

## Introduction

### *Writing the History of Rape*

In South Africa during the winter of 2006, Jacob Zuma went on trial for the rape of Fezekile Kuzwayo. Zuma was the former deputy president and one of the country's most popular politicians; Kuzwayo, publicly known by the nickname Khwezi, was a much younger woman and a family friend. As the trial unfolded, thousands of South Africans participated in public demonstrations supporting either Zuma or Khwezi. Outside the courthouse, Zuma's defenders chanted "Burn the bitch" while setting photographs of Khwezi on fire. Inside, Zuma portrayed himself as a strong Zulu patriarch and used Zulu culture to explain his actions toward Khwezi. Across the country, South Africans showed their support of Zuma by wearing shorts with the slogan "100% Zulu boy." Gender activists, meanwhile, tied Zuma's trial to the larger problem of sexual violence in contemporary South Africa; they founded the One in Nine Campaign and carried posters that invoked women's rights under the 1996 Constitution.<sup>1</sup>

In media representations, Zuma's rape trial was interpreted primarily as a political drama, one more twist in the long tale of rivalry between Zuma and his political rival, President Thabo Mbeki.<sup>2</sup> In this telling, Zuma emerges victorious. He was acquitted of rape and went on to be elected president of the African National Congress (ANC) and then, in 2009, of South Africa. Such accounts, however, have little to say about why this political drama was enacted through

<sup>1</sup> Mmatshilo Motsei, *The Kanga and the Kangaroo Court: Reflections on the Rape Trial of Jacob Zuma* (Sunnyside, South Africa: Jacana, 2007); Mark Hunter, *Love in the Time of AIDS: Inequality, Gender, and Rights in South Africa* (Bloomington: Indiana University Press, 2010); Redi Tlhabi, *Khwezi: The Story of Fezekile Ntsukela Kuzwayo* (Johannesburg: Jonathan Ball, 2017).

<sup>2</sup> Nancy Worthington, "Of Conspiracies and Kangas: Mail & Guardian Online's Construction of the Jacob Zuma Rape Trial," *Journalism* 11, no. 5 (October 12, 2010): 607–23.

a rape trial in particular – rather than, for example, one of the many corruption allegations that have dogged Zuma over his political career. Why did the National Prosecuting Authority decide that Khwezi's accusations were credible enough to justify a trial but charges of accepting bribes were not, even though Zuma's friend Schabir Shaik was convicted on charges of corruption and fraud related to payments made to Zuma?

Zuma's rape trial revealed a deep cleavage in South African society on the subject of sexuality. While Khwezi's supporters spoke in the language of liberal constitutionalism and human rights, Zuma's defenders invoked ideas of custom. Both groups, however, shared a sense that sexual ethics could not be separated from questions of politics. For Zuma's supporters, the prosecution revealed a dangerous disregard for Zulu culture on the part of the South African state. For feminist activists, the trial represented a commitment to holding powerful men accountable in the new democratic dispensation.

In this book, I argue that both of these positions have roots in a set of unresolved debates about how nonconsensual sex should be understood and dealt with in South African society. To adapt the words of Linda Gordon, the history of sexual violence “is not the story of changing responses to a constant problem, but, in large part, of redefinition of the problem itself.”<sup>3</sup> In South Africa, for example, a 2007 law expanded the definition of rape to include marital rape and the rape of men.<sup>4</sup> However, the public disputes over Zuma's trial have much deeper roots. Since the late precolonial era, if not before, Southern Africans have recognized a deep link between the control of sexuality and political authority. The question of *who has the right to consent to – or refuse – sex* is intertwined with the question of *who has the legitimate right to exercise political power*. The colonial Cape Colony saw famously intense debates over the latter question. Liberal humanitarians, racial nationalists, defenders of African “custom,” and millenarian prophets all put forward distinctive visions of

<sup>3</sup> Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence, Boston, 1880–1960* (New York: Viking, 1988), 27–28.

<sup>4</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007). For detailed analysis of the law, see Dee Smythe and Bronwyn Pithey, eds., *Sexual Offences Commentary: Act 32 of 2007* (Claremont, South Africa: Juta, 2011).

legitimate political authority.<sup>5</sup> These debates were intertwined with equally intense struggles over the control of sexuality, particularly female sexuality, whose echoes reverberate through history to the present day.

*Colonizing Consent* traces this history in one region of South Africa, the area within the Eastern Cape known as Xhosaland (*emaXhoseni* or *kwaXhosa*), over the century from 1820 to 1927 – in other words, from the late precolonial period through the year that saw the passage of both the Immorality Act (prohibiting interracial sex outside of marriage) and the Native Administration Act (fully segregating South Africa's legal system). In doing so, it tells two interrelated stories. The first is a social history of sexual violence and its aftermath in the Eastern Cape. As the Cape Colony expanded into Xhosaland, colonial rule brought new mechanisms for dealing with sexual assault, including the colonial legal system as well as the disciplinary processes of missionary churches. Although the missionaries and administrators who introduced these new legal venues promised to use them to protect African women from unwanted sex, these promises largely went unfulfilled. The changes wrought by colonialism made it much more difficult for women to win any form of redress in cases of sexual assault.

The second story told in these pages is about the relationship between sexual consent and political authority. The colonial encounter introduced new ways of understanding sexual consent and transformed older ones. *Colonizing Consent* highlights four major frameworks that structured understandings of sexual consent in colonial Xhosaland: custom and familial authority, the spiritual world, liberalism and the individual subject, and race. Each of these frameworks for understanding female sexuality was linked to a distinct understanding of politics. The concept of custom, for example, justified both familial control of female sexuality and chiefly power, while colonial authorities justified their expansion through claims to protect individual African women from sexual violence on liberal terms. As a result, disputes over nonconsensual sex carried inescapable political valences, and political disputes were fought on the bodies of both white and black women in the Eastern Cape.

<sup>5</sup> Lungisile Ntsebeza, *Democracy Compromised: Chiefs and the Politics of the Land in South Africa* (Leiden: Brill, 2005).

## Rape and the Politics of Governance

Contemporary South Africa has an exceptionally high rate of sexual violence.<sup>6</sup> Both academic and popular discussions resort to the language of crisis to describe the prevalence of rape in the country, lending urgency to efforts to identify the historical causes of the “epidemic.”<sup>7</sup> Helen Moffett argues that apartheid-era racial categories provided a script for the use of violence to enforce social hierarchies; further, as the postapartheid state formally committed itself to a platform of gender equality, men turned to this script and used rape to reinforce patriarchal authority.<sup>8</sup> Moffett identifies compelling resonances between the discourses of patriarchy and white supremacy. Yet, she acknowledges, “South African women are sick of hearing that apartheid is to blame for the brutality that men mete out to them.”<sup>9</sup> They are sick of it because invoking apartheid can serve to exempt black men from any culpability, but also because they discern, correctly, that the South African history of rape encompasses much more than the racial politics of the apartheid era.

Within the last few years, a new surge of both popular and academic writing has begun to flesh out this history in hopes of better understanding the present. In the most persuasive of such efforts, Pumla Dineo Gqola traces the violent masculinities of the contemporary era to the hypermasculinity embraced by both sides of the struggle to end apartheid as well as the pervasive sexual exploitation of black women by white men that began in the colonial era.<sup>10</sup> Gqola’s analysis points to important continuities between past and present, and between the violence of white rule and the violence of patriarchal masculinity,

<sup>6</sup> Naeemah Abrahams et al., “Worldwide Prevalence of Non-Partner Sexual Violence: A Systematic Review,” *Lancet (London, England)* 383, no. 9929 (May 10, 2014): 1648–54.

<sup>7</sup> Lisa Vetten, “Roots of a Rape Crisis,” *Crime and Conflict* 8 (1997): 9–12. For an example from the press, see “The Shocking Truth about Rape in South Africa,” *Business Tech*, March 10, 2017, <https://businesstech.co.za/news/general/163503/the-shocking-truth-about-rape-in-south-africa/>.

<sup>8</sup> Helen Moffett, “‘These Women, They Force Us to Rape Them’: Rape as Narrative of Social Control in Post-Apartheid South Africa,” *Journal of Southern African Studies* 32, no. 1 (January 5, 2010): 129–44.

<sup>9</sup> Ibid., 143. Moffett notes these limitations, framing her intervention not as a complete explanation but rather as the first step in “examin[ing] how the legacy of apartheid intersects with justificatory narratives of rape.”

<sup>10</sup> Pumla Dineo Gqola, *Rape: A South African Nightmare* (Johannesburg: Jacana, 2016).

which are amply borne out by evidence presented in this book. *Colonizing Consent* extends this analysis to consider the history of not only the prevalence but also the politicization of rape in South Africa. In the process, it shows that understandings of rape were deeply contested in the colonial era, and in ways that have yet to be resolved.

The political resonance of rape in South Africa finds echoes across the African continent and the postcolonial world. Shortly before Zuma went on trial in South Africa, a Ugandan court acquitted presidential candidate Kizza Besigye of rape in another trial that was widely understood to be politically motivated. In 2010, former Israeli president Moshe Katsav was convicted of rape, while the 2016 presidential election in the United States was shaped by leaked audiotapes in which Donald Trump boasted about sexual assault. Collectively, these episodes reveal an enduring connection between political power and sexual violence. As Achille Mbembe observes, “political struggles in the postcolony are nearly always fought in the guise of sexual struggles.”<sup>11</sup> In these struggles, rape allegations (whether proved or not) carry particular moral valence as embodiments of dangerously unchecked power.

The parallels extend beyond heads of state to larger struggles over the state’s role in prosecuting rape (or failing to do so). In India, a series of brutal and highly publicized gang rapes since 2012 have led to mass protests over the state’s perceived unwillingness to protect women from sexual violence and effectively prosecute those who commit it. Meanwhile, efforts to make it easier to prosecute rape have sparked political backlash. In both Ghana and Kenya, recent bills to criminalize marital rape failed after opponents successfully portrayed them as Western threats to African culture and, by extension, sovereignty.<sup>12</sup> Attempts to punish rape more systematically are understood – correctly – as attacks on broader systems of social and political power, such as the authority of husbands over their wives or the power of customary law against an international discourse of human rights. Anti-rape activists on

<sup>11</sup> Achille Mbembe, “On the Postcolony: A Brief Response to Critics,” *Qui Parle* 15, no. 2 (2005): 168.

<sup>12</sup> Saida Hodžić, “Unsettling Power: Domestic Violence, Gender Politics, and Struggles over Sovereignty in Ghana,” *Ethnos* 743 (2009): 331–60; Winifred Kamau, Patricia Nyaundi, and Jane Serwanga, “The Legal Impunity for Marital Rape in Kenya” (Toronto, 2011), 2.

the continent are routinely labelled un-African and accused of being the tools of Western feminists and, by extension, of imperialism.

How did rape, the most intimate of violations, become such a politically charged subject, in Africa and elsewhere? Rape is a violation of sexual norms, but these norms are themselves hotly debated, particularly in the postcolonial context. South African feminists are not only outraged at Zuma's alleged rape of Khwezi; they are outraged that *his defenders do not think that his actions count as rape*. Moreover, in colonial and postcolonial South Africa – as in many historical contexts – political authority has been closely interwoven with the regulation of sexuality. Rape thus reveals ruptures in not only sexual but also political norms; for Zuma's critics, the alleged rape reveals not only a callous disregard for Khwezi's sexual consent, but also a disregard for the human rights encoded in the South African constitution – indeed, for the very idea of rights themselves.

This link between sexuality and political authority has both African and imperial roots. In Guinea, Emily Osborn has shown how the household served as a foundational site of political activity from the precolonial era into the twentieth century, in large part through marriage alliances and sexual relationships.<sup>13</sup> Closer to the site of this study, Zulu kings not only consolidated authority through the marriages of their own family but also claimed control over marriages of their subjects, thus reinforcing authority over military regiments.<sup>14</sup> Meanwhile, European understandings of political power were also built on sexual regulation. Carol Pateman argues that the idea of the political contract – the governing political metaphor for modern British politics – depends on an implicit sexual contract, one that grants men sexual power over women and excludes women from full and equal participation in political life.<sup>15</sup> Less abstractly, concern for sexual morality pervaded nineteenth-century British political life. Efforts to

<sup>13</sup> Emily Osborn, *Our New Husbands Are Here: Households, Gender, and Politics in a West African State from the Slave Trade to Colonial Rule* (Athens: Ohio University Press, 2011).

<sup>14</sup> See Jennifer Weir, “‘I Shall Need to Use Her to Rule’: The Power of ‘Royal’ Zulu Women in Pre-Colonial Zululand,” *South African Historical Journal* 43, no. 1 (2000): 3–23; Sean Hanretta, “Women, Marginality and the Zulu State: Women's Institutions and Power in the Early Nineteenth Century,” *Journal of African History* 39, no. 3 (1998): 389–415.

<sup>15</sup> Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).

curb the evils of prostitution, homosexuality, sexually transmitted diseases, and other sexual transgressions undergirded the development of the modern British state.<sup>16</sup> As European empires spread across the globe, these preoccupations took on a new political valence. The sexual practices of the indigenous populations of the Americas, Asia, Australia, and Africa all provided European observers with evidence of their own moral superiority – and therefore the legitimacy of European rule.<sup>17</sup>

In Southern Africa, Cheryl Walker has described colonial rule as a “collision” between settler and indigenous patriarchies, which interacted in complex ways.<sup>18</sup> In some cases, colonial and African elites found common ground in a shared interest in controlling women’s sexuality. In Malawi and Zambia, Martin Chanock shows that African men eagerly sought the help of the colonial state to bolster their authority over their wives and daughters – often via colonial courts that claimed to enforce customary law.<sup>19</sup> For their part, colonial administrators used the language of custom to bolster their own political authority. The resulting patriarchal coalitions focused on the control of women’s sexuality and reproductive capacity. As Nancy Rose Hunt argues, women surface in colonial archives most often as the subjects of “moral panic” around the subjects of “prostitution, polygamy, adultery, concubinage, and infertility.”<sup>20</sup> Strict control

<sup>16</sup> See, *inter alia*, Jeffrey Weeks, *Sex, Politics, and Society: The Regulation of Sexuality since 1800*, 4th ed. (New York: Routledge, 2017); Judith Walkowitz, *City of Dreadful Delight: Narratives of Sexual Danger in Late-Victorian London* (Chicago: University of Chicago Press, 1992); Michel Foucault, *The History of Sexuality, Vol. 1: An Introduction*, trans. Robert Hurley (New York: Vintage, 1990).

<sup>17</sup> Catherine Hall, *Civilising Subjects: Metropole and Colony in the English Imagination 1830–1867* (Chicago: University of Chicago Press, 2002); Antoinette Burton, *Burdens of History: British Feminists, Indian Women, and Imperial Culture, 1865–1915* (Chapel Hill: University of North Carolina Press, 1994).

<sup>18</sup> Cheryl Walker, *Women and Gender in South Africa to 1845* (Cape Town: David Philip, 1990), 1.

<sup>19</sup> Martin Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge University Press, 1985).

<sup>20</sup> Nancy Rose Hunt, “Noise over Camouflaged Polygamy, Colonial Morality Taxation, and a Woman-Naming Crisis in Belgian Africa,” *The Journal of African History* 32, no. 3 (1991): 471. See also Elizabeth Schmidt, “Negotiated Spaces and Contested Terrain: Men, Women, and the Law in Colonial Zimbabwe, 1890–1939,” *Journal of Southern African Studies* 16, no. 4 (1990): 622–48; Jean Allman, “Rounding up Spinsters: Gender Chaos and Unmarried

over female sexuality became the foundation for colonial power, an essential part of the bargain that European administrators struck with the African intermediaries who carried out the day-to-day work of colonial rule.<sup>21</sup> Women who resisted this control were labeled as “wicked” and held up as threats to social order – a phenomenon that has strong echoes in the postcolonial era, when national governments in Tanzania, Uganda, Malawi, and elsewhere have sought to regulate sexuality in service of fashioning new nations, as evidenced perhaps most strikingly through campaigns against miniskirts, “Western” hair-styles, and homosexuality.<sup>22</sup>

Yet European and African patriarchies were not always so easily combined. Christian missionaries urged Africans to adopt new sexual moralities and gendered divisions of labor that, although deeply patriarchal, directly challenged precolonial forms of patriarchal control. Although colonial states generally declined to ban polygyny, bride-wealth, and other practices that offended European sensibilities, administrators in many territories did hope that policies such as the “hut tax” and regulations limiting the amount of bridewealth would reform African sexuality along European lines.<sup>23</sup> Neither African nor European societies were monolithic patriarchies, before or during colonialism. As Tom McClendon and Benedict Carton both show in the South African colony of Natal, men of different generations could have divergent interests in the control of female sexuality.<sup>24</sup>

Women in Colonial Asante,” *The Journal of African History* 37, no. 2 (1996): 195–214.

- <sup>21</sup> This bargain was not limited to British territories where indirect rule was embraced as a theory of colonialism. For a French example, see Roberts, *Litigants and Households*.
- <sup>22</sup> Dorothy Hodgson and Sheryl McCurdy, eds., “Wicked” Women and the Reconfiguration of Gender in Africa (Portsmouth, NH: Heinemann, 2001); Jean Allman, ed., *Fashioning Africa: Power and the Politics of Dress*, (Bloomington: Indiana University Press, 2004); Andrew Ivaska, *Cultured States: Youth, Gender, and Modern Style in 1960s Dar Es Salaam* (Durham: Duke University Press, 2011).
- <sup>23</sup> Hunt, “Noise over Camouflaged Polygamy”; Brett Shadle, “Girl Cases”: Marriage and Colonialism in Gusiiland, Kenya, 1890–1970 (Portsmouth, NH: Heinemann, 2006); Sean Redding, “Legal Minors and Social Children: Rural African Women and Taxation in the Transkei, South Africa,” *African Studies Review* 36, no. 3 (2012): 49–74; Emily Burrill, *States of Marriage: Gender, Justice, and Rights in Colonial Mali* (Ohio University Press, 2015).
- <sup>24</sup> Thomas V. McClendon, *Genders and Generations Apart: Labor Tenants and Customary Law in Segregation-Era South Africa, 1920s to 1940s* (Social



Meanwhile, women in colonial Africa were sometimes able to turn both the language of custom and that of Christian respectability to their own purposes.<sup>25</sup> Debates over the morality of polygamy, the sinfulness of adultery, and the proper age of consent took place not only between Europeans and Africans, but also within African communities.

Sex itself also crossed racial lines, even when imperial ideologues tried to deny the fact. In Indonesia, Ann Stoler has shown how racial segregation depended in turn on the regulation – formal and informal – of sexual intimacies; a rich body of scholarship has extended these insights to a wide range of colonial contexts, from British India to French Louisiana.<sup>26</sup> Across British Africa, white settler communities feared the potential of interracial potential to undermine the racial order.<sup>27</sup> Meanwhile, as Carina Ray and Rachel Jean-Baptiste have argued, anxieties over interracial sex infused African nationalist discourses.<sup>28</sup> Collectively, these studies underline the degree to which political authority in colonial Africa rested on claims to control female sexuality.

*History of Africa* (Portsmouth, NH: Heinemann, 2002); Benedict Carton, *Blood from Your Children: The Colonial Origins of Generational Conflict in South Africa* (Charlottesville: University of Virginia Press, 2000).

<sup>25</sup> Rachel Jean-Baptiste, *Conjugal Rights: Marriage, Sexuality, and Urban Life in Colonial Libreville, Gabon* (Athens, OH: Ohio University Press, 2014).

<sup>26</sup> See, *inter alia*, Ann Laura Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley: University of California Press, 2002); Durba Ghosh, *Sex and the Family in Colonial India: The Making of Empire* (Cambridge: Cambridge University Press, 2006); Jennifer M. Spear, *Race, Sex, and Social Order in Early New Orleans* (Baltimore: Johns Hopkins University Press, 2009); Emmanuelle Saada, *Empire's Children: Race, Filiation, and Citizenship in the French Colonies*, trans. Arthur Goldhammer (Chicago: University of Chicago Press, 2012); Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York: Oxford University Press, 2009).

<sup>27</sup> Dane Keith Kennedy, *Islands of White: Settler Society and Culture in Kenya and Southern Rhodesia, 1890–1939* (Durham: Duke University Press, 1987); Brett Shadle, *The Souls of White Folk: White Settlers in Kenya, 1900s–1920s* (Manchester: Manchester University Press, 2015).

<sup>28</sup> Carina E. Ray, “Decrying White Peril: Interracial Sex and the Rise of Anticolonial Nationalism in the Gold Coast,” *American Historical Review* 119 (2014): 78–110; Rachel Jean-Baptiste, “‘A Black Girl Should Not Be with a White Man’: Sex, Race, and African Women’s Social and Legal Status in Colonial Gabon, C. 1900–1946,” *Journal of Women’s History* 22, no. 2 (2010): 56–82.

In this context, rape was a political question. In the public spheres of settler colonies, rape – particularly interracial rape – posed a violent threat to the carefully managed racial order. Across colonial Africa, rape rendered political power as physical violence. In the Eastern Cape, rape trials also became forums for disputes over political authority. In tracing this history, *Colonizing Consent* writes sex into political history, and politics – in its most violent manifestations – into the history of sex.

### Naming Rape and Claiming Power

So far, I have used the term “rape” as though it has an easily defined meaning. In some contexts, it does. In contemporary South Africa, rape is a crime with a technical legal definition. According to the 2007 Criminal Law Amendment Act, “any person . . . who unlawfully and intentionally commits an act of sexual penetration with a complainant . . . without the consent of [the complainant] is guilty of the offence of rape.” The phrase “sexual penetration” is itself defined broadly, to include anal, genital, and oral penetration with any object.<sup>29</sup> Yet rape is not only a legal term; it also carries common-sense meanings, which often do not map well onto legal definitions. In the courtrooms of the colonial Eastern Cape, litigants argued not only about whether someone had committed rape but also – and often more heatedly – about what should count as rape.

The contestation over meaning poses a challenge to historians who attempt to trace the history of rape. Eric Reitan has described rape as an “essentially contested” concept, one that cannot be invoked without making a controversial claim about what the term means.<sup>30</sup> Defining rape as “sex without consent” simply shifts the burden to the idea of consent itself. What constitutes sexual consent? Can a child consent to sex – and if not, when does a child become an adult? Does marriage constitute irrevocable consent to sex? What separates persuasion from coercion, and can coercion coexist with consent? Are there some forms of sex to which people should *not* be able to consent, such as sex

<sup>29</sup> Republic of South Africa. Criminal Law (Sexual Offences and Related Matters) Act, no. 32 of 2007, ch. 2, para. 3.

<sup>30</sup> Eric Reitan, “Rape as an Essentially Contested Concept,” *Hypatia* 16, no. 2 (2001): 43–66; Keith Burgess-Jackson, “Rape and Persuasive Definition,” *Canadian Journal of Philosophy* 25, no. 3 (1995): 415–54.