36.

68. Anderson et al., *supra* note 51, at 312.

69. See generally Kristine M. Chapleau & Debra L. Oswald, *A System Justification View of Sexual Violence: Legitimizing Gender Inequality and Reduced Moral Outrage Are Connected to Greater Rape Myth Acceptance*, 15 J. TRAUMA & DISSOCIATION 204 (2014).

would reasonably misinterpret. If you want the protection of the law, you better behave the way we want you to.

C. Rape Schemas in Legal Problem Solving

These abstract reasoning systems become concrete when someone within the ingroup needs to solve a particular sexual assault problem. When we look at the various rape myths identified by Diana Payne and colleagues⁷⁰ from the prospective of people from the ingroup who have figure out how a good, ingroup man was accused of rape, patterns emerge.

The central rape schema is an event schema about what “real” rape looks like: “real” rape involves a deviant man who uses violence and weapons against a woman who is a stranger, causing injuries in the process.⁷¹ And it is reinforced by person schemas about rapists. “Real” rapists come from the outgroup: they are violent, sexual deviants. When good, ingroup women get raped, it is by those outgroup men. The corollary to this central rape schema is the schema that ingroup men (good, normal guys) do not rape.

When the problem solver uses the schema that only deviants rape and is then presented with a defendant who does not look like a deviant—in fact, is from the ingroup—the problem solver likely forms the hypothesis that this man could not be a rapist. Therefore, either the man made a mistake or the woman really did consent.

While we should not expect the legal problem solvers will disregard the law, we should expect that they will be very cautious when given a case

70. For this discussion, I am relying on the Illinois Rape Myth Acceptance Scale found in Payne et al., *supra* note 59 and Sarah McMahan & G. Lawrence Farmer, *An Updated Measure for Assessing Subtle Rape Myths*, 35 SOC. WORK RES. 71 (2011). Diane Payne and colleagues used exhaustive factor analysis to categorize forty rape schemas into seven categories. Sarah McMahan and Lawrence Farmer later conducted focus group testing on Payne’s scale and dropped three categories, two of which I am also not going to focus on. *Id.* at 74. The first is the myth that rape is a trivial event. That category presumes that a rape had occurred but that the rape was not socially significant; however, in this article, I am focusing on schemas that help people decide whether a rape has occurred. I also am not going to focus on the rape schema that women want to be forced into sex. While this rape schema still occasionally pops up in popular culture, in the McMahan and Farmer study, the focus groups said that these views were now outdated and too overtly sexist. *Id.* The interesting thing about this latter category is that it represented a justification for ingroup rape of ingroup women, rather than ingroup rape of outgroup women. The idea is that “good” women want to be overpowered by “good” men, like Scarlett O’Hara was by Rhett Butler.

71. Burt, *supra* note 59, at 27.

involving an ingroup man. In a society where sex role socialization teaches men to take the risk in sexual situations,⁷² those in the ingroup would want to give the man every benefit when reviewing the facts. He is, after all, one of them.⁷³

Many of the rape schemas serve to reinforce the hypothesis of mistake as to consent. The mistake hypothesis has two components: either some outside condition prevented the man from being able to understand signs of non-consent; or the woman's signs were not clear enough (or some combination of both).

Toward the "outside conditions" mistake, these schemas include, "A good, normal guy sometimes cannot control his sexual urges after a woman has turned him on." In that case, the schema is that a man can involuntarily lose control of himself when his sex drive reaches a tipping point and so not be able to notice that the woman is not consenting. According to the ingroup problem solver, that would be a reasonable mistake for a good guy to make.

Another outside condition is alcohol. These schemas are, "If a man is drunk, he probably does not know what he is doing," or, "If both people are drunk, then they are both responsible for what happens."⁷⁴ The reasoning is the same—a good but drunk man is not able to understand that a woman is not consenting, and according to the ingroup problem solver, that would be a reasonable mistake for a good guy to make.

The "unclear signs" or miscommunication schemas revolve around the generalization that good guys sometimes do not understand when a woman says no. One is the schema that "Women who behave in non-traditional

72. Amy Grubb & Emily Turner, *Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity, and Substance Use on Victim Blaming*, 17 *AGGRESSION & VIOLENT BEHAV.* 443, 446 (2012).

73. For example, in a recent opinion by the Navy-Marine Corps Court of Criminal Appeals in a non-stranger rape case, the court said:

Although we recognize that the Appellant's typed statement to NCIS in some form admits culpability, we express *grave concern* about the lack of detail in the statement, particularly in light of the fact that NCIS interviewed the Appellant for almost two hours, yet produced a statement about the incident consisting of a mere 14 lines.

United States v. Lucas, No. 201100372, 2012 CCA Lexis 322, at *12 n.6 (N-M. Ct. Crim. App. Aug. 28, 2012) (emphasis added). The practice of taking those kinds of short statements is commonplace in military investigations and the court has not expressed grave concern about the practice in criminal cases involving outgroup men. But here, in a case involving an ingroup man, the court expresses grave concern about the practice.

74. Related to this is the idea that if both are drunk, then both should be charged with rape. *E.g.* United States v. Redmon, No. 201300077, 2014 CCA LEXIS 369 (N-M Ct. Crim. App. June 26, 2014) (unpublished).

ways (drinking, going to bars without her boyfriend or husband, having extra-marital sex, wearing provocative clothes) assume the risk.” When we are dealing with outgroup, deviant rapists, that risk is the risk of rape. When we are dealing with ingroup, good guys, that risk is the risk of miscommunication. If a bad, outgroup woman does those things, then a good, ingroup man can reasonably mistake that behavior as signs of consent.

Related is the schema that “women often do not clearly say ‘no.’”⁷⁵ The more extreme version of this is the schema that “Women sometimes say ‘no’ when they mean ‘yes.’”⁷⁶ The event schema is that women (both ingroup and outgroup) will say no or give equivocal signals or offer token resistance so that the man will not think that they are cheap or easy, and the good, ingroup man is expected to keep persisting when hearing a weak “no.” The man is expected to continue in the face of resistance until the woman screams or fights back—thereby clearly communicating her lack of consent. That is itself another event schema, “Real victims fight back.”⁷⁷ The reasoning that follows is that if the woman does not follow her script, then the good, ingroup man can reasonably believe that she consented.

Shifting now to the second part of the hypothesis (the reason a good guy is under the suspicion is that she really did consent and is lying about it now), several rape schemas support the hypothesis. The first is, “She asked for it.”⁷⁸ This is closely related to the “she assumed the risk (of a mistake)” schema.⁷⁹ Instead of being used to show the reasonableness of the man’s mistake, now the schema is used to show that the woman actually consented. The proof that she consented is the evidence that she engaged in non-traditional sexual behavior (drinking, going to bars without her boyfriend or husband, having a history of extra-marital sex, wearing provocative clothes) before the event. For the ingroup, this is what outgroup women do when they want to have consensual sex. If a woman does those things, she is essentially signaling a blanket consent to sex.⁸⁰

75. Payne et al., *supra* note 59, at 50.

76. *Id.* at 64 (noting the schema types, including those where women actually wanted the event to occur).

77. *Id.* at 49–52 (noting multiple examples of responses wherein individuals did not view an act as rape where the woman did not struggle to defend herself).

78. *Id.* (showing multiple responses of individuals who view certain actions, such as dressing suggestively, as the victim being responsible).

79. *Id.* (noting responses wherein some individuals viewed certain behavior as implying sexual willingness, such as going to a man’s apartment on a first date).

80. A variant of this applies to ingroup behaviors, too, in that a woman who accepts dinner and movie from a man in a traditional courtship is now in his sexual debt: by

The next schema in the reasoning chain is that outgroup women lie about rape.⁸¹ The schema is that an outgroup woman (or a woman soon to be cast out of the ingroup when this process is over) will often lie about rape to protect her reputation, her relationships (if this looks like cheating); her self-esteem (because she regrets the sex or feels cheap); or because she is crazy or vindictive.⁸² When a male decision-maker looks at one of these fact patterns, he may think, “I have had sex according to the same script that is in this fact pattern. What if she had been crazy or vindictive? But for the grace of God go I.”

D. The Entire Flow

Reviewing this discussion from the perspective of those charged with solving the legal problem, the basic cognitive pathway is acceptance of traditional gender role beliefs or conservatism, which is associated with acceptance of these rape schemas. We saw above that studies connect traditional gender role beliefs and conservatism with the acceptance of these rape schemas. We should expect that those who follow this pathway will ultimately resolve the problem in favor of the man, and research has shown that the acceptance of these rape schemas is associated with siding with the man in the ultimate normative judgment about blame.⁸³

Social science research provides strong evidence of this entire cognitive pathway, from ingroup identification to the acceptance of these rape schemas to outcome judgments that favor the man. Some studies have found a connection directly from the acceptance of traditional gender role beliefs to the ultimate judgment, skipping the

accepting those things, she signaled her consent to sex. *See generally* Susan A. Basow & Alexandra Minieri, “You Owe Me”: *Effects of Date Cost, Who Pays, Participant Gender, and Rape Myth Beliefs on Perceptions of Rape*, 26 J. INTERPERSONAL VIOLENCE 479 (2011).

81. Payne et al., *supra* note 59, at 49–52 (noting responses where woman lied about rape in order to cover up other actions, such as an illicit affair).

82. *Id.*

83. *See generally* Barbara Krahe, *Social Psychological Issues in the Study of Rape*, 2 EUR. SOC. PSYCHOL. 279 (1991); G. Tendayi Viki et al., *Evaluating Stranger and Acquaintance Rape: The Role of Benevolent Sexism in Perpetrator Blame and Recommended Sentence Length*, 28 L. & HUM. BEHAV. 295 (2004); Charlene Muehlenhard, *Misinterpreting Dating Behaviors and the Risk of Date Rape*, 6 J. SOC. & CLINICAL PSYCHOL. 20 (1988).

schemas.⁸⁴ And other studies have found connections across the entire pathway.⁸⁵

III. *The Rape Schemas Are Inaccurate or Sexist*

As discussed above, if the schemas that people use during the inference process are faulty, then the entire reasoning process is compromised. The rape schemas we just discussed are faulty. They are inaccurate or obviously sexist.⁸⁶

The central rape schema, that rape involves a deviant man who uses violence and weapons against a woman, is inaccurate. These cases (stranger rapes) do occur and when they come up they are treated seriously by the ingroup; however, most rapes do not follow this script. Most forcible rapes (78–89%) are committed by a man that the woman knows: friend, acquaintance, current and former date and boyfriend, current and former husband, employer, fellow employee, father, step-father, uncle.⁸⁷ Further research shows that a small percentage (6%) of men from the ingroup commit most rapes.⁸⁸

The “mistake” schemas are also inaccurate or obviously sexist. For example, except in rare circumstances, the law does not allow outside

84. See generally Rosanne Proite et al., *Gender, Sex-role Stereotypes, and the Attribution of Responsibility for Date and Acquaintance Rape*, 34 J. C. STUDENT DEV. 411 (1993).

85. See generally Viki & Abrams, *supra* note 57; Abrams et al., *supra* note 57; Niwako Yamawaki, *Rape Perception and the Function of Ambivalent Sexism and Gender-Role Traditionality*, 22 J. INTERPERSONAL VIOLENCE 406 (2007); Szymanski et al., *supra* note 57.

86. A complete discussion to prove this claim is beyond the scope of this article, and many others have attempted to prove that claim. See generally *Cultural Myths and Supports for Rape*, *supra* note 33; Burt, *Rape Myths and Acquaintance Rape*, *supra* note 71; *Rape Myths*, *supra* note 26; JOANNA BOURKE, *RAPE* (2007); Katie M. Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761 (2011); Estrich, *supra* note 29.

87. NATIONAL VICTIM CENTER, *supra* note 28, at 4; KIPATRICK ET AL., *supra* note 28, at 30. See generally RAPHAEL, *supra* note 28, at 89.

88. In a study of 1,882 male college students, David Lisak and Paul Miller found that 6% reported that they had committed rape or attempted rape. David Lisak & Paul A. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 73, 76, 78 (2002). Lisak and Miller also found that a majority of these men were repeat offenders, such that “a relatively small proportion of men are responsible for a large number of rapes”. *Id.* at 80. See also Michele L. Ybarra & Kimberly J. Mitchell, *Prevalence Rates of Male and Female Sexual Violence Perpetrators in a National Sample of Adolescents*, JAMA PEDIATRICS (Oct. 7, 2013), <http://archpedi.jamanetwork.com>.

conditions like excitement or intoxication to excuse criminal conduct. Generally, the only place where excitement mitigates a crime is in homicide, where murder may be reduced to manslaughter if, for example, someone catches their spouse in bed with another person or is adequately provoked by some type of violence coming from the victim.⁸⁹ Other than that, the law does not let someone get away with a crime because the person really wants something: “But the diamond was really pretty and I really, really wanted it” is not a legal excuse. Likewise, the law does not let a defendant get away with robbery if he really wants money; asks a woman for \$50; she says she will only give him \$25; but he gets really, really excited and takes the full \$50.⁹⁰

As for alcohol, in common law crimes, voluntary intoxication is a failure of proof defense, meaning the man needs to be so drunk that he could not have formed the specific intent required by the crime.⁹¹ For general intent crimes, if a person gets drunk, that person is morally blameworthy for any harm he causes while drunk—for example, like somehow missing the indications that he was trespassing. In the common law, rape is a general intent crime. If a man gets drunk and misses the signs that the woman has not consented, then any evidence that he was drunk should not matter. He should still be blameworthy.

The difference in how the law treats these conditions in rape cases versus how it treats them in other crimes like robbery, murder, or non-sexual assault is due to sexism.⁹² We are willing to say that these conditions make conduct or mistakes “reasonable” in sexual assault cases, but not in others.

The mistake schemas related to a miscommunication between the man and woman are also inaccurate, exaggerated, or obviously sexist. Looking first at the schema that a woman asks for it by the way she behaves or dresses (and so a man can be confused about whether she consented), one of the corollaries to that schema is that a woman will fight back if she really does not want sex. If a woman fights back, we assume the man is now on fair notice that she really means “no.” But we now know that some female (and male) rape victims experience involuntary nervous system responses that may prevent them from speaking or moving, much less fighting back.⁹³

89. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 535–37 (5th ed. 2009).

90. This example has been used in various rape schema debiasing programs.

91. See DRESSLER, *supra* note 89, at 327.

92. See Estrich, *supra* note 29, at 1125–26 (providing many examples of differences like these, where the only plausible explanation for their existence is sexism).

93. See generally Brian M. Marx et al., *Tonic Immobility as an Evolved Predator*

One study by Mary Koss and colleagues found that 76.6% of women in acquaintance rape cases “turned cold.”⁹⁴ While 69.6% reported that they struggled somehow (which would not likely be enough to provide fair notice), only 11.2% screamed or tried to run away.⁹⁵

The “she asked for it” schema confounds potential for sex with consent to sex.⁹⁶ How a woman behaves may give signals as to whether she might be interested in sex at some point, but in the moment right before the sexual act, more is required. If someone dresses up to go to an open house and expresses interest in buying the house to the seller, the seller cannot then hand the potential buyer a piece of paper saying, “It is now yours at my asking price.” More is required. Potential for consent does not equal consent.

Current research on sexual scripts shows that the actual script is much more complicated than the schema suggests, where women use subtle clues to communicate consent or lack of consent—and where men also understand those clues.⁹⁷ While men may misinterpret behavior and communication early in the relationship as signals that a romantic relationship might be an option,⁹⁸ when they are at the critical moment, they understand what “no” means.

Defense: Implications for Sexual Assault Survivors, 15 *CLINICAL PSYCHOL.: SCI. & PRAC.* 74 (2008); Sarah E. Ullman, *Reflections on Researching Rape Resistance*, 20 *VIOLENCE AGAINST WOMEN* 343, 347 (2014); Jennifer J. Freyd, *What Juries Don't Know: Dissemination of Research on Victim Response Is Essential for Justice*, *TRAUMA PSYCHOL. NEWSL.* 15, 15–17 (Fall 2008); Dr. Rebecca Campbell, Webinar on the Neurobiology of Sexual Assault for the National Institute of Justice (2012), available at <http://www.nsvrc.org/elearning/20044>.

94. Mary P. Koss et al., *Stranger and Acquaintance Rape: Are There Differences in the Victim's Experience?*, 12 *PSYCHOL. WOMEN Q.* 1, 12 tbl.2 (1988).

95. *Id.*

96. See *R. v. Park*, 2 S.C.R. 836, 838 (S.C.C. 1995) (“An honest belief that the complainant would consent is, by itself, not a defense to sexual assault where the accused is aware of, or willfully blind or reckless as to, lack of consent at the time of the sexual activity.” (emphasis added)).

97. See Celia Kitzinger & Hannah Frith, *Just Say No? The Use of Conversation Analysis in Developing a Feminist Perspective on Sexual Refusal*, 10 *DISCOURSE & SOC'Y* 293, 293–94 (1999). See generally Hanna Frith & Celia Kitzinger, *Talk About Sexual Miscommunication*, 20 *WOMEN'S STUD. INT'L FORUM* 517 (1997); Hanna Frith & Celia Kitzinger, *Reformulating Sexual Script Theory: Developing a Discursive Psychology of Sexual Negotiation*, 11 *THEORY & PSYCHOL.* 209 (2001); Rachael O'Byrne et al., “If a Girl Doesn't Say ‘No’ . . .”: *Young Men, Rape and Claims of ‘Insufficient Knowledge’*, 18 *J. COMMUNITY & APPLIED SOC. PSYCHOL.* 168 (2008).

98. April Bleske-Rechek et al., *Benefit or Burden? Attraction in Cross-Sex Friendship*, 29 *J. SOC. & PERS. RELATIONSHIPS* 569, 575–79 (2012).

Research suggests that 94% of men understand when a woman has not consented to sex and they stop.⁹⁹ In their own experiences, they may have seen the potential for sex, pursued it—maybe while they were themselves drunk—and later found out through the normal ways that people say “no” that she did not want sex, and stopped. They may have left the encounter frustrated, but they did not leave as rapists. The vast majority of men have not and would not penetrate an unwilling woman. They would never be Biff from *Back to the Future* or Bug from *Uncle Buck*, and they know that something is wrong when they watch the scenes in those movies—because they understand the signs.

Six percent of men keep going. Remember that in the Koss study, 76.6% of the women turned cold, 69.6% struggled, and 11.2% screamed or tried to run away. In addition, 83% reasoned or pled with the man—probably saying things like, “No” and “I don’t want to do this” and “Stop,” and 45.7% cried or sobbed.¹⁰⁰ These women sent pretty clear signals.¹⁰¹ Ninety-four percent of men will not have intercourse with a woman who is struggling, sobbing, and saying, “stop.” Six percent will, and as Thomas MacAulay Miller phrases it, “It’s not that they don’t understand, they just don’t like the answer.”¹⁰²

The overwhelming majority of both men and women have only had consensual sexual experiences, where both have known whether consent was communicated and where both have respected that communication. This overwhelming majority should have accurate relational schemas¹⁰³

99. Lisak & Miller, *supra* note 88, at 78.

100. Koss et al., *supra* note 94, at 12 tbl.2.

101. Some research exists that advances the idea that up to 40% of women have said “no” when they mean “yes.” See Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women’s Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCHOL. 872, 874 (1988). See also Charlene Muehlenhard & Marcia L. McCoy, *Double Standard/Double Blind: The Sexual Double Standard and Women’s Communication About Sex*, 15 PSYCHOL. WOMEN Q. 447, 451 (1991); Susan Sprecher, *Token Resistance to Sexual Intercourse and Consent to Unwanted Sexual Intercourse: College Students’ Dating Experiences in Three Countries*, 31 J. SEX. RES. 125, 127 (1994). The lead researchers in the area have seriously questioned this research because, among other things, the instrument used in these studies has serious validity problems. Charlene L. Muehlenhard & Carie S. Rodgers, *Token Resistance to Sex: New Perspectives on an Old Stereotype*, 22 PSYCHOL. WOMEN Q. 443, 448–49, 461–62 (1998).

102. Thomas MacAulay Miller, *Mythcommunication: It’s Not That They Don’t Understand, They Just Don’t Like the Answer*, YES MEANS YES (Mar. 21, 2011), <http://yesmeansyesblog.wordpress.com/2011/03/21/mythcommunication-its-not-that-they-dont-understand-they-just-dont-like-the-answer/>.

103. See generally Mark W. Baldwin, *Relational Schemas and the Processing of Social*

based on their own experiences that they can be applied to these legal problems. Instead, the “mythcommunication” schema perseveres.

This is likely because the basic dating script that leads to the critical moment—“that men are expected to initiate sexual relations and women are expected to set the limits on how much sexual activity occurs”¹⁰⁴—is largely unchanged.¹⁰⁵ Men and women, for better or for worse, still send signals that they are interested in someone and potentially interested in sex. And when an ingroup man takes the risk of making the first move, those in the ingroup will forgive that first move—even though the “first move” for a rapist is part of an event schema that is completely different than the one imagined by the problem solvers.

The last rape schema is that the woman consented and is lying about it now. Some women do lie about sexual assault and some men are falsely accused. David Lisak and colleagues reviewed the reliable research in this area and reported that these studies find that 2.1–10.9% of rape reports are false,¹⁰⁶ where false reports are defined as “a thorough investigation must yield evidence that a crime did not occur.”¹⁰⁷

However, this schema is given much more strength than it deserves. A man does not run a 2–11% chance of being falsely accused after having consensual sex. The probability of being falsely accused after having consensual sex is much, much lower. The probability of being falsely accused after a consensual sexual encounter is the number of false allegations divided by the number of consensual sexual encounters.

For example, looking at the military population, the Department of Defense reported that there were 5,061 sexual assault reports in 2013.¹⁰⁸ Applying the Lisak figures would mean that there are around 100–500 false reports. Assume that these accusations all involved consensual sex acts (and not accusations where no sex acts occurred). There are roughly 1.4 million active-duty service members. Now consider how many consensual

Information, 112 PSYCHOL. BULL. 461 (1992).

104. Antonia Abbey, *Alcohol-Related Sexual Assault: A Common Problem Among College Students*, 14 J. STUDIES ON ALCOHOL (SUPPLEMENT 14) 118, 120–21 (2002).

105. See Asia Anna Eaton & Suzanna Rose, *Has Dating Become More Egalitarian? A 35 Year Review Using Sex Roles*, 64 SEX ROLES 843, 855 (2011) (reporting that traditional gender stereotypes still remain in place in courtship despite progress in other areas).

106. David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1330 (2010).

107. *Id.* at 1319.

108. U.S. DEP'T DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 2 (2013).

sex acts those service members had in 2013. Some of them are married or in long-term relationships, but even if we estimate that there were 500,000 consensual sex acts outside of long-term relationships (the type of cases that the legal problems solvers are most often called on to judge), 100–500 false reports would be a very, very small percentage of the overall consensual acts.

The probability that “but for the grace of God go I” is very small, but the false complaint schema is still powerful and in use.¹⁰⁹ This is likely because false reports are reported as a percentage of all sexual assault reports (which are themselves a small percentage of all sexual assaults)¹¹⁰ rather than as raw number or as a percentage of all consensual sexual encounters.

In addition, when the victim has inconsistencies in her statement and the problem solver uses the “women lie” schema, the problem solver is likely to conclude that the woman lied. But we now know that victims have memory problems that are a direct result of the trauma they experience. The trauma itself causes problems in the perception of the event, the recording of those perceptions into memory, and recall of those perceptions, particularly when victims are interviewed shortly after the event.¹¹¹ When a problem solver uses the schema that women lie, those problems of perception, recording, and recall look like lies or reasons not to believe the victim rather than as evidence of the trauma itself.

We saw above that if the schemas are faulty, the entire inference process is compromised. The schemas that people often use in rape cases are faulty. We also saw that certain ingroups—those with traditional gender role beliefs and conservatives—hold these schemas at higher levels than those with the opposite worldviews. This is a problem. Those ingroups are using an inferential reasoning process that is compromised. Not surprisingly, we saw that when these ingroups solve legal problems, they solve them in favor of the man at a higher rate than those with the opposite worldviews.

109. Overestimating how often two events occur together is called the illusory correlation. FISKE, *supra* note 5, at 141.

110. Estimates are that only 5–20% of sexual assaults are reported. Kimberly Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 156 (2012). If we use a false report rate of 10% and a sexual assault reporting rate of 20%, the percentage of false reports to rape reports would only be .02%.

111. Campbell, *supra* note 93; *Shifting the Paradigm for Investigating Trauma Victimization*, BATTERED WOMEN’S JUSTICE PROJECT (last visited Oct. 14, 2014), available at http://www.bwjp.org/forensic_experiential_trauma_interviews.aspx.

That cognitive flow may explain why the military has not made progress on the sexual assault problem, as critics claim. If the military population is more traditional or conservative than the general population, then the military population would likely use those inaccurate schemas at a higher rate than those in the general population would. The inferential reasoning problem would be amplified.

IV. Social Cognition, Rape, and the Military

A. Social Cognition in the Military

The military recognizes social cognition principles and has adopted them into its official decision making process, largely in response to the problems the military had in Iraq. In 2006, after a tour as a division commander in Iraq, General David Petraeus took command of the academic center of the Army, the Combined Arms Center at Fort Leavenworth, Kansas.¹¹² There, he oversaw the redrafting of Army and Marine Corps counterinsurgency doctrine.¹¹³ He recognized that the military did not understand the operational environment in Iraq, that the military was fighting an insurgency using tactics designed for conventional wars, and that the military needed to rethink the way that it thinks.¹¹⁴ The resulting manual was part of his call for change.

The manual explicitly incorporates social cognition principles:

The way that a culture influences how people view their world is referred to as their worldview. *Many people believe they view their world accurately, in a logical, rational, unbiased way.* However, people filter what they see and experience according to their beliefs and worldview. Information and experiences that do not match what they believe to be true about the world are frequently rejected or distorted to fit the way they believe the world should work. *More than any other factor, culture informs and influences that worldview.* In other words, *culture influences perceptions, understandings, and interpretations of events.*¹¹⁵

112. Peter Bergen, *How Petraeus Changed the U.S. Military*, CNN (Nov. 11, 2012), <http://www.cnn.com/2012/11/10/opinion/bergen-petraeus-legacy/>.

113. *Id.*; LINDA ROBINSON, TELL ME HOW THIS ENDS 76–83 (2008).

114. The manual contains a full chapter on understanding the operational environment. U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, INSURGENCIES AND COUNTERING INSURGENCIES, 2-1 (2014).

115. *Id.* at 3-1 (emphasis added).

From that paragraph, we see that the military recognizes that cultural worldviews (i.e., group identities) influence perceptions and interpretations of events (i.e., outcome judgments) according to beliefs (i.e., schemas). The military also recognizes that people experience naïve realism, which is “the notion that one sees the world objectively (even though we suspect that others may not).”¹¹⁶ Those in the ingroup filter information through their worldview but believe that they are approaching the problem in a logical, rational, unbiased way.

In addition to revamping its counterinsurgency doctrine, the military also changed its official problem solving process. Prior to the shift in thinking brought about by General Petraeus, the military had been slavishly following a rigid, formal system called the Military Decision Making Process. Commanders and their staffs became masters at that system, seeking discrete inputs and producing beautifully written plans—but these plans were often designed “to fight the wrong problem.”¹¹⁷ Having failed to correctly visualize the current problem at the start of the process, commanders would “end up fighting the last war.”¹¹⁸

Starting in 2008, the military began to adopt a problem solving process called “design.”¹¹⁹ Under design methodology, commanders first aim to understand the current environment (“What is going on?”)¹²⁰ and they then visualize the desired end state (“What should the environment look like?”).¹²¹ That frames the problem and helps the commander to produce a problem statement (“How do we get from here to there?”).¹²²

In this methodology, commanders must understand the operational environment and the current situation. They do this by using their “experience, intellect, creativity, intuition, education, [and] judgment.”¹²³

116. FISKE, *supra* note 5, at 84.

117. JACK D. KEM, DESIGN: TOOLS OF THE TRADE 63 (2009).

118. *Id.*

119. *Id.* at 5.

120. U.S. DEP’T ARMY, ARMY DOCTRINE REFERENCE MANUAL 5-0, THE OPERATIONS PROCESS 2-6 fig.2-2 (May 17, 2012) [hereinafter ADRP 5-0]; *see also* U.S. DEP’T ARMY, ARMY DOCTRINE REFERENCE MANUAL 3-0, UNIFIED LAND OPERATIONS 4-1 to 4-2 (May 16, 2012) [hereinafter ADRP 3-0]. While I am primarily citing Army doctrine, this process has been adopted by the Joint Staff. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATION PLANNING III-2–III-3, III-12 (Aug. 11, 2011) [hereinafter, JOINT PUB. 5-0].

121. ADRP 5-0, *supra* note 120, at 2-6 fig.2-2.

122. *Id.*

123. JOINT PUB. 5-0, *supra* note 120, at III-2; *see also* ADRP 3-0, *supra* note 120, at 4-1.

In other words, commanders use especially wise generalizations about how the world works.

Frequently, commanders must rely on event schemas to understanding the environment:

In a broad sense, a narrative is a story constructed to give meaning to things and events. Individuals, groups, organizations, and countries all have narratives with many components that reflect and reveal how they define themselves. Political parties, social organizations, and government institutions, for example, all have stories bound chronologically and spatially To narrate is to engage in the production of a story—an explanation of an event or phenomenon by proposing a question or questions in relation to the artifacts themselves. These questions may include—What is the meaning of what I see? Where does the story begin and end? What happened, is happening, and why?

Narrative construction—the conscious bounding of events and artifacts in time and space—is central to framing. Commanders, staffs, and unified action partners construct a narrative to help understand and explain the operational environment, the problem, and the solutions.¹²⁴

If the commander's intuition and knowledge is wrong, or if the commander is using inaccurate event schemas, then the commander will not have an accurate understanding of the operational environment. If so, the commander will not be able to properly frame the problem or visualize the solution.¹²⁵

How commanders frame the problem drives the solution that they choose for that problem. The military provides an example of this in the context of a combat operation: “How individuals or groups frame a problem will influence potential solutions. For example, an organization that frames an insurgent group as ‘freedom fighters’ probably will approach solving a conflict differently from an organization that frames the insurgent group as ‘terrorists.’”¹²⁶

In the sexual assault context, if commanders understand the sexual assault environment to be one where only deviants rape, they will approach the problem much differently than if they recognize that the rapists come from the ingroup. A commander who frames the accused service member as a good soldier will solve the problem much differently than one who frames him as a potential rapist.

124. ADRP 5-0, *supra* note 120, at 2-5.

125. *Id.* at 1-3.

126. *Id.* at 2-5.

If those in the military who handle sexual assault cases are overly represented by certain worldviews (like traditional gender role beliefs or conservatism), then those worldviews would likely influence their perceptions and interpretations of the sexual assault cases that they are responsible for solving. They will likely be using inaccurate schemas, particularly event schemas or narrative constructions about what “real” rape looks like, and this will cause them to improperly frame the problem. And these problem solvers would likely believe that they are approaching the problem in a logical, rational, unbiased way—even if they are not.

B. Traditional Gender Role Beliefs and Conservatism in the Military

Two studies of military populations provide insight into the levels of traditional gender role beliefs and conservatism in the military. Both studies gathered data on a narrower sub-population of the military—the officers. From these narrow populations come the convening authorities and policy makers.

First, the Triangle Institute for Security Studies (TISS) conducted the Survey on the Military in the Post Cold War Era in 1998 as part of a larger research project on civil-military relations.¹²⁷ The researchers sought to identify and measure differences in belief systems held by the elite military population, the elite civilian population, and the general population;¹²⁸ to explore whether there was a gap in beliefs; and to estimate whether any gap harmed military effectiveness or civil-military relations.¹²⁹ The general concern was that the military (particularly the officer corps) was becoming increasingly conservative and aligned with the Republican Party and might otherwise hold contempt for civilian society.¹³⁰

127. The primary research based on this survey was published in *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY* 1-6 (Peter D. Feaver & Richard H. Kohn, eds., 2001). The RAND Corporation also published a study based on the data. THOMAS S. SZAYNA ET AL., *THE CIVIL-MILITARY GAP IN THE UNITED STATES: DOES IT EXIST AND WHY?* (2007). The original researchers also published a codebook. JANET NEWCITY, *DESCRIPTION OF THE 1998–1999 TISS SURVEYS ON THE MILITARY IN THE POST COLD WAR ERA 1* (1999) (on file with author). See generally <http://tiss-nc.org/research/the-civil-military-gap/cm-purpose/>.

128. NEWCITY, *supra* note 127, at 1.

129. Triangle Inst. for Sec. Studies, *CM Method*, <http://tiss-nc.org/research/tiss-civil-military-relations/cm-method/> (last visited Feb. 27, 2014); Triangle Inst. for Sec. Studies, *CM Purpose*, <http://tiss-nc.org/research/tiss-civil-military-relations/cm-method/> (last visited Feb. 27, 2014) <http://tiss-nc.org/research/the-civil-military-gap/cm-purpose/>.

130. See generally Peter D. Feaver et al., *The Gap Between Military and Civilian in the*

The TISS project gathered data from certain military leaders: mid-career officers who were attending staff colleges, more senior officers who were attending war colleges, and general officers attending a required course.¹³¹ The researchers also gathered data from selected groups of civilian leaders and from the general civilian population.¹³²

The TISS survey included an item that measured one facet of traditional gender role expectations: that family labor should be divided such that women should work at home. The item asked whether mothers should be encouraged “to stay at home with their children rather than working outside the home.”¹³³ This item was administered to the sample of civilian leaders (but not the general public sample) and military leaders. Of the civilian leaders, 41% agreed strongly or somewhat that women should be encouraged to stay at home. Of the military leaders, 51% agreed.¹³⁴ The data suggests that, at least for this facet of traditional gender role beliefs, the military leaders are more traditional.

The TISS survey also included an item that asked the respondents to label themselves along a liberal to conservative spectrum.¹³⁵ The researchers reported the following for the general public non-veterans and for the military leaders:¹³⁶

United States in Perspective, in *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NAT'L SEC.* 1–2 (Peter D. Feaver & Richard H. Kohn eds., 2001).

131. NEWCITY, *supra* note 127, at 3–4. The researchers also gathered data on ROTC and service academy cadets.

132. *Id.*, at 4–5.

133. *Id.*, at 10.

134. Ole R. Holsti, *Of Chasms and Convergences: Attitudes and Beliefs of Civilians and Military Elites at the Start of the New Millennium*, in *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NAT'L SEC.* 48–49 tbl.1.11 (Peter D. Feaver & Richard H. Kohn eds., 2001). The researchers reported that the difference was statistically significant at $p < .001$.

135. NEWCITY, *supra* note 127 at 24.

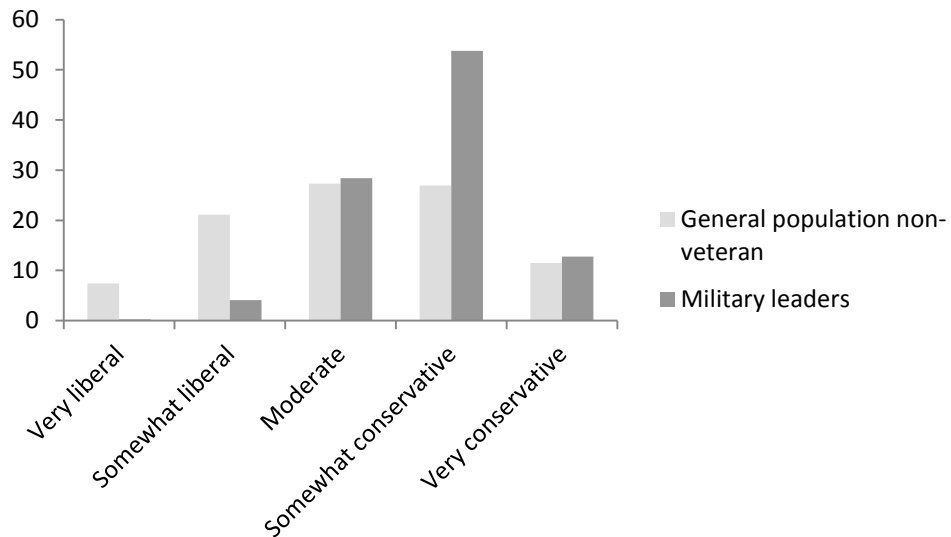
136. Holsti, *supra* note 134 at 33 tbl.1.4. The researchers report that the difference was statistically significant at $p < .001$.

Table 1: Political self-label comparison, TISS general population non-veteran and military leaders, by percent

<i>Response</i>	<i>General public non-veterans</i>	<i>Military leaders</i>
Very liberal	7.4	0.3
Somewhat liberal	21.1	4.1
Moderate	27.3	28.4
Somewhat conservative	26.9	53.8
Very conservative	11.5	12.8

Displayed graphically, the difference between the two samples is very apparent:

Figure 1: Political self-label comparison, TISS general population non-veteran and military leaders, by percent



The data suggests that the military leaders—the potential convening authorities and policy makers—are much more conservative than those who are in the general population who are not themselves veterans.

In the second study, conducted in 2004, Jason Dempsey surveyed the active duty Army population looking for answers to the same basic questions posed by the TISS researchers.¹³⁷ Unlike the TISS survey, which only looked at selected ranks, Dempsey surveyed the entire rank population with a few minor exceptions.¹³⁸ Another significant difference between his study and the TISS study is that he only looked at the Army population while the TISS survey looked at all branches of service.

Dempsey included a gender-role item in his study. He chose his item language because it was used in the 2004 National Annenberg Election Survey and he wanted to make direct comparisons between his sample and samples taken from the general population.¹³⁹ The item language is: “Some people feel that women should have an equal role with men in running business, industry, and government. Others feel that the woman’s place is in the home. Where would you place yourself on a scale from 1 being an equal role for women and 7 being a woman’s place is in the home?” Dempsey reports that 60% of the civilian population (sampled in the Annenberg survey) fully agreed that women should have an equal role, while only 49% of Army officers in his sample fully agreed.¹⁴⁰

Dempsey also included an item that asked the respondents to label themselves along a liberal to conservative spectrum. He found that the entire Army population looked very much like the general public;¹⁴¹ however, he also found that “the similarity between the general American population and the army population masks two very different populations in the Army data set. One is heavily conservative but relatively small (the officer corps), and the other is more moderate and liberal but much larger (the enlisted ranks).”¹⁴² Comparing the responses from the officers in his sample to the sample of the general public used in the Annenberg sample, he reported:¹⁴³

137. See generally JASON K. DEMPSEY, *OUR ARMY: SOLDIERS, POLITICS, AND AMERICAN CIVIL-MILITARY RELATIONS* (2010).

138. *Id.*, at 6.

139. . *Id.*, at 240 app. C.

140. *Id.* at 62.

141. *Id.* at 74–75.

142. *Id.*

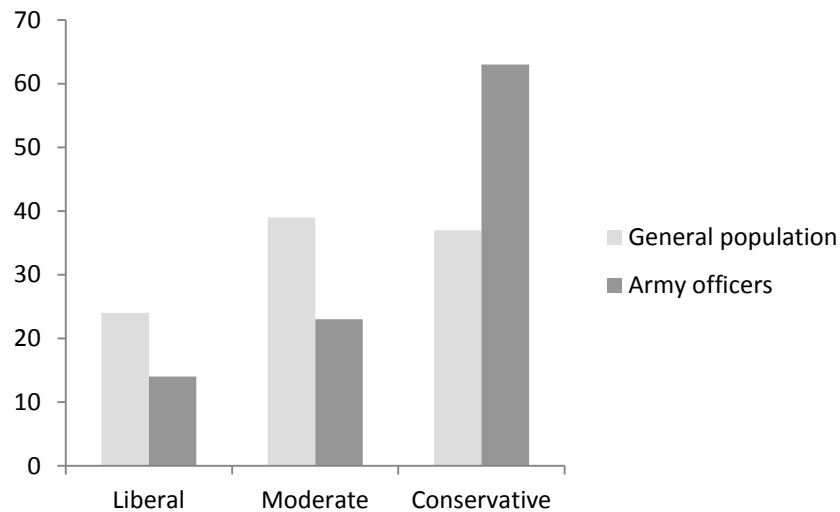
143. *Id.* at 74 tbl.5.2; see also *id.* at 75 tbl.5.3. Dempsey reported that the differences

Table 2: Political self-label comparison, Dempsey general population and Army officers, by percent

<i>Response</i>	<i>General public</i>	<i>Army officers</i>
Liberal	24	14
Moderate	39	23
Conservative	37	63

Displayed graphically, the difference between the two samples becomes very apparent:

Figure 2: Political self-label comparison, Dempsey general population and Army officers, by percent



The data suggests that the Army officer population—the population that produces the potential convening authorities and strategic policy makers—is much more conservative than the general population.

were statistically significant at $p < .001$.

Both studies suggest that the military population that makes the decisions on military justice and sets sexual assault policy is much more traditional than the general public, at least toward one facet of traditional gender role beliefs,¹⁴⁴ and more conservative than the general population. As discussed above, research indicates that people with those worldviews are more likely to use inaccurate rape schemas when solving sexual assault problems. This suggests that the problem of a compromised inferential reasoning process—the use of inaccurate rape schemas which results in untrustworthy outcome judgments—is exacerbated in this population within this military community.

C. Examples of the Use of Rape Schemas in the Military

The data from those two studies suggests that the population that produces convening authorities and strategic policy makers is more traditional and conservative than the general public. Other research suggests that those who are traditional and conservative subscribe to inaccurate rape schemas at a higher rate than those who have the opposite worldview. In addition to that inferential reasoning problem, and it may

144. Regina Titunik has concluded that the TISS data shows that the military population is not more sexist than the general population. Regina F. Titunik, *The Myth of the Macho Military*, 40 *POLITY* 137, 144–45 (2008). This part of the TISS study was discussed in Laura L. Miller & John Allen Williams, *Do Military Policies on Gender and Sexuality Undermine Combat Effectiveness?*, in *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NAT'L SEC.* 361, 366–77 (Peter D. Feaver & Richard H. Kohn eds., 2001). Titunik looked at items in the TISS study that explored whether the military should remain dominated by male values; confidence levels in female leaders; whether women should be allowed to serve in all combat positions; and whether there was more sexual discrimination in the military than in the public realm. Titunik, *supra* note 144, at 145–47. In general, the general public appeared to have more traditional attitudes than the military population.

However, the reliability and validity of this part of the TISS study has been called into question because the differences in responses may have been due to “the respondents’ knowledge about the issues studied and the importance to place on them.” SZAYNA ET AL., *supra* note 127, at 62. The questions related to specific policy issues and those in the military may have had direct knowledge and experience with those issues while the general public may have responded based on conjecture or beliefs.

In addition, because these items were very narrow—exploring attitudes in the military context—the military respondents may have also been influenced by a social desirability bias that would not have influenced the general public respondents. Social desirability bias occurs when respondents answer an item in a way that “presents themselves in the most favorable manner relative to prevailing social norms”. Maryon F. King & Gordon C. Bruner, *Social Desirability Bias: A Neglected Aspect of Validity Testing*, 17 *PSYCHOLOGY & MKTG.* 79, 80 (2000). A military respondent who answers with what appears to be a sexist response would be running against the norms professed by the military leadership.

turn out that some of these inaccurate schemas are amplified within the military context.

The schema that only deviants rape (and good guys do not) is greatly intensified in the military:

Some social scientists have noted that considering the “character and military service of the accused” when deciding the disposition of a sexual assault allegation may be based on false beliefs about who perpetrates sexual assault. They argue that sexual predators are adept at being likeable to authority figures and are “such masters of the ‘hidden persona’ . . . that their colleagues and commanders are often happy to offer positive character testimony to investigators and courts-martial.” . . . [M]ore than a decade of war has led military leaders to value achievement in combat above all other characteristics, and that this has created a situation where commanders tend to overlook or tolerate sexually abusive conduct among subordinates.¹⁴⁵

Not only is the offender a member of the ingroup, he may be a hero within the ingroup.

This schema played a large role in the recent reversal of the conviction of an Air Force pilot. The pilot, Lieutenant Colonel James Wilkerson, had been convicted by a court-martial composed of panel members of sexually assaulting a guest at his house.¹⁴⁶ The convening authority, Lieutenant General Craig Franklin, overturned the panel’s findings. In a letter to the Secretary of the Air Force, General Franklin explained his reasoning:

I was perplexed in relation to this conundrum—Lt Col Wilkerson was a selectee for promotion to full colonel, a wing inspector general, a career officer, and described as a doting father and husband. However, according to the version of events presented by the prosecution, Lt Col Wilkerson, in the middle of the night, decided to leave his wife sleeping in his bed, walk downstairs past the room of his only son, and also near another room with two other sleeping guest-children, and then he decided to commit the egregious crime of sexually assaulting a sleeping woman who he and his wife had only met earlier that night.¹⁴⁷

145. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 66 (internal citations omitted).

146. Craig Whitlock, *Air Force General’s Reversal of Pilot’s Sexual-Assault Conviction Angers Lawmakers*, THE WASHINGTON POST (Mar. 8, 2013), http://www.washingtonpost.com/world/national-security/air-force-generals-reversal-of-pilots-sexual-assault-conviction-angers-lawmakers/2013/03/08/f84b49c2-8816-11e2-8646-d574216d3c8c_story.html.

147. Letter from Lieutenant General Craig Franklin, Commander, Third Air Force, to Secretary of the Air Force Michael Donley 6 (Mar. 12, 2013), *available at* <http://www.foia.af.mil/shared/media/document/AFD-130403-022.pdf>.

General Franklin was perplexed (as in, he experienced cognitive dissonance) because his schema of a rapist did not match the information he received about Colonel Wilkerson. That schema prevented General Franklin from understanding the operating environment.

A recent military appellate case also illustrates the power of the “only deviants rape” schema. In *United States v. Lucas*,¹⁴⁸ a service member was convicted of rape by court-martial composed of panel members. In the military, the first level of appellate courts (composed of military judge advocates) can make independent factual findings and decide for itself whether the accused is guilty beyond a reasonable doubt.¹⁴⁹ Here, the military appellate court reversed that panel’s finding and dismissed the charge with prejudice.¹⁵⁰

The court in *Lucas* reversed the panel’s decision in large part because the judges used the “only deviants rape” schema. The court stated, “We find that the explanations [the accused] gave to the [investigator] regarding the events . . . are believable, especially considering the evidence of his good military character and service history admitted at sentencing.”¹⁵¹ In the military, evidence of good military character can be admitted during the guilt-phase of the trial to prove that the accused did not commit the offense.¹⁵² Even so, the court should not have used evidence admitted during the sentencing proceeding to decide a guilt-phase question—but that evidence was inconsistent with a powerful schema (only deviants rape) and this court could not avoid the temptation to use it. According to this court, those with good military character are not deviants and so do not rape. At the very least, they tell the truth to investigators.

148. See generally *United States v. Lucas*, No. 201100372, 2012 CCA Lexis 322 (N-M. Ct. Crim. App. Aug. 28, 2012).

149. See UCMJ art. 66(c) (2012). (Stating that the service courts of criminal appeal “may affirm only such findings of guilt . . . as it finds correct in law and fact . . . In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the evidence”).

150. *Lucas*, 2012 CCA Lexis 322, at *2.

151. *Id.* at *12.

152. See Elizabeth Lutes Hillman, *The “Good Soldier” Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879 (1999). This exception, which essentially serves as pipeline for evidence that supports the schema that only deviants rape, is under serious Congressional scrutiny. This exception will close for sexual assault offenses under either of two current proposals. S. Res. 2410, 113th Cong. § 545(g) (2014); H.R. Res. 4435, 113th Cong. § 537 (2014). The issue is whether it this evidence will be allowed for other offenses.

Turning to schemas related to whether the woman actually consented and so must be lying about it now, these schemas also appear to still be in use in the military. One the schemas—that real victims fight back—is likely amplified in the military. Most service members, including women, receive training on how to fight in close quarters. The amplified schema here would be, real victims fight back, especially when they have received training in how to fight.

Returning to *Lucas*, we find that reasoning. The court stated, “It is illogical to believe that a man weighing just over 200 pounds could accomplish [the rape] against a female Marine, trained in Marine Corps Martial Arts, weighing 155 pounds, under the circumstances as described in the record before us.”¹⁵³ If she were a real victim, she would have fought back; she did not, so she must have consented and is lying about it now.

It is illogical to believe that a real victim trained in martial arts would not fight back—if you apply incorrect schemas. If you apply schemas that are informed by neuropsychology, it makes perfect sense. In these kinds of sexual assaults, the woman is often not aware that she is in danger. She is not on patrol, adrenaline pumping, anticipating an attack from the enemy that might end in a close-quarters knife fight. In those situations, knowing martial arts might be useful. In a sexual assault case where the woman trusts the person she is with and is not anticipating danger, the attack will likely be over before the woman understands what just happened. Here, the court expected a 155-pound woman to use martial arts against a 207-pound Marine Corps non-commissioned officer who, by the way, was also trained in martial arts, when his brain was ready for the assault and hers was not. That is illogical.

The schema that women frequently lie about sexual assault is still officially endorsed by the military. In 2012, the Department of the Army published *Army 2020: Generating Health & Discipline in the Force*,¹⁵⁴ an exhaustive report on health and crime in the Army. The tone of the portion of the report that dealt with misconduct was about cracking down on misconduct committed by people whom we would consider to be outgroup service members—those who use drugs, go absent without leave, steal, commit assaults.

153. Lucas, 2012 CCA Lexis 322, at *9.

154. U.S. DEP'T ARMY, ARMY 2020: GENERATING HEALTH & DISCIPLINE IN THE FORCE AHEAD OF THE STRATEGIC RESET (2012), available at <http://www.usagria.army.mil/docs/GoldBook.pdf> [hereinafter, ARMY 2020].

In the discussion of sexual assault, however, the tone changes. The authors tell us that:

Consistent with the civilian literature, reporting of sexual offenses (particularly for rape and aggravated sexual assault) include both legitimate and false allegations. A review of FBI data for sexual assaults across a seven-year period found that approximately 25% of sexual assaults referred to the FBI involved false allegations (based on post-arrest and post-conviction DNA exonerations).¹⁵⁵

Note that those figures apply to stranger sexual assaults. In non-stranger sexual assault, identity (and DNA evidence) is not an issue. Stranger sexual assault is not the problem facing the military. The authors of this section do not appear to understand the problem.¹⁵⁶

The authors then cite discredited research to report that 23–50% of rape allegations are false¹⁵⁷ and then tell us why women lie about rape: “The same article posited several key motivations behind false allegations, including: (1) a need for an alibi to compensate for problems arising from consensual sex, (2) in retribution for a perceived wrong such as rejection or betrayal, and (3) to satisfy a need for attention or other material gain.”¹⁵⁸ The authors then continue by reporting that the “veracity of the complaint must be questioned to preserve the presumption of innocence because ‘sex crimes are the only crimes that do not require corroborating evidence for conviction.’”¹⁵⁹ The last part of that statement is simply inaccurate, and the authors do not make a similar point about the credibility of people who allege theft or simple assault or any other crimes.

In contrast to the authors’ treatment of other crimes, where the focus is on catching and convicting outgroup service members, in the sexual assault context, the focus is how women lie about sexual assault. When offenders otherwise look super-ingroup (they are good soldiers), the ingroup needs a really good explanation for why so many from the ingroup are being accused of sexual assault. The Army’s top law enforcement officials

155. *Id.* at 128.

156. This section is inconsistent with earlier portions of the report, where the authors otherwise seem to understand the environment. The authors identified trends about when these assaults occur and who the victims are, and, importantly, that almost all of the sexual assaults in the Army involve an offender that is known to the victim. ARMY 2020, *supra* note 154, at 124–25. This last finding does not seem to have had much impact on the rest of the report.

157. *Id.* at 128–29.

158. *Id.* at 128.

159. *Id.* at 128.

explanation is that upward of half of the women are lying. The Army's top law enforcement officials do not understand the problem.

The Franklin letter, the *Lucas* case, and the Army report are anecdotes and are low-hanging fruit at that. General Franklin, the judges in *Lucas*, and the authors of the Army report obviously used inaccurate rape schemas.¹⁶⁰ But they all serve as contemporary examples of how these rape schemas operate with greater intensity in the military, and they serve as examples of how many in the military who are charged with solving these problems cannot properly frame these problems. They do not understand the current conditions of the operational environment and so cannot visualize the proper end state. They have a cognitive blind spot.

V. Conclusion and Policy Implications

This article suggests that the military populations that produce convening authorities and policy makers are overrepresented by people who are traditional and conservative. Other research has shown that those ingroups use inaccurate rape schemas to solve sexual assault problems at a higher rate than those with other worldviews. And research has shown that those ingroups choose outcome judgments that favor the man more than those with other worldviews. They cannot visualize what is happening during these assaults. They do not understand the operating environment. They have a blind spot.

This article suggests that some of the criticisms of the military's handling of sexual assault cases are accurate—that those who handle these cases follow a cognitive process that seeks to rationalize why a good, ingroup man would be accused of sexual assault and that explains away why an outgroup woman would accuse him of sexual assault. The research suggests that this problem is not based on hostile sexism, though; rather, it is likely based on benign sexism related to traditional gender role beliefs, particularly beliefs about how women should behave sexually.

There are three basic proposals for reform.¹⁶¹ One is that we give these cases to civilian law enforcement. However, giving these cases to

160. The Franklin letter and the *Lucas* opinion contain many other instances where the authors used inaccurate rape schemas.

161. Other proposals do exist but do not have much likelihood of gaining traction. For example, one recent House resolution included a provision that these cases bypass the commander and automatically be referred to a courts-martial. Holley Lynn James Act, H.R. 1517, 112th Cong. § 3(a) (2011).

other civilian law enforcement agencies will not likely change anything. Many other law enforcement jurisdictions are also under serious criticism.¹⁶² These other law enforcement agencies may have populations that are very similar to the military population and may rely on the same schemas.

The second is that we give these cases to someone outside of the chain of command, either a military prosecutor from outside of that chain of command,¹⁶³ an independent military convening authority,¹⁶⁴ or independent director of prosecution within the Department of Defense.¹⁶⁵ The rationale is that this will erase the potential conflict of interest that a convening authority faces when the accused and victim both come from the convening authority's command. However, giving these decisions to military lawyers or independent convening authorities will not likely change anything. The ingroup/outgroup distinction is not based on what unit the accused or the victim belong to; rather, the distinction is based on what social group they belong to.

Further, we can infer that these military lawyers and this other convening authority are also likely traditional and conservative and so will use these inaccurate rape schemas. In addition, many of these lawyers served as defense counsel in sexual assault cases (in the military, it is common practice for judge advocates to serve as both prosecutors and defense counsel). As defense counsel, they probably reinforced pre-existing rape schemas as they defended these cases. They may not be able to unlearn those cognitive processes. The military lawyers may be the worst option.

162. See, e.g., HUMAN RIGHTS WATCH, *CAPITOL OFFENSE: POLICE MISHANDLING OF SEXUAL ASSAULT CASES IN THE DIST. OF COLUMBIA* (2013); Cassia Spohn & Katharine Tellis, *Justice Denied? The Exceptional Clearance of Rape Cases in Los Angeles*, 74 ALB. L. REV. 1379 (2011); Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197 (2014) (highlighting Baltimore, New Orleans, Philadelphia, St. Louis, Atlanta, Dallas, Milwaukee, Mobile, Oakland, and Washington, D.C.).

163. Military Justice Improvement Act of 2013, S. Res. 1752, 113th Cong. § 2(a) (2013). After a fairly public battle, this bill fell five votes short of the 60 required to defeat a filibuster. Amanda Marcotte, *What Happened to the Military Sexual Assault Bill in the Senate on Thursday?*, SLATE (Mar. 7, 2014, 10:57 AM), http://www.slate.com/blogs/xx_factor/2014/03/07/military_sexual_assault_bills_claire_mccaskill_defeats_kirsten_gillibrand.html.

164. COMM'N. OF CIVIL RIGHTS, *supra* note 3, at 67.

165. Sexual Assault Training Oversight & Prevention Act, H.R. 1593, 113th Cong. § 5(a) (2013).

The third option is to keep the status quo. A bill that recently passed the Senate would require the military to ask the victim whether she wanted the case to go to court-martial or a civilian jurisdiction, and then to give that preference great weight—but preserves the status quo.¹⁶⁶ Under this option, commanders will continue to make decisions likely using inaccurate rape schemas, while receiving advice from lawyers who are likely using inaccurate rape schemas, and the victim's only other option is to take the case to civilian law enforcement officials who are likely using inaccurate rape schemas.

Real reform requires that the people who resolve these legal problems do so without the influence of these rape schemas. We could choose to keep the current structure—but only if we could commit to intensively training each general court-martial convening authority and his or her staff judge advocate and then certifying that they are free of these schemas. We could choose to use centralized decision makers—but only if they are certified as free of these schemas. We could choose to let local law enforcement offices handle these cases—but only if the people in those offices are free of these schemas.

The decision then turns on which is the most efficient system. Congress cannot likely fund and supervise the training of every local law enforcement office. Centralized decision makers will likely greatly increase transaction costs—primarily, case-processing times. The best solution may be to keep the current structure but to require that general courts-martial convening authorities and staff judge advocates be certified after having gone through intensive (probably multi-day) training on the realities of sexual assault.

The findings from this study go beyond just these commanders and their lawyers. These findings also suggest that the entire population that handles these cases (investigators, trial attorneys, trial and appellate judges, panel members) may be more likely to use this cognitive processing than members of the general public. All of these actors should be trained and certified before being allowed to act on these cases. With this training and certification, Congress could reach the ultimate goal—a system that is free of inaccurate schemas, not just one that is no worse than the others around.

166. See generally Victims Protection Act of 2014, S. Res. 1917, 113th Cong. § 3 (2013).