

Chapter 1:

Contested Rape

The first chapter argues that the concept of rape is contested and that dominant accounts are contaminated by so-called rape myths. The chapter relies on a distinction between manifest and operative concepts of rape and—drawing on a number of cases—shows that widely accepted rape myths distort the operative understanding of rape, thus giving rise to an institutional mismatch with adverse consequences for rape victims. Furthermore, the chapter discusses attempts to apply the idea of essential contestability to the concept of rape and argues that even though a contested concept, rape should not be seen as in the standard sense essentially contested.

1.1 INTRODUCTION

In order to elucidate what rape is and how it is situated in the social world, including its relation to social injustice, we have to map out the various forms of rape and see how the concept of rape is understood in everyday contexts. The way competent language speakers use the term can give us some insight into how rape is conceptualized. And knowing how it is conceptualized is one part of providing a rich theory of rape.¹ Part of the task of systematically mapping out and elucidating the phenomenon of rape in the world, is to analyze how the concept is *de facto* understood by competent language users. I argue (1) that the concept is contested, but that (2) despite its contestedness, the everyday dominant usage of the term and underlying conceptions of rape are distorted

1 | Note that this does not imply that what individuals think determines the meaning of the term 'rape'. Rather, what I argue is that there is a mismatch between the dominant understanding of rape—the way it is conceptualized by most individuals—and the forms it takes in the world. We have to explicate this mismatch to get to the bottom of how we *should* understand the concept, which is the aim of this book.

by so-called rape myths and therefore fail to track the various forms of rape in the world. It is the task of this chapter to provide insight into how rape is conceptualized and to foster a philosophical discussion on how to theorize these insights.

What is the problem with the concept of rape? Several philosophers have written about rape as a philosophical topic and it is covered rather well in more recent debates (philosophical as well as non-philosophical). However, an interesting phenomenon transpires in understandings of the concept of rape and in the philosophical and non-philosophical debates: the concept of rape is highly contested. Neither scholars nor competent language speakers are in agreement at all on what it means or should mean. And, furthermore, everyone assumes that their understanding of the concept is better than the understanding of others. This, as such, is not problematic. However, the most salient understandings of rape are distorted by so-called rape myths and thus fail to track the various forms of rape as they exist in the world. This has deeply problematic implications for rape victims. The claim of contestation and its problematic consequences guide the discussion of this chapter.

The first half of the chapter is concerned with how the concept is understood in the social world and how our use of the term matters because of its problematic consequences. In the first section (Section 1.2), I argue that the concept is contested. However, despite the fact that it is contested, the most dominant understandings of rape are distorted by so-called rape myths and therefore do not track the various forms of rape that exist in the world. I illustrate this phenomenon with the help of Sally Haslanger's proposed distinction between manifest and operative concepts—the first describing the concept as it is institutionalized, the second describing its dominant understanding. (Section 1.2.1) I then discuss how—in the context of a sexist social structure—the operative concept is distorted by so-called rape myths. In other words, the dominant social practice of using the term 'rape' is affected by myths about the sexual behavior of women and gender non-conforming people and about sex in general as well as our (implicit) assumptions of male entitlement. (Section 1.2.2) If this is true, then the operative concept—the one distorted by rape myths—is not in line with the legal definitions, i.e., with the manifest concepts. I call this an 'institutional mismatch'. Institutional mismatches can have deeply problematic consequences for victims of rape and I illustrate this with the help of three examples in which victims are not believed due to the distorted operative concept. (Section 1.2.3)

In the second half, I focus on the *differentia specifica* of the concept of rape. I suggest that the contestation of the concept shows that there is something about the concept itself that invites disputes. I then have a look at two theories that take these thoughts into account: Keith Burgess-Jackson's theory of 'rape' as a vague term and Eric Reitan's theory of rape as an essentially contested

concept. (Section 1.3) In Section 1.3.1, I concentrate in detail on Eric Reitan's theory of rape as an essentially contested concept. The general idea is that different groups and individuals assign different understandings to the concept and that disclosing these understandings results in disputes rather than a common understanding. Finally, in Section 1.3.2, I show that Reitan's theory faces several problems. Nevertheless, he brings forward important insights into the character of the concept of rape that will provide part of the basis for a cluster account of rape that I develop in the next chapter.

1.2 CONTESTATION AND CONCEPTUAL PROBLEMS

When it comes to the concept of rape, neither philosophers nor everyday competent language users are in agreement as to how to understand the concept properly. And, furthermore, they compete about which understanding is the best. In other words, they not only disagree about which acts fall into the category of rape and which do not, they also disagree on how to understand the category best. Let us describe this by saying that the concept is contested. I start my explanation with the following three newspaper articles on incidents of rape:

(1) In 2007, Laura Sessions Stepp wrote an article for *Cosmopolitan* titled "A New Kind of Date Rape". Telling the story of college student, Alice, she writes:

"No. Stop," she said softly—too softly, she later told herself. When he ignored her and entered her anyway, she tensed up and tried to go numb until it was over. He fell asleep afterward, and she left for her dorm, "having this dirty feeling of not knowing what to do or who to tell or whether it was my fault." While it felt like rape to her—she had not wanted to have sex with Kevin—she was not sure if that's what anyone else would call it.

"It fell into a gray area," she said recently. "Maybe I wasn't forceful enough in saying I didn't want it." Even today, she is reluctant to call it rape because she thinks of herself as a strong and sexually independent woman, not a victim.

Alice's "gray area" experience is something that is becoming so common, it has earned its own moniker: gray rape. It refers to sex that falls somewhere between consent and denial and is even more confusing than date rape because often both parties are unsure of who wanted what. (Sessions Stepp 2007)

According to Sessions Stepp, non-consensual sexual activity is not always rape. To reserve the deep moral condemnation against the crime of rape, but not against forms of rape that are not physically aggravated, she makes

a distinction between ‘rape’ and ‘gray rape’. Gray rape are forms of rape that do not deserve the same moral condemnation (and should maybe also not be legally sanctioned) but are non-consensual.²

(2) In a recent case a former Stanford University athlete, Brock Turner, was sentenced to imprisonment and probation for the sexual penetration of an unconscious woman. He was convicted of three felonies—one of which was assault with intent to rape—and faced up to 14 years in prison. However, despite the prosecution’s demand of six years in state prison, the judge gave a six-months sentence. He stated: “A prison sentence would have a severe impact on him.” (Hunt 2016) Part of the reasoning of the judge was motivated by the following personal character statement given by Turner’s father, Dan A. Turner, that is reprinted in an article by Gray (2016: my emphasis):

[...] Living under the same roof with Brock since this incident, I can tell you firsthand the devastating impact that it has had on my son. [...] As it stands now, Brock’s life has been deeply altered forever by the events of Jan 17th and 18th. He will never be his happy go lucky self with that easy going personality and welcoming smile. His every waking minute is consumed with worry, anxiety, fear, and depression. [...] These verdicts have broken and shattered him and our family in so many ways. His life will never be the one that he dreamed about and worked so hard to achieve. That is a steep price to pay for 20 minutes of action out of his 20 plus years of life. [...] What I know as his father is that incarceration is not the appropriate punishment for Brock. He has no prior criminal history and has never been violent to anyone including his actions on the night of Jan 17th 2015. Brock can do so many positive things as a contributor to society and is totally committed to educating other college age students about the dangers of alcohol consumption and sexual promiscuity. [...]

Even though Dan A. Turner does not provide a theory of what rape is, he clearly states what is not. Non-consensual penetration of an unknown and unconscious woman, according to Turner, is not rape but an act of sexual promiscuity. It should thus not be morally condemned or legally punished—as these actions are reserved for proper acts of rape.

(3) In an article titled “Being Too Scared to Say No Is a Very Clear Way of Saying No”, Laura Bennett writes:

We all know what fear looks like. [...] Wide eyes, shaking, frozen still, unable to speak, skin getting paler. Fear may not always look identical but it is always recognisable. Your

2 | I do not critique the views presented here even though some are deeply problematic. This overview is merely to show that there is contestation over the concept of *rape*.

body enters a state when you're scared; you enter fight or flight as your brain detects an external threat which you must be prepared to fight or flee from. [...] And therefore, this is not an excuse: "But they didn't say no". Yes, they did. With every fibre of their being. [...] There are countless other ways to clearly not give consent to something, and fear is only one of these. But, when it comes to fear, don't be the person who wilfully ignores the clear signs they are getting. [...] (Bennett 2017)

According to Bennett, rape is not merely non-consensual sex, rather it is non-affirmative non-consensual sex. Non-consensual sex is often taken to imply that being passive counts as consent; that is, everything short of verbal or physical refusal implies consent. However, Bennett clearly holds that passivity (e.g., out of fear) is a sign of refusal and thus for a sexual activity not to count as rape the consent needs to be affirmative.

It is not the case that the three writers—Sessions Stepp, Turner, and Bennett—are confused about how to apply the concept of rape or how to understand it. Instead, they each hold a different view of how to best understand the concept. That is, they each have an underlying theory of rape that they think most adequately captures the phenomenon of rape. However, each of these underlying theories differs significantly from the others. Hence, the three examples can be understood as being engaged in a debate over the best understanding of rape. Insofar as the concept is prone to debate over its best understanding, it is contested. Keith Burgess-Jackson argues that everyone, who uses the term 'rape' has a theory of what rape is. Such a theory need not be spelled out. Instead, he claims, "I may be unaware of and unable to articulate my theory, but I necessarily have one." (1995: 441) Respectively, we all have an understanding of rape that correlates with a theory which we express when we use the term 'rape'. And, in line with Burgess-Jackson, such a theory need not necessarily be well articulated or explicitly formulated; it might amount to nothing but a cluster of vague intuitions that we have regarding rape. This implies that we can have the following scenarios of interpersonal agreement and disagreement with regard to concepts:

full agreement: "S and T agree on what rape is (that is, they share a conception/theory of rape) and agree that X is (or is not) rape."

factual disagreement: "S and T agree on what rape is, but disagree that X is rape."

conceptual disagreement: "S and T agree that X is (or is not) rape, but disagree about what rape is. (In this case S and T are using 'rape' in different senses, or giving the term different theoretical definitions. [...])"

full disagreement: “S and T disagree about what rape is and about whether X is rape.”³ (Burgess-Jackson 1995: 441-2, emphasis in original)

According to this explanation, the aforementioned writers are in full disagreement. Each of them has an underlying theory of rape that they believe best captures the phenomenon and each of the theories differ significantly from the others. Thus, they disagree on how to conceptualize rape. Because they employ drastically different theories, they would also be in disagreement of whether a given case is a case of rape if they all talked about the same case. For example, according to Dan A. Turner’s theory of rape, penetration of an unconscious woman is not rape, while according to both Sessions Stepp’s and Bennett’s theory it is. Thus, they disagree about what rape is and which cases are cases of rape and which are not.

This alone is not a problem. After all, there are many concepts that spark debates about how to properly understand them which have no problematic consequences for our communication or our everyday lives. Yet, I contend that the contestedness of a concept such as rape can lead to problematic consequences. For example, if I were to experience an act of rape, but my theory of it is significantly different from yours, then you might be unable to acknowledge my experiences, my harm, or draw the same consequences from it that I legitimately hope for. This has drastic implications in the legal system, but also in our day-to-day lives. I might be unable to report what happened to the police or the police might be unable to investigate due to differences in theories. I might lose my friends for lack of hoped support or be unable to make myself intelligible to anyone else. This is particularly true if the social structure brings it about that the most salient understandings of a concept are distorted in such a way that they fail to capture most instances of that concept. In the following, I argue that despite the contested character of rape, its most salient understandings are affected by so-called rape myths. This has deeply problematic consequences for rape victims. Thus, it is in our interest, as feminists, to elucidate the problems of the de facto understandings of the concept of rape and to overcome the distorted understandings. Before I show how other theories have navigated their way through these difficult issues, I illustrate how the most dominant understandings are distorted and their problematic consequences. I thus explain why it is important to tackle these issues in ways that neither overlook the contestedness nor give rise to

3 | Burgess-Jackson uses various terms for the factual and conceptual disagreement that, for reasons of simplicity, I have narrowed down. For instance, he calls the factual disagreement ‘epistemological/factual’ and the conceptual disagreement ‘conceptual/theoretical/explanatory’.

problematic uses. To do so, I employ Sally Haslanger's distinction between operative and manifest concepts.

1.2.1 Manifest and Operative Concepts

Haslanger argues that concepts help us to draw distinctions between things. They help us to structure our world. Nevertheless, even if we have a concept in mind which we can use to group certain things into the same category, we might not explicitly apply the concept in each specific case. We do not always ensure that each thing we group does actually meet the conditions for applying the concept. Rather, we often rely on assumptions that help us link easily accessible criteria with the conditions of membership for the concept. (Haslanger 2012: 388) Our "rough-and-ready responsiveness" to things, to borrow a phrase from Haslanger, is not in line with all the conditions for applying the concept in question.⁴ The concept that we attempt to apply does not match the way that it is

4 | One could object by saying that we do not actually need to know the applicability conditions of a concept for applying it correctly but instead only its reference-fixing conditions. Semantic externalism claims that we do not always grasp exactly what it means for something to fall under the concept's intension, but that we can nevertheless refer to it in the correct way. In other words, I can refer to the liquid in my glass as 'water' without precisely grasping what it takes for something to be water. According to Schroeter, applicability conditions tell us "what it takes for a concept to apply to an object", they "specify the concept's intension by means of certain semantically basic features" (2004: 429). Reference-fixing conditions, on the other hand, "single out the reference of a concept [...] by citing some inessential but epistemically accessible features of the reference" (2004: 430) In short, we do not need to specify what it takes for something to count as X, in order to grasp the reference-fixing conditions. Mikkola has provided a similar distinction: that between extensional and semantic functions. (2016: 106) If this is true, then the fact that we sometimes fail to apply a concept in line with all its conditions for application is no problem at all; we would still be able to refer to the thing in question. However, Schroeter further claims that we neither have *a priori* access to the applicability conditions of our concept nor do we have *a priori* access to the reference-fixing conditions of our concept either. (2004: 439) Instead, which aspects of our conceptual practice are important is a matter of normative assessment and *a posteriori* considerations "about how that practice actually manages to hook up with things in the world." (2004: 442) I take it that this is precisely why the distinction Haslanger draws between operative and manifest concepts is important: it tracks the (sometimes misguided) intuitions speakers have about the concept in question as well as the formal definitions.

systematically applied.⁵ Hence, Haslanger distinguishes between two different concepts: the manifest concept, which is the one we attempt to apply, and the operative concept, which is the one that would be extrapolated from our actual usage in a given community. (2012: 388)

Distinguishing between operative and manifest concepts in this way, can give rise to the following scenarios. First, as competent language users, we can have a mismatch between two different manifest concepts. Let us for the sake of illustration assume that the manifest concept is the formal or legal definition of a given community. In a conversation, two speakers from two different communities use the same term, ‘rape’, yet they assume different formal definitions. Let us say, the first speaker is from England, while the second is from Germany. When the first speaker utters the word ‘rape’, she assumes the intentional penetration with the penis of the vagina, anus or mouth, without consent and without reasonable belief in consent.⁶ When the second speaker utters the word ‘rape’, she assumes the penetration of the body of another person accomplished by force, the threat of force, the exploitation of circumstances in which the other person is helpless, or against the will of the other person.⁷ Imagine further that the English speaker and the German speaker talk about a third person, who the German speaker knows to have been the victim of rape. After a few minutes into the conversation, the German speaker remarks that the rape in question was committed by a woman. At that

5 | A different and more familiar way to make the distinction between manifest and operative concepts is to say that, in some cases, a speaker’s conceptions are not in line with the concept. That is, although there is only one concept of *rape*, there is more than one conception. On this view, one person’s conception can differ from another person’s conception. (cf. Higginbotham 1998) Sometimes they can be drastically different, for example, if we compare a feminist’s conception of rape and Todd Akin’s conception of rape. If there is one concept and several different conceptions, it is possible that some conceptions are congruent with the concept and others are not. The mismatching conceptions are either straightforwardly false or slightly mistaken. However, first, the concept-conception distinction begs the question of what the meaning of the “one” concept is. Second, while the concept-conception distinction tracks individual speakers’ intuitions and understandings, the Haslangerian distinction tracks the difference between the formal (or institutionalized) definition and the dominant usage that can be extrapolated from a given community. And, third, the Haslangerian distinction not only explains how it can happen that the manifest and operative concept do *not* match, but how individual speakers can be ignorant of this. I say more about this in what follows.

6 | See UK Government, Sexual Offences Act 2003, Chapter 42, Part 1: www.legislation.gov.uk/ukpga/2003/42/section/1; accessed September 7, 2017.

7 | See Strafgesetzbuch: Straftaten gegen die sexuelle Selbstbestimmung, §§177: <https://dejure.org/gesetze/StGB/177.html>; accessed September 7, 2017.

point, the English speaker replies: "If that is the case, then it was not an act of rape." The formal definition assumed by the English speaker narrows rape to the act of penetration with a penis. Unless they start comparing the different legal definitions of their communities, they have a misunderstanding.

Second, sometimes our formal definition (our manifest concept) is not in line with the actual language practice in a given community. Imagine a police officer talking to a woman about her complaint of being raped by her husband. And imagine that the police officer is a member of a community in which the formal definition of rape is one that includes marital rape, but the actual usage of the term within that community is one that excludes marital rape. Because the police officer is part of a community in which the operative concept excludes marital rape, when he utters the term he assumes the penetration of the body of another person by a stranger, accomplished by force, the threat of force, the exploitation of circumstances in which the other person is helpless, or against the will of the other person. According to the operative concept, rape is an act that can only be committed by strangers and cannot occur within marriage. The woman, thus, fails to make intelligible to him that she was raped. Furthermore, the police officer is ignorant of the fact that the actual usage of the term 'rape' is not in line with the formal definition. When he fails to make intelligible that the woman was raped, he falsely believes that this is because she was not raped according to the formal or legal definition. And, finally, the mismatch between the operative concept and the manifest concept has unjust consequences for the woman. The police officer does not process her complaint since in his eyes she has no grounds for making a rape charge.⁸

And, third, because communities are fragmented, the actual usage within a given community can differ from one group of speakers to the next; both groups can fail to match the manifest concept or one can fail and one can succeed to match it. Assume for example two communities within Germany, in which the actual usage of the term 'rape' is not in line with the German legal definition of rape. And, furthermore, the actual usage of each community is not in line with the other. In one community, the feminist one, the operative

8 | Note that it could be the case that both the woman and the police officer are part of the same community and, thus, both assume that marital rape is not part of rape—despite the formal or legal definition stating otherwise—and fail to make intelligible what happened as an act of rape. See Jenkins (2016) for an explication of how victims of rape can hold a problematic operative concept or, as she calls it, "working understanding". It could also be the case—as I described above—that the woman and the police officer come from different communities such that the operative concept of the woman's community matches the manifest concept, while the operative concept of the police officer's community does not. In this case, it is only the police officer who fails to make intelligible what happened to the woman as an act of rape.

concept refers to non-consensual sex. In the other community, the mainstream one, the operative concept refers to physically aggravated stranger rape. In this case, multiple operative concepts are at work; and neither one needs to be in line with the manifest concept.

In what follows, I focus on scenarios in which the legal definition is the manifest concept in each jurisdiction, e.g., the German legal definition of rape is the manifest concept within Germany. And despite there being multiple operative concepts—as, for example, the contestedness of the concept shows—there is one dominant operative concept.⁹ In other words, there is a widely shared informal and implicit working definition that does not match the manifest concept for reasons I explicate below. Roughly, the multiple operative concepts are each distorted by one or more specific rape myths. For example, one operative concept relies on the myths that rape is always stranger rape, another operative concept relies on the myths that rape is always physically aggravated, and so on. When I speak of the ‘dominant operative concept’ what I mean to track is all of these multiple operative concepts. Hence, the dominant operative concept is the concept that is extrapolated from various communities and that is distorted by rape myths in general. The mismatch between the legal definition and the dominant usage is an indicator of a deeper mismatch—that between the various forms of rape in the world and the dominant usage of the term ‘rape’. In so far as the legal definition aims at representing the world accurately, it can be seen as an attempt to encompass the various forms of rape as they exist in the real world. Hence, by showing the mismatch between the legal definition and the dominant usage, I want to draw attention to this deeper mismatch.

9 | A mismatch between the legal definition and the dominant usage in a given community is what I call the ‘institutional reading’ in the following. The institutional reading is only one possible way of understanding the distinction between operative and manifest concepts. It follows Haslanger’s own distinction between institutional and so-called “local” uses, which she illustrates with the example of tardiness, e.g., the school’s rules about being tardy (the manifest concept) can be similar or different to the specific rule employed by each teacher (the operative concept). (Haslanger 2012: 368-9) Other possibilities where the operative and manifest concepts are distinct are: public uses versus more idiosyncratic uses, what is explicit versus what is implicit in the minds of users, what is thought (what we take ourselves to be doing with the concept) versus what is practiced (what we’re actually doing with it), and appropriate versus inappropriate uses. (Haslanger 2012: 369)

1.2.2 Rape Myths and Operative Concepts

I ended the last section by suggesting that one way in which things can go wrong is when a community has a dominant operative concept¹⁰ that is not in line with the community's manifest concept. In the following, I show that despite the fact that the concept of rape is contested and more than one operative concept exists in a given society, there is a dominant operative concept that is influenced by so-called rape myths. This dominant operative concept is shared more widely as the working definition of rape than any other given operative concept.¹¹ If this is the case, then this has deeply problematic consequences for victims of rape. Let me start by providing some background information on rape myths. Rape myths are prevailing myths about sexual conduct between men and women that shape our understandings of sexual activities and sexualized violence. The concept of rape myths was introduced in the 1970s by feminist sociologists and philosophers to explain false cultural beliefs that enabled sexualized violence against women. (cf. Brownmiller 1975; Schwendinger and Schwendinger 1974) Rape myths vary depending on the context, however, they generally "follow a pattern whereby, they blame the victim for their rape, express a disbelief in claims of rape, exonerate the perpetrator, and allude that only certain types of women are raped" (Grubb and Turner 2012: 10, emphasis in original). For example, if the belief is that women mean "yes" when they say "no," then a man who ignores a woman's "no" does not do her wrong. On the contrary, according to the myth, he fulfills the woman's desire that she failed to articulate. This is how rape myths legitimize sexualized violence or make it appear as something that it is not. On the basis of this research, Lonsway and Fitzgerald propose the following definition for rape myths:

[A]ttitudes and beliefs that are generally false, but are widely and persistently held, and that serve to deny and justify male aggression against women. (Lonsway and Fitzgerald 1994: 134, my emphasis)

We can think of rape myths as myths that legitimize male entitlement to a female body.¹² (cf. Edwards et al. 2011) Rape myths do this either by implying

10 | I use the expression 'dominant operative concept'—the dominant usage of a term in a given community—interchangeably with the notion of 'dominant working understanding'.

11 | Similar ideas are brought forward in Jenkins (2016).

12 | In this sense, rape myths can be said to also apply to gender non-conforming people. For example, a myth might exist to the extent that gender non-conforming people are promiscuous and so cannot be raped. Or that trans*persons in transition cannot be raped, because only women can be raped. I here concentrate on rape myths

that the act in question was not an act of rape, because it was implicitly wanted by the woman and therefore consensual (“she asked for it”) or by making it into something else (“it wasn’t really rape”). This false assumption of consent is expressed in various ways: either because the woman acted in ways that show her implicit consent, or because external factors are such that any woman would automatically consent. Research about rape myths often group together all attitudes and beliefs that lead to male aggression against women. It is, however, conceptually relevant to make a distinction between rape myths that are based on the woman’s behavior and those that are based on the external circumstances; this is a distinction in content. Hence, let us distinguish the following two categories of rape myths:

“She asked for it”-myths:

- She asked for it, because if a woman verbally resists, she secretly desires to be overpowered.
- She asked for it, because it is reasonable to assume that she consents to sex if she acts or dresses in a way that is “sexually teasing” or “sexually provocative.”
- She asked for it, because otherwise she would not have gotten intoxicated around men.
- She asked for it, because she did not physically resist the act.
- She asked for it, because otherwise she would have been emotionally devastated after the act and in need of psychological help.
- She asked for it, because otherwise her body would not have been lubricated.

“It wasn’t really rape”-myths:

- It wasn’t really rape, because once consent is given, it cannot be withdrawn part-way through the sexual act.
- It wasn’t really rape, because rape always involves overwhelming physical force and no force was used in this act.
- It wasn’t really rape, because perpetrators of rape are people of color or foreigners.
- It wasn’t really rape, because perpetrators of rape are psychologically unstable or aggressive.
- It wasn’t really rape, because rape is an interracial crime.
- It wasn’t really rape, because rape is only committed by strangers and cannot occur within marriage or a relationship.

about women’s sexuality, because these are researched to a far greater extent than other rape myths. However, I contend that similar myths exist for gender non-conforming people and thus more empirical research should be done to gain a better understanding of them.

- It wasn't really rape, because consent is automatically present if a prior consensual sexual act between the same parties recently took place.¹³

Two Distinct Functions of Rape Myths

Rape myths can serve two distinct functions. They can either be used as a purely descriptive explanation of the act or as a normative justification of the act. Let us therefore make a further distinction between their explanatory function and their justificatory function. While in the first case, myths are used to make sense of what happened, in the second case they are used to justify what happened. This distinction often goes hand in hand with another distinction: rape myths can be explicitly as well as implicitly held. Consider first myths that are explicitly held. Susan Estrich, for example, remarks that in most cases, the man is negligent of the harm he inflicts on the woman. She says, "common is the case of the man who could have done better but did not; could have paid attention, but did not; heard her refusal or saw her tears, but decided to ignore them." (1987: 97) In the cases in which someone holds the myths explicitly, he understands the harm he inflicts, but believes that he is entitled to the act.¹⁴ He ignores the passiveness or pain of the woman. This person is likely to use rape myths in a justificatory way, i.e., as a justification that what he did, was either not "really" rape or that the woman "asked for it."¹⁵

Consider next cases in which rape myths are implicitly held. In such cases the myths of entitlement is not weighed stronger than the pain of the woman, but the pain of the woman cannot be made intelligible by the person who holds the myths. The implicit myths result in an epistemic lack or distortion such that the perpetrator lacks the capacity to understand the act in question as an act of sexualized violence.¹⁶ While in the explicit case the belief of entitlement trumps the harm inflicted, in the implicit case the epistemic lack brings about an unintelligibility of the act in question. A person who holds rape myths implicitly cannot use them in a justificatory way—he is not aware of their justificatory potential—rather, he uses them in an explanatory way, as part of

13 | Neither list should be understood as exhaustive.

14 | Note that there are cases in which the line between explicitly and implicitly held rape myths is blurred. For example, a strong belief in male entitlement can lead to the belief that the woman "really wants it".

15 | Using myths as a justification serves to legitimate the act in question and "explains away" the fact that the act is rape. Importantly, the myths are sometimes used as justification even in cases in which the perpetrator does not believe in the myth, but uses it knowing that it is dominant and often seen as an excuse. For instance, lawyers sometimes advise their clients to say that they believe in one of the myths listed above knowing that they are false, but also knowing that they can serve as an excuse.

16 | I say more about these cases in the last chapter of the book.

his narrative of what happened. Hence, he takes it as a descriptive fact that when she said “no,” she actually meant “yes.”

Rape myths are not only commonly held by perpetrators (and men in general), but often victims (and women in general) believe in these myths as much as men. If they are held by victims or women, they can also have two functions. They can, on the one hand, serve as an explanation of what happened (“it wasn’t really rape”) or, they can, on the other hand, serve as a justification for the perpetrator’s behavior by placing the blame on the woman herself (“I asked for it.”). In both functions they can work as psychological comfort, e.g., “if women bring rape upon themselves, then as long as I dress and behave in a way that is not ‘sexually teasing’ nothing like that will happen to me.” This allows women to act in ways that would otherwise feel too “risky”, e.g., to walk home alone in the dark, get wasted in the company of men, etc. Often, women do this consciously or unconsciously to restore their sense of feeling safe. If rape has to do with their own behavior or the specific context they brought themselves into, then avoiding this behavior or that context will keep them safe. Otherwise, they would need to acknowledge the devastating fact that rape can happen to them even if they take all the precautions against it. This is also a strategic move that victims of rape employ to regain a sense of trust in the world and others. In this sense, rape myths can serve healing processes. (cf. Freedman 2014: Chapter 3) But rape myths can also hinder a woman’s understanding of what happened. Peterson and Muehlenhard interviewed a group of women who had been raped and found that some of them were victims of what Peterson and Muehlenhard called ‘unacknowledged rape.’ They described the event that happened to them in ways that fit the legal definition of rape but were unwilling to apply the term ‘rape’ to what they experienced. Peterson and Muehlenhard found that women who were victims of rape but did not apply the term ‘rape’ to what happened, were more likely to accept rape myths and were raped in ways that matched the rape myths they accepted. They were unable to conceptualize their own experience as one of rape. (Peterson and Muehlenhard 2004)

Rape Myths: Their Prevalance and their Implications

Rape myths reflect societal attitudes—a sexist society creates and maintains rape myths. Research has shown that rape myths are widely accepted in more or less all social groups in the Western world and that they are related to the proclivity of sexualized violence.¹⁷ (cf. Desai et al. 2008; Edwards et al. 2011; Loh

17 | Rape myths acceptance is measured with the following scales: the Rape Myths Acceptance Scale (RMAS) is one of the widely used scales measuring rape myths, attitudes towards adversarial sex, and acceptance or interpersonal violence. Scores for self-reporting likelihood of committing rape correlate with RMAS scores. (cf. Burt 1980) The Rape Empathy Scale (RES) measures empathy towards rape victims and

et al. 2005; Lonsway and Fitzgerald 1994; Payne et al. 1999) People rely on such myths in their understanding of what constitutes rape. (cf. Edwards et al. 2011: 761) Lonsway and Fitzgerald (1994) hold that between 25 % and 35 % of male and female respondents agree with the majority of rape myths.¹⁸ Buddie and Miller (2001) hold that 66 % of college men and women endorse rape myths. Iconis (2008) found similar results in her literature review concerning the acceptance of rape myths in college students. Basile (2002), Payne et al. (1999) and Feild (1978) also made comparable conclusions when using non-college samples.

Some rape myths are more widespread than others. 40.2 % of 3210 random participants of a telephone interview believed that accusations of rape are false. (McGee et al. 2011) Data, however, suggests that the number of false reporting is between 8 % and 0.2 %. (Kelly et al. 2005) 40 % of the participants believed that rape happens because of overwhelming sexual desire, even though the overwhelming motivation for rape is a desire for power. 29.2 % believed that victims hold some responsibility (e.g., they invited the rape with a short skirt). (McGee et al. 2011) Warshaw (1994: 120) cites research on the proportion of college boys agreeing to the statement that it was 'okay' to force a date to engage in sex if she either 'gets him sexually excited,' 'has led him on,' or 'is going to have sex with him and changes her mind.' 51 percent agreed to the first statement and 54 percent agreed to the second and third. (cf. Goodchilds et al. 1988) Sociologist Amy Dellinger Page (2011) evaluated seven police and sheriff's departments in the United States on rape myth acceptance:

The "rape myth acceptance" scale measured agreement with statements like "Any victim can resist a rapist if he or she really wants to," "Women who dress provocatively are inviting sex," "Many women secretly wish to be raped," "A woman is responsible for preventing her own rape," "Any man can be raped," and the like, on a five-point scale: strongly disagree, disagree, neither disagree nor agree, agree, and strongly agree. For the most part, the officers responding didn't fall for the most egregious rape myths. [But] 16.6 percent agreed and 6.1 percent strongly agreed with the statement "Any

perpetrators in heterosexual rape scenarios. (cf. Deitz et al. 1982, 1984) The Illinois Rape Myth Acceptance Scale (IRMAS) scores Sex-Role Stereotyping Scale, Sexism Scale, Adversarial Sexual Belief Scale, Adversarial Heterosexual Beliefs Scale, Hostility Towards Women Scale, Acceptance of Interpersonal Violence Scale, Attitudes Toward Violence Scale. (cf. Payne et al. 1999)

18 | Suarez and Gadalla (2010) found that in general men are more likely to endorse rape myths than women. (cf. Anderson 2004a; Anderson et al. 1997; Earnshaw et al. 2011) And, individuals who hold negative attitudes towards women (or other groups, e.g., other races, sexual orientation, class, age) are more accepting of rape myths. (Anderson et al. 1997; Suarez and Gadalla 2010)

victim can resist a rapist if he or she really wants to.” So that’s 22.7 percent of cops who apparently think victims just didn’t want not to be raped badly enough? That they could have gotten away if they’d really tried? (Harding 2015: 85-6, emphasis in original)

And those are the people trained in investigating crimes like rape. Because police officers rely on certain myths, they are unable to investigate or process rape charges if the case reflected a mismatch with what they believed rape to be. Even more disturbing, Schwartz (2010) found that many police officers thought a high percentage of rape reports are false—leading them to not investigate further. 27.3 % of the officers reported that their gut estimate is that between 0 % and 10 % of rape reports were false. A similar number of police officers, 28.8 %, said that up to 50 % of rape reports are false, and some police officers even believed 95 %-100 % of reports to be false. This is in line with a 2010 investigation of FBI data in the *Baltimore Sun* that found that over the last 40 years, more than 30 % of investigated cases were deemed unfounded and 40 % of emergency calls about rape in Baltimore were not investigated at all. (Fenton 2010; Harding 2015) In other words, in at least 30 % of rape cases the false beliefs of police officers bring it about that investigations do not even continue because the cases are “unfounded.” And in about 40 % of emergency cases the victims do not get any help, because the police officers cannot even bring themselves to believe that a person is actually in need. The false beliefs also lead to uninvestigated rape kits, e.g., rape kits that are taken from the victims but never tested as part of the investigation.¹⁹ (cf. Atassi and Dissell 2013; CBS 2015; Reilly 2016; Sainz 2014; Werner 2015)

Rape myths have severe implications for those harmed by acts of sexualized violence. Jurors in rape case trials are more likely to find the defendant innocent when they accept rape myths, police officers are more likely to stop investigations in rape cases when they accept rape myths, and rape victims are more likely to blame themselves for the rape or are unable to acknowledge the act as an act of rape when they accept rape myths (to name just a few). The BPP School of Health and Professional Development issued an investigation into whether rape case jurors are influenced by rape myths. Rape case jurors have the task of deciding whether a defendant is innocent or guilty. In 2011 and 2012 the conviction rate for rape cases was 62.5 %, in 2007 it was 58 %. However, for drug offences the conviction rate is 91.6 % and the overall rate is 83.5 %. This is far higher than the overall conviction rate for sex offences (60.4 %). Why? The lack of physical or objective evidence in cases of rape means that the jurors have to assess whether they believe the defendant or the complainant. Research has shown that judgement of credibility is overwhelmingly based on

19 | Rape kits are used by medical personnel to gather and preserve physical evidence off the body of rape victims.

personal biases and attitudes rather than on the testimony of the witnesses. For example, beliefs about how a “real” rape victim looks and behaves greatly influences judgements of credibility. Hence, most rape cases are not judged on the basis of evidence or testimony but on the basis of beliefs shaped by rape myths. (cf. Burrowes 2012: 3-4)

Acceptance of Rape Myths

Rape myths can be especially problematic in two ways: (1) In cases when other evidence or information is sparse, we are more likely to use so-called indicator properties to help with our evaluations. And, (2) in cases when rape myths are the most salient explanation, we ignore other explanations. Consider (1) first. To navigate social practices and the social world in general, we rely on broad schemas. Schemas help us to group things into categories and enable us to quickly respond to things in the world. For example, the schema that tigers are dangerous stops me from climbing over the fence into the tiger pit in the zoo. While some schemas are helpful, others are problematic and guide us according to racist, sexist, or ableist (to name only a few) beliefs and attitudes. The less schemas about something are available for us to make a judgement, the more we resort to indicator properties that are not directly linked to the object under scrutiny. For example, if I do not have a schema according to which tigers are dangerous, I might resort to the fact that the fence is very high in the zoo to conclude that they are dangerous. Sometimes we fare well with this strategy, other times we do not. Indicator properties allow us to make judgements in situations where further information is lacking. The less access I have to indicator properties that actually concern the object or situation at hand, the more likely it is that I resort to broader schemas and indicators to evaluate the situation. Indicator properties can be influenced by prejudicial stereotypes (cf. Fricker 2007; Hutchison 2013) or rape myths that implicitly convey false ideas of what rape is or about women’s sexuality and men’s entitlement. For example, in a case where proper consent of the woman is absent, a man might resort to indicator properties that are influenced by rape myths to judge whether the woman consents or not. He might then falsely judge her smile or her short skirt to convey sexual interest.

Consider (2) next. Often, we can give several different explanations for a single case. For example, a toddler might be screaming in the garden in front of my window either because she is hungry, or she hurt herself, or maybe she realized her father went inside, or for any other reason. Which of these is the correct explanation can be tested—even though in some cases we might never know for sure. Obviously, some explanations are more salient than others. For example, that I am writing these words because I have a deadline is a more salient explanation than the one that there is nothing I like to do better. Some explanations are the most salient ones but nevertheless false. In some contexts,

rape myths can function as the most salient explanations. The man who treats the woman's refusal as "sexual foreplay" takes the explanation that women say "no" when they mean "yes" as the most salient explanation for the situation at hand. Or rape myths can block certain explanations as unthinkable. The wife who believes that rape cannot occur in marriage will treat the explanation that her husband is stressed or overly loving as more salient than the explanation that her husband raped her. That her husband raped her is unthinkable because it is blocked by the myths that rape does not occur in marriage. In both cases, rape myths can be used according to the justificatory and descriptive function. They can justify the fact that no other explanation was available or that this was the most salient explanation and they can function as a description of what was available and most salient.

Rape myths as salient explanations boil down to an understanding of rape exclusively along the lines of physically aggravated stranger rape. Most people consistently judge an act to be an act of rape when it closely resembles the following prevailing image of rape: rape as the vicious act of a male stranger waiting in the dark to physically overpower and penetrate a young female victim against her will and her physical resistance.²⁰ For example, a case like the one that happened to Susan Brison. She writes:

On July 4, 1990, at 10:30 in the morning, I went for a walk along a peaceful-looking country road in a village outside Grenoble, France. [...] About an hour and a half later, I was lying face down in a muddy creek bed at the bottom of a dark ravine, struggling to stay alive. I had been grabbed from behind, pulled into the bushes, beaten, and sexually assaulted. (2002: 2)

The same people who do not hesitate one moment to judge Brison's case to be a case of rape find it much harder to judge cases in which the victim and the perpetrator know each other, or are in a relationship of some sort, or cases in which force and resistance are not physically aggravated.²¹ For example, a case like this:

20 | Research shows that most acts of rape do not resemble this prevailing image of rape, rather most acts of rape happen in private and are committed by someone known to the victim without overwhelming force. (cf. Allison and Wrightsman 1993; Harding 2015; Warshaw 1994) Yet, the stranger rape image continues to be the most prevailing image of rape. I address this issue in Section 1.2.2.

21 | Brison herself writes that she was believed to be a victim of rape, because of the type of assault: "Since I was assaulted by a stranger, in a 'safe' place, and was so visibly injured when I encountered the police and medical personnel, I was, throughout my hospitalization and my dealings with the police, spared the insult, suffered by so many

Adrienne had just turned thirteen. [...] Adrienne walked three miles to Mike's house, where she found him waiting in his front yard. He signaled for her to come into the house. "Don't make any noise because my parents are asleep," he said. "They'd kill me if they found us in here." So throughout the night, Adrienne remained silent.

Mike led her downstairs into the family room. Now that she was inside his house, a deep fear set in, and Adrienne panicked. In her words, "I just completely left my body." She does not know how her clothes came off. All she remembers is coming back to the intense pain of Mike ramming inside her. He was ripping her apart. She blacked out. (Anderson 2004b: 1401-2)

Because Mike and Adrienne knew each other, Mike did not use any aggravated physical violence, and Adrienne entered his house willingly, most people find this case harder to judge than a case of physically aggravated stranger rape. In other words, even though the physically aggravated stranger rape is by far the least likely to occur, it is this case that people identify quickly as an instance of rape, while other less aggravated cases give rise to doubts. (cf. Allison and Wrightsman 1993; Harding 2015; Warshaw 1994) This corresponds to research that shows that men will admit to sexually coercive behaviors and women will self-report victimization when the researchers give behavioral descriptions of acts of rape and sexual abuse instead of using the labels of 'rape' or 'sexual abuse'. (Edwards et al. 2014) By many, rape is only understood in terms of physically aggravated stranger rape.

Note that the prevailing image of rape (especially for the U.S. context) is often tinted with racist beliefs. The prevailing image of rape is physically aggravated rape by a black stranger (or by a man from another minority group). (cf. Bar On 1999; Dines 1998) America has a long history of using the image of the black rapist, who attacks white women, to legitimize lynchings and convictions.²² Research, for example, shows that scenarios of date rape are more often judged as acts of rape when the man involved is black than when

rape victims, of not being believed or of being said to have asked for the attack." (Brisson 2002: 7) This corresponds to what Henderson (1992) reports.

22 | The Equal Justice Initiative writes in 2015: "Nearly 25 percent of the lynchings of African Americans in the South [between 1888 and 1950] were based on charges of sexual assault. The mere accusation of rape, even without the identification by the alleged victim, could arouse a lynch mob. The definition of black-on-white 'rape' in the South required no allegation of force because white institutions, laws, and most white people rejected the idea that a white woman would willingly consent to sex with an African American man." (Initiative 2015: 10) See also Harding (2015: 68-9). Note that rape is mostly an interracial crime— with the only exception being Native American women; they are targeted more often by white men than by Native American men.

he is white.²³ (Foley et al.1995) The most famous case being the Central Park Five in 1989, where five black and Latino teenagers were arrested for the rape of a white woman jogger in New York's Central Park despite the complete lack of evidence. The twenty-eight-year-old jogger had been raped and beaten and was left for dead with a fractured skull, a swollen brain, and three-quarters of blood less than when she entered the park that evening. She did not remember anything, including her name. Five black and Latino teenagers were found nearby, arrested and convicted despite the lack of any evidence. All of them served time in prison. In 2002, a convicted serial rapist and killer confessed to the rape and his confession was backed up by DNA evidence—unlike the forced confessions of the five young men arrested in 1989.

We can now say that the salient operative concept of rape is physically aggravated stranger rape. This is problematic because it fails to capture most forms of rape. Rape myths can thus distort our understanding of what rape is in ways that are deeply problematic. In cases where rape myths are salient explanations—where they serve an explanatory function—we often adopt them unconsciously. There are many ways in which we come to adopt rape myths, here are two. First, rape myths circulate by means of everyday depictions and symbols. Rape myths are widespread in the media. We are confronted with false statements about rape on a daily basis and it is hard not to adopt these views. For example, Dolce & Gabbana as well as Calvin Klein ran billboard adds glamorizing gang rape. Suit maker Duncan Quinn directly portrays sexualized violence in his adds, as do Belvedere Vodka and the Italian fashion company Relish. Even Peta suggests in its media campaigns that it is better to be vegan and sexually violate your girlfriend (because she will enjoy it!) than not to be vegan.²⁴ T-shirt retailers make money by selling tops that read “No means no, well, maybe if I’m drunk” or less subtly “No means yes.” In 2013, Robin Thicke’s song “Blurred Lines” got played on nearly every radio station and in nearly every club; the chorus includes “I know you want it / But you’re a good girl.” (cf. Harding 2015: 12) Basically, we all grow up and live in a social world where rape myths are used for entertainment. How can we not fall for them? Drawing on work by Barkey and Koplin, Rae Langton argues that there are rapists who copy what they see in pornography. If pornography portrays a woman resisting being raped who later “comes to a shuddering orgasm” (Langton 2009: 184), then some men might be inclined to believe that women mean “yes” when they

23 | Research also shows that scenarios are less often judged to be cases of rape when the attacked woman is black. (cf. Foley et al. 1995) This corresponds with psychological research that shows that black rape victims are blamed more and are less likely to disclose their experiences because of particular stereotypes against black women. (cf. George and Martinez 2002)

24 | For pictures of all of these see Green (2013).

say “no.” The same holds for general media representation of rape myths. It is through media representations such as the above, that we—unconsciously—adopt rape myths.

Second, rape myths can be adopted through our everyday language practices. Robert Stalnaker claims that the general reason for talking is to exchange information. This, Stalnaker argues, assumes a common ground.²⁵ It assumes that everyone in the conversation recognizes that information is shared and that they are in a situation of communication. The common ground then is a set of shared beliefs and the presupposition that certain beliefs are common amongst all speakers. But, according to Stalnaker, shared presuppositions are not the only thing that can be part of the common ground, certain assumptions may become a part of it as well, at least temporarily. (2002: 704) The common ground can involve more than just belief. We can accept a proposition without really believing it. We can treat it as true in a certain context (at least temporarily) and ignore the possibility that it might be false. In other words, we can have a successful conversation because we accept things in the common ground we know to be false.

Sometimes our conversations take place in a non-defective context, where all the beliefs about the common ground of the participants in the conversation are correct. Everyone presupposes the same things. However, just as we have conversations in non-defective contexts, we have them in defective contexts. In other words, not everyone’s beliefs about the common ground in the conversation are correct. Sometimes those defective contexts are not noticed by the participants of the conversation and they go on having the conversation as if the context was non-defective. Other times, someone in the conversation notices the defective context. In these cases, the participant of the conversation has two options: she can go along with the defective context for the sake of conversation or she can try to correct it. Consider Stalnaker’s example: Alice meets Bob, who is holding his baby daughter. And Alice says: “How old is he?” If Bob notices the defective context, he can now correct her. He might answer: “She is ten months old.” (Stalnaker 2002: 717-8) But if Bob just does not care whether people take his daughter to be a daughter or a son, if he simply does not care about sex differences, then he might very well just go with the defective context and say “Ten months.” This way, Alice keeps believing that Bob’s daughter is a son. Indeed, Bob’s daughter taken as a son is now part of the common ground between Bob and Alice.

What I am interested in here is similar to what Sally Haslanger picked out in her “Ideology, Generics, and Common Ground” (2011): the way in which the common ground can help us understand certain phenomena of our everyday language practices that have problematic outcomes. Let us say that someone

25 | Compare to Grice’s *common ground status*. (1989: 65 and 274)

introduces the following rape myth into the common ground: “When women say ‘no,’ they mean ‘yes’.” He does so by way of an example: “A friend of mine, who is a girl (!), told me that women often say ‘no’ even though they want to have sex, to not appear as sluts. Thus, when women say ‘no,’ they actually mean ‘yes’”. Listening to this story, we know that there are women who might do this, but we also know that in this universal form the statement is wrong. However, for the sake of the conversation (and because we are very tired of refuting sexist beliefs constantly), we go along with it. Imagine further, that the group of conversing people does not just consist of us and the storyteller, but of two more persons who do not know anything about rape myths. They do not question what is said because once the statement is introduced into the common ground and no one refutes it, they believe it to be true. They just adopted a rape myth. How we get new information into the common ground of course depends on the specific conversation. However, there is social pressure to stick to the general conventions that we have for successful communication. (Haslanger 2012: 457) That is, there is pressure to conform to the common ground of those with whom we are in conversation, as seen in our hypothetical example. This is only one piece of the puzzle. But it shows how seemingly insignificant statements that are not blocked from entering the common ground of the conversation, can produce and reproduce rape myths.

Larry May and Robert Strikwerda provide an honest description of the way in which many male teenagers behave in groups. They write:

As teenagers, we ran in a crowd that incessantly talked about sex. [...] we would tell each other stories about our sexual exploits, stories we all secretly believed to be pure fictions. We drew strength from the camaraderie we felt during these experiences. [...] Over time, conversation turned more and more to group sex, especially forced sex with women we passed on the road. To give it its proper name, our conversation turned increasingly to rape. [...] Only much later in life did we think that there was anything wrong, morally, socially, or politically, with what went on in that group of adolescents who seemed so ready to engage in rape. Only later still did we wonder whether we shared in responsibility for the rapes that are perpetrated by those men who had similar experiences to ours. (1994: 134)

Besides other arguments, May and Strikwerda argue that “[i]nsofar as some men, by the way they interact with other (especially younger) men, contribute to a climate in our society where rape is made more prevalent, then they are collaborators in the rape culture and for this reason share in responsibility for rapes committed in that culture.” (1994: 146) The idea is that by not blocking these stories, by not pointing out that rape is not ok, by not reminding other men that rape jokes are not funny, men contribute to a culture in which rape becomes more and more acceptable. In other words, by not blocking certain rape

stories or myths from becoming part of the common ground of a conversation, those men who failed to speak up share responsibility when someone in the group goes away thinking that rape is legitimate, tolerated, wanted, or simply “not really rape”. And while it is often not possible for women to block certain utterances from becoming part of the common ground in settings where men are dominant, the same holds for women in women only groups. To allow rape myths to enter the common ground, means to share responsibility when another woman fails to make her own experience intelligible as an experience of rape.

However, rape myths need not socially circulate in a way that makes them unquestionable.²⁶ In the aforementioned conversation, two listeners adopted rape myths because they could not make them out to be false, but we were part of the conversation as well and we knew them to be false yet did not question them in this particular case. Imagine that there was another person present who also knew them to be false but decided not to say anything because they serve a useful function for him. He can use them to excuse his sexist behavior towards women. This person knows better but actively chooses to accept rape myths. In cases where rape myths are accessible explanations but other explanations are also available—that is, in cases where they serve a justificatory function—we have to explain their adoption in different ways. Part of the reason why they are accepted is because they serve as an excuse. We can then say that they are adopted knowingly. Yet, once they enter our ways of seeing the world, the calculated acceptance of rape myths can become blurred such that we forget they are not the most salient explanation but only one false explanation of many.

1.2.3 Institutional Mismatches

To briefly recap, rape myths reflect societal attitudes.²⁷ They contribute to sexualized violence being (re-)produced, perpetuated and justified, and they permeate current social institutions. (cf. Edwards et al. 2011) And rape myths have problematic consequences. We can now say that the dominant operative concept of rape is distorted by rape myths—it is indeed because of rape myths in these cases that there is a mismatch between the manifest concept (the legal

26 | Whether we adopt rape myths because they are the most salient explanations available or because we choose to accept them depends on how deep we are embedded in the sexist structure of our society and whether there exist ways in which we can break out of the sexist framework. In the following (especially in Chapter 4), I argue that rape myths are ideologically salient beliefs within a sexist ideology.

27 | I say more about how rape myths function as part of a sexist ideological system in Chapter 4.

definition) and the dominant operative concept, or, accordingly, between the forms of rape in the world and the dominant usage of the term 'rape'. Most individuals' usage is distorted by rape myths.²⁸ Let us call a mismatch between the manifest concept (as the legal or formal definition) and the dominant operative concept an 'institutional mismatch'. To illustrate, assume that the city's regulation for littering is the following: the disposal of any physical object on city grounds and outside the designated areas of disposal is an act of littering and therewith forbidden. However, every Sunday on my way home from the market I dispose a half-eaten apple in the bushes next to the bus stop. Knowing about the biological fact that my half-eaten apple will quickly start rotting and then decompose into the earth—literally vanishing—I do not take my act of disposal to be an act of littering. And, I contend that many people make similar assumptions. The operative concept of littering (say, an act is an act of littering only if I dispose of objects on city grounds that do not decompose into nature and have a lasting effect on the cleanliness of the city) therefore diverges from the manifest concept (the city's regulation for littering). This example follows the—my words—institutional reading of Haslanger's manifest concepts.

I have claimed that institutional mismatches arise when the dominant operative concept and individuals' usage of the respective term is affected by rape myths. I have then shown why it is indeed plausible to think that rape myths can have said impacts. And I have briefly suggested that institutional mismatches can have deeply problematic consequences. Let me now turn to consider how the institutional mismatch can be especially devastating in these cases. To make this more amenable, consider the following three examples of such mismatches in regard to rape. In each example, individuals of a given

28 | It need not necessarily be the case that the operative concept is the one that is distorted. There are lots of cases in which our manifest concepts rely on sexist, racist, or other discriminating beliefs and assumptions, and in which our actual usage has developed progressively. Think, for example, of feminist struggles to include marital rape in the legal definition of rape. This is why I argued above that there can be more than one operative concept in a given community. However, taking into account the research on rape myths, we can say that the most dominant operative concept is distorted by rape myths. In this section, I focus solely on distorted operative concepts. Of course, rape myths have for a long time (and in some cases still do) influenced our legal definitions (and *vice versa*). Operative concepts and manifest concepts can and do influence each other. Thus, if research shows that operative concepts are defective, then it is plausible to assume that manifest concepts are defective too (at least in some ways).

community apply the dominant operative concept, which is distorted by rape myths, without being aware of the institutional mismatch.²⁹

The Court Case

In 2011, juror Patrick Kirkland published a long essay about the decision to acquit New York City police officers Kenneth Moreno and Franklin L. Mata of rape charges. Kirkland was a juror for the following case: New York City police officers Moreno and Mata were called to the home of the alleged victim, because she was too intoxicated to exit a taxi. They returned to her apartment twice that night (proven by security camera footage). They tried to cover this up by placing a false 911 call to the area of the apartment in order to have a justification to go back there. Three years later in court, Moreno admitted to cuddling with the alleged victim and singing to her, while she was wearing only a bra. According to testimony, Mata waited in another room at that time. The alleged victim, on the other hand, reported that she was woken up to being penetrated by one of the police officers. In his essay, Kirkland explains how he and the other jurors came to the decision that neither one of the police officers had committed an act of rape with certainty. Their decision was based on the view that the prosecution was unable to demonstrate that the scenario in question was an act of rape instead of an act of sex. Interestingly, in his essay, Kirkland explains how he convinced another juror, juror Number Four, that there is not enough evidence that the act in question was really an act of rape. This is how he reports the scene:

“She said she woke up to being penetrated,” Four repeats.

I turn directly to Four. Hours have passed. We’ve gone in circles, and Four has seemingly made the penetration line her new mantra.

My elbows hit my knees and I speak slowly. “You do know that penetration can mean sex, right?” I ask.

I can hear her mind racing, speeding toward the light of reason. “Yes.”

“And you know that sex does not equal rape?”

29 | As I have said, one could make more fine grained distinctions between the different rape myths that affect the dominant operative concept. This would result in multiple operative concepts that are all—in one way or another—distorted by rape myths. However, I speak here of just one dominant operative concept for the sake of illustrating the problematic consequences that institutional mismatches can bring about, especially since the above discussed rape myths all essentially center around similar false assumptions.

She stares down at her notepad. "She said ... she felt the penetration."
(Kirkland 2011: 208-10)

Juror Number Four was right in feeling uneasy about this, but failed to express it clearly. What is beyond reach for Kirkland is the fact that rape is non-consensual sexual intercourse under New York State law and that the alleged victim could not have given consent if she was sleeping while the penetration started.³⁰ A sleeping person cannot consent to having sex. Kirkland is right that sex does not equal rape, but the dominant operative concept he relies on fails to include non-consensual sex and is therefore not in line with the legal concept. Rape according to New York State law is roughly non-consensual sexual intercourse; it is the manifest concept of rape, the institutionalized, legally manifested concept in the legal context of New York State. Juror Kirkland, on the other hand, assumed the dominant operative concept distorted by rape myths. According to the operative concept, the case of a sleeping woman being penetrated is not rape, while according to the manifest concept it is. Not only does this mismatch between the dominant operative concept and the legal manifest concept of rape result in a disrespectful attitude of Kirkland towards juror Number Four, it also falsely leads to the acquittal of Moreno and Mata.

The Rapist Case

Naomi Wolf suggests that some rapists fail to understand that they have committed an act of rape; in other words, their understanding of rape is defective.³¹ They rely on a distorted operative concept that misrepresents what rape is. Wolf says:

boys rape and girls get raped as a normal cause of events. The boys may even be unaware that what they are doing is wrong; violent sexual imagery may well have raised a generation of young men who can rape women without even knowing it. (1991: 167, emphasis in original)

30 | To be more precise, under New York State law, someone is guilty of first-degree rape, if "he or she engages in sexual intercourse with another person who is incapable of consent by reason of being physically helpless." Furthermore, "physically helpless" is defined as when "a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act." (New York Penal Code Article 130, Sex Offenses)

31 | Some anti-pornography scholars suggest a similar line of thought. Langton, for example, argues that a person who learns the rules of sex from a certain kind of pornography (namely, pornography that depicts cases of rape which magically "turn" consensual half-way through the act) "might not even recognize an attempted refusal" of a woman in real life. (Langton 2009: 58)

In David Goldie's Australian Broadcasting Commission's documentary *Without Consent* (1992), an anonymous and young rapist is interviewed who reports that the gang rapes he took part in were not rapes. The acts were committed for the sake of male camaraderie, for overpowering a woman together with mates. His view is that rape concerns only those acts in which the lack of consent is essential to the experience of the rapist. Since the lack of consent was less important than the male camaraderie in what he did, he did not participate in acts of rape. (cf. Langton 2009: 58, footnote 54)

Under Australia's common law, rape is defined as carnal knowledge of a woman against her will.³² The manifest concept of rape in the legal context of Australia can roughly be described as sexual intercourse against the will of the woman. The way the respective term is used by the anonymous rapist, however, relies on the dominant operative concept and assumes that rape is sexual intercourse against the will of the woman and in which the lack of consent is essential to the experience of the rapist. This, again, amounts to a mismatch between the legal manifest concept and the usage of the term by the rapist interviewed. Furthermore, relying on the dominant operative concept makes it impossible for the rapist to judge his own acts as acts of rape.

Last but not least, sometimes problematic consequences do not result from the institutional mismatch directly, but from a distorted neighboring concept. In these cases, the dominant operative concept of rape does not result in a mismatch between the usage and the manifest concept and thus lead to highly problematic outcomes. Rather, the defective neighboring category prevents the correct application of the manifest concept. While we often have beliefs about certain things that are not essential for our understanding of the concept we employ, some beliefs nevertheless affect our understanding of the concept by blocking our correct application of that concept. In these cases, background beliefs can limit our application of the concept. They block us from applying the manifest concept at all. Rape victim is such a neighboring operative concept, as shown in the following example:

The Police Case

On a Monday morning in August 2008, two Lynnwood police detectives—Sgt. Jeffrey Mason and Jerry Rittgarn—are called to a rape scene. The victim, Marie, who just turned 18, told the detectives that she was asleep in her apartment when she was awoken by a man with a knife. He tied her up, blindfolded her, gagged her, and then raped her. After he left, she managed to untie herself and

32 | Statutory extensions and modifications to the common law crime of rape have been made in all jurisdictions to varying degrees since this definition, see <https://www.alrc.gov.au/publications/25>. Sexual Offences/'rape'-penetrative-sexual-offence; accessed September 7, 2017.

call for help. She could not offer many details, but believed that the man wore a condom when he raped her, was white, and wore a gray sweater. She could not say how long the attack had lasted. Throughout her testimony and the police's inspection of her apartment, Marie appeared calm and focused. (Armstrong and Miller 2015) For someone, like Sgt. Jeffrey Mason and Jerry Rittgarn, who relies on a concept of rape victim as being hysterical or showing clear signs of physical abuse, Marie simply did not appear to be a rape victim.

Members of the police force commonly hold assumptions about what rape victims look like and how they behave. (cf. Allison and Wrightsman 1993; Harding 2015) They are indeed so common that by 2008 specialists had developed protocols to deal with the challenges rape cases often brought: "These guidelines, available to all police departments, detailed common missteps. Investigators, one guide advised, should not assume that a true victim will be hysterical rather than calm; able to show clear signs of physical injury; and certain of every detail. Some victims confuse fine points or even recant. Nor should the police get lost in stereotypes—believing, for example, that an adult victim will be more believable than an adolescent." (Armstrong and Miller 2015) Sgt. Jeffrey Mason and Jerry Rittgarn had certain assumptions of what rape victims are like, assumptions that were not in line with Marie's behavior. These assumptions led them to distrust her—despite the evidence that was found in her home and on her body. Detectives found the rear sliding glass door unlocked and slightly ajar in Marie's apartment. They discovered that the railing of the back porch was covered with dirt, except for one part (as if someone recently climbed over), they also found a knife from Marie's kitchen next to the bed, a shoestring on the bed, and a second shoestring tied to a pair of underwear (used for blindfolding and gagging Marie) in the apartment. They sent Marie to the hospital for sexual assault examination. The medical report noted abrasions to Marie's wrists and her vagina. However, the report also stated that Marie was in no acute distress. (Armstrong and Miller 2015) Besides all available evidence, the detectives decided not to believe Marie and dismissed the case.³³

Marie was attacked in the jurisdiction of Washington. Under Washington State Legislature, rape in the first degree is defined as:

33 | See Armstrong and Miller (2015) for the whole story: The detectives not only disbelieved Marie and dismissed the case, they pressured her to admit that she was lying to seek attention and charged her with filing a false report, punishable by up to a year in prison. The rapist who had attacked Marie was a serial rapist, who attacked at least 28 women in total. Had Mason and Rittgarn believed Marie, it is likely that they could have caught him earlier and could have prevented the rapes of the five victims that came after Marie's attack.

A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory: (a) uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or (b) kidnaps the victim; or (c) inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or (d) feloniously enters into the building or vehicle where the victim is situated.³⁴

Marie's attacker engaged in sexual intercourse with her by forcible compulsion (she was blindfolded, gagged, and tied up), he used a deadly weapon (a knife from Marie's kitchen), and he entered her apartment feloniously. Only one of these features must be in place to define the act as rape in the first degree. According to the manifest concept, Marie was raped. However, Mason's and Rittgarn's operative concept of rape victim deviated from Marie. It affected their thinking insofar as they failed to apply the legal concept of rape, but instead judged that someone like Marie could not have been raped because she did not act like a rape victim, according to their understanding of how a rape victim is supposed to act. Their operative concept of rape might have been in line with the manifest concept, yet they never even applied their concept of rape to the scene at hand, because the neighboring concept of rape victim blocked them from doing so. This had serious consequences for Marie.

The examples show that the dominant operative concept—the dominant usage of the concept within a community affected by rape myths—and the manifest concepts do not necessarily match.³⁵ To be more precise, they show that even when we think that the concept we apply is in line with the legal or institutional concept in the specific context, this is not always the case. And the dominant operative concept—the actual usage of the concept—is distorted by rape myths. As we have seen, this results in problematic consequences; individuals who rely on the dominant operative concept are more likely to commit acts of rape, are less likely to see what happens to them or others as

34 | See <http://app.leg.wa.gov/RCW/default.aspx?cite=9A.44.040>; accessed July 13, 2016.

35 | One could argue that while rape myths are problematic beliefs, they are not *part* of the concept in the way I describe it here. That is, they are not essential to the concept and can be discarded, for example, when we pay closer attention to the phenomenon. According to this explanation, the officers, jurors, and the rapist are merely careless in their application of the manifest concept. However, I think this does not fit well with the research that police officers—despite the education about the law they have—use ‘rape’ drastically different than what the legal definition states. Hence, I think that it is not exaggerated to say that rape myths can affect our usage in ways that block the application of the manifest concept and leave us with an operative concept that is different to the manifest one without us being aware of this difference.

acts of rape, and in the case of officials, are less likely to process or judge the act in question as one of rape.

I have shown that the concept of rape is contested, but that despite the contestation—the multiple operative concepts in one community—the dominant operative concept of rape is distorted by rape myths and not in line with the formal or legal definition. I have furthermore argued that this can have problematic consequences. The dominant operative concept exclusively tracks physically aggravated stranger rape and thus fails to track the various forms of rape that exist in the world. In the following section, I have a look at how other philosophers account for the concept of rape while at the same time acknowledging that it is contested. I focus in particular on the following question: Given that rape is contested, should we take one step further and say that it is essentially contested, and if so, does this imply that there is no use in cleaning up the concept and providing a theory of rape? In the end of Section 1.3, I argue that this would be a rash decision and that, instead, we need to ameliorate the concept such that it captures more adequately the phenomenon of rape as it occurs in the world and thus counter the distorted dominant operative concept—which I turn to in Chapter 2 and 3.

1.3 ESSENTIALLY CONTESTED CONCEPTS

A theory of rape needs to account for the contestation of the concept and the dominant but distorted operative concept. At the same time, it needs to do justice to the experiences of rape victims. Leaving things as they are is deeply problematic for the reasons sketched above, and, hence, in our theorizing we have to account for the ways in which the concept of rape is understood and for the problems this brings with it, while, at the same time, overcoming them. In the following, I focus on two theories that use the insights of contestation as a starting point to account for the concept of rape and to show its emancipatory potential, i.e., show how the contestedness of the concept can bring about a theory of rape that tracks more adequately the real-life-phenomenon of rape.

I start with a more detailed look at a theory by Keith Burgess-Jackson and then advance to a theory by Eric Reitan. I ended the above discussion on contestation by suggesting that there is a plausible explanation why the concept of rape is prone to such debates—more so than some other concepts. The explanation is that—and this is a thought also expressed by Burgess-Jackson (1995)—different people endorse different understandings of what rape is. And each person takes their definition to be better and more adequate in describing acts of rape. This can lead to the dominant operative concept, according to which only some forms of rape are tracked, or it can—at least theoretically—lead to an operative concept such that more forms of rape are tracked than

either the manifest or the dominant operative concept or both. The latter case would be a case that has emancipatory potential in so far as it does justice to the experiences of rape victims.

Burgess-Jackson has a similar idea and provides a good starting point for a conceptual discussion about the specific character of the concept. He argues that while there are clear cases of rape and of not-rape, there is a whole range of cases between these two ends in which it is hard to judge whether an act clearly belongs to one side or the other. In other words, he thinks that the term ‘rape’ is vague because competent language users disagree on the word’s application over a range of cases. This happens because, and here Burgess-Jackson advances a claim by Robinson, “Disagreement in the use of a word by competent language users signals, or constitutes evidence of, absence of clear meaning, or what we are here understanding as vagueness.”³⁶ (Burgess-Jackson 1995: 434, emphasis in original) Thus, Burgess-Jackson submits, people disagree over the term because it is vague.³⁷ But, he also argues that the vagueness of the concept should not stop us from trying to make it more precise—in fact it can be beneficial for feminist aims. Hence, he thinks that the concept of rape is epistemically vague; the more we come to know and the better we come to know the phenomenon of rape, the more precise our definitions will be.

Burgess-Jackson makes an interesting observation: there are cases in which most competent language speakers disagree about whether they should be considered rape or unproblematic sex.³⁸ However, this alone is not a problem. We could simply say that the concept is vague in Burgess-Jackson’s sense and so we have to stipulate better definitions that capture more adequately the phenomenon of rape—a strategy which he actually seems to suggest. While this might dissolve the disagreement, it is only useful insofar as people acknowledge the gray area of rape, include cases from the gray area in the category of rape and come to a new definition. However, if, as I have argued, each person thinks that their definition is better than others, and if the dominant operative concept of rape is distorted by rape myths and thus does not expand into the gray area but assumes only physically aggravated stranger rape, then Burgess-Jackson’s

36 | For the original argument on general agreement of competent language users and the meaning of a word, see Robinson (1965: 113).

37 | Note that Burgess-Jackson’s understanding of vagueness as disagreement is drastically different to most theories of vagueness. According to these, a term is vague iff it fulfills the following conditions: (a) it has borderline cases; i.e., cases where it is unclear whether the predicate applies or not; (b) it lacks well-defined extensions (or, according to Graff (2000), has fuzzy boundaries); and (c) it is susceptible to the sorites paradox. (Keefe 2000: 6-8)

38 | And, in this sense, what Burgess-Jackson argues for is much closer to my claim of contestedness than a claim about vagueness.

strategy fails. As I show in the next section, Reitan (2001) offers a different and more radical theory. He argues that rape is an essentially contested concept.

1.3.1 Rape as an Essentially Contested Concept

What if the concept of rape is an “essentially contested concept”? Walter Bryce Gallie first put forward the idea of essentially contested concepts.³⁹ According to Gallie, different groups of people assign different understandings to the concept in question. Yet disclosing these different understandings and underlying theories does not end the disputes between different groups. Instead, every group in the dispute thinks of their use as the proper interpretation of the concept. And they bring forward arguments and other forms of justification to argue for their understanding. But even after hours of dispute, the different groups of people will still be convinced of their specific arguments and their understanding of the concept in question. (Gallie 1956: 168) Therefore, in Gallie’s words, essentially contested concepts are concepts “the proper use of which inevitably involves endless disputes about their proper uses on the part of their users” (1956: 169).

Eric Reitan applies the theory of essentially contested concepts to the concept of rape. Similar to Burgess-Jackson, his project is motivated by the public controversy over the definition of rape between advocates of its traditional understanding and their feminist critics. And, again, similar to Burgess-Jackson, he starts from the assumption that “[r]ape is a [...] word laden with emotive and evaluative significance” (Reitan 2001: 43). To Reitan, whenever we name a sexual act ‘rape’ we “attach to it the harshest sort of condemnation” (2001: 43). However, while Burgess-Jackson is concerned with feminist re-definitions of rape as a vague concept, that is, the extension of the concept of rape to cases that fall in the borderline area, Reitan makes a stronger claim. He argues that feminists do not extend the meaning of ‘rape’ to capture cases that previously fell into the borderline area so much as they create the very idea that there is a borderline area. (2001: 45) He is thus not concerned with the re-definition of what already fell into the borderline area of a vague concept, but with a new definition such that it includes acts that lie outside of the borderline area. And, according to Reitan, to provide such a new definition is acceptable

39 | Note that MacIntyre holds a slightly different theory about essentially contested concepts. He argues that for some concepts we cannot give conditions that determine the application of the concept in question but that we can nevertheless behave *as if* there were such conditions. However, there are a few cases in which we cannot even apply the concept in the *as if* sense, i.e., there are cases in which we even debate the paradigmatic cases of the concept. According to MacIntyre, these concepts are essentially contested. (1973: 2)

because the concept of rape is not merely vague but essentially contested in the sense Gallie argues for. In short, Reitan's argument is: the term 'rape' has powerful appraisive meaning, and because of this, any definition of rape has normative significance.⁴⁰ Rigid definitions of rape exclude some contemporary understandings, e.g., those of feminists. Excluding those understandings silences some moral perspectives by definition; this is problematic. Thus, we need to understand the concept of rape not in terms of rigid definitions, but in other ways. Understanding rape as an essentially contested concept allows sufficient flexibility (for open moral discourse), but preserves the core meaning which frames the discourse. (Reitan 2001: 53-4)

Let me spell out in more detail how Gallie's account of essentially contested concepts works and how it is used by Reitan for the concept of rape. Gallie argues that some concepts are intensionally complex. It is not worthwhile to try to capture them by one general definition, but rather they are adequately captured by a number of competing characterizations. Further, these competing characterizations are unified by a common appraisive meaning and a shared set of complex paradigms. A paradigm is an exemplar of the case in question such that everyone agrees that it falls within the concept. For example, football is a paradigm case of the concept of sport simply because everyone agrees that it is a kind of sport. Nobody would contest that football is a sport, in comparison to ping-pong; some people might think that ping-pong is a leisure activity but not a sport. The intentional complexity originates from the fact that the concepts are taken to differ according to whatever elements of the paradigms are considered most fundamental for determining the term's extension. (Gallie 1956)

Reitan's argument that rape is an essentially contested concept relies on the following conditions⁴¹: (a) all of the objects falling within the concept's extension have a common value judgement attached to them; (b) this appraisal (common value judgement) results from the complex set of characteristics that the object

40 | Similar arguments are brought forward for the term 'racism'. Blum (2002) argues that racism is a term of moral appraisal—it has an expressive content that includes condemnation—and that the more insight we gain about the morality of racial wrongdoing, the more we shift the object of the concept. A good summary of this view and an insightful critique of it is given by Shelby (2014). Indeed, much of what Shelby argues for in regard to racism is similar to the approach that I take in this book. I similarly argue that political philosophy and structural analysis of the social institutions have primacy over the moral debates in normative analyses of rape and that conceptualizing rape as part of an ideology helps to see what is problematic about it. See my Chapters 3 and 4.

41 | These conditions broadly mirror the necessary conditions that Gallie (1956: 172 and 180) specifies for essentially contested concepts.

in question has (these characteristics appear to varying degrees); (c) not any characteristic is legitimate (the characteristics are taken from the paradigm cases); (d) the appraisal does not have to be positive, but can be of a negative nature. (Reitan 2001: 48-51) According to these criteria, the concept of rape is an essentially contested concept. First, the concept of rape has a strong appraisive character. People react with moral disgust and general condemnation towards the crime of rape.⁴² Second, there are clear paradigm cases. And paradigm cases are understood here (in line with Gallie) as cases that everyone agrees to fall under the concept in question. Reitan takes the following to be the strongest paradigm: “a stranger using physical force to overpower and vaginally penetrate a resisting woman” (2001: 49). In other words, no one would suggest that the case of physically aggravated stranger rape is not a case of rape. Third, the paradigms have a complex array of characteristics. They display a whole range of characteristics. In the case of the physically aggravated stranger rape, possible features are physical violence, penetration, control, lack of consent, coercion, resistance, and so on. Fourth and finally, disputes about the nature of the concept of rape result because different theorists emphasize different aspects of the paradigm as essential conditions for something to fall within the scope of the concept. Although there is agreement about the paradigm belonging to the concept, there is disagreement about why that is the case. (Reitan 2001: 48) For example, while traditionalists stress the importance of physical violence, force, and penetration as essential features of acts of rape, feminists stress the importance of lack of consent and control as essential features. Thus, while both feminists and traditionalists agree that the paradigm case of physically aggravated stranger rape is an instance of rape, they disagree why this is the case. Since different groups regard different characteristics as essential, they take different acts to fall under the concept. In other words, while they agree that physically aggravated stranger rape is an instance of rape, feminists—by stressing consent as an essential feature—take it that non-coercive forms of date rape are also rape, while traditionalists disagree on this. Furthermore, Reitan argues that the (feminist) debate determines the borderline area by highlighting characteristics of the paradigm case that extend the concept of rape to include non-coercive forms of rape. If the borderline area is indeed determined by feminist accounts, then a rigid definition excludes these borderline areas and therewith excludes contemporary understandings. Thus, according to Reitan, mapping the concept of rape in the form of essentially contested concepts allows us to include borderline cases that would otherwise be excluded. (Reitan 2001: 51-7)

42 | According to Reitan, the first to suggest so was Garver (1988). Yet I have argued that often people only do so when it comes to physically aggravated stranger rape and not when it comes to other forms of rape. I say more about this in Chapter 4.

1.3.2 Contesting Essentially Contested Concepts

Understanding the concept of rape as essentially contested allows us to include instances that were previously disregarded. However, accounting for rape in these ways faces at least the following three problems: (1) The view rests on the specific paradigm case of physically aggravated stranger rape. This is by itself problematic for the concept of rape and, furthermore, excludes certain instances from the concept of rape that we, as feminists, would want to include. (2) Not everyone has the same power or social standing that allows for their claims to be taken seriously. However, in order to claim that certain contested characteristics are essential and to have one's word count as valid assumes a certain social standing. (3) Reitan (as well as Gallie) rely on a view of semantic internalism when it comes to essentially contested concepts. That is, according to them, a concept is either contested or its meaning is "in the head". However, taking seriously the insights of semantic externalism suggests otherwise and it is, I claim, the more useful semantic theory to endorse. I will now take a more detailed look at each one of these problems.⁴³

First, understanding rape as an essentially contested concept rests on the specific paradigm case of physically aggravated stranger rape. This is by itself problematic. Even though it is empirically true that physically aggravated stranger rape is the instance of rape accepted by nearly everyone, continuing to focus on physically aggravated stranger rape as the paradigm of rape masks much more common and subtle forms of rape. Susan Estrich writes the following about her own rape by a stranger who threatened to kill her with an ice pick:

In many respects I am a very lucky rape victim, if there can be such a thing. [...] I am lucky because everyone agrees that I was "really" raped. When I tell my story, no one doubts my status as a victim. No one suggests that I was "asking for it." No one wonders, at least out loud, if it was really my fault. No one seems to identify with the rapist. (Estrich 1987: 3)

She was believed because her attacker was a stranger with a weapon.⁴⁴ Endorsing physically aggravated stranger rape as the paradigm example of rape—even if

43 | I will here not address critiques that are brought forward against the theory of essentially contested concepts in general, but instead narrow the critiques to what is important for the specific concept of *rape*.

44 | It would be wrong not to note that part of the reason why Susan Estrich was believed without doubt was the fact that she was white while her attacker was black. As argued before, racism is a strong factor in rape convictions and in whether we believe a victim or not.

this is the most uncontested example—strengthens the dominant operative concept of rape. Thus, the problem is not that it is false to take physically aggravated stranger rape as the paradigm in dominant meaning—in fact this is what I have argued for above. The problem is that by constructing a theory around this paradigm, we fall prey to reproducing the paradigm, even if this is not in our interest. It again becomes the focus point of analyses of rape, although it is far from actually capturing most cases of rape.

Furthermore, this view excludes certain instances from the concept of rape that we, as feminist, would want to include. Reitan's paradigm is: the stranger who uses physical force to overpower his victim and sexually penetrates her. This paradigm example displays different characteristics, e.g., physical force, sexual penetration, lack of consent, etc. While most people agree that this is an instance of rape, they disagree on why. That is, they stress different characteristics as essential for the act. Someone might, for example, say that physical force is the most essential characteristic, while another person holds that lack of consent is the most essential. Taking, for example, lack of consent as the key characteristic means that other acts with the same characteristic can be categorized as acts of rape. Thus, even though the paradigm case is rather narrow, according to Reitan, this view makes it possible to categorize acts as acts of rape on the basis of certain characteristics and therefore create a broader spectrum for what falls under the concept. However, consider the following case:

In Oregon the supervisor at a U.S. Postal Service facility called one of his subordinates into the copy-room and demanded oral sex. The woman refused at first, but she eventually complied because she feared she would be fired. Over the next several months the supervisor repeatedly summoned her to his office, discussed her work, and then demanded sex in a way that left no doubt that her performance evaluations would depend on her willingness to meet his sexual demands. (Schulhofer 1998: 12)

This case is radically different to the paradigm example of physically aggravated stranger rape—the threat is not against her life or physical well-being but leaves her a choice: submit or lose her job. However, considering that many people cannot afford to lose their job as it would mean losing housing, health care, or being unable to provide the necessary means for her kids and family, the choice she faces is not a real choice. Thus, we should be committed to the view that what happens to the U.S. Postal Service worker is rape; she submits out of fear for losing what she needs to live her life.⁴⁵ However, her case has not much in

45 | We should, of course, also be committed to the view that even if she did not fear for her job and thus what she needs to live her life, the fact that she submits under

common with the paradigm case; it hardly shares any of the characteristics.⁴⁶ Reitan argues that picking out certain characteristics of the paradigm case can widen the scope of what rape is in fruitful ways. However, unless one characteristic of the complex array of characteristics from the paradigm case can be found in the case at hand, the case at hand would not classify as a case of rape. One could now argue that we should define consent in a way that the U.S. Postal Service worker does not consent. Although our theory of consent should show that this case does not count as valid consent, a lot of work needs to be done to successfully make this point on the basis of the physically aggravated stranger case paradigm. The characteristic of consent that plays a role in the paradigm example is of a very different sort than the one that we should employ in the U.S. Postal Service case. But unless the kinds of consent are similar, it is hard to see how the U.S. Postal Service case exhibits the same characteristic as the paradigm case. Thus, even though Reitan is correct in arguing that his account widens the scope of what counts as rape and what does not, it still excludes acts that should not be excluded and is therefore not good enough. And while the vagueness of the concept counts as an extension from the paradigm case, according to Reitan, it is questionable whether this can really extend the scope of what counts as rape. The fact that everyone agrees on the paradigm of stranger rape shows that there is hesitation to understand rape differently. Why then should anyone who is convinced of the dominant understanding suddenly extend this understanding in the way Reitan hopes for?

Second, to be able to endorse contested characteristics like consent, as essential and to have one's word count assumes a certain social standing—a social standing in which one is taken as epistemically credible. However, not everyone is in the same social position of power and of epistemic credibility. Alcoff and Gray-Rosendale (1996: Section 1) argue that a speech act situation

pressure is enough to make the case a case of rape. But for now, let us stick with the less controversial example.

46 | One could reply that both cases, the physically aggravated stranger rape and the postal service facility case, are essentially about coercion and thus we can abstract from the stranger rape paradigm to other cases that involve coercion—even if to a lesser degree. While I agree that both cases are about coercion, I disagree that we can easily abstract from the way coercion is used in cases of physically aggravated stranger rape to the way it is used in a case like the one above. In fact, the problem with the dominant view of rape as exclusively about stranger rape seems to be that people fail to see that a case like the Postal service facility one is about coercion. And, even if we, as feminist philosophers, can abstract in these ways and clearly see both cases as coerced, it is questionable how this can solve the problem that many cases of rape—those that divert from the stranger rape paradigm—are unintelligible as cases of rape to the dominant understanding.

is always a normative arrangement, in which some individuals are assumed to have the authoritative status of conveying knowledge while others do not. Miranda Fricker's account of testimonial injustice expresses a similar thought: "Testimonial injustice occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker's word." (2007: 1) Some individuals occupy social positions that give them a credibility deficit, while others occupy positions that give them credibility excess. Fricker argues that there is a specific form of social power—identity power—which leads to a specific form of injustice. Identity power is at work when someone makes (intended or unintended) use of their specific social identity to influence the actions of someone with a different social identity. For example, in the case of gender identity power, "a man makes [...] use of his identity as a man to influence a woman's actions—for example, to make her defer to his word." (Fricker 2007: 14) Instances of testimonial injustice with respect to gender identity power are *inter alia* gaslighting or mansplaining. (cf. McKinnon 2017; Solnit 2014)

Jeremy Waldron argues that there must be a way for critical argument between the advocates of the different characteristics of the concept in question. (1985: 337) Everyone has to try to convince the others that her picked characteristic is more important than the others' characteristics and everyone has to acknowledge that everyone does this. In other words, there has to be a proper competition over the best characteristic. Unfortunately, as we have seen, some persons are better positioned to make their words count—the participants of the debate are therefore never equal. In other words, while Reitan can agree that some social positions can better shape the debate of what should count as rape—how far the extension from the paradigm should advance—he must also claim that some definitions of rape will not get uptake, will not be part of the contestation of meaning, and so on. But since Reitan explicitly proposes his theory for feminist purposes, so that we, as feminists, can widen the scope of what counts as rape, it is problematic if those feminist suggestions will not achieve uptake.

Third, Reitan relies on a view of semantic internalism when it comes to essentially contested concepts. Reitan argues that because different people have different understandings of how to define rape, it must be essentially contested. He thus ignores the view that meanings are fixed (at least partly) by something external to our mind, i.e., a view known as semantic externalism. Why does this matter? Let us have a look at Hilary Putnam's account of semantic externalism. Putnam's ideas result from a critique of the traditional theory of meaning. He thinks that the traditional theory of meaning rests on the following two unchallenged assumptions:

- Knowing the meaning of a term 'T' is just a matter of being in a certain psychological state.

- The meaning (intension) of 'T' determines its extension in the sense that sameness of intension entails sameness of extension. (Putnam 1975: 219-21)

It follows that if two speakers have the same set of descriptions in mind when they think of rape, then the term used by them must have the same meaning and the same extension. However, Putnam argues that the descriptions of natural kind terms associated by ordinary speakers fail to determine meaning because they fail to provide necessary and sufficient conditions for the application of the term in question.⁴⁷ This shows that the psychological state of the speaker by itself does not determine the extension of the term 'rape.' Putnam rejects (i) and instead proposes the thesis of foundational externalism:

(FE) For all natural kind terms 'T', and all meaning M, the totality of facts that determine that 'T' expresses M include external facts. (cf. Wikforss 2008: 161)

This is problematic for Reitan. If we believe that meaning is indeed internal to our minds, then Reitan is right in stating that whenever we cannot give a proper *a priori* conceptual analysis that results in a universal concept we must be confronted with an essentially contested concept. However, if we think that the external world contributes to meaning, then there are more alternatives to meaning in terms of *a priori* conceptual analysis or essential contestability. If we rely on semantic internalism for giving an *a priori* analysis of rape, then the fact that 'rape' means rape is determined entirely by internal facts.⁴⁸ Two persons, who are in the same state of mind have a specific set of descriptions that they associate with the term 'rape.' These descriptions function individually as necessary and jointly as sufficient conditions for an act to be an act of rape. Therefore, all people who are in the same state of mind must have the same meaning and extension for the term in question. Whenever this is not the case and the meaning and extension differ—although the people use the same term—Reitan is correct in assuming that the concept is essentially contested. If, however, we rely on semantic externalism for giving a conceptual analysis of rape, then it can very well be the case that two individuals have a different set of descriptions that they associate with the term 'rape', without it being the case that rape is essentially contested.

A related point is made by John Gray. According to him, marking a concept as essentially contested can only be possible on the basis of exact knowledge

47 | I will here not provide an argument for whether what is here said for natural kind terms fits the phenomenon of 'rape' but instead refer to Haslanger's discussion of natural and social kind terms and semantic externalism. (Haslanger 2012: 394-8)

48 | I follow Wikforss (2008) and assume that internal factors are the underlying physical nature (the microphysical structure of the object in question).

of the sociological and/or historical context in which the concept was and is used. (1977: 336) Without such knowledge we cannot distinguish between essentially contested concepts and confused uses of concepts. Further, if rational arguments show the inadequacy of certain views about the concept in question, we should not judge the concept to be essentially contested. Rather, rival uses then “express conflicting moral and political commitments” (Gray 1977: 334) but reason can arbitrate between them. Nevertheless, I think that there are some valuable insights to be found in Reitan’s ideas of contestability of the concept of rape. On a descriptive level, it is (as shown before) indeed the case that the concept is contested. And on a normative level, it should be the case that the concept can be open for changes and critiques. Since, following Reitan, if it is not open for changes, it excludes valuable normative insights of feminists, for example. Guided by the idea of contestability, I propose my own theory of how to understand the concept of rape in the next chapter.

The first half of the chapter was concerned with the dominant working understanding of the concept of rape and how our use of the term matters, since it can have problematic consequences. With the help of examples, I have argued that the concept is contested. Hardly anyone is in agreement as to how to understand the concept best. I have then shown how the actual usage of ‘rape’ can differ from its formal definition—and the various forms that rape can take in the world. I have illustrated this phenomenon with the help of the institutionalized reading of Haslanger’s distinction between operative and manifest concepts. Furthermore, I have shown that the dominant operative concept that many individuals rely on is distorted by so-called rape myths and that this has deeply problematic consequences for victims of rape. In the second half of the chapter, I have focused on the specific characteristic of the concept. I have argued against Reitan’s view that the concept is essentially contested but concluded that there are fruitful insights in Reitan’s account: *de facto* the concept is contested. And this could—at least theoretically—be fruitful for feminist endeavors to change the dominant understanding of the concept.