

Chapter 2:

Rape as a Cluster Concept

Chapter 2 develops the type of conceptual analysis that promises to capture all relevant forms of rape: a conceptual cluster-model. The cluster-model is developed through a critical discussion of multiple-realizability, which is dismissed, and a discussion of Wittgensteinian family resemblance, for which problems are identified but which is eventually embraced. In the final sections of the chapter, it is argued that even the cluster model version of conceptual analysis stands in need of a more complex social theory of rape as a supplement, and proposes five desiderata that such a theory would have to satisfy.

2.1 INTRODUCTION

In the last chapter, I analyzed the use of the term ‘rape’ and its problematic consequences. I argued that the concept of rape is contested and that despite the several distinct working understandings of it, the dominant operative concept is influenced by so-called rape myths. Thus, while the concept’s contestedness can be fruitful for an emancipatory understanding of the concept, we need to be attentive to how it can also lead to deeply problematic consequences. This chapter starts from the insight that the dominant working understanding of rape does not capture most forms of rape as they exist in the world. I therefore propose a conceptual analysis that better tracks the various forms of rape and can thus bring about a conceptual change of the working understanding of rape. My modest aim in this chapter is to provide a broader understanding of the concept.¹ The proper work of this chapter is to lay out the necessary conditions for a more adequate theory of rape that can ultimately ground a conceptual analysis. First, in Section 2.2, I briefly consider whether we can solve the con-

1 | I do not claim that my proposal is the only way we can come to a broader understanding. I aim to show that it is *one* way of doing so.

ceptual problems that the concept of rape faces with the help of an account of multiple realizability. I argue that we cannot. I then turn to an obvious choice: cluster theories. After giving a short introduction to cluster theories, I focus on probably the most famous example of a cluster theory: Ludwig Wittgenstein's family resemblance. However, Wittgenstein's family resemblance account faces at least two problems: what I call, (1) the universal resemblance problem, and (2) the identification problem. (Section 2.2.2) I argue that an idea from Berys Gaut can solve the aforementioned problems of Wittgenstein's theory—at least when it comes to the concept of rape. (Section 2.3) Furthermore, I contend that the idea of family resemblance has *prima facie* plausibility since it has been used effectively for other feminist analyses. I take a closer look at two of these analyses that both concern the concept of woman: the first account is by Marilyn Frye (Section 2.3.1) and the second by Natalie Stoljar (Section 2.3.2). I then propose a way to use these models for a cluster account of rape that tracks the various existing forms of rape and can, thus, enrich our understanding of it. However, in the final section, I raise some challenges that the proposed cluster account faces: (1) it lacks practicability (Section 2.4.1), and (2) it is not normatively adequate (Section 2.4.2). I conclude that a conceptual analysis of rape has to be grounded in a complex social theory of rape in order to adequately track the phenomenon of rape. I end by stipulating five desiderata that a theory of rape needs to fulfill in order to function as a basis for a conceptual analysis. (Section 2.4.3) These desiderata guide the discussion in the chapters to follow.

2.2 CLUSTER THEORY

I have argued that there are several distinct working understandings of the concept of rape—the concept is contested—and that the dominant operative concept is distorted by rape myths. Furthermore, I have shown that the dominant operative concept fails to track most forms of rape and that this has deeply problematic consequences. A proper conceptual analysis should be able to track all forms of rape as they appear in the world. In the following, I propose one strategy for analyzing the concept that looks promising in this regard: understanding the concept of rape as a cluster concept. Before I do so, I briefly turn to another obvious alternative: if the aim of the analysis is to account for rape in a way that it tracks the various ways it is realized in the world, then a definition that is multiply realizable suggests itself.

2.2.1 On Multiple Realizability

One way to conceptually analyze rape would be to give a unified account of rape that is multiply realizable. In its most basic form, the idea of multiple realizability stems from Hilary Putnam; it is the idea that high-level properties can be “multiply realizable” at the lower level. (Putnam 1967) Take Brian Epstein’s discussion of the legal fact of murder as an illustration:

Consider, for instance, the fact Whitey Bulger is a first-degree murderer. (In case you’re not from Boston, Whitey Bulger is the famed local mobster who was recently captured and convicted, after a sixteen-year manhunt.) This legal fact is the case because of things Whitey Bulger actually did. [...] Massachusetts law contains specific conditions for having the property being a first-degree murderer: if someone kills a person with deliberately premeditated malice aforethought, the killer is a first-degree murderer. All it takes for someone to be a first-degree murderer is that the person satisfies those conditions. Since Whitey murdered several people, there are many facts that make it the case that Whitey Bulger is a first-degree murderer. Among them, for instance, is the fact Whitey Bulger killed Bucky Barrett with deliberately premeditated malice aforethought. The connection between these facts is, of course, not just happenstance. The fact that Whitey killed Bucky grounds the legal fact about Whitey: it is the metaphysical reason for Whitey being a murderer. (Epstein 2015: 31, emphasis in original)

The fact that Whitey killed Bucky grounds the legal fact that Whitey is a first-degree murderer does not tell us anything about how Whitey killed Bucky—except that he did so with deliberate premeditated malice aforethought. But this does not say whether Whitey stabbed Bucky, or shot him, or poisoned him, or strangled him, or whatever other ways there are to murder someone. Thus, the conditions for being a first-degree murderer are multiply realizable.

Now, a similar view could be taken for the concept of rape. Consider the common definition of rape as non-consensual penetrative intercourse (and let us say, for the sake of the argument, that consent is defined as verbal and affirmative). The fact that someone had sex with another person without obtaining consent would then ground the fact that it was rape. Yet, the definition of rape would be multiply realizable because any act of non-consensual sex would fall under it, such as, someone overpowers another person physically and forces her to intercourse, or someone has sex with another person who engages enthusiastically in the act, but does not verbally affirm the act, and so on.

However, while a multiply realizable unified approach to rape does account for the various instantiations in which rape as non-consensual sex can be realized, it does not account for the various degrees in which acts of rape can be realized. In the Introduction I suggested that rape is not a black-and-white phenomenon, but rather that acts can be realized in different degrees. For example,

the non-consensual act of penetration of an unconscious woman admits of a higher degree of non-consent, than the act of penetration for which affirmative consent is given but not verbally. According to a unified account that is multiply realizable (as, for example, specified above) both these acts would count as rape in the same way, that is, they are both non-consensual penetrative intercourse as long as consent is defined as verbal and affirmative. But this seems counterintuitive. One could now argue that such an unsatisfying result is due to the specific definition given. That is, if we define rape as something else than non-consensual penetrative intercourse where consent has to be verbal and affirmative, then we would not encounter the problem that both, the case of the unconscious woman and the case of the physically consenting woman, are cases of rape. While this is of course correct, it does not change the fact that any unified approach that is multiply realizable—whatever the particular definition—does not account for the degrees that forms of rape can take.² What we thus need is not only a model that can account for the various forms that rape can take, but also one that can account for the various degrees in which acts of rape can be instantiated. In the following, I propose a cluster account along the lines of resemblance. As David Armstrong writes: “resemblance admits of degrees, thus allowing for loosely held together classes, involving different degrees of resemblance and with uncertain boundaries.” (1989: 48)

2.2.2 Wittgenstein's Cluster Theory

To have a less constrained definition—one that admits of degrees—I propose that we could understand rape as a cluster concept. This way we can account for the various instances of the phenomenon of rape as well as capture the various degrees to which an act can be instantiated. However, to be able to use a cluster model as a tool to account for the phenomenon of rape, we need to understand how cluster theories work. First, I give a brief overview of what cluster theories are and then, in Section 2.2.2, consider Wittgenstein as a main representative of cluster theories. Next, I raise some general problems that Wittgenstein's theory faces (what I call the ‘identification problem’ and the ‘universal resemblance problem’), but argue for possible solutions with respect to the concept of rape by using insights from Berys Gaut. (Section 2.3) Furthermore, a Wittgensteinian theory is *prima facie* plausible as other feminist scholars have resorted to

2 | Furthermore, while the lack of consent is an accurate description of cases of acquaintance rape or marital rape and intuitively captures well what goes wrong in these cases, it is less accurate when it comes to rape in war or genocidal rape. Intuitively, these cases are problematic for different reasons than for their lack of consent. In this way, a unified account that is multiply realizable is still too constrained to track the phenomenon of rape accurately.

Wittgenstein's family resemblance theory to account for conceptual problems in feminist philosophy. I present two of these views: Frye's and Stoljar's account of the concept of woman and explicate how they counter the aforementioned problems. (Section 2.3.1 and 2.3.2) In Section 2.3.3, I propose a cluster model for the concept of rape, influenced by the aforementioned approaches, which can account for various forms of rape in various degrees.

In general, cluster theories oppose the form of definition that gives individually necessary and jointly sufficient conditions to uniquely specify a concept. As David Cooper claims, the essential characteristic of a cluster theory is the possibility "to list sufficient conditions for the applicability of a cluster concept term, [and the impossibility] to list any necessary conditions for its applicability." (1972: 496) Normal definitions usually take the following form:

$$x \text{ is } F \text{ iff}_{df} x \text{ is } G, H, \text{ and } I$$

X counts as an F if and only if x has the properties G, H, and I. Cluster theories, on the other hand, can take various forms. Consider the following two examples:

$$x \text{ is } F \text{ iff}_{df} x \text{ has a sufficient number of the properties } G, H, I$$

$$x \text{ is } F \text{ iff}_{df} x \text{ has any one (or more) of the properties } G, H, I$$

In both cases, there are no necessary conditions, but each of the conditions is sufficient. In the former case, something counts as F just in case it has enough of the properties specified. In this case, one would need to further specify how many properties are sufficient for something to count as F. In the latter, only one property has to be realized for something to count as F. For example, Martha Nussbaum writes that objectification is a cluster concept insofar as "we sometimes treat any one of these features as sufficient, though more often a plurality of features is present when the term is applied." (1995: 258) Thus, any one of the seven features that she introduces (i.e., instrumentality, denial of autonomy, inertness, fungibility, violability, ownership, and denial of subjectivity) is sufficient for categorizing a behavior as objectifying, but none of them are necessary.

Berys Gaut (2000: 26-7) specifies the following criteria that concepts need in order to count as cluster concepts:

1. If all the criteria of the object are instantiated, then the object falls under the concept; the criteria are jointly sufficient for the application of the concept, but even if fewer criteria are instantiated, the object can still fall under the concept.

2. None of the criteria of the object are individually necessary for the object to fall under the concept; there is no criteria that all objects that fall under the concept must possess.

If we take (1) and (2) together, it implies that even though there are conditions that are sufficient for the application of a cluster concept, “there are no individually necessary and jointly sufficient conditions.” (Gaut 2000: 26, emphasis in original) Instead:

3. There are disjunctively necessary conditions: some of the criteria apply if an object is said to fall under the concept.

Having given a rough overview of two possible ways to think about cluster concepts and having shown some general criteria that any cluster theory has to fulfill, I now turn to Wittgenstein’s theory of family resemblance as the classical example of cluster theory. The theory of family resemblance makes use of a particular class of cluster theories, that of resemblance theories. Roughly, the idea of a resemblance theory is that all the members of a given set resemble each other along some dimension more than they resemble the things not in the set. For example, red things resemble each other along the dimension of color more than they resemble blue or yellow things. (cf. Armstrong 1989: Chapter 3) Resemblance theories are one way to use cluster theories. After giving a brief overview of Wittgenstein’s theory, I raise two general problems that his theory faces: (1) the universal resemblance problem, and (2) the identification problem.

The general thrust of Wittgenstein’s family resemblance ideas is to reject any notion of essentialism. He introduces the notion of family resemblances for the first time in *The Blue Book* when he observes “our craving for generality” (Wittgenstein 1997[1965]: 17), which can be found in more than one philosophical confusion. (cf. Pompa 1967: 63) The notion is then reintroduced and described in more detail in his *Philosophical Investigations* (2009[1953]). Here Wittgenstein criticizes common philosophical views about meaning and the nature of concepts (to mention just a few) as based on a wrong understanding of how language works. He argues “that predicates do not denote sharply circumscribed concepts, but mark family resemblances between the things labeled with the predicate” (Sluga and Stern 1996: 21). Family resemblances should here be understood as an analogy or metaphor for how particular uses of the same word are connected. Instead of dogmatically looking for one essential core of a word that determines its meaning and is common to all uses of the word, we should regard the uses of a word as “a complicated network of similarities overlapping and criss-crossing.” (Wittgenstein 2009[1953]: §66) In other words, family resemblance shows the lack of boundaries of words and

distances itself from any exactness of words. Furthermore, Wittgenstein asks us to take a non-ideal stance in regard to the question of what is common to the different uses of a word: “look and see whether there is anything common to all” (2009[1953]: §66, emphasis in original) and we will find “similarities, relationships, and whole series of them at that.” (2009[1953]: §66)

Probably the most popular defence of the notion of family resemblances is given by Renford Bambrough.³ He provides the following formal understanding of the analogy: Imagine a set of objects classified by having or lacking the features ABCDE. And imagine further that there are five objects edcba “such that each of them has four of these properties and lacks the fifth, and that the missing feature is different in each of the five cases.” (Bambrough 1960: 210)

e	d	c	b	a
ABCD	ABCE	ABDE	ACDE	BCDE

If we focus on, say, edca, we see that they all have B in common, yet it is not in virtue of B that they are called by the same name. And “[e]ven if the actual instances were indefinitely numerous, and they all happened to have one or more of the features in common, it would not be in virtue of the presence of the common feature or features that they would all be rightly called by the same name, since the name also applies to possible instances that lack the feature or features.” (Bambrough 1960: 210)

Bambrough here formally illustrates Wittgenstein’s idea that when we look at how we actually use words, we find that a word is used in many different ways with “many common features overlapping.” (Wittgenstein 1997[1965]: 20) And these different ways form a family; that is, “they have family likenesses which are not clearly defined.” (1997[1965]: 20) Or as José Medina expresses the very same thought: “the actual use of language cannot be encapsulated in clear-cut definitions and exact rules.” (2002: 134) There are cases in which the application of the rule of how to use a word is clear and cases in which the application is undetermined; what underlies the rule-governed use of a word can therefore not be a definition in the traditional sense. Actual usage does not have a sharp boundary, rather the meaning of some words is made of overlapping similarities.

However, Wittgenstein’s proposal is not without problems. Many philosophers find Wittgenstein’s family resemblances attractive because there are plenty of cases in which we have a hard time finding a single and definite common

3 | Bambrough (1960) brings forward an argument that defends the notion of family resemblances as a solution to the problem of universals. For a critique of this, see Manser (1967).

property, but in which we nevertheless want to give the same name to the set of things in question. The idea of family resemblances suggests an elegant way out of that dilemma. But the idea of family resemblance faces at least two problems: (1) the universal resemblance problem, and (2) the identification problem. I will now have a look at each, respectively. First is what I call the 'universal resemblance problem'. In his critique of the notion of family resemblances, Richard Beardsmore emphasizes the lack of context in Wittgenstein's account. When Wittgenstein asks us what games have in common, he fails to provide a "context from which the common factor was to be identified." (Beardsmore 1992: 137) Yet, what is common to a set of cases must be common to them from a specific viewpoint. In the absence of a context that specifies the interlocutor's interest in, say, games (or what he would count as possessing the same characteristic), Wittgenstein's quest "to discover something that all games have in common will simply lack sense." (Beardsmore 1992: 141) Beardsmore illustrates this line of thought with the following example:

if you wonder whether modern warfare is a game, I may point to the resemblances between clay pigeon shooting and shooting at enemy soldiers, between the rules of warfare and the rules of association football, and to the fact that in both there is winning and losing. (1992: 142)

This problem can also be expressed in the following way: resemblance is a three-fold relation. Two members of a set resemble each other along some dimension and they do so more than they resemble the things outside the set. What needs to be specified is the dimension according to which the things under investigation resemble each other—thus, if we lack that dimension, then all things resemble each other in some way (inside and outside of the set). Of course, what Wittgenstein has in mind are resemblances between more than two things in ways that are not transitive. As Armstrong says: "If you resemble your sister quite closely and your sister resembles your mother quite closely, it is perfectly possible that you have no close resemblance to your mother." (1989: 40) You and your sister resemble each other in different respects than your sister and your mother do. One must build a whole network of resemblances for the things in the set. Nevertheless, each resemblance relation need to specify in what respect the things resemble each other and even within a complex network, not all resemblances can be equally relevant. Otherwise, all concepts show some resemblance with others inside and outside the set, which would not be helpful. Yet, if some resemblances are more important than others to the meaning of 'games', for example, then we end up with another problem: the identification problem.

Second what I call the 'identification problem'. Anthony Manser argues that if we decide to list characteristics of, say, the activity of being a game, then only

those characteristics that are relevant to the activity should be listed as C_1 to C_n . We do not list all the properties. By listing ‘the set of properties C_n which apply to all games’, we presuppose “that games are already identified by some means or other, so that their properties or characteristics can be determined by inspection.” (Manser 1967: 213-4) Leon Pompa makes a similar point when he argues that “in general the relevant resemblances which are to explain the application of the general term cannot be established without reference to some limiting criterion which again must be logically prior to those resemblances it is to help specify.” (Pompa 1967: 66) Take the example of resemblances between family members: the concept of a family is necessarily independent and logically prior to that of the resemblances between its members. We cannot establish that x and y resemble the same family unless we know what family that is. Similarly, with concepts: we cannot say that something falls under this or that concept, unless we know what concept that is. Thus, it seems that the proposal to define concepts in terms of family resemblance does not work. (Pompa 1967: 65) The idea is that we already presuppose what x is in our quest to find criteria that describe x , and thus those criteria cannot tell us anything about x .

These problems have been addressed in a rich metaphysical literature on Wittgenstein’s family resemblance in particular (cf. Cavell 1979, 2000; Munro 2006) and resemblance nominalism in general (cf. Armstrong 1989; Bird 2003; Rodriguez-Pereyra 2002). I do not attempt to answer these issues here, but instead suggest that while they might pose problems in general, they do not do so for a cluster account of rape. Furthermore, I do not take sides in the metaphysical debate on realism and nominalism. The cluster account that I propose below should not be understood as a general argument for nominalism. Instead, for the particular question at hand—what concept tracks the various forms of rape in the world—a cluster account is attractive. Sometimes, nominalism implies the rejection of the existence of social categories, but this is not what I attempt. Instead, I here follow Stoljar and use nominalism as “the rejection of a universal” (2011: 28), that is, I deny that there is an universal that explains how the category of rape is unified. Finally, the fact that insights from Wittgenstein’s family resemblance theories have again and again proved fruitful for feminist philosophy grants *prima facie* plausibility to the use of a cluster theory for our conceptual analysis of rape. I now show why the concept of rape does not face the aforementioned problems and I look at two feminist scholars—Marilyn Frye and Natalie Stoljar—who have used Wittgensteinian accounts to explicate the concept of woman. They have found Wittgenstein’s view attractive since it can balance the following tension: on the one hand, we need a category of woman to criticize the oppression of women, but, on the other hand, we want to steer clear of essentializing categories that would exclude some women (e.g., trans*women) from the category.

2.3 RECONSIDERING FAMILY RESEMBLANCES AND CLUSTERS

Both, the account given by Frye and by Stoljar seem helpful for the task at hand—conceptually analyzing rape—because both deal with similar aspects: the concept of woman is similarly contested, includes a wide range of features, and needs to account for a whole spectrum of diverse phenomena that should fall under the concept. Both Frye and Stoljar stay close to the idea of family resemblance in their cluster accounts of the concept of woman; Frye in terms of resemblance to prototypicality and Stoljar in terms of resemblance to paradigms.⁴ Before I show in more detail how both of these accounts work, let me say a few words about why the aforementioned problems do not arise for the concept of rape.

Consider the second problem, what I have called the ‘identification problem’, first. The idea is that we cannot say that something falls under this or that concept, unless we identify what that concept is. In other words, we already presuppose what *x* is in our quest to find criteria that describe *x*, and thus those criteria cannot tell us anything about *x*. I contend that the identification problem does not pose a problem for the endeavor of conceptually analyzing rape. When we use the idea of resemblances (or any other cluster account) to shed light on the concept of rape, we do not start from zero. There already is a historically shaped debate on what ‘rape’ means or should mean, and this proposed conceptual analysis is not independent of this debate. We can therefore draw on the arguments, experiences, knowledge, and intuitions that we all have about

4 | Note that understanding cluster theories in terms of resemblance to paradigms or prototypes is not uncontroversial. For example, Gaut (2000, 2005) argues for an alternative view of cluster concepts in regard to the concept of *art*. He argues that any cluster account that is based on resemblance to paradigms (or prototypes, we might add) faces the identification and universal resemblance problem. To avoid these problems, according to Gaut, we should consider the meaning of proper names as part of Wittgenstein’s family resemblance notion and understand resemblance in terms of general properties (see Wittgenstein [2009 [1953]: §79]; for an explication see Searle [1967]). For critical responses to Gaut, see Adajian (2003, 2005); Davies (2004); Stecker (2000). For a defense, see Meskin (2007) and for a further account, see Weitz (1956). Furthermore, there is an interesting insight to be gained from the aforementioned problems. Consider again, Beardmore’s example of comparing warfare and football: pointing out resemblances between warfare and games works because there are such resemblances. The notion of family resemblance shows that there are indeed many neighboring categories that share features with the specific category we are interested in. This, however, should not make us withdraw from the notion of family resemblances, rather it should teach us something about the concepts we use and the way we use them.

the concept of rape; those are what comes prior to the analysis of rape as a cluster. We thus have a rough understanding of what rape is and can resort to that understanding when stipulating criteria or paradigms for the concept.

Next, consider the first problem, what I have called the ‘universal resemblance problem’. What needs to be specified is the dimension according to which the things under investigation resemble each other; because if we lack that dimension, then all things resemble each other in some way (inside and outside of the set). Since we do not start from zero in the conceptual analysis of rape, but instead can draw on debates, experiences, etc., we can use these debates to specify a dimension according to which all acts resemble each other. However, similarity along one dimension is not good enough for the task at hand. For example, if all things in the set resemble each other with respect to violence, then the set includes many cases that, intuitively, we do not want to include in the set of rape, e.g., cases of BDSM or cases of battery. In other words, not all cases of violence are cases of rape. On the other hand, if all things in the set resemble each other with respect to non-consensual penetrative sex, then the set fails to include some cases that, intuitively, we want to include, e.g., non-consensual acts that do not amount to penetrative sex. Hence, specifying the resemblance-relation with respect to one dimension is either too constrained or not constrained enough. Of course, Wittgenstein speaks of a whole network of resemblances. We can easily specify more than one dimension according to which the cases in the set are acts of rape. And, according to Armstrong (1989), the resemblances are not in a transitive relation. Not each act in the set needs to resemble all other acts along the same dimension, rather, some acts in the set resemble each other according to one dimension, while other acts resemble each other along another dimension, thus building a complex network of resemblance relations. We could, therefore specify more than one dimension, e.g., lack of consent, violence, penetration, etc., with different acts resembling each other in different ways. Cluster accounts are marked by having (a) multiple criteria for the application of the concept in question, although none of those criteria are individually necessary, and (b) by allowing a great deal of indeterminacy in how the criteria must apply if the object in question is to fall under the concept. Even though this answers the universal resemblance problem—not all resemblance relations specify the set—it still faces the problem that it is not constrained enough. That is, it still might include acts that intuitively we do not want to have included. I come back to this problem at the end of the chapter. Before I propose a cluster account that more accurately presents the different forms of rape, I will take a more detailed look at the theories of Frye and Stoljar to see how they cope with the aforementioned problem.

2.3.1 Frye, Family Resemblance, and Rape

I start with an account by Marilyn Frye and consider a second account by Natalie Stoljar in the next section.⁵ Frye uses the notion of family resemblance for the concept of woman. Frye's account of what it is to be a woman follows the metaphor of resemblances between family members. Not only does Frye take Wittgenstein to have provided us with a metaphor that raises doubt about the importance of universal categories, she also transforms Wittgenstein's diagnosis of the craving for generality into another metaphor: the metaphor of a container.

The metaphor in the background is that of a set, figured as a container: the individual is "in" the category, like peas are in the can; the criteria of membership in a category are the walls of the container that sharply separate what is inside (the ϕ s) and everything else (the undifferentiated universe of the not- ϕ). In this picture, if one is in a category one is exactly like everything else that is in it, in some specific respect; and one is thereby constrained and limited by that "definition" of what one is, as though that likeness foreclosed all difference among the members and all differentiation among the things that are not members. (Frye 2011: 86)

While some have endorsed the view that if there is no definable set (or container), then gender as a category does not exist—that is, women and men do not exist—Frye argues that the fact that there is no definable set should be taken to mean that social categories (or at least some of them) are not sets (or containers) in the way that it is often assumed.⁶

She then turns to the Wittgensteinian metaphor of family resemblance in order to shed some light on the question of what it means to be a woman. Wittgenstein thinks of the resemblances between family members as "a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail" (Wittgenstein 2009[1953]: §66).

5 | Frye and Stoljar are not the only ones to notice the attraction of Wittgenstein's ideas for feminist theorizing. Munro builds on family resemblances in her account of gender and argues that this "permits collective action under the banner of a women's movement" (2006: 159) without drifting into essentialism of what women are. Other scholars that have used Wittgenstein's family resemblance for an elucidation of gender are Heyes (2000) and Nicholson (1994). See also Scheman and O'Connor (2002) for some connections between feminist philosophy and Wittgensteinian theories.

6 | A similar conclusion is drawn by Young (1994), who argues for a new meaning of social groups according to the phenomenon of serial collectivity. According to her, this can account for women as a collective without assuming that women have a common identity.

Frye takes the metaphor of such a network of similarities between family members and fills out the details with the help of a theory by Dupré and an account given by Rosch and Mervis. According to Dupré, “the observable world of living things is not homogeneous.” (Frye 2011: 93) Yet, there are patterns of correlations in it. For example, there is a strong correlation between having fur and being quadruped and a similarly strong correlation between having feathers and having wings. In this sense, living kinds can be understood as densities of observable correlations. Following Frye, some of these correlations allow for predictions about behavior, hierarchies, timidity, etc., but they do not allow for predictions about essences. She then goes on to argue that according to these correlations, we can think of genders as artificial natural kinds (or artificial living kinds)⁷: the cultural training that makes women and men creates patterns of behavior, posture, desire, etc., that

imitate the distinctive shape, density, and structure of those correlational densities that are the living kinds. The image emerges of genders, and many other social categories, as artificial natural kinds, or more specifically artificial living kinds. (Frye 2011: 93-4, emphasis in original)

And, according to Frye, we can turn to Rosch and Mervis’ understanding of the notion of family resemblance to spell out the particular kind of density at work in Dupré’s account. Rosch and Mervis in their (1975) have argued for a prototype reading of the notion of family resemblances. Many categories have what is called a “prototype structure”:

This means that there are items in the category that are “best examples” and others that are less good, or not good examples of the category. For example, for the non-specialist North American robins are very good examples of birds, but penguins are not, though that same non-specialist does affirm that penguins are birds. (Frye 2011: 89)

Rosch and Mervis use the idea of family resemblance to construct an operational notion of degree of prototypicality. Those things that have the most widely shared attributes have a high degree of family resemblance with other things in

7 | One way to think of the multidimensional nature of social categories is as a homeostatic property cluster. The theory of homeostatic property clusters stems from Boyd (1999a,b). He thinks of natural kinds as groups of entities that share similarities that are stable. Thus, the species so defined need not have essential properties. Even though the theory is originally about natural kinds and the feminist project of giving a unified account of the concept of *woman* is about social kinds, the homeostatic property cluster theory can still shed some light on social kinds as well. For such an account, see Hauswald (2014).

the same category, while those with lesser shared attributes have a lower degree of family resemblance. Furthermore, empirically speaking, Rosch and Mervis found that those things with a high degree of family resemblance are the most prototypical things in the category, i.e., the “best” examples of the category. And, comparing things of one category with things of another neighboring category, the most prototypical things of one category have low degrees of family resemblance with the things of a neighboring category. The non-prototypical things, on the other hand, have higher degrees of family resemblance with things in a neighboring category. This makes family resemblance “not simply a matter of strung-out pair-wise similarities such as: Uncle Jack and Cousin Ethyl have similar noses, Cousin Ethyl and Grandpa have similar eyebrows, Grandpa and brother Charles have similar gaits ... etc.” (Frye 2011: 90, emphasis in original) The relations in Rosch and Mervis’ analysis are relations between the thing with the whole set of things in the category. Finally, Rosch and Mervis have developed a solution for what I described earlier as the universal resemblance problem. If everything is similar to everything else in various ways, then we need a condition that specifies how things show resemblance in relevant ways. Resemblance (or similarity, as Frye says) can only do the work here if we have a condition that identifies some resemblances as salient and other resemblances as non-salient. Rosch and Mervis provide a salience-condition, when they ask the subjects who take part in the research to list those features of the things that they regard as “typical and characteristic.”

While Rosch and Mervis’ salience condition works well for some concepts, such as bird, it poses problems for an account of rape. As I have argued in the last chapter, the dominant working understanding of rape is such that it fails to track most forms of rape in the world. Asking subjects to list features of rape that they regard as typical and characteristic will likely track only a small portion of the various acts of rape—namely, acts of physically aggravated stranger rape. And even if we would gather a group of subjects diverse enough to counter the narrow working understanding, the concept would nevertheless be contested. Therefore what is taken as typical might not align in the same way as Rosch and Mervis’ example of birds. That is, in regard to rape, some might take characteristic A, B, and C as typical, while others take D, E, and F as typical—how should we then proceed to decide? In other words, according to Frye’s account, we would either fail to account for a broad range of acts of rape, or we would have contested criteria. Let us now turn to see if Stoljar’s use of family resemblance for an account of woman is more plausible as a model for a conceptual analysis of rape.

2.3.2 Stoljar, Clusters, and Rape

In her defense of gender nominalism, Stoljar brings forward a view that she calls “resemblance nominalism” which is influenced by theories of cluster concepts. She understands “nominalism” as the rejection of universals; that is, according to her, resemblance nominalism rejects the view that there is a universal womanness that explains the unified concept of woman. This rejection is based on the assumption that there are (at least) two different kind of groups, those that are genuine classes and those that are gerrymandered classes. (Stoljar 2011) Armstrong calls the genuine classes ‘types’. (cf. Armstrong 1978a,b, 1989) They are groups of individuals that are similar to each other and “share a property that is attributed to them based on qualitative resemblances” (Stoljar 2011: 28). For example, if the group of women are a genuine class then they share the property of “being a woman”. Classes of gerrymandered objects, on the other hand, are heterogeneous classes; they might have a property in common but it is not based on qualitative resemblances. (cf. Lewis 1986) Genuine classes (or types) can be candidates for universals, gerrymandered classes cannot. While nominalists often assume that there are no universals and thus no gender universals, Stoljar argues that some classes are candidates for universals but there are differences of degree between these classes. And, further, the class of woman is moderately heterogeneous.

Stoljar’s proposal for gender nominalism is guided by the idea that

womanness is something complex, not something simple, and the ingredients in the complex structure of womanness are not always the same ingredients from one woman to another. The same ingredients make up the components in our concept of woman but are not always instantiated in the individuals to whom the concept applies. (Stoljar 2011: 40, emphasis in original)

Thus, Stoljar argues that resemblance, not sameness, is important for the class of woman; “womanness” is not the same for each woman, but is rather a “cluster of overlapping sets of properties or parts.” (2011: 41) According to Stoljar, to conceptually analyze the concept of woman, we must first identify paradigm cases. She takes the following cases to be paradigmatic for the concept of woman:

- (i) “a person who has an XX chromosome and female sex characteristics, additional bodily features such as a characteristic female gait, and responsibility for child-rearing and other family-oriented tasks”;
- (ii) “a transgender person who attributes womanness to herself and dresses ‘as a woman,’ has female secondary sex characteristics and many of the elements of

female phenomenology though she lacks an XX chromosome and does not have responsibility for child-rearing or other domestic tasks”;

- (iii) “a person whose biological sex is ‘indeterminate’ (hermaphrodite) who has been brought up ‘as a girl’ and as a result satisfies typical female roles, has many of the aspects of female phenomenology and bodily features, and dresses and lives as a female though she lacks female sex characteristics.” (Stoljar 2011: 41)

These cases are paradigmatic for the concept of woman because they include properties of a complex and intersecting set of properties such as the following: having particular biological and bodily characteristics, having particular phenomenological features or lived experiences, taking on particular social roles, calling oneself a woman and being called a woman because of the identified features. (Stoljar 2011: 41) To be more precise, according to Stoljar, to count as paradigms they must possess features from at least three of the four sets of features. (1995: 284) However, there is no feature or set of features that all the paradigms share, instead the paradigms have family resemblances to each other. Thus, the concept of woman is a cluster concept:

there is a cluster of different features in our concept of woman and in order for an individual to satisfy the concept, it is sufficient (and necessary) to satisfy enough of, rather than all and only, the features in the cluster. The type “woman” is a type in virtue of the resemblance structure that obtains among individual members of the type. (Stoljar 2011: 42, emphasis in original)

To sum up, Stoljar proposes that the concept of woman should be analyzed according to resemblance nominalism in the following way: certain paradigmatic cases of what it is to be a woman provide a cluster of different (sets of) features and for an individual case to fall under the concept, it has to satisfy enough of the given features. Therefore, all individuals who satisfy enough of the features resemble each other in some ways, although they are still particular and diverse. Note, that Stoljar’s proposed cluster concept does not argue against necessary and sufficient conditions. In comparison to Cooper (1972), who argued that a cluster concept has to have a sufficient number of the given properties but does not require necessary conditions, Stoljar claims that specifying that the object in question needs enough of the features listed is indeed equivalent to specifying necessary and sufficient conditions. (Stoljar 2011: 42) However, she does not subscribe to a view of resemblance nominalism in which the relation of resemblance is egalitarian such that to be a member of a type X means to resemble all other entities that are X. (cf. Rodriguez-Pereyra 2002) Instead, her proposal is some version of an aristocratic resemblance relation: to be a member of X means to resemble a paradigm of X. (cf. Price 1953)

Is the account that Stoljar proposes an attractive model for the concept of rape?⁸ Most of the work in Stoljar's account of resemblance nominalism is done by the idea of "enough resemblance" and the paradigm cases—individuals count as being part of the concept of woman if they show sufficient resemblance to the paradigm cases. While the general notion of resemblance faces the aforementioned identification problem, I have argued that this problem does not arise with respect to the concept of rape. Using the idea of resemblances (or any other cluster account) to shed light on the concept of rape does not start from zero. As already argued, there is a historically shaped debate on what 'rape' means or should mean, and the proposed conceptual analysis is not independent of this debate. We can therefore draw on the arguments, experiences, knowledge, and intuitions that we all have about the concept of rape; those come prior to the analysis of rape as a cluster. We thus have a rough understanding of what rape is and can resort to that understanding when stipulating criteria or paradigms for the concept.

Consider next the idea of resemblance at work in Stoljar's account. As I have shown before (Chapter 1), using the notion of paradigms is not without problems when it comes to the concept of rape. The dominant working understanding of rape is physically aggravated stranger rape. This, however, fails to account for a vast range of acts of rape in the world. Using physically aggravated stranger rape as the paradigm of rape, as Reitan (2001: 49) proposes, is problematic. Not because it is wrong—this is exactly what most individuals understand rape to be—but because it reproduces this distorted understanding of rape. As I have shown in Chapter 1, what we as social agents think of rape and how we understand the concept is highly influenced by rape myths and the relations of gender inequality that shape our social world. This means that the paradigm of rape we can all easily agree on misrepresents the social reality of rape, e.g., most of the time, rape is not stranger rape, but acquaintance rape, which does not involve physical violence from a stranger, but psychological pressure from an acquaintance.⁹ Furthermore, according to Stoljar, what falls

8 | I do not attempt to provide an argument for or against her view that gender nominalism is preferable to gender realism because it can account better for women's diversity. For the whole account and its motivations, see Stoljar (1995, 2000, 2011). For a critique, see Mikkola (2016: Chapter 3.4).

9 | One could argue that we can have a prototype account based on statistics; so there might be (and quite possibly are) some types of rapes that are more prevalent statistically speaking than others, e.g., date rape is probably much more common than stranger rape. We could then appeal to prototypical cases by using frequency rather than something evaluative like "proper" type of rape. While employing frequency instead of evaluative use of prototype would solve some problems, it fails to capture aspects that are not yet recognized as rape (even if very prevalent). For instance, most papers on

under the concept needs to sufficiently resemble the paradigm case. But having our concept built around a misguided paradigm means that we fail to account for most cases of rape. A case where a girl is psychologically pressured by her boyfriend to have penetrative sex only shares one common feature with the paradigm case: the feature of sexual penetration. However, this would either imply that this case does not fall under the concept of rape because sexual penetration is not enough for sufficient resemblance, or it implies that sexual penetration is sufficient for resemblance and the case falls under the concept but so would consensual sex. Both results are problematic. However, Stoljar does not argue that we can make use of only one paradigm. In fact, in her own theory she proposes three different paradigms of individuals that fall under the category of woman. We can make use of a similar strategy when it comes to a cluster account of rape and specify multiple paradigms that delineate the cluster such that it tracks a range of forms of rape. Stoljar's theory, thus, looks promising for a cluster theory of rape.

2.3.3 Rape as a Cluster

I have argued that we can make use of a multiple paradigm theory, according to what Stoljar proposes, in our quest to conceptually analyze rape. Understanding cluster accounts—at least with respect to the concept of rape—in this way, raises a further question: How do we decide which paradigms are part of the cluster? Wittgenstein says, “Don’t think, but look!” (Wittgenstein 2009[1953]: §66) It is, according to Gaut, “a plea to see how the concept in question is used in the language.” (Gaut 2000: 28) I suggest we understand this plea differently, not as the question of how the concept is used in language, but instead how the phenomenon is actually realized in the world. As we have seen in the last chapter, an investigation into how language users understand the concept not only shows that the concept is contested but also that its dominant working understanding fails to track most forms of rape in the world. Being guided by the usage of ordinary people would thus be misleading and not result in an adequate cluster concept of rape. Rather, our paradigms should be able to track the various forms of rape that exist in the world. Consider the following three paradigms. These paradigms track distinct examples of forms of rape in the world and therewith aim at a broader understanding of rape.

date rape (see, e.g., Anderson [2004b]) are written against the background that date rape was not recognized as rape and, thus, statistics of rape would not have accounted for date rape. In other words, similarly to evaluative uses, frequency-prototypicality can be distorted too. I am grateful to Nora Kreft for bringing up the question of frequency-prototypicality.

Paradigm I

"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. [...] I sang to myself as I set out, stopping to pet a goat and pick a few wild strawberries along the way. 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. [...] Although I had said I'd do whatever he wanted, as the sexual assault began I instinctively fought back, which so enraged my attacker that he strangled me until I lost consciousness. When I awoke, I was being dragged by my feet down into the ravine. [...] I wish I could convey the horror of losing consciousness while my animal instincts desperately fought the effects of strangulation. This time I was sure I was dying. But I revived, just in time to see him lunging toward me with a rock. He smashed it into my forehead, knocking me out, and eventually, after another strangulation attempt, he left me for dead." (Brison 2002: 2)

Paradigm II

"When Jodie told her college boyfriend that she had been raped by his best friend, he was quiet for a long time. When she got up to leave, he told her she should spend the night in his room, that he wouldn't touch her: 'During the night, I woke up to find him on top of me. At first I thought [the rapist] was back and I panicked. My boyfriend said that he was just trying to get me "used to things" again, so that I wouldn't be frigid for the rest of my life. I was too drained to fight or argue, so I let him. My mind was completely blank during it. I felt nothing.'" (Warshaw 1994: 76)

Paradigm III

Excerpts from interviews with Ifeta, Kadira, and Ziba about the women's camp in Dobo, Bosnia, 1992: "It was a camp of abuses, humiliations, rapes ... I don't know how to put it into words. [...] They pushed bottle necks into our sex, they even stuck shattered, broken bottles into some women... Guns too. And then you don't know if he's going to fire, you're scared to death, everything else, the rape, becomes less important, even the rape doesn't seem so terrible to you anymore. [...] They beat the women who didn't get pregnant, especially the younger women; they were supposed to confess what contraceptives they were using. [...] I saw about seven or eight little girls who died after they were raped. I saw how they took them away to be raped and then brought them back unconscious. [...] If it was in the morning they'd leave them lying there the whole day; if they threw them in in the evening they'd stay till the next morning. Then they'd come and collect the bodies. (Stiglmeyer 1994: 118-20)

The first example is stranger rape committed with extreme physical violence (to the point of attempted murder). The second is an example of acquaintance rape between romantic partners that does not involve aggravating physical force but misuse of trust and sorrow. The third is an example of genocidal rape in which women are targeted for sexual abuse in many humiliating and torturing ways (to the point of forced impregnation) because they are part of the enemy. These diverse paradigms include multiple dimensions according to which acts of rape resemble each other, such as violence, lack of (affirmative) consent, psychological pressure, physical force and resistance, coercion, threat, etc. Thus, the three paradigms exhibit a range of features that acts of rape can include and that can guide our understanding of which acts fall within the set and which do not. Furthermore, describing rape in terms of the aforementioned paradigms makes it possible to extract features according to which different acts resemble each other. But, again, not each act of rape shares all features with one (or all) of the paradigms, rather, the different features build a complex network of resemblance relations.

Let me now turn to an explication of what the cluster of rape looks like. Imagine a cluster with different branches. Think of a big oak tree. These branches symbolize the different features that acts of rape can exhibit such as violence, lack of (affirmative) consent, psychological pressure, physical force and resistance, coercion, threat, and so on—whatever features are included in the paradigm examples above. The branches represent the many different features that acts of rape include as they take place in the social world and thus track the diverse forms of acts of rape. For example, acquaintance rape (e.g., date rape, partner rape, spousal rape), campus rape, war rape, prison rape, status rape (e.g., statutory rape, custodial rape), gang rape, punitive and revenge rape, exchange rape, ceremonial rape, theft rape, corrective rape, rape by deception, and genocidal rape. The cluster does not specify necessary or sufficient conditions of what each act includes or of what all of the acts together include. Yet, it includes all criteria that each of these specific forms of rape can include. Obviously an act can involve several criteria. And, I suggest, the more features an act exhibits—the closer it resembles one of the paradigms—the more certain we can be that the act in question is an act of rape. This broadens the understanding of rape such that not only physically aggravated stranger rape is “proper” rape, but that all acts which resemble the aforementioned paradigms are considered rape. Hence, the cluster tracks the various forms of rape in the world.¹⁰

10 | I am not arguing that a cluster account is the only way to conceptually analyze rape in a way that tracks the various forms of rape. Rather, I attempt to show *one* way to make this work. One could very likely have a similar kind of variation even if one provides necessary and sufficient conditions. For example, if one gives a functional definition

Furthermore, in line with what I have mentioned before, Gaut argues that we have no problems judging an object to fall under the concept in one extreme and no problem to judge it not to fall under the concept in the other extreme. (2000: 26) We can similarly say that some acts are definitely acts of rape and some are definitely not. Between these extremes are cases that are acts of rape even though they are not extreme examples and there are acts that border the cluster of rape in which we are undecided if they should be considered rape or not. Gaut suggests that what makes it possible to judge if objects fall under the concept or not is the fact that we have extreme examples in which such a judgement is uncontested. According to the proposed cluster, every act that closely resembles the paradigms, or, in other words, that exhibits a vast range of the features of one (or more) of the paradigms, is an extreme case of rape. Roughly, the more features are fulfilled, the better we can know that an act is an act of rape. Obviously, we would not judge an act to be an act of rape, that involves only one of the features and, thus, shows hardly any resemblance to any of the paradigms. For example, sexual penetration is not sufficient for an act to count as an act of rape. Again, remember that (Gaut 2000: 26-7) argues for the following three conditions that any cluster concept needs to fulfill:

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

Regarding the second condition, we have seen how the proposed cluster of rape lists a vast range of features, but no individually necessary ones; thus, it can account for a whole range of different acts of rape. Similarly, with the third condition: since the proposed cluster lists many possible criteria, an act of rape needs to fulfill some of them to count as rape. Finally, the first condition can help with the question of how many features need to be instantiated for an act to count as an act of rape: if all the criteria are instantiated, then the act is an act of rape definitely, i.e., the criteria are jointly sufficient. The less criteria are instantiated, the less we can judge an act to be an act of rape definitely. In other words, the more tree branches we need to describe an act in question, the high-

of a kind, then some things will fulfill the function better than others. And there will be cases in which it is unclear whether the cases fulfill the function or not.

er the chance that it is an act of rape. And the less branches are included, the lower the chance; the act in question is then more likely to fall in the gray area of rape than to be an exact case of rape. Having proposed a way in which we can conceptually analyze the concept such that it tracks various instances of rape, instead of being narrowly defined as physically aggravated stranger rape, I now raise some possible objections against the proposed cluster account of rape.

2.4 PROBLEMS

The cluster account is a good philosophical tool to understand the diverse forms of rape as they exist in the world instead of succumbing to the (distorted) working understanding of it. However, there are at least two problems with the proposed cluster account. First, it faces problems of practicability. It is not constrained enough and encompasses acts that, intuitively, we do not want to have included in the set of rape. Hence, it does not function fully as a practical guide to decide whether an act falls under the concept or not. Instead, it merely provides rough parameters, i.e., the more an act resembles one or more of the paradigms, the better we can judge it to be an act of rape. The cluster therewith does not adequately capture the phenomenon of rape and, further, these practicability questions can create problems for legal application procedures. Second, the proposed cluster fails to be normatively adequate. While it can account for a broad range of forms of rape (which is consistent with the overall contestedness of the concept), it fails to explain why the dominant working understanding assumes that only one form of rape—physically aggravated stranger rape—is “proper” rape. That is, it fails to explain the prevalence of false or misguided understandings and speaker’s usage of the term. Thus, the cluster account falls short in two ways: in adequately tracking the phenomenon of rape and in explaining speaker’s intuitions and usage of the concept and term. After I tackle both problems in the next two sections, I conclude that the cluster account is nevertheless attractive and has the potential to account for the phenomenon of rape, but needs to be refined in a way that solves the outlined problems. I suggest that a conceptual analysis of rape needs to be grounded in a social theory of rape in order to track the phenomenon adequately as well as overcome misguided understandings. Thus, at the end of the chapter, I propose some *desiderata* that a theory of rape needs to fulfill as well as constraints that a conceptual analysis of rape must confront. (Section 2.4.3) I then propose a method in Chapter 3 that, I argue, can yield a satisfactory social theory of the phenomenon and that can ultimately ground a conceptual analysis of the concept.

2.4.1 Practicability

I have proposed a cluster account of rape along the lines of a big oak tree, the branches of which symbolize the features that acts of rape can exhibit: the more features are realized, the closer the act in question resembles one (or more) of the three paradigms and the more it can definitively be judged an act of rape. Furthermore, I have suggested that an act that merely exhibits one feature does not count as an act of rape. However, I have not specified how many features need to be satisfied for an act to count as an act of rape. For example, an act that shares only the features of sexual penetration cannot satisfyingly be judged as an act of rape. What about an act of BDSM that satisfied the features of sexual penetration and violence? Intuitively, of course, an act of BDSM should not count as an act of rape, but that implies that two features are not enough for something to count as rape either. However, in the case of coercion and sexual penetration, we might very well want to say that this qualifies as an act of rape. If that is the case, then in some cases two features are enough for something to count as an act of rape. We could now argue that some features are more important than other features. But if this is the case, we need to figure out which features are more relevant than others. In any case, more work needs to be done to constrain the cluster in a way that tracks adequately the phenomenon of rape without tracking acts that are not rape.

Furthermore, I contend that there is a close connection between our conceptual analysis of rape and legal definitions. While, of course, we should not assume that the ordinary meaning of ‘rape’ and the legal meaning of it are the same, I take it that one constraint of the legal meaning is to adequately describe the phenomenon in the world. Hence, one way to narrow down on the legal meaning is to engage in a conceptual analysis that aims at tracking the phenomenon adequately. In this way, our philosophical endeavors to grasp the concept can have an impact on the law, which has happened before in a couple of other cases. Consider, for example, MacKinnon’s and Dworkin’s definition of pornography, which they drafted as an attempt to change pornography legislation; or consider the ways in which the Wolfenden Committee in 1954 referred to the writings of both John Stuart Mill and Jeremy Bentham to decriminalize homosexuality. This close relation is also evident in many current writings on rape, in which philosophical arguments are used to change the legal meaning of ‘rape’. (cf. Anderson 2004b; Pineau 1989) However, the thus far proposed cluster account of rape is unfit for legal practice. Consider the following case:

A widely reported 1996 trial involved an upstate New York woman who went to a restaurant with her date. Both were drinking heavily. The woman passed out in the bathroom. Her date, waiting for her to join him outside, fell asleep in his pickup truck. Meanwhile, four men carried the woman from the bathroom to a booth, where they undressed her.

All four then allegedly raped her, left her in the booth, and returned to their beer and sandwiches. (Schulhofer 1998: 7)

Say that according to the legal definition¹¹, a person is guilty of rape in the first degree when they engage in sexual intercourse with another person:

By “forcible compulsion”—compelling the victim through the use of physical force or the threat of immediate death, physical injury or kidnapping;

- (a) Who is incapable of consent by reason of being physically helpless;
- (b) Who is less than 11 years old; or
- (c) Who is less than 13 years old and the defendant is 18 years old or more.

In the best and ideal outcome, the jurors would apply the definition to the case at hand and conclude—based on the facts available—that the act was indeed an act of rape and that the defendants are thus guilty of rape in the first degree. Such a conclusion would be reached by investigating whether all (or enough) conditions of the definition are fulfilled in the case at hand. Because the men used physical force to carry the unconscious woman to a booth (first condition) and she was incapable of consent (second condition) the act in question falls under the definition of rape in the first degree. However, let us assume that the jurors were influenced by rape myths and were just unable to apply the definition to the case at hand unbiased. Instead they believed—as they actually did—that the drunk state of the woman makes it that we cannot be sure if she consented or not to the act in question. Let us thus say that they—as they actually did—acquitted the three men of the charges of rape. But on the basis of of the legal definition, we can justifiably criticize the biased decision to acquit the defendants. In other words, we could argue that intoxication entails the incapacity for consent, or that an intoxicated woman facing four men is physically helpless, or that carrying an unconscious woman into a booth is an act of kidnapping, and so on. The definition gives us grounds to repeal the acquittal, as was indeed the case; only after a political uproar were the defendants brought to trial again. Legal definitions are thus grounds for judgement or critique.

Without the legal definition, things are more complicated. First, without a definition we have no criteria to decide whether a case is correctly described as rape or not. And, second, without a definition we do not have grounds to contest the outcome of a legal process; how could we argue that jurors are biased if there is no definition that counters such biases. This suggests that the looser a definition is, the more likely our biases and false beliefs could affect the legal

11 | This is according to the New York Penal Code Section 130.25; see: <http://statelaws.findlaw.com/new-york-law/new-york-rape-laws.html>, accessed: December 19, 2016.

outcome. For example, black men are often found guilty for the same charges that white men are found innocent, especially in rape cases. (cf. Freedman 2013) A recent exemplary case is the aforementioned one against Brock Turner. In 2016, Brock Turner, who at the time was a student at Stanford University and part of the swim team, was convicted and sentenced to six months in jail for sexually assaulting an unconscious girl. He was found guilty on three felony counts: assault with intent to commit rape of an intoxicated or unconscious person, sexual penetration of an intoxicated person, and sexual penetration of an unconscious person. In total, these charges can carry a maximum sentence of 14 years. Brock Turner got six months. In a similar case, Raul Ramirez, a 32-year old immigrant from El Salvador, was sentenced to three years. The cases of Brock Turner and Raul Ramirez have similar charges of sexual assault, both include admittance of the defendants, and most importantly, both were ruled by the same judge. (cf. Bess 2016; Blay 2017; Levin 2016; Palumbo-Liu 2016) This suggests that the more loose our definition of the concept, the more likely that we judge acts in question according to our biased beliefs. Indeed, Katrina Hutchison argues that in cases where we do not have access to further evidence, we are likely to take other indicator properties into account to make a judgement about whether or not something falls under the concept in question. (2013: 108-9) Indicator properties allow us to make judgements in situations where further information is lacking. But the less access we have to indicator properties that actually concern the situation at hand, the more likely we resort to broader schemas and indicators to evaluate the situation. Prejudicial stereotypes influence which indicator properties we deem relevant. Thus, in the case above, the judge believed a white man to be less deserving of a prison sentence than a person with an immigrant status. Even though the properties of being white or being an immigrant should not play a role in a judgement of rape, they did and thus influenced the outcome of the judgement. The less defined a concept, the more a judgement of what falls under it is susceptible to prejudicial stereotypes that should not play a role in the evaluation of the case in question.¹² Thus, the openness of the descriptive cluster makes it possible to account for a vast range of cases and their contestedness, but it also means that the cluster is more susceptible to false beliefs—something that we should work hard to avoid when it comes to the concept of rape because of its serious and problematic consequences.

12 | Of course, even clearly defined concepts can be judged prejudicially (I come back to this point in Chapter 5).

2.4.2 Normative Adequacy

Gaut concludes his paper by setting some constraints on the adequacy of any cluster account. (2000: 30-1) One constraint is that the account must be normatively adequate:

It needs to be normatively adequate: our linguistic intuitions may be flawed in resting on confusions, ignorance, etc. Some intuitions that do not fit the proposed account may be rejected, there will be a reflective equilibrium between the account and intuitions. This must include a theory of error: some account must be offered of why people have the mistaken intuitions they have; ideally this account can also explain why rival theories enjoyed great popularity. (Gaut 2000: 30)

According to Gaut, a normatively adequate account is sometimes not in line with ordinary speaker's linguistic intuitions. This is the case, because sometimes our linguistic intuitions are false or misguided. And, if that is the case, a normatively adequate account rejects the false and misguided intuitions and explicates why certain intuitions are misguided and why individuals endorse them nevertheless. Because the proposed cluster account tracks a broad range of forms of rape, it is not in line with the dominant working understanding of rape, i.e., it is not adequate to most speaker's intuitions about the concept. However, my account does not take into account the distorted understandings. While a normatively adequate conceptual analysis might not do that itself, it should be based on a theory of the phenomenon that does. Only if we have a theory of the phenomenon of rape that explains speaker's misguided intuitions can we strive for changing the working understanding. We thus have to understand why and how individuals are misguided so as to propose a strategy that counteracts the misguided understandings. A normatively adequate cluster account should be prescriptive: it should provide a better understanding of rape that adequately tracks the phenomenon and aims at changing the misguided intuitions about it. Hence, the proposed account fails to be normatively adequate and should be revised.

The normative inadequacy is partly due to the fact that the descriptive cluster account is not based on a social theory of rape that maps the underlying structural dimension of rape. It does not mention or counter the gap between existing forms of rape and the dominant working understanding— and therefore fails to account for the fact that some individuals are in more danger to be raped than others. And, for some individuals, raping (and getting away with it) is an actual choice, while for others it is not. According to RAINN, 9 out of 10 victims of rape are female and 1 out of every 6 American women has been the victim of an attempted or completed rape in her lifetime. (2016c,d) We fail to account for the concept of rape adequately if we do not give an explanation of

the gendered character of rape. Brison, for example, writes that rape is a “gender-motivated violence against women, which is perpetrated against women collectively, albeit not all at once and in the same place.” (2002: 98) And Burgess-Jackson argues that it is an act that “subjugates an entire class of individuals (women) to another (men)” and that “every woman, qua, woman, is wronged by it.” (2000: 289) Even though I contend that some individuals fall victim to rape while others do not, it is not (anymore) the case that only the social group of women are a target of rape. Other social groups experience rape as well.

In 2016, 80,600 inmates in the American prison system were sexually assaulted or raped (RAINN 2016c) and 60 % of those violated were violated by the institution’s staff and not by other inmates (RAINN 2016b); transgender students are at higher risk of rape or sexual assault than other students, 21 % of transgender or nonconforming students experienced rape or sexual assault (in comparison to 18 % female students and 4 % male students) (RAINN 2016d); Native Americans are twice as likely to experience rape or sexual assault compared to all races in the States (RAINN 2016d); male college students are 5 times more likely to experience rape or sexual assault than non-students (RAINN 2016d). The gendered character of rape should not be explained with a focus on the victims of rape, but rather with a focus on the perpetrators of rape. Most rapists are men; 98 % of perpetrators are male. (re.ACTION 2007: 70)

To map rape adequately, we have to explain why it is a violent act that is overwhelmingly committed by men. And we have to show that acts of rape do not stand alone. It is not accidental that rape is mostly committed by men, it is rather in line with the general inequality between genders. Men as a social group are socially (and often physically) more powerful than, for example, women and gender non-confirming people, and it is only when they lose this hierarchical position (e.g., in prison) that they become a target of rape as well. Furthermore, this conforms to ideals of masculinity which portray violence as an attractive feature and weakness as an unattractive feature of men. And because men are more powerful, they feel entitled to be more powerful, to have unrestricted access to women and their bodies, and so on. And, they turn dangerous when such access is denied or when they fail to prove the masculinity they think they deserve. (cf. Manne 2016) We do not have to go as far as the example of Elliot Rodger, who killed six people and injured fourteen because he wanted to punish women for rejecting him and other men for having what he was entitled to but could not get. Thus, rape is part of a broader sexist framework of gender inequality and it is due to this “system” that there are false and misguided conceptions of rape.

A conceptual analysis of rape must be grounded in a theory that systematically maps the phenomenon of rape to be normatively adequate and it must provide an explanation why rival accounts (e.g., rape myths) are popular. I therefore suggest that a conceptual analysis should do more than descriptively

accounting for the external reality. It should be grounded in a rich social theory of rape that systematically maps rape as part of a broader system of gender injustice and it should aim at a conceptual change to counter the distorted working understanding of rape. I now suggest the relevant desiderata that a theory of rape needs to fulfill in order to be useful and I lay out the constraints that a conceptual analysis has to satisfy in order to be normatively adequate.

2.4.3 Desiderata

We have seen that the proposed cluster account of rape falls short in two ways: First, it lacks practicability, and second, it is normatively inadequate. It is not grounded in a social theory of rape and, thus, fails to counter the divergence between the reality of rape and the distorted intuitions about it. I propose that we use these shortcomings to specify desiderata that a theory of rape has to fulfill in order to be useful as the background for conceptual analysis. Remember, we can only provide a fruitful conceptual analysis that can counter the distorted understandings of rape and aim at conceptual change, if we have a social theory of rape that not only explains the existing forms of rape and their embeddedness in the social world, but also explicates how distorted understandings come about, how they do not track the phenomenon of rape, and why they enjoy popularity. This is not to say that conceptual change is the only change that is needed. Far from it. If we want to counter the prevalence and moral wrong of rape, we need to strive for conceptual change as well as material changes. However, as philosophers, we are much better equipped to do the former than the latter. This does not imply that, as social activists, we should not also work for this. I come back to the latter in the last chapter, but let us for now say that, as philosophers, we should work on providing more just understandings of concepts that traditionally reproduce inequalities between different social groups, such as misguided or false understandings of the concept of rape. Taking these thoughts into account, I stipulate the following desiderata that a theory of rape needs to fulfill. It needs to

Desideratum 1: adequately map the phenomenon in a way that explicates its structural embeddedness;

Desideratum 2: explicate speaker's intuitions, (distorted) understandings, and actual usage of the concept;

Desideratum 3: be normatively adequate and explain the gap between false or misguided understandings and the existing phenomenon as well as provide explanations of how such misguided or false understandings come about and enjoy popularity;

Desideratum 4: explain the injustice of it; and

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

This conceptual analysis should be flexible in a way that allows for changes when we gain further information about the phenomenon; be constrained enough to allow for proper judgements; account for different degrees; acknowledge the concept's contestability, gray area, and neighboring categories; be non-paternalistic¹³; and have heuristic utility.¹⁴

As the attentive reader will have noticed, I have not taken on board a desideratum that holds that the account needs to be adequate to intuitions. For example, in the way Gaut does: "it must agree with our intuitions about what we would say about actual or counterfactual cases." (2000: 30) Instead, I will propose a new variant of conceptual analysis in the next chapter (Chapter 3) that is informed by Sally Haslanger's ideas of amelioration. This variant of conceptual analysis is not necessarily based on intuition, instead it can be revisionary or, in other words, prescriptive.

I have discussed several cluster theories—from Wittgenstein's family resemblance ideas to specific feminist theories—and argued that even though most of the theories face problems, what I have called the 'universal resemblance problem' and the 'identification problem', these problems do not arise with regard to the concept of rape. I then proposed a way to use the cluster model for an analysis of rape such that it tracks the various forms of rape as they exist in the world. However, I have argued that the proposed cluster account faces at least two serious challenges: it lacks practicability, and it is normatively inadequate. I have concluded that a conceptual analysis of rape needs to be based on a rich social theory of the phenomenon of rape to be able to adequately track the phenomenon as well as counter the distorted working understanding of the concept. I have ended by stipulating five desiderata that a rich theory of rape needs to fulfill to be useful as a background for a conceptual analysis of rape. These desiderata guide the discussion in the chapters to follow.

13 | I understand paternalism roughly as interference with another person that seeks to benefit that person in some way yet is against that person's will. (cf. Cholbi 2017: 123) Thus, to define an act that benefits certain persons without being granted the authority to do so by these persons is in danger of being paternalistic. See also Coons and Weber (2013); De Marneffe (2006); Grill (2007); Groll (2012); Kleinig (1983) for the notion of paternalism.

14 | When I speak of heuristic utility what I mean is that the concept should fit into the larger social theory of rape. This is because rape cannot be made intelligible outside a broader framework of gender inequality. What I do not mean is that the analysis should be simplistic and only account for the phenomenon itself without considering its social embeddedness.

