

Chapter 5:

Ameliorating the Concept of Rape

Corresponding to the second element of the method of emancipatory amelioration (EA), Chapter 5 aims at improving our conceptual understanding of rape with a view to the emancipatory goal of improving upon the defective status quo. The chapter puts forward a revised cluster concept, according to which rape can be characterized by ten properties which particular instances of rape may exhibit to a greater or lesser degree, and argues that such an understanding satisfies the desiderata identified in Chapter 2.

5.1 INTRODUCTION

In Chapter 2, I argued that one way to track the various forms of the phenomenon of rape is by developing the concept into a cluster account. However, I also argued that the proposed cluster fails as it does not adequately track the social embeddedness of rape. Thus, I proposed that a conceptual analysis of rape has to be based on a rich social theory of the phenomenon. I specified five desiderata that a social theory of rape has to fulfill. I then proposed that the conceptual analysis of rape has to be based on the social theory and has to be prescriptive. In Chapter 3, I developed a method that can yield the social theory as well as a prescriptive conceptual analysis. The last chapter and this chapter apply the method of emancipatory amelioration (EA) to the phenomenon of rape. In the last chapter, I presented an account of how rape is embedded in the social world. I argued that rape is a social practice which is either rendered acceptable by being re-interpreted or is *prima facie* accepted, and that rape as a social practice is part of a sexist ideology. Furthermore, I have shown that as part of a sexist ideology, rape is not merely an individual wrong, but helps sustain social and structural injustice. This social theory of rape maps the various forms of rape as well as disentangles the faulty conceptions and attitudes of rape from its standing in the real world and accounts for the persistence of misguided

beliefs. The main question that guides the work in this chapter is: What should the concept of rape be, given the context of the sexist ideology?

In this chapter, I turn to the second step of the method of emancipatory amelioration (EA) and ameliorate the concept of rape. This amelioration is grounded in the social theory provided in Chapter 4 and is guided mainly by the pragmatic condition of emancipatory amelioration (EA): it pursues the question of which concept could work best taking into account the critical analysis of the status quo and the aim of correcting the defects of the status quo. The first section, Section 5.2, collects the relevant insights that are needed for ameliorating the concept of rape. In Section 5.2.1, I give a brief overview of the last chapter and the insights of the cluster account discussed in Chapter 2. I then propose a revised cluster.¹ To do so, in Section 5.3.1, I turn to the specific aspects of the social theory in which the amelioration should be grounded and then I develop a revised cluster in Section 5.3. Finally, I consider whether the theory fulfills the specified desiderata (Section 2.4.3), present some objections and show the potential of the theory (Section 5.3.3 and 5.3.4).

5.2 EMANCIPATORY AMELIORATION AND RAPE

Let me start by giving a brief summary of the method of emancipatory amelioration (EA) as specified in Chapter 3:

(EA) Emancipatory Amelioration yields a social theory and a conceptual analysis that each satisfies one of the following two conditions:

1. Normative Condition: it is directed at exposing defects in the status quo (social theory);
2. Pragmatic Condition: it pursues the question of which concept works best to bring about emancipatory transformation (in the sense of a social and legal transformation to a more equal and just social structure) taking into account the structural analysis of the status quo (conceptual analysis).

Emancipatory amelioration (EA) is emancipatory because it aims at emancipatory transformation of the status quo; it is grounded in a social theory of the phenomenon in question, which reveals the (underlying) social structures and its defects that stand in the way of emancipation. The method of emancipatory amelioration (EA) has two steps: to expose the defects in the status quo, the first step of emancipatory amelioration (EA) is to engage in a social theory of the phenomenon. This step takes its clue from the normative condition: it works

1 | I am grateful to Lea Prix, Johanna Müller, Isette Schuhmacher, and Eva von Redecker for helping me think through the details presented here.

to expose defects in the status quo with the idea that these defects need to be corrected. In a second step, it can ameliorate a given concept on the basis of the social theory and aim at an emancipatory understanding of the concept. This second step takes its clue from the pragmatic condition: it pursues the question of which concept could work best taking into account the social theory of the first step. As a reminder, the first step consists of several small steps: (1) Experiencing a moment of rupture or practical contradiction; (2) failing to make intelligible said moment of rupture in our lived experiences; (3) coming to realize the structural dimension (by, e.g., shared experiences); and, (4) engaging in immanent critique, i.e., a critical analysis of the schemas and practices that brought the practical contradiction about and made it unintelligible. The second step of the method of emancipatory amelioration—the step of amelioration—ameliorates a given concept on the basis of the first step. It begins by asking: what concept would work best regarding our emancipatory aims? And it takes as a starting point the social theory that resulted from the first step. I have worked on the first step in the last chapter (Chapter 4) and provided a social theory of rape.² I now turn to ameliorate the concept such that it tracks adequately the phenomenon of rape as explicated by the social theory. I do so, first, by spelling out the contours of the cluster (Section 5.2.1 and 5.2.2) and then, in Section 5.3, turn to which insights from the social theory are important for ameliorating the concept.

2 | But why should we accept the underlying social theory for the project of amelioration? If the conceptual elucidation of rape hinges on an adequate social theory of rape, the ‘smaller’ parts of the picture hinge on the plausibility of the ‘bigger picture’. But what justifies the bigger picture? What grounds do we have to accept the suggested social theory of rape? First of all, the rules for the social theory are set up in a way to make it unlikely that we are influenced by our pre-existing commitments, attitudes, and beliefs. We start to engage in the process of theorizing only if we experience a moment of rupture and draw the necessary conclusions from this moment. Furthermore, the theory not only explains rape but a wider system of which rape is a part, it provides answers to the questions asked (e.g., why is the dominant working understanding popular?), it explains the matter without having to rely on external standards, and it is supported by empirical data. But, of course, whether the theory is a good theory or not can only be known retrospectively—by asking whether the outcomes of understanding rape in line with the target concept are better or worse.

5.2.1 Insights from the Proposed Cluster Account of Rape

As shown in Chapter 2, cluster accounts have the following structure:

1. If all the criteria are instantiated, then the object falls under the concept; the criteria are jointly sufficient for the application of the concept, but even if fewer criteria are instantiated, the object can still fall under the concept.
2. None of the criteria of the object are individually necessary for the object to fall under the concept; there is no criteria that all objects that fall under the concept must possess.
3. There are disjunctively necessary conditions: some of the criteria apply if an object is said to fall under the concept. (cf. Gaut 2000: 26-7)

One way to spell this out is with regard to resemblance. I then argued that we can make use of a multiple paradigm theory to conceptually analyze rape. I proposed three paradigms—stranger rape, acquaintance rape, genocidal rape—that track distinct examples of forms of rape in the world. I suggested thinking of a big oak tree to conceptualize the cluster. The branches of the tree represent the different aspects that an act of rape can have. The more aspects are realized—that is, the closer the act in question resembles one (or more) of the paradigms—the better we can judge an act to be an act of rape. This idea is influenced by Gaut (2000), who argues that we have no problems judging an object to fall under the concept in one extreme and no problem to judge it not to fall under the concept in the other extreme. High degrees of resemblance are one extreme, no resemblance is the other. Analyzing the concept of rape this way broadens the dominant working understanding insofar as it includes all cases that resemble any one of the paradigms. It can, thus, track various forms of rape. However, I discussed two problems that the proposed cluster faces: the problem of practicability and the problem of normative adequacy. And I argued that what we need is a revised model based on a social theory of the phenomenon of rape. This revised model has to adequately track the social reality of rape as provided in Chapter 4.

5.2.2 Cores, Prototypes, and Definitions

The second step of emancipatory amelioration (EA)—the actual amelioration—can be done in (at least) three different ways: (1) we could stipulate a definition of the concept in question, (2) we could provide prototypes or paradigms of the concept in question, or (3) we could outline a core of a cluster concept. In each of the three ways, the method applied is roughly the same; first, the social theory of the phenomenon of rape paints a broader picture of the social embeddedness of the phenomenon, and, second, the concept is ameliorated by

asking the following question: given the specific context (of sexist ideology), which concept would work best as an emancipatory concept? Obviously, this question can be answered in multiple ways. Let me quickly work through the three mentioned above.

First, the method of emancipatory amelioration (EA) could be used to stipulate a unified definition for the concept of rape. Whatever then is tracked by the definition falls under the concept in question. In this way, the project would be close to Haslanger's use of the method of amelioration. She uses the project of amelioration to stipulate a definition of, for example, woman, race, and parent that is in line with feminist and anti-racist purposes. Whatever is tracked by the definitions falls under the concept. For example, her definition of woman is:

S is a woman if

- (i) S is regularly and for the most part observed or imagined to have certain bodily features presumed to be evidence of a female's biological role in reproduction;
- (ii) that S has these features marks S within the dominant ideology of S's society as someone who ought to occupy certain kinds of social position that are in fact subordinate (and so motivates and justifies S's occupying such a position); and
- (iii) the fact that S satisfies (i) and (ii) plays a role in S's systematic subordination, that is, along some dimension, S's social position is oppressive, and S's satisfying (i) and (ii) plays a role in that dimension of subordination. (Haslanger 2012: 234, emphasis in original)

This definition is based on a particular social theory of the system of sexist oppression and gives priority to the structure of subordination and privilege that exists in regard to the social classes of men and women. It aims at changing our concept of woman such that the concept tracks the ways the phenomenon of woman is constrained by sexist oppression. Because this definition tracks the real life conditions of what it means to be a woman, it is open for revision if the real life conditions change. However, it is open to revision insofar as we have to stipulate a new definition if the social conditions change. Once the social conditions change, the definition fails to adequately track the phenomenon and, thus, demands revision. This is one way to provide a conceptual analysis informed by a social theory. There might be a way though to account for at least small changes in the social theory without having to stipulate a new definition or having to change the model every time. Let us see if the other alternatives can provide this. Furthermore, while Haslanger in her endeavor to ameliorate the concept of woman prioritizes the system of sexist oppression, I want to hold on to a view that can prioritize at least two aspects: the various forms of rape and the social embeddedness of rape in the sexist ideology. Hence, let us see

whether a cluster account—either with respect to paradigms or cores—can be helpful in this respect.³

Second, as I proposed in Chapter 2, the method of emancipatory amelioration (EA) could be used to provide paradigms (or prototypes) for the concept of rape. Roughly, things that have the most widely shared attributes have a high degree of family resemblance with other things in the same category, and things that have lesser shared attributes have a lower degree of family resemblance. And to broaden the account, one could stipulate more than one paradigm, as I have indeed done, such that a thing in question can resemble one or more paradigms. For example, an act that shares high degrees of resemblance with any one of the paradigms can be judged to fall under the concept, while an act that shares only low degrees of resemblance does not. This would account for all acts that show resemblance with any of the paradigms and the more paradigms we have, the broader the category. These paradigms, according to emancipatory amelioration (EA), would then be informed by the social theory. While a cluster of paradigms, as I have shown before, can account for a whole range of forms of rape, it does not account for the social embeddedness of the phenomenon, e.g., the gap between the dominant working understanding of the sexist ideology and the various forms of rape as explicated by the social theory. Hence, I suggest turning to a different kind of cluster theory.

Third, the method of emancipatory amelioration (EA) can be used to provide the core to a cluster model. This model can be realized in two different ways: (1) Roughly, the cluster itself could list various properties, of which an act of rape does not necessarily needs to have all, but it needs to have some. Said cluster of rape has a core: the middle part of the cluster. This core consists of the properties that are most essential to the concept of rape and from which an act needs to have a specific number to count as rape. The more properties an act in question has, the closer the act is located to the middle of the cluster and the clearer the act is one of rape; the lesser properties an act has, the more it is located on the boundaries of the cluster of rape. Or (2) the cluster could list various features, of which an act of rape needs to have all, but it is open to different degrees. This model also consists of a core that lists all of the properties of the cluster in their—for lack of a better word—most “extreme” form. The closer an act is located to the middle of the cluster, the most extreme

3 | This is, of course, not to say that a cluster account is better. Rather, whether we choose one or the other is a matter of what we prioritize in our theorizing. I expect that both—the cluster as well as the unified definition—could ameliorate the concept of *rape* adequately. However, the unified definition needs more work to do so, because, as Jenkins (2016b) correctly argues, by prioritizing the social embeddedness of the concept of *woman*, Haslanger’s definition fails to include various forms of the phenomena.

its properties are realized and the more definitely is it a case of rape. In my proposal below, I make use of the latter model.

Outlining the core of a cluster has the following benefits: (a) it is adaptable according to the given social theory; (b) it acknowledges that the act of rape is located on a map⁴ (i.e., its properties are realized in degrees); (c) it acknowledges that the map of rape has fuzzy boundaries to other categories (e.g., between acts of unproblematic sex and acts of sexualized violence, or between acts of violence and acts of sexualized violence); (d) it highlights its conceptual closeness to neighboring categories such as violence, unproblematic sex, domestic violence, abuse, incest, etc.; and (e) it nevertheless provides the central aspects that each act of rape needs to have. On the basis of the social theory (given in Chapter 4), I now sketch a cluster model for the concept of rape.

5.3 A CLUSTER MODEL OF RAPE

In Chapter 2, I sketched a cluster account of rape. While the proposed cluster tracked various forms of rape, it faced the problem of practicability and normative adequacy. In Chapter 3, I outlined a new method—emancipatory amelioration (EA)—that is particularly useful for social phenomena embedded in a broader social structure. In Chapter 4, I argued that rape is a social practice and part of a sexist ideology. This also provides insight about which conceptions are accurate and which are based on false schemas. This analysis and the given critique of the underlying social structures of rape provide the grounds for ameliorating rape and constitutes the first step within the method of emancipatory amelioration (EA). In this chapter, I provide the second step: the ameliorative part. This part should fulfill the fifth desiderata as defined in Section 2.4.3:

Desideratum 5: The social theory has to be able to ground a prescriptive conceptual analysis that adequately tracks the phenomenon and strives for conceptual change; whereby the conceptual analysis has to

- (a) be flexible in a way that allows for changes when we gain further information about the phenomenon;
- (b) be constrained enough to allow for proper judgements;

4 | I argued before that the act of rape is located along a spectrum in which some cases are realized in extreme and some in less extreme ways. I have also argued that the idea of a spectrum presupposes two-dimensionality and that we should move away from two-dimensionality. As I propose shortly, we can understand the cluster as a three-dimensional map, with many different properties that are realized in many different degrees.

- (c) account for different degrees;
- (d) acknowledge the concept's contestability, gray area, and neighboring categories;
- (e) be non-paternalistic; and
- (f) have heuristic utility.

In the following, I spell this part out with the help of a core of the cluster.

5.3.1 Insights from Rape and Ideology

In Chapter 2, I argued that the proposed cluster is insufficient with regard to its content. It does not track the phenomenon of rape adequately because it lacks the background of a rich social theory. The cluster model that I propose in this chapter takes rape as a social phenomenon and explains the distorted beliefs about rape. It does so by taking seriously the insights of the last chapter. First, I argued that rape is not merely an individual act, but a social practice that— together with other social practices—constitutes a social structure. As a social practice, rape is constituted by interdependent schemas and resources. Second, rape is an accepted social practice. It can be justified by the social structure in two ways: (1) most forms of rape—those that diverge from the example of physically violent stranger rape—are reinterpreted and made intelligible as something other than rape and are thus rendered acceptable. Or, (2) in cases where the act is not reinterpreted as something else, it is *prima facie* acceptable in so far as sanctions (and other institutional consequences) are weak. In other words, raping and getting away with it is a real option for many. Third, the social structure is a pejorative, holistic and self-operative sexist ideology. The sexist ideology is constituted by ritualized social practices (such as rape) and is governed and made intelligible by a coherent cultural *techné* (that includes rape myths) which organizes us in gendered relations of domination and subordination. The sexist ideology explains the illusive, pervasive, and misguided character of sexualized violence (including rape). Fourth, rape is not merely an individual moral wrong, but—as part of a sexist ideology—it helps sustain social and structural injustice. These insights, as well as the insights gained in previous chapters, inform us in determining the properties important for accurately describing rape.

Let us now turn to the insights from the last chapters and see what features are relevant for an adequate analysis of rape. I propose that there are six insights that are directly relevant for the components that should be part of the cluster of rape: its various forms, its embeddedness in the social structure, the accepted character of rape, its ideological embeddedness, its link to heteronormativity (Chapter 4), and its contestedness (Chapter 1). These six insights are relevant for the content as well as for the structure of the cluster.

First, as part of a broader ideological structure, rape is a social practice that maintains (and is maintained by) the ideological framework. Other similar social practices are domestic abuse, sexualized violence in general, homophobic abuse, violence against trans*persons, etc. Furthermore, rape as a social practice is not one clearly defined act, but a conglomerate of acts, e.g., sexual penetration, physical violence, resistance, undressing, rubbing, kissing, and many more. Finally, not each incident of rape has the same properties or at least not to the same degree, e.g., while one rape might involve physical violence and brutality, another does not or to different degrees. I contend that this highlights three aspects that the cluster model of rape should be able to make intelligible in its structure. The model has to be designed in a way that can accommodate that

- (i) all acts of rape lie on a map with the centre of the map representing those acts that include all properties of rape in their most extreme appearance—e.g., lots of violence and brutality, no consent, etc.—while the edges of the map represent acts that we feel hesitant to describe as rape at all;
- (ii) there are gray areas between the core of the map and the edges of the map, i.e., areas in which we are hesitant to describe the acts as rape or something else—for instance, sexualized violence, unproblematic sex, physical (but non-sexual) violence;
- (iii) there are neighboring categories starting at the edges of the map, with which the category of rape shares the gray areas, e.g., the category of unproblematic sex, physical violence, domestic abuse, prostitution, pornography, etc.

Second, rape is an accepted social practice in two ways: on the one hand, most forms of rape are reinterpreted and made intelligible as something other than rape and thus acceptable and, on the other hand, forms of rape that are made intelligible as rape are only weakly sanctioned, i.e., the institutional structure works to protect the perpetrator instead of the victim. For example, remember that in most states in the United States the minimum marriage age is 18, however, states allow exceptions in which children younger than 18 can wed. One exception is that children aged 16 and 17 can marry with parental consent and it is commonly not investigated whether the child is willing to marry or not. The second exception for children aged below 16 to marry is with judicial approval. Many states do not specify any minimum age in these cases.⁵ In most cases, the age difference between the child and the person she is married to is more than 4 years, which is the age difference beyond which sexual relations fall under statutory rape; that is, in most cases, young girls are being married to much older men. (Reiss 2015) In these cases, marriage makes the statutory

5 | For numbers of child marriages with parental or judicial approval, see Kristof (2017).

rape legal. We can say that the legal institutions help sustain gender inequality. Thus, we cannot fully understand rape without understanding the underlying inequality between perpetrators and victims that is produced and maintained by the social structure (including rape myths and social institutions). This makes questions of gender inequality a component of the cluster of rape.

Third, taking seriously the way that we, as social agents, are part of a sexist ideology has implications for what we understand as consent. Most scholars agree that rape should be defined as some variant of non-consensual sex. (cf. Archard 1997, 1998; Dripps 1992; Hurd 1996; Muehlenhard et al. 1996; Schulhofer 1998; Wertheimer 2003) This stipulates at least two features that any act of rape must have: lack of consent and sexual activity. But these are not enough to describe rape adequately. Remember, for example, Luis Pineau's insightful discussion of when it is reasonable to assume that consent is indeed given. Pineau argues that, empirically speaking, women do not tend to enjoy the kind of sex that results from (psychological) pressure from a date. And if this is true, then it is unreasonable for a man in that situation to assume (given the absence of active participation) that his date consents because people usually do not consent to something they find unpleasant. (Pineau 1989) Yet, one could argue that, being embedded in the sexist ideology, the victim consents because she believes that, as a girl, it is her "duty" to have sex with her date (e.g., she thinks she has led him on, she owes him, etc.). This is problematic for Pineau's theory, because it assumes that neither the perpetrator nor the victim know what they want and are influenced by common rape myths, thus, neither the perpetrator nor the victim might be able to reasonably judge the situation. The victim chooses against her best interest. Growing up in a system that taught her that women are submissive (and that they sexually enjoy being submissive!) brings it about that the victim consents to an act that is clearly not in her real interest but is, instead, a false interest. Thus, consent becomes a questionable concept when the ideological context is taken seriously; it can, therefore, be rendered inapplicable by rape myths. The notion of consent as a component of the cluster of rape can therefore only be informative when the ideological context is taken into account. One way to do so is by pairing questions of consent with questions of rape myths and (ability of) resistance.

Furthermore, understanding rape as part of a broader social structure highlights that it is not free from power relations. In a social structure, some individuals have more power than others (and some even have power over others). This depends on their social group membership and the nodes they occupy in the social network (e.g., in which relations they stand to others, their social roles, etc.). Differences in social power can have effects on whether we want to call an act rape or not. For example, social group membership (and other social positions) can make psychological pressure harmless in one situation and threatening in another. Remember the discussion of sexual pressure by Scott

Anderson (2005b). He claims that an argument about whether psychologically pressuring someone to have sex is rape should acknowledge underlying gender dynamics. Pressure to have sex is distinct from other interpersonal pressures because sexual pressure helps to reinforce gender hierarchy. There is a difference between men pressuring women to have sex and vice versa: more men than women will actually use violence if they cannot achieve their goal with psychological pressure, and more men have the ability (in most cases) to resist such violence without being harmed. (Anderson 2005b: 366) Of course, this is not only true for the social relation between men and women. A prison guard, for example, also occupies a social position of power and his pressuring an inmate to have sex is therefore equally problematic. These differences in power become especially problematic if the incident takes place in a deserted location or a context that is prone to misuse of power: the 14-year-old girl who is taken to a deserted road by her older sister's ex-husband is not in a position to refuse sex (cf. Schulhofer 1998: 4) and the street prostitute who happens to come across a violent customer in the middle of the night in a deserted area of town cannot refuse or call the police as her business is illegal. Similarly with contexts or relations of authority between the persons involved. The student who was pressured to have sex in order to graduate by her high school principle was not in a position to consent. (cf. Schulhofer 1998: 114) Mental and / or physical incapacity can also render consent impermissible: the woman who passed out drunk in a public bathroom and was then raped by four men was in no condition to refuse or consent (cf. Schulhofer 1998: 7) and the thirteen-year-old girl who saw a doctor for her learning disabilities was not informed enough to know how to consent when the doctor subjected her to intercourse (cf. Schulhofer 1998: 45). I contend that location and context, mental and/or physical incapacity, and the persons involved can render consent impossible. Thus, question about location and context, mental and/or physical incapacity, and the (power relations between) persons involved are all useful questions of any account of rape.

Fourth, as I argued in Chapter 1, rape is a contested concept. Taking seriously its contested character can provide an answer to the debate of whether rape is sex or violence. As Muehlenhard et al. (1996) argue, the question of whether rape is sex or violence is complex; it is not merely about the assumption that rape is about lust and sexual desire and the counter-argument (strongly brought forward by feminists) that rape is not about lust but about power over another person. An answer to this question can, for example, depend on whose perspective we are taking. The victim's perspective might yield different insights than the perpetrator's perspective, however, neither perspectives of victims nor perspectives of perpetrators are homogenous sets; neither is it the case that all victims share a perspective nor that all perpetrators do. And indeed, some victims clearly experience the act of rape as violence (often those are cases of stranger rape or cases in which a weapon or aggravating violence

is used), while others do not perceive it as rape at all because of its similarity to sex. Feminists have long argued that rape is about violence instead of sex in order to highlight the fact that men are not driven by uncontrollable sexual urges. However, as MacKinnon has stressed, this often leads to the problem that many victims of rape do not see what happens to them as an act of rape, because it did not involve physical violence. Rather, she argues, often rape is sex. (MacKinnon 1987c) I do not intend to answer the question of whether rape is sex or violence here, but instead suggest that both accounts—rape as sex and rape as violence—should be taken seriously by an account of rape. Thus, questions of sexual activity (including penetration), threat and force, and brutality and violence should all figure in the cluster of rape. So far, the following notions are important for the content of the cluster: sexual activity, violence, means of physical coercion, means of psychological coercion, ability to resistance, lack of consent, capacity to consent, interpersonal relationality, and context.

Finally, taking seriously the embeddedness of rape in a sexist ideology makes rape a problem of gender relations in the wider sense; gender relations should here imply more than just relations between men and women, but instead should include heteronormativity, homophobia, transphobia, and discrimination of those living outside of the binary gender system. Corrective rape—rape for homophobic or transphobic reasons—does not target one gender, but rather persons with specific sexual orientations or gender identities. Rape in prison targets individuals for their “female” characteristics, but it does not target—strictly speaking—women. And so on. This implies that the problem of rape cannot be countered by claiming that we should give up on heterosexual sex as, for example, Andrea Dworkin (1981, 1987) hints at and Jill Johnston (1973) argues. As we have seen above, understanding sexist ideology as a holistic system, implies that not only the members of one specific social group (say, men) are distorted in their beliefs about sex and consequently rape. Instead, all social groups are subject to sexist ideology. Remember the discussion of Pineau’s account of date rape above: I argued that it is not merely the man whose conception of reasonable consent is mistaken, but similarly the woman who consents against her best interests. Taking seriously the holistic character of the sexist ideology makes it equally implausible to argue that only heterosexual activities are affected by sexist beliefs, while homosexual (or other non-heteronormative relations) are not. Not only heterosexual individuals grow up in the ideological structure and are shaped by it. As MacKinnon, for example, argues in regard to homosexuality:

homosexuality [is not] without stake in this gendered sexual system. Putting to one side the obviously gendered content of expressly adopted roles, clothing, and sexual mimicry, to the extent the gender of a sexual object is crucial to arousal, the structure

of social power which stands behind and defines gender is hardly irrelevant, even if it is rearranged. (MacKinnon 1989b: 141)

Sexist ideology permeates every instance of our lives as social agents—whatever our specific identities—and it shapes our gender roles and positions (in the wider sense) even if they are in opposition to the sexist ideology. It can thus be hard to disentangle our real interests and desires from our distorted interests and desires. The structure of the cluster of rape should be broad enough to encompass these insights and should also include sexualized violence that happens outside of heteronormative relations. Rape should thus not be explained in terms of women versus men only. The cluster model should therefore include questions of heteronormativity.

5.3.2 A Normative Model of Rape

As we have seen in Chapter 2, a cluster account has multiple criteria for the application of a given concept, none of which are individually necessary. Even though there are conditions that are sufficient for the satisfaction of a cluster concept, there are no individually necessary and jointly sufficient conditions. In other words, a cluster account consists of criteria that are disjunctively necessary, i.e., for something to fall under the concept not all criteria need to be fulfilled. In the proposed cluster, I have specified the relevant criteria in terms of resemblance to three paradigms. However, for the revised cluster, I draw on specific properties that result from the social theory given in Chapter 4 and not on resemblances. This is mainly because I aim at a three-dimensional model. What needs to be specified for the revised cluster model of rape is the following: (1) the properties that an act must have in order to be tracked by the model, (2) how many and which of the properties are sufficient for an act to be tracked by the model, and (3) the structural aspect. I claimed that the cluster model must address the following aspects to adequately track rape: sexual activity, violence, means of physical coercion, means of psychological coercion, ability to resistance, lack of consent, capacity to consent, interpersonal relationality, context, gender inequality and heteronormativity. I also mentioned that each act tracked by the model has to have all of the properties specified, but that it can have each property to different degrees. Furthermore, as a reminder, the structural aspect is shown through the image of a map which includes all components, the gray areas, and the neighboring categories. Note that the conditions specified in the fifth desideratum concern the content as well as the structure of the model. If the model specifies the properties and the specific structure, it also fulfills the conditions of the fifth desideratum; by specifying the specific properties, the way they need to be satisfied, and the specific

structure of the model, it also fulfills the conditions of flexibility, practicality, intensity, contestability, non-paternalism, and heuristic utility.

In the following, I sketch a revised—let us say ‘normative’—cluster model of rape that is informed by the method of emancipatory amelioration (EA). In doing so, I bring together all of the strings of the project: the insight that rape is contested and has a dominant working understanding (Chapter 1), the different forms of rape and the cluster view (Chapter 2), the method that yields a social theory and a prescriptive conceptual analysis (Chapter 3), and the theory of rape as a social practice that helps sustain social and structural injustice (Chapter 4). Roughly, the normative cluster will have a core (the center of the cluster) that is informed by the social theory (as provided in Chapter 4) and the core then defines the relevant branches of the cluster. First, I identify the core and its branches and specify the precise structure of the cluster. Second, I show how the different properties of rape can be realized to different degrees. Third, I show how the branches represent a spectrum of which rape is one extreme form and how the different acts along the spectrum have fuzzy boundaries. Fourth, and finally, I sketch how such a cluster includes neighboring concepts and how they overlap with the category of rape. What I want to get at in the end is a rich conceptual analysis of rape that understands the phenomenon’s social embeddedness and that has the potential to change the way we understand the phenomenon of rape. According to the normative cluster that I propose here, to be able to judge an act as an act of rape (or not), many aspects need to be taken into account. Hence, even someone who assumes the distorted working understanding—that only physically aggravated stranger rape is rape—has to take into account each aspect that the cluster model specifies, some of which shake the narrow understanding of rape, such as gender inequality.

The core of the normative cluster model—the center of the map—presents the most extreme forms of the aspects of the model. The basic idea is that each aspect of the cluster model (e.g., lack of consent or sexual activity) is located on a spectrum. At the two ends of the spectrum, the aspect is either fully realized or not at all. For example, at one end there is complete lack of consent, at the other end there is full consent. Or, in other words, at the end of each spectrum are the aspect’s most extreme cases. Not in all cases is it appropriate to speak of “extreme” cases. For example, the aspect of sexual activity is either realized as penetration on one end of the spectrum and as no touching at the other. Neither one is accurately described as “extreme”, however, for now bear with my use of the word ‘extreme’. When I say ‘most extreme realization of sexual activity’ what I want to express is sexual penetration, when I say ‘least extreme realization of sexual touching’ what I want to express is no touching. Thus, with the example of consent, what I mean to express when I say ‘extreme’ is complete lack of consent, when I use ‘least extreme’ I mean full consent. Or full brutality (extreme) and no violence (least extreme). Note also that while

each component is located on a two-dimensional spectrum, the model with all aspects creates a three-dimensional map. I come back to this.

For an act to be tracked by the cluster model and to, thus, count as an act of rape, it has to include all aspects of the model. However, the degree to which each property is realized is left open.⁶ If all properties are realized in their most extreme sense, then the act is located at the core of the cluster model and can be judged to be a case of rape with certainty. The more its properties are realized to lesser degrees, the further the act is located away from the core and the least likely is it an act of rape. Let me illustrate. Imagine a tree with several thick branches—like the aforementioned oak tree—that again and again split into smaller branches the further to the outside we get. All branches meet at the trunk and from there grow into different directions. Imagine the trunk as the core of the account. Here all branches come together, i.e., the trunk-core consists of all branch-properties. The trunk-core includes all branches of the concept. Now, imagine further that we are in a small forest; there is not just one tree, but many. The further we follow each branch growing away from the trunk, the closer it gets to the branches of other trees; sometimes some branches of one tree are entangled with branches from another tree. We have difficulties seeing where one branch ends and another begins. The branch that is close to the trunk represents the specific property in its most extreme aspect, while the branch that is furthest away from its own trunk represents the least extreme aspect of the property. However, when one branch is entangled with a branch from another tree, then this branch might represent the most extreme aspect for one tree (being very close to its trunk), but the least extreme aspect for another tree (being far away from this trunk).

The model is based on the social theory of the phenomenon of rape and it is realized in a way that prioritizes both rape as part of a sexist ideology as well as the diverse forms the phenomenon of rape can take. In other words, to conceptually track the phenomenon adequately, one must stress its social embeddedness and its diverse realizations. This is why the model is a cluster that includes components that highlight the social embeddedness of the

6 | It seems that instead of a realization in degrees, the properties are either fully realized or not realized. In other words, the degree of fulfillment ranges from 0-1, i.e., not at all exemplified or fully exemplified. For example, some acts of rape are not at all physically violent. They rate 0 on the violence metric. But they can still count as rape. So one could question in what sense the properties are *all* necessary? I think this is mostly a terminological issue, the reason why I argue that all properties have to be fulfilled to some degree for something to count as rape, is to highlight the various degrees that the properties can take. It is not the case, that we judge whether there is violence or not, but rather that we have to judge how much violence there is on a scale that reaches from fully violent to no violence.

phenomenon, such as gender inequality, rape myths, etc. The social theory of rape has identified the following main aspects: (1) Rape is not an individual act, but a social practice that is constituted by resources and schemas; (2) rape as a social practice is part of a sexist ideology. These two insights shape the core of the normative cluster in so far as the core does not only involve aspects of physical force or lack of consent, but also the interplay of rape myths and resistance, overall gender inequality, and the power difference between the persons involved. And, by shaping the core of the cluster, they necessarily also shape the rest of the cluster as the core defines the branches that stretch away from the trunk. The normative cluster-tree that explicates rape as a cluster concept includes the following branches:

- (b₁) Sexual activity
- (b₂) violence,
- (b₃) means of physical coercion,
- (b₄) means of psychological coercion,
- (b₅) ability of resistance,
- (b₆) lack of consent,
- (b₇) capacity to consent,
- (b₈) interpersonal relationality,
- (b₉) context,
- (b₁₀) gender inequality and heteronormativity.

Let me walk through the different aspects:

The lack of consent-branch, in its most extreme form, includes the complete lack of consent (verbal or otherwise) from the victim and the complete disregard of such lack of consent from the perpetrator. In its least extreme form, it includes the enthusiastic consent of one person and the complete respect of the will of a person by another. In the middle of the branch, it includes all the diverse forms in which (lack of) consent and (dis)respect for consent can be lived, e.g., hesitant consent (verbal or otherwise) from the victim and the will (but failure) to respect the other person's consent from the perpetrator. The further along we move on the consent-branch and further away we get from the rape-trunk, the closer we move to the unproblematic sex-trunk (that is, to the neighboring category of unproblematic sex). This can be spelled out similarly for the other branches.

The sexual activity-branch ranges from penetration on the one end to no physical touching on the other. To be more precise, it includes acts of penetration of any bodily orifice on the end of the spectrum closest to the trunk and, on the other end, it includes no touching. Between these two extremes are various acts, such as sexual touching of genital areas, touching of non-sexual body parts through clothing, and so on.

The violence-branch ranges from full brutality to no violence. In its most extreme forms, it includes full brutality, such as hate-crime, life threatening physical violence, sadism. And in its least extreme forms, it includes no violence with many acts of physical and psychological violence and brutality between these two ends.

The means of physical coercion-branch ranges from fully coerced on the one end to fully volitional on the other. Its most extreme forms include force with a weapon or the threat of someone's life. In its least extreme form, it includes the absence of force or threat, with the middle of the branch representing all the forms of threat and force between these ends.

Similarly the means of psychological coercion-branch ranges from fully coerced to fully volitional. In its most extreme forms, it includes material pressures (e.g., threat of being financially cut off or cut off from children, housing, etc.). In its least extreme form, it includes the soft begging of a respected partner.

The ability to resistance-branch ranges from full physical or psychological inability to consent to being in control. It includes ways in which resistance is shown (again from the extreme to the least extreme end), but also includes the reasons for why resistance is not forthcoming, i.e., rape myths, fear, etc. In its most extreme forms, then, this includes strong resistance, lack of resistance for fear of death or serious harm, lack of resistance because of the belief that it will not help or does not fit the social positioning (for example, if, as a girl in a sexist ideology, I come to believe that girls do not ever resist physically, then my capacity to resist is constrained in a way that forecloses the choice of resistance completely). In its least extreme form, this includes no resistance because no resistance is needed or willed in the situation (e.g., consensual sex), full critical capacity of the ideological schemas, or absence of ideological beliefs.

The capacity to consent-branch ranges from mental or physical incapacity to consent to full capacity to consent. In its most extreme forms, it includes physical and mental incapacity because of unconsciousness, drugging, sleeping, or physical constraints, or mental and physical disabilities. In its least extreme forms it includes no mental or physical constraints to consent.

The interpersonal relationality-branch ranges from fully dependent on one end to fully independent on the other. It includes the histories, experiences, motivations of the persons involved, the number of persons involved, the relations between these persons, and the power difference between them. In its most extreme forms, it includes acts in which one person is targeted by a group of persons (e.g., gang-rape), in which one person has a lot of power over another (e.g., rape of an inmate by a prison guard), etc. In its least extreme forms, it includes acts in which no power difference is in play, and in which none of the persons involved has a history of abuse.

The context-branch ranges from helpless contexts to supportive contexts. This branch concerns a person's specific situation. In its most extreme forms, this can include deserted areas in which no help is available or situations in which asking for help might increase the risk. In its least extreme forms, it includes contexts in which help is easily available and can actually lower the risk of the situation.

Finally, the gender inequality and heteronormativity-branch ranges from full inequality on the one end of the spectrum to full equality on the other. In its most extreme forms it means that the act takes place in a context in which no equality between genders is given and a heteronormative system is in place, in its least extreme forms, full equality between genders and no heteronormative system is given.

To schematize, each branch can be realized according to the following spectra:

- (b₁) sexual penetration – absence of physical touch
- (b₂) full brutality – no violence
- (b₃) full physical coercion – full volition
- (b₄) full psychological coercion – full volition
- (b₅) full physical or psychological inability to consent – full control
- (b₆) complete lack of consent – enthusiastic consent
- (b₇) mental or physical incapacity to consent – full capacity to consent
- (b₈) fully dependent – fully independent
- (b₉) helpless context – supportive context
- (b₁₀) full inequality – full equality

The tree consists of all properties that have to be fulfilled if an act is to count as rape. However, to which degree or intensity each property is realized is left open. If we had an adjuster, it would depend on the particular act in question where we put it. Consider, for example, the lack of consent-branch. If the act in question is one that involves complete lack of consent, the adjuster would be close to the trunk. If the act in question is one that involves affirmative nods, the adjuster would be somewhere in the middle of the branch. We can say that the lack of consent-branch is made of one big branch from which smaller arms branch off. The big branch represents the overall notion of consent and the smaller arms represent different ways in which consent can be absent or realized. Every act of rape includes all of the components of the cluster, but where the adjuster is located on the many branches depends on each specific act and, thus, on how the components of rape are realized. While the big branch arising from the trunk represents the general notion of the aspect, its growing into smaller and smaller branches represents the different ways this aspect can be realized. We have to adjust the adjuster for each branch.

Furthermore, while the branches work as a metaphor for the idea of a two-dimensional spectrum between rape and, for example, unproblematic sex, the tree-model works as a metaphor for the three-dimensionality of the phenomenon. The cluster model not only presents rape as an extreme form of sexualized violence, but also as located in the same model as unproblematic sex and other neighboring categories. The closer a case in question is located at the core of the cluster, the more extreme the case is. According to this account, there is no neat distinction between acts of rape and other acts of sexualized violence (like sexual abuse, domestic abuse, sexual harassment, etc.) and there is no neat distinction between acts of rape and acts of unproblematic sex or other neighboring categories. Rather, between all these cases there are fuzzy boundaries in which one concept leaks into the next. The branches symbolize the fuzzy boundaries of rape with the adjuster specifying where we are in the cluster. First, the further we move away from the trunk, the more borderline a case is. And, second, some branches touch with branches from other trees, e.g., the consent-branch of the rape tree touches the consent branch of the sex tree, and so on. Thus, we can move along a branch away from the rape tree and towards the unproblematic sex tree. Where one tree ends and another starts is unclear, between the trees are fuzzy boundaries.

Finally, thinking a spectrum and fuzzy boundaries suggests that the normative cluster model of rape includes categorically different but nevertheless neighboring categories. Imagine that the tree we have visualized is not a solitary tree in the middle of a town square, but is part of an overgrown forest. The tree that represents the category of rape is surrounded by other trees—those other trees are the neighboring categories of the concept of rape. For example, the tree that represents the category of unproblematic sex, of domestic abuse, of physical violence, of torture, and so on. Each concept is represented by a tree in the forest and concepts that share overlapping components are located next to each other in the forest. The cluster of rape and the cluster of unproblematic sex share, for example, the component of consent—even though this component is realized in drastically different ways. The tree that represents unproblematic sex is then surrounded by other trees, for example, the tree of romantic relationships and the tree of marriage. The closer the concepts are connected, the more entangled are the branches of the two trees. In some parts the forest is very wild and overgrown and it is hard to see where one tree ends and another starts; in other parts, the forest is planted in rows and the trees barely touch each other. Thus, the normative cluster account makes intelligible the idea that there is no neat distinction between acts of rape and other acts (for example, other acts of sexualized violence or acts of unproblematic sex). It follows the idea that the different branches cannot be chopped off at any particular place, rather the category of rape and other categories overlap. The rape tree should therefore never be looked at in isolation, but is necessarily part of a forest in

which the branches of the rape tree and other trees are interconnected. The other trees in the forest represent the neighboring categories of rape and the neighboring categories of the neighboring categories and so on.

To recap, each instance of rape is located in a three dimensional space on the nodes of different branches. Branches work together and create a complicated interconnected cluster. For example, the lack of consent-branch and the ability to resistance-branch together acknowledge acts in which the victim consents for false reasons (due to rape myths) or in which the perpetrator fails to understand the lack of consent (due to rape myths) but would be willing to respect the victim's will if he could. Furthermore, it is likely that the further away we move from the trunk on one branch, the further away we also move on another. For example, the less force is involved, the less brutality is involved; the less physical pressure is involved, the less violence is involved; the less brutality is involved, the less resistance is involved. However, this need not necessarily be the case, for example, the less mental constraint is involved, the more brutality might be in place.

For the sake of illustration, take the aforementioned example from Schulhofer:

A widely reported 1996 trial involved an upstate New York woman who went to a restaurant with her date. Both were drinking heavily. The woman passed out in the bathroom. Her date, waiting for her to join him outside, fell asleep in his pickup truck. Meanwhile, four men carried the woman from the bathroom to a booth, where they undressed her. All four then allegedly raped her, left her in the booth, and returned to their beer and sandwiches. (1998: 7)

The incident is located in the tree in the following way: (1) On the sexual activity-branch, the case lies close to the trunk as the woman is sexually penetrated (more than once). (2) On the violence-branch, the case lies somewhat close to the trunk. The four men do not use aggravated physical violence in the sense of beating or weapon use, but the woman is unconscious, they drag her over the floor, and leave her on the floor afterwards. (3) On the means of physical coercion-branch, the incident lies somewhere close to the trunk; the woman is carried to another location by four men when she cannot resist at all. (4) Because no psychological pressure is involved, the act is located far away from the trunk on the means to psychological coercion-branch. (5) The ability to resistance-branch is not realized in respect to the women, however, it is realized in respect to the alleged perpetrators as they seem to rely on certain rape myths that take unconscious women as objects to be used. (6) On the lack of consent-branch, it is right at the trunk; there is no consent at all as the woman is unconscious and the men clearly do not respect her inability to consent. (7) On the capacity to consent-branch, the incident lies close to the trunk again; the woman is in no mental

or physical capacity to consent or resist. (8) On the interpersonal relationality-branch, the case lies close to the trunk too; the perpetrators have no special position of authority over the woman, however, they are four, while she is alone. (9) On the context-branch, the act lies further away from the trunk as the location is public; however, the public location might still be a context in which available help is not forthcoming because of rape myths, etc. (10) On the gender inequality-branch, it is lying close to the trunk to; obviously, the men instrumentalize and consume women in similar ways in which they consume beer. Even though the case does not lie close to the trunk in all aspects, enough components are realized in ways that make it plausible to judge the case as one of rape and not one of a neighboring category. This is because it lies close to the trunk in most realized aspects, making it out to be a case of rape and not a neighboring one.

As we have seen, the normative cluster model of the concept of rape consists of all the properties that any act of rape must have in order to be tracked by the concept. However, it does not stipulate in which way these components are realized in a particular act of rape. It provides a whole range of features that acts of rape contain, but where an act is located on each branch is left open. The closer an act is to the core of the cluster, the better we can judge it as an act of rape. However, since the boundaries between the core and the rest of the cluster and the boundaries within the cluster are fuzzy, there is no specific node in the structure that we can designate as the border between acts of rape and acts of not-rape. Furthermore, because the structure of the tree is three-dimensional and any act in question is located at various nodes in the structure, it is unlikely that any act is like another, so that we can make out a distinct point at which all acts of one kind are acts of rape and not something else. Where an act is located depends on the various interlocking branches of the tree. In other words, even though I have specified the properties that each act of rape must have, I have not defined how those properties are realized. This accounts for the various and diverse forms of rape that I sketched in Chapter 2. Furthermore, it accounts for the different experiences individuals have; depending on where the act is located on the ability of resistance-branch, the gender inequality-branch, and the interpersonal relationality-branch, different individuals can take away different experiences from similar acts. For example, a situation might seem less threatening when experienced from a social position of authority or power, than when experienced while lacking such power. I say more about this in Chapter 6.

To sum up, the normative cluster model of rape specifies the different aspects that any act of rape has without specifying how these aspects are realized. Furthermore it makes intelligible how rape is not neatly distinguishable from other acts of sexualized violence or other neighboring categories, rather it shows that the closer an act is located to the core of the cluster, the more extreme an example of rape it is without saying that acts further away from the core are not examples of rape. This way the cluster model tracks not only

acts of rape but also acts that have similarities with the phenomenon of rape without putting them into the same category as acts of rape. Each property of rape has a spectrum on which a specific act is located, and depending on each location within each spectrum, it gives a different image of the nodes on which the specific act is located within the cluster. Rape can be realized in many different ways as long as it consists of the specified properties. This, then, is also a solution to the feminist debate of whether rape is sex or violence or both; it can be either or and it can be both depending on the nodes at which a specific act is located.

5.3.3 The Desiderata Fulfilled

The normative cluster model of the concept of rape has to satisfy the fifth desideratum that I identified in Chapter 2. The social theory of the phenomenon of rape has to:

Desideratum 5: be able to ground a prescriptive conceptual analysis that adequately tracks the phenomenon and strives for conceptual change; whereby the conceptual analysis has to

- (a) be flexible in a way that it allows for changes when we gain further information about the phenomenon;
- (b) be constrained enough to allow for proper judgements;
- (c) account for different degrees;
- (d) acknowledge the concept's contestability, gray area, and neighboring categories;
- (e) be non-paternalistic; and
- (f) have heuristic utility.

The social theory systematically maps the phenomenon of rape in the world as well as explicates its embeddedness within the sexist ideology. Since it is based on the social theory, the cluster model can adequately track the phenomenon. The resulting cluster is grounded in the critical analysis of the given social structure, what I have analyzed as the sexist ideology, and therefore provides an explanation of the structural dimension of the concept; that is, it explicates a wide understanding of gender, sexuality, and heteronormativity as the central points of rape. Furthermore, the underlying social theory provides explanations of how misguided or false understandings come about and enjoy popularity. The cluster model includes components that track the gender inequality of the underlying system, and thus prevents the mere application of those components as distorted by rape myths. Hence, the model asks us to consider properties of rape that the dominant working understanding fails to track, such

as rape myths and gender inequality. I now turn to discuss each constraint of the conceptual analysis:

Flexibility: The theory is flexible enough to account for changes in the phenomenon it describes. The core and the components of the cluster are arrived at by means of a social theory yielded by the method of emancipatory amelioration (EA). Thus, the resulting cluster is influenced by the critical analysis of the status quo and the social embeddedness of the concept. Once the status quo or the social context in general change, the normative cluster model of the concept of rape changes too. It does so in two ways: (1) By locating acts of rape in different nodes within the cluster, it allows for flexibility within the cluster. For example, the context of gender equality might be very different from one case to the next or from one historical, global, or local context to the next. The cluster does not need to be changed for every change in the social context, rather the branches provide enough flexibility to allow for some changes. (2) Once the status quo changes completely, the critical analysis of the given situation can yield different results. Thus, in such a case, emancipatory amelioration (EA) is likely to yield another core of the cluster. For example, in a social world in which there is no gender inequality, the emancipatory amelioration (EA) would not yield the aspect of gender inequality and this particular branch could be cut off. Or, in a social world in which cyber rape becomes a real phenomenon, a branch that represents the aspect of “virtuality” needs to be added to allow the cluster concept to account for this new phenomenon.

Intensity: While the cluster model specifies the properties that an act of rape must have in order to be tracked by the concept, it does not specify to which degree these properties have to be realized. Instead, each property is a component of the cluster model in terms of a spectrum—that is, its most extreme and its least extreme part (and everything between these two extremes) is part of the model. Depending on the contours of the act in question, the adjuster can be moved along each spectrum. The more properties are realized in their most extreme ways, the closer the act lies at the core of the model and the more definite is it an act of rape. The more properties are realized in their least extreme ways, the further away is the act and the closer it moves to the neighboring categories of rape.

Contestability, Gray Areas, and Neighboring Categories: The theory accounts for the contestability and gray areas of the concept. Even though the normative cluster account that I developed here is based on a social theory and thus prioritizes understanding rape in terms of the sexist ideology and not, for example, in terms of the dominant working understanding, it nevertheless allows for contested opinions by including several aspects of rape. Remember from the discussion on contestability, that what is often contested are which features are supposed to be essential for an act to count as rape; different groups or individuals highlight different components as essential. The cluster

model takes them all to be essential, but not on their own. It, thus, includes the components that are debated, but asks to consider all of them when judging whether an act is rape or not. And, in being flexible enough to account for changes, the cluster allows new viewpoints to enter the cluster. Furthermore, as I have described above, the cluster highlights the spectrum of each component of the cluster as well as the fuzzy boundaries between acts of rape and other acts of sexualized violence or the neighboring categories such as domestic abuse.

Heuristic utility: The theory has heuristic utility—not in Gaut’s narrow sense, but in a wider sense in which the domain in question is not taken to merely encompass the concept itself, but the underlying framework. Thus, in our case, the heuristic utility stretches to the domain of the sexist ideology. Because the first step of emancipatory amelioration (EA) locates rape as a social practice within a sexist ideology, it provides a broader theory of sexist relations of which rape is only one part. This insight is also directly realized in the normative cluster model insofar as the cluster does not draw a neat dividing line between rape and other sexist practices. It is worth noting that the heuristic utility-constraint is motivated by one of Gaut’s adequacy constraints, but is adjusted according to the purposes at hand. Gaut’s constraints reads:

[The account] needs to have heuristic utility: the account should be such as to figure in true or at least promising theories about the object to which the concept applies; that is, any account of a concept should ideally fit into a larger heuristic package about the domain concerned. (2000: 31)

What Gaut seems to have in mind here is a more practical approach according to which the account needs to fare well in, for example, a trial and error kind of way. Taking into account the facts that we know, we can make educated guesses about the concept in question. Thus, the way we understand the concept fits into the broader context of facts that we know about the subject matter. In the way that I have formulated the desideratum, I think that the concept of rape should not merely match the facts about the subject matter, but the broader framework in which it is set. Thus, understanding rape as embedded in a sexist ideology, means it needs to track the underlying ideology.

Non-Paternalistic Judgement Guiding: Last but not least, the theory is shaped well enough so that it can evaluate cases without being paternalistic. Both of these constraints have their origin in the problem identified in Chapter 2: because the concept has legal (and everyday) importance, it should be able to give guidance in our legal decision making processes. At first glance, it might seem as if it does not fulfill this criterium—after all, we do not have necessary and sufficient conditions at hand that we can use to evaluate any given act. How then should we judge an act in question? I argue that the normative cluster account does satisfy this requirement. To do so, I draw on an aspect that I

outlined in Section 2.4.1: the law is not as determinate as we assume it to be. As Ronald Dworkin argues, the law “is an exercise in interpretation.” (1982: 179) The idea is that the law does not fully determine judicial decisions. It is not only a given legal definition that determines the judgement of an act, but also the ways in which it is interpreted. Furthermore, it is not true that the law only consists of legal definitions, rather, it consists of cases, regulations, statutes, constitutional provisions, and other legal materials, including various interpretations of existing definitions, regulations, and statutes. Thus, the law is not as determinate as we intuitively assume it to be. Lawrence Solum gives three possible answers to the question of whether “the law determine[s] the outcome of particular legal disputes?”

The simple, commonsense answer to this question might be, “Yes, the laws (the statutes, cases, and so forth) fix the way that judges decide cases.” A more sophisticated answer might go, “Yes and no, the laws have a big influence, but other things (politics, preferences, and so on) may also come into play.” A very cynical answer to the question could be, “No, the laws have nothing to do with how cases come out. They are just window dressing that skillful lawyers and judges can manipulate to justify any decision they please.” (Solum 2010: 479)

He then concentrates on a version of the last claim, the idea that law is indeed indeterminate. The indeterminacy thesis comes in various shades of which the strong claim above is only one. A weaker claim in the debate is the view that the law does not fully determine judicial decisions. However, various versions of the claim have been brought forward in the indeterminacy debate. Indeed, so many that Drucilla Cornell writes: “Perhaps no phrase has been more misunderstood by legal scholars than the ‘indeterminacy thesis’” (1993: 1196) Two schools of legal theory are of particular interest in the debate: critical legal studies and legal realism.⁷ (cf. Solum 2010)

Contemporary uses of the indeterminacy thesis figure as part of a radical critique of liberal legal theory. While liberal theory advances the notion of the ideal of the rule of law, radical critiques postulate that “law is politics.” The ideal of the rule of law takes it as given that legal disputes can be settled by manifest and generalized rules and applied by courts in fair procedures. The rule of law therefore forbids arbitrary decisions, instead commanding that similar cases be treated similarly. (cf. Rawls 1971) The indeterminacy theory states that the

7 | This is not to say that all critical legal scholars ascribe to the indeterminacy thesis. Rather, critical legal scholars have used the indeterminacy thesis to argue for a relationship between law and society; legal language is indeterminate because the social context to which it refers is indeterminate. (cf. Binder 2010: 269)

actual and real-life law falls short of the ideal of the rule of law in, following Solum, three ways:

(1) judges will rule by arbitrary decision, because radically indeterminate law cannot constrain judicial decision; (2) the laws will not be public, in the sense that the indeterminate law that is publicized could not be the real basis for judicial decision; and (3) there will be no basis for concluding that like cases are treated alike, because the very idea of legal regularity is empty if law is radically indeterminate. (Solum 2010: 480)

Let us for the purpose at hand understand the indeterminacy thesis broadly conceived as:

The Indeterminacy Thesis: The laws (broadly defined to include cases, regulations, statutes, constitutional provisions, and other legal materials) do not determine legal outcomes. (cf. Solum 2010: 479-80)

So far, in line with the indeterminacy thesis, we have assumed that the legal outcomes are either determined by the law or they are not. However, this is incorrect: legal outcomes might also be constrained by the law (but short of being determined by it).⁸ In Solum's words: "a case is underdetermined by the law if the outcome (including the formal mandate and the content of the opinion) can vary within limits that are defined by the legal materials." (2010: 480) Whether we say that the law is indeterminate or whether we say that legal outcomes are constrained by the law but not fully determined by it is irrelevant for what I want to argue. Our cases hinge on the fact that even though we often assume that the law determines legal outcomes and debates, that is, we often assume that legal definitions give us precise rules that can be applied in regard to specific cases, this is not the case. Rather, legal outcomes are either arbitrary outcomes or they are personal interpretations of the legal rule—I urge those who hesitate to adopt the radical claim of arbitrariness to consider the weaker claim that the law constraints legal outcomes but does not fully determine them. The law is then an interaction between rules and definitions and the

8 | This is often called the *underdeterminacy thesis* in comparison to the *indeterminacy thesis*. (cf. Solum 2010: 480) We can distinguish the following: (1) "[t]he law is *determinate* with respect to a given case if and only if the set of legally acceptable outcomes contains one and only one member" (Solum 2010: 480, emphasis in original), (2) "[t]he law is *underdeterminate* with respect to a given case if and only if the set of legally acceptable outcomes is a nonidentical subset of the set of all possible results" (2010: 481, emphasis in original), and, (3) "[t]he law is *indeterminate* with respect to a given case if the set of legally acceptable outcomes is identical with the set of all possible results." (2010: 481, emphasis in original)

personal interpretations of those in the business of the law. In both cases, the radical and the weaker claim, biases and false beliefs (like rape myths) can sneak into legal outcomes, because legal outcomes are either fully or partly determined by the interpretation of individuals. In either case, the practice of law falls short of its fair and equal ideals.

So, it is not the case that only legal definitions determine the outcomes of legal judgements, but precedents and interpretations help the process along. It is then clear, that a normative cluster account for rape can provide grounds for (legal) judgement. Depending on where the adjusters are located on each branch, our legal judgements will be different. Once a couple of cases have been judged, other judgements can relate to those. Further, the more a case of rape relates to other illegal acts specified by neighboring clusters, the more our judgement should take into account both given clusters—the one of rape and the other. For example, if a case fulfills the aspects of the cluster of rape and the cluster of murder, our judgement should take both grievous concepts into account. I therefore see no reason why a normative cluster should fail to provide grounds for evaluation and judgement. Of course, a given and established definition of rape, can help guide interpretation, can reduce biased outcomes, and can function as grounds for critique. And, this last point seems especially important for feminist struggles. If nothing else, having a legal and documented definition gives us grounds for calling out the injustice when the given definition is not followed in legal procedures. Nevertheless, given the fact that we have legal (and more or less progressive) definitions but still fail to do justice to victims of rape on a broad scale, we should not overburden the demand for a general legal definition of rape.

As mentioned already, I have dismissed Gaut's constraint of intuitive adequacy. He states that any cluster account needs to be adequate to a broad range of intuitions. (2000: 30-1) However, this is problematic when it comes to the cluster of rape and, particularly, when we assume that rape is embedded in a sexist ideology. If our conceptions are distorted by rape myths, then our intuitions are likely to be misleading. Specifying that the cluster should be intuitively adequate can give rise to false components within the cluster account of rape. Indeed, the method of emancipatory amelioration (EA) is—like Haslanger's project of amelioration—revisionary and, thus, not necessarily intuitively adequate. Amelioration (in both forms) does not necessarily comply with either our ordinary understanding of the concept in question or our use of the term in question, instead it asks us to consider what concept would be most useful for our purposes. It is therefore a revisionary alternative to the existing concept's understanding. Haslanger argues that intuitive adequacy is not as relevant as we often take it to be for the following two reasons. First, amelioration as a conceptual analysis asks us to consider which concept we should use instead of claiming to be an analysis of how concepts are actually

used. The fact that the resulting concept is counterintuitive does not speak against this project. (Haslanger 2000) Second, even when we engage in an analysis of how concepts are actually used, we might come to find that they are counterintuitive. Indeed, our language use is not always intuitive.⁹ (Haslanger 2005, 2006) Because I have adopted a variant of ameliorative analysis as (part of) a method that can yield the cluster concept of rape, I have dismissed Gaut's constraints of adequacy to intuition. The normative cluster model of rape that I have proposed in this chapter fulfills all of the constraints for the fifth desideratum—the one concerned with prescriptive conceptual analysis—that I have stipulated in Chapter 2. However, before closing the chapter by saying that the normative cluster model tracks the phenomenon of rape adequately and, at the same time, yields a conceptual change of how to understand rape, I consider one possible objection in the last section.

5.3.4 A Possible Objection

The normative cluster of rape seems to be open to the following objection. Is not the talk of extreme realization of properties similarly as dangerous as talk of stranger rape paradigms when it comes to the concept of rape? In other words, should we not refrain from classifying some cases as extreme as this opens the door for arguments that take only physically forced sex by a stranger as rape (the extreme case) while less extreme cases are not taken as rape and thus more tolerated? However, the most extreme cases according to the normative cluster model are not cases of physically forced stranger rape, since in this case only some aspects are realized in their most extreme form. Other cases are at least as extreme—cases in which other aspects are realized in their most extreme form. Furthermore, an advantage of the normative cluster account is that not only those cases that lie close to the trunk in nearly all aspects are judged to be cases of rape. Clearly, the further we move away from the trunk in many aspects the less we can judge an act to be rape, however, there is a vast area surrounding the trunk that still falls under the judgement of rape. And, furthermore, with paradigms, we have only a couple of available paradigms that function as a template for all other cases: in the case of the normative cluster model, however, we allow for a vast amount of diverse cases. I, thus, contend that the normative cluster account is better suited to deal with the following: it highlights the diversity of cases of rape (and sexualized violence) and incorporates new phenomena that diverge from classic paradigms, such as corrective rape, prison rape, etc. It is therefore not restricted to the binary gender system in the sense that men are rapists and women are victims even

9 | See Saul (2006) for a discussion of both these reasons and Mikkola (2009) for a critique in regard to the concept of *woman*.

though it includes the aspect of gender inequality. It provides a template for evaluating cases without restricting the category unnecessarily and it leaves room for acknowledging the gray area of the concept of rape.

Finally, reconsider the case mentioned earlier:

A widely reported 1996 trial involved an upstate New York woman who went to a restaurant with her date. Both were drinking heavily. The woman passed out in the bathroom. Her date, waiting for her to join him outside, fell asleep in his pickup truck. Meanwhile, four men carried the woman from the bathroom to a booth, where they undressed her. All four then allegedly raped her, left her in the booth, and returned to their beer and sandwiches. (Schulhofer 1998: 7)

According to the normative cluster model, the judgement was that the case is a clear case of rape (most aspects are realized in their least ideal forms). Speaking in terms of emancipation, this evaluation is better than existing legal definitions and their interpretations, because it involves more aspects than intercourse, force, and consent. This is what became of the case in real life:

The four men admitted the acts of intercourse, pleaded guilty to minor misdemeanor charges, and received sentences limited to fines of \$840 each. But after a political uproar over the leniency of the sentences, prosecutors managed to get the guilty pleas set aside and brought the first of the defendants to trial on felony rape charges. At trial the man's lawyer argued that "if the woman had consumed enough alcohol to be helpless, as she testified, then she could not be sure that she had not consented to sex." [...] The jury acquitted. (Schulhofer 1998: 7)

The legal definition was in terms of consent, the jury's interpretation solely focused on consent—with all the distorted ideological beliefs about women's consent that they brought to the table. According to the normative cluster model of rape, the jury could not rely solely on a false notion of consent, rather they would need to consider each branch separately—analyzing whether it is realized and how it is realized. Thus, even if they judge the act to lie far away from the trunk on the consent branch (as the woman "might" have consented while being unconscious), they would still need to consider other aspects than consent and also aspects that go against their false beliefs, such as gender inequality.¹⁰

10 | The normative cluster model of *rape* might then actually be superior to a more orthodox conceptual analysis: it is flexible, it accounts for different degrees and acknowledges the contestability, the gray area, and the neighboring categories, and it is non-paternalistic. Furthermore, someone in the business of judging an act according to the normative cluster model has to consider each branch separately (how is each property realized?) and cannot rely on one (and often faulty) property; e.g., consent as

I have thus engaged in the second step of the method of emancipatory amelioration (EA): I have ameliorated the concept of rape. I have argued for a normative cluster model that is grounded in the insights gained from the first step of emancipatory amelioration. This normative cluster works in the following way: It has a core that is specified by the given social theory. This core involves all properties that an act of rape must have in order to be tracked by the concept. And, it defines the spectrum of each property from its most extreme form (close to the core) to its least extreme form (far away from the core). Each act of rape lies in this cluster model and each property of the cluster is realized, but to which degree they are realized is left open. However, the more properties are realized that lie close to the core, the better we can judge a case to be a case of rape. The further away its properties are from the core, the closer they get to neighboring categories, making the case one of the gray area. This normative cluster model is arrived at with the help of the first and second step of the method of emancipatory amelioration (EA)—as argued for in Chapter 3—and it takes into account the view that the concept of rape is contested (Chapter 1) and subject to ideological distortions (Chapter 4). Finally, it fulfills the fifth desideratum specified for a social theory in Chapter 2.

In the next chapter, I show how the social theory of the phenomenon of rape maps and explicates a contemporary phenomenon of rape that other theories fail to account for. While most theories that place rape within a patriarchal structure can make intelligible acts of date or acquaintance rape as acts of rape, they can only do so according to one explanation: the structural power of men that structurally exploits all women sexually. However, the critical analysis of sexist ideology indicates that the problem is far greater than this. The sexist structure is not only holistic but has developed a life of its own and by doing so, it is less clear who suffers from the system. One contemporary phenomenon of rape is the situation in which a woman chooses against her interest and engages in, for example, dehumanizing acts of sex. Or the phenomenon where a man is epistemically incapable of distinguishing between unproblematic sex and date rape. I take a more detailed look at these phenomena and discuss the implications that these bring for our condemnation of perpetrators and our solidarity for victims. The proposed normative cluster model strives for a conceptual change that makes it possible to have a rich understanding of the concept that can yield strategies against rape in its most common forms. The next chapter focuses on social change.

passive consent. Thus, the person also needs to take into account properties that go against his false beliefs, such as gender inequality or heteronormativity. Nevertheless, in this book I take a modest approach: the same good results might be achieved with functional or general definitions. In the end, the normative cluster was a theory choice that I made and developed.